EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

Wage and hour violations for private and public sector employers can result in disruption and damages of several hundred thousands of dollars. **Find out about your rights and responsibilities under Wage and Hour laws at a Wage and Hour Compliance Briefing scheduled from 8:30 a.m. until 12:30 p.m. on October 16, 2000 in Birmingham and October 18, 2000 in Montgomery.** The briefing will be conducted by Lyndel Erwin, former District Director for the Wage and Hour Division of the United States Department of Labor, and Richard I. Lehr. A comprehensive outline and registration form is enclosed. The Montgomery briefing will feature a thorough discussion of the unique wage and hour issues covering public sector employers. Tuition includes a comprehensive Wage and Hour guidebook. For more information contact Ms. Sherry Morton at 205/323-9263.

NLRB CHANGES THE LAW (AGAIN) EXTENDING REPRESENTATION RIGHTS TO NON-UNION EMPLOYEES DURING INVESTIGATORY INTERVIEWS

On July 10, 2000, in the case of *Epilepsy Foundation of Northeast Ohio*, the National Labor Relations Board by a 3 - 2 vote ruled that employees in a non-union workplace have the right to request that a co-worker be present during an investigatory interview which the employee reasonably believes may lead to discipline. Since the Supreme Court's 1975 *NLRB v. J. Weingarten* decision, employees at unionized locations have had this right. The Supreme Court in *Weingarten* ruled that the right to request the presence of a union representative during an investigatory interview that may lead to discipline "falls within the literal wording of Section 7 of the [National Labor Relations] Act that 'employees shall have the right . . . to engage in . . .concerted activities for the purpose of mutual aid or protection.'" The Supreme Court recognized that the union representative is not only assisting the employee, but also representing the interests of the entire bargaining unit.

The NLRB first extended *Weingarten* rights to non-union employees in its 1982 *Materials Research Corp.* decision, and then overruled it in 1985. In once again extending *Weingarten* to the non-union setting, the Board stated in *Epilepsy Foundation* that the right to have an employee present at an investigatory interview that may lead to discipline "greatly enhances the employees' opportunities to act in concert to address their concerns that the employer does not initiate or continue a practice of imposing punishment unjustly."

The case arose when employees Arnis Borgs and Ashraful Hasan sent a memo to the director of the foundation criticizing the effectiveness of their immediate supervisor. The director asked Borgs to meet with her and Borgs' supervisor. Borgs requested that Hasan also attend that meeting, but the director told him that he had to attend the meeting alone. After he refused to attend the meeting, the director terminated Borgs for insubordination.

The majority rejected the argument that extending *Weingarten* to a non-union workplace "wreaks havoc" on the non-union employer's opportunity to deal directly with its employees. The Board also rejected the argument that, as an outcome of its July 10 decision, employers will issue discipline with fewer investigations, thereby increasing the risk of an unfair decision and potential workplace turmoil. The Board characterized both arguments as "speculation."

In dissent, Member Hurtgen points out that "at most, Section 7 protects non-union employees in their seeking assistance at an investigatory interview, Section 7 does not require the employer to accede to that request." Hurtgen's point is that it is protected activity for the employee to ask someone to be present at the interview, but the employer is not required to permit another person to be present.

Board decisions are not self-enforcing. If the employer in this case chooses not to comply with the Board decision, the Board must seek enforcement through the Court of Appeals, which will review the case and decide whether the Board's decision should be upheld. Alternatively, the employer may initiate an appeal on its own. **Until a final determination is made regarding the Board's decision, we suggest that non-union employers continue to conduct their internal investigations in a confidential manner that excludes an employee from accompanying another employee to an interview.** If an employee insists on another employee attending the interview, we would not advise terminating the employee based solely on his or her refusal to attend the interview. Rather, tell the employee that the investigation and decision will be made without the benefit of whatever information he or she may have been able to provide during the course of the interview.

EMPLOYEE JOB SEEKING WHILE ON FMLA PROTECTED

Debbie Stekoff was employed as a nurse at St. John's Mercy Health Hospital in St. Louis. She became emotionally upset after an argument with her supervisor, and gave the supervisor a note from her physician stating that due to her emotional distress, Stekoff would not be able to work for two weeks. The hospital became aware that Stekoff participated in an orientation session for her second employer during that two week period. The hospital terminated her for two reasons. First, the hospital said that she did not provide a doctor's note before she began her leave and second, the hospital felt that if she were well enough to participate in a new employee orientation for another employer, she was well enough to return to work.

The Court stated that the employer's requirement of the doctor's excuse before the leave began is inconsistent with the FMLA. According to the

Court, "[t]here is no requirement in the statute that an employee be diagnosed with a serious health condition before becoming eligible for FMLA leave. As a matter of common sense, moreover, it seems to us that an employee who falls and breaks a leg while on the job should not be required to attempt to continue to keep working and be subject to termination for failure to do so or even for failure to perform some task up to standard until a doctor arrives and excuses him or her." Stekoff's participation in a new employee orientation while out on Family Medical Leave did not conflict with her need for medical leave. According to the Court, her doctor stated that, "Stekoff needed a break from her work at St. John's because the environment in her unit was reinjuring a traumatized area of her life."

Remember, an individual who is on leave for his or her own serious health condition under the FMLA or to care for a family member with a serious health condition is not necessarily limited from engaging in other activities during that leave, including work.

FAIR LABOR STANDARDS ACT TIPS -- THE MOTOR CARRIER EXEMPTION: IT MAY APPLY TO YOUR COMPANY

The overtime provisions of the Fair Labor Standards Act do not apply with respect to any employee over whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of The Motor Carrier Act of 1935. This exemption has been interpreted as applying to any **driver**, **driver's helper, loader or mechanic** employed by a carrier and whose duties affect the safety of operation of motor vehicles in the transportation on public highways of passengers or property in interstate or foreign commerce.

