EMPLOYMENT LAW BULLETIN

The Newsletter of **LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.**

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TO OUR CLIENTS AND FRIENDS:

On March 1, 1999, the EEOC issued a 70-page policy guidance statement addressing reasonable accommodation and undue hardship under the ADA. Although not the law, the EEOC's guidance is given "great deference" by the courts. The following is a summary of key points from the EEOC's statement:

1. An employee is not required to use the term "reasonable accommodation" or refer to the ADA, but rather may request an accommodation in "plain English." Also, a reasonable accommodation may be requested on behalf of an employee by somebody else, such as a family member or fellow employee. The accommodation request does not have to be in writing, although the employer may confirm the request in writing.

2. When an employer receives a request for an accommodation, the employer must begin what the EEOC refers to as "an informal process to clarify what the individual needs and identify the appropriate reasonable accommodation." If the need for accommodation is not obvious, the employer has the right to request that the employee provide documentation to support the need for any accommodation. According to the EEOC, "in requesting documentation, employers should specify what types of information they are seeking regarding the disability, its functional limitations, and the need for reasonable accommodation. The individual can be asked to sign a limited release allowing the employer to submit a list of specific questions to the health care or vocational professional." The employer may also request that the employee be evaluated by a health care professional chosen by the employer.

3. The employer does not have to provide the accommodation preferred by the employee. Rather, "if there are two possible reasonable accommodations, and one costs more or is more burdensome than the other, the employer may choose the less expensive or burdensome accommodation as long as it is effective." If the employee does not accept the accommodation, the employer may conclude that the employee is no longer qualified for the job.

4. If an employer notices a job applicant has a disability, the employer may ask whether reasonable accommodation is needed to perform specific job functions and, if so, what type of accommodations. Interestingly, the EEOC says that an employer must reasonably accommodate an applicant during the application process even if the employer knows in advance that it cannot reasonably accommodate that same applicant if he or she is hired. The EEOC views the application process as entirely separate for analyzing reasonable accommodation obligations as compared to the obligations that apply to the performance of the job.

5. The employer may not apply a leave policy that provides for automatic termination if an employee does not return at the end of the leave to those with disabilities. Rather, for a disabled employee, the employer would first have to consider whether it would be an undue hardship to grant additional leave or otherwise hold the job open. If the employer has a job available that the employee

could do as an alternative to the leave, then the employer may require that the employee remain on the job in the available position rather than grant leave as a reasonable accommodation. There also may be circumstances where other workplace policies could be modified as a form of reasonable accommodation. To accommodate by creating an exception to a policy does not require the employer to either revise the policy or create exceptions for non-disability-related reasons.

6. If reassignment is considered as a form of accommodation, the employee must already be qualified to perform the new position. The employer is not obligated to train the employee for the reassignment. Furthermore, the transfer or reassignment does not have to be a promotion. The reassignment or transfer could even be to a position that does not pay the same. Even if an employer has a policy that does not permit transfers, an employer must still consider transfer as a form of reasonable accommodation.

Note that an employer is not required to provide reasonable accommodation where to do so would interfere with other employees' opportunities to do their jobs. This is particularly true if the form of reasonable accommodation is to revise an employee's schedule. For example, if an employee must work modified hours as a form of accommodation but the modification of hours may be disruptive to others, that would be an undue hardship and an accommodation of this type would not be required. Also, a requested accommodation of the leave may be denied where the employee does not give an approximate or fixed date of return and the failure to do so causes an undue hardship to the employer.

7. The EEOC also issued "instructions for investigators" when investigating an ADA charge. These include exploring the following issues: (1) Is the charging party qualified for the job without regard to disability? (2) Did the charging party or someone on the charging party's behalf request reasonable accommodation? (3) Did the employer engage the charging party in an interactive process to try to accommodate? (4) If the charging party requested a particular accommodation and another accommodation is offered by the employer, why is that the case? (5) If the employer offered the charging party the opportunity to transfer to a vacant position, was it a position as close as possible to the prior position regarding pay, schedule and responsibilities?

The EEOC also included guidance for small employers. However, it did not provide smaller employers with greater flexibility than larger employers; it is simply an abbreviated version of the 70-page document.

Please contact us if you have any questions regarding the EEOC policy guidance.