Requirements

The exemption applies to those employees for whom the Department of Transportation (DOT) claims jurisdiction and if the employer is:

1) a private carrier and hauls property or;
2) a common or contract carrier and hauls property or passengers;

and additionally if:

- **!** the employee's duties (consisting wholly or in part) affect the safety of operation of a motor vehicle and;
- **!** the employee's travel is in interstate commerce; or
- **!** the employee transports goods to an intrastate terminal transporting goods that are on an interstate journey. For example, taking parts from the company warehouse to the local bus station for shipment out of state.

The exemption can apply to those employees called upon to perform, either regularly or from time to time, safety-affecting activities. The employee comes within the exemption in all workweeks when he or she is employed in such work.

Where safety-affecting employees have not made an actual interstate trip, they may still be subject to DOT's jurisdiction if:

- the employer is shown to have an involvement in interstate commerce and;
- if the employee could have been reasonably expected to make an interstate journey or could have worked on the motor vehicle in such a way to affect the safety of its operation.

Where an employee meets the above criteria, the DOT will assert jurisdiction over that employee for a four (4) month period beginning with the date he or she could have been called upon to engage in the carrier's interstate activities. Thus, such employee(s) would be exempt for the four-month period.

The exemption does not apply to employees of non-carriers such as commercial garages, firms engaged in the business of maintaining and repairing motor vehicles owned and operated by carriers, or firms engaged in the leasing and renting of motor vehicles to carriers.

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Mr. Erwin can be reached at (205) 323-9272. Prior to working with Lehr Middlebrooks Price & Proctor, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the United States Department of Labor, Wage and Hour Division, and worked for 36 years with the Wage and Hour Division on enforcement issues concerning the Fair Labor Standards Act, Service Contract Act, Davis Bacon Act, Family and Medical Leave Act and Walsh-Healey Act.

EMPLOYER JUSTIFIED IN DENYING REQUEST FOR COBRA EXTENSION

The case of *Marsh v. Omaha Printing Company* (8th Cir. July 12th, 2000) involved whether an employee's eighteen months of COBRA coverage could be extended for an additional 11 months. Under COBRA, once the 18-month coverage ends, it may be extended by 11 months if the former employee is determined to be disabled under the Social Security Act. Marsh requested an extension prior to expiration of the 18 months, but before Social Security decided whether Marsh was disabled under the Social Security Act. The requirement for meeting the Social Security Act's definition of disability includes that the individual has to be disabled within 60 days of the termination of employment. Ultimately, the Social Security Administration determined that Marsh was disabled, but that determination occurred after the 18 months expired. The District Court concluded that because the determination arose after the 18 months, Marsh was not entitled to the additional 11 months of COBRA coverage.

The Court recognized that the delays of the Social Security Administration can lead to a harsh result under COBRA such that an individual is not entitled to the 11 months of additional coverage. However, the Court stated that "Congress would have to amend COBRA to prevent such harsh results."

COURT VACATES $3.1 MILLION AWARD BASED ON COMMENTS DURING INVESTIGATION

A Texas jury awarded $3.1 million in a slander claim arising out of the investigation of a sexual harassment complaint. This award was reversed by a Texas Appellate Court on June 29, 2000. *Wal-Mart Stores, Inc. v. Lane* (Tex. App. -- Corpus Christi).

Employee Thomas Lane was fired by Wal-Mart after an investigation regarding sexual harassment charges levied against him by employee Susan Sparks. After Sparks made her allegations, Lane then alleged that Sparks sexually harassed him. Lane alleged that the company slandered him by making statements about his alleged harassment during the course of an internal investigation, at a unemployment compensation hearing and to a manager of another store where Lane did not work.

The court concluded that the "investigation privilege" protected the company's comments about Lane during the course of the sexual harassment investigation. According to the court, **the privilege "remains intact as long as the communications pass only to persons having an interest or duty in the matter to which the communications relate."** The court explained that "none of Wal-Mart's slanderous statements about Lane were made outside the course of investigation of employee wrongdoing or to any persons who did not have a business interest or duty in the matter to which the communications related."

The court also stated that Wal-Mart had judicial and absolute immunity from consequences for communications at Lane's unemployment compensation hearing because the court viewed the hearing as *quasi judicial* in nature. The court also concluded that the comment made to a Wal-Mart manager at another store that Lane was fired for sexual harassment was not defamatory, because the comment was, in fact, true.

Remember to limit the scope of disclosures during the course of and subsequent to an investigation to only those who need to know. Employers are often asked questions by curious employees regarding why an individual was terminated or whether an individual was engaged in improper activities. Unless those employees need to know the answer, the employer should not provide them with the information. Rather, the employer should explain that out of respect for employee dignity and privacy interests, the employer does not discuss matters concerning other employees, including the inquiring employee, with any employee who does not have a professional need to know.

DID YOU KNOW . . .

. . . that another Court of Appeals has invalidated the DOL requirement to give employees advance notice that an absence is charged as FMLA? *Ragsdale v. Wolverine Worldwide, Inc.* (8th Cir. July 11, 2000)? The Eighth Circuit joined the Eleventh Circuit in concluding that the Department of Labor rule creates a right that "the statute clearly does not confer. While the statute only requires the employer to provide 12 weeks of unpaid leave, under the DOL regulations, the employer could be forced to provide much more leave." The

court explained that under the regulations, if the employer does not tell the employee that the leave is FMLA, the employee retains the right to use the FMLA leave in addition to the leave of absence