ORGANIZED LABOR PUTS ITS MONEY ON THE TABLE FOR Y2K ELECTIONS

Organized labor enjoyed a successful year in 1998, signing up a total of 475,000 new members. However, the net increase turned out to be only 65,000 members, when accounting for attrition. Of course, when its numbers do not look good, organized labor wants to change the labor laws. On February 18, 1999, at the AFL-CIO winter meeting in Miami Beach, Florida, President John Sweeney announced a number of strategies for organized labor to increase its political impact in order to further its membership goals:

< It will spend $40,000,000 between now and November, 2002, to influence the outcome of the elections. Furthermore, the organization will strive to offer 2,000 union members as candidates for public office in the Y2K elections.

< Unions will conduct a major voter registration drive. This will be done

through home visits, mailings, telephone efforts and work site visits.

< Organized labor will push to ask Congress to bar federal contractors who are found to violate the National Labor Relations Act. This legislative push will not begin until after the November, 2000 elections.

< The AFL-CIO will assign unions to organized industries in certain locations based upon union "density" demographics. That is, unions that are dominant in certain industries will be the unions designated to organize those industries. Unions that dominate certain localities will be the unions designated to organize in those localities, even if the industries are unrelated. Unions have consolidated, much like several industries, so that territorial disputes have become less common, and such that unions can spend more of their money on organizing rather than fighting each other.

< The AFL-CIO is seeking the enactment of pay equity legislation in 22 states. According to the organization, women earn $3,500 a year less at jobs that are of "comparable worth" to those that are dominated by men. Those states where the disparities are the greatest include Indiana, Louisiana, Michigan, Montana, North Dakota, Wisconsin and Wyoming.

BROAD RELEASE SIGNED BY FORMER EMPLOYEE BARS CLAIM FOR DEFAMATORY REFERENCE

Unfortunately, too many employers do not provide information about former employees, believing that to do so creates a risk of defamation litigation. One of the most effective ways to enable an employer to tell the truth and avoid such claims is to obtain a broad waiver and release from a former employer seeking a reference. This worked in the case of *Bardin v. Lockheed Aeronautical Systems Co., Inc.* (Cal. Ct. App., March 1, 1999). Bardin worked for Lockheed until she was laid off in 1993. In November, 1995, she applied for a job to work as a police officer for the Los Angeles Police Department. You may accuse the LAPD of many things, but conducting poor background checks is not one of them. They required their applicants to sign a statement releasing former employers from any claims arising from the former employer's disclosure of the employee's work record or its opinion about an applicant's performance. It turns out that Lockheed disclosed that Bardin's termination was related to problems due to her excessive drinking. She was not hired by the LAPD and sued Lockheed, claiming among other things defamation and intentional interference with the potential economic advantage of employment with the Police Department. In granting the company's motion for summary judgment, the court noted that the release that she signed said that former employers would be free "from any and all liability for damage of whatever kind." This language, according to the court, would include even false information or information that could not be substantiated. According to the court, "Bardin argues that the release does not expressly release Lockheed from disseminating false or baseless statements. We do not find that limitation in the language of the release. It broadly and unambiguously releases a former employer 'from any and all liability for damage of whatever kind.'"

Most employers will continue to provide neutral information, at best, about former employees. However, if your organization wants to provide more than that, consider obtaining a broad release that covers not only the company, but also those individuals who provide the information. Include language that is so broad that it covers opinions, in addition to work record.

EMPLOYER PURCHASES "ALPHABET LIABILITY" WHEN TERMINATING MANAGER AFTER HEART ATTACK

ERISA and FMLA violations cost an employer approximately $160,000 when it terminated its plant manager shortly after he returned to work after a heart attack. *Nero v. Industrial Molding Corp.* (5th Cir., March 2, 1999). Nero was working on an interim basis as a plant manager for the employer at its Lubbock, Texas facility. He suffered a heart attack on May 29, 1995 and returned to work in mid-July. Upon his return to work, the employer told him that he could remain employed as a shift supervisor but at half the salary he received as the interim plant manager, or he could work as a shift supervisor at a plant manager's salary for 90 days, provided that by the 91st day he was working elsewhere. The company also decided to offer Nero another option, which is to be terminated and receive two months' pay. Nero sued, claiming that the employer violated the FMLA by not restoring him to his previous position as plant manager, even on an interim basis, and that the employer violated ERISA by attempting to avoid paying the insurance costs associated with his heart attack.

The company argued that it made the decision to terminate Nero before his heart attack. However, according to weekly performance reviews of Nero's progress, he was meeting company expectations. In fact, the most recent review was conducted five days before his heart attack. The court said that "on the basis of the evidence, a jury could reasonably believe that Nero was performing his job properly for a number of months and that the time of IMC's termination of Nero was not merely a coincidence." It turns out that Nero's medical claims were the most expensive suffered by the employer for that year and that had Nero remained employed, the employer would have incurred an additional $25,000 in expenses. The court also noted that "Nero's termination followed so shortly after his claim to medical benefits that the jury could reasonably infer a retaliatory motive."

Employers face a dilemma when a poorly performing employee begins or ends an FMLA leave. In Nero's case, the employer's fall came because it was unable to prove that Nero's performance was unsatisfactory before the FMLA leave began. However, if an employer can show that performance was unsatisfactory and a termination decision was made before FMLA leave began, then it would be able to defend a claim of retaliation under the FMLA. Alternatively, employers are on strong ground if the reason for the termination is due to performance, attitude, behavior or attendance problems that began before the leave and continued when the employee returned from the leave. The timing of the termination will still make the employer's motive suspect; therefore, be sure the evidence is there to justify that the decision would have been made regardless of whether the employee exercised FMLA rights.

DID YOU KNOW...

. . .that according to the poll conducted the International Survey Research, LLC, 37% of American employees today fear a job loss, compared to 12% in 1981? This is actually an improvement from 1997, when 44% of American workers feared a job loss. 62% of those surveyed believe that as long as they continue to do good work, they will have a job to return to tomorrow. The survey also indicated that employee dissatisfaction with the size of pay raises has increased despite a slower growth rate for consumer prices. According to the Department of Labor, consumer prices rose 1.6% in 1998, down from 1.7% in 1997, and 3.3% in 1996.

. . .that an otherwise exempt computer consultant must be paid overtime because she was paid straight time rather than a salary? *Hagadorn v. M. F. Smith & Associates, 10th Cir. February 12, 1999?* There is no question that Hagadorn would have qualified at least for the administrative exemption from overtime under the Fair Labor Standards Act. She was responsible for several projects and reports, for conducting weekly meetings, and for assessing the capabilities of hardware at several locations throughout the country. Her employer laid her off due to a decline in work and then terminated her because she allegedly took a customer's computer. Her response to all of this was to sue for overtime violations, claiming that she was owed 522-1/2 hours for overtime. Although the court said that an exempt individual may be paid overtime without jeopardizing his or her exempt status, the pay records in this case failed to show that the employee received the same recurring, pre-determined weekly-based salary. Therefore, although the employee's duties were exempt, the failure to pay the employee properly nullified the exemption.

. . .that criminal charges may be filed against a company based upon an automobile accident following the company's holiday party regarding the deaths of employees leaving the party (Wis. Car. Ct. February 18, 1999)? Michael Divine attended a company holiday party on December 4, 1998 and drank entirely too much. On his way home, he crashed into Kathy Stephenson's car and killed both of them. Apparently, the employer knew that Divine drank too much and offered to give him a ride home, but did not follow through on that. According to the Stephenson's estate attorney, "you've got an employer who has accepted the responsibility to give him a ride home and didn't follow through on that." The company now faces the risk of criminal charges in addition to civil liability. If alcohol is served at a company function, be sure that steps are taken to eliminate the risk of an employee having too much to drink and then driving.

. . .that, according to a survey released on March 15th by the Society for Human Resources Manager, although 97% of employers surveyed had policies against sexual harassment, the number of sexual harassment claims filed has increased? According to those who responded to the survey, 15% reported that sexual harassment complaints were filed in 1995, 23% in 1996, 32% in 1997, and 30% in 1998. 62% of the employers said they provide sexual harassment training and 86% established formalized reporting and investigation procedures. Furthermore, 25% stated that they have updated their harassment policies within the past year. The fact that more cases are reported does not mean there is more harassment. Rather, from our prospective, it means that employers are doing a better job of establishing a work place where employees can step forward if they believe such behavior has occurred.

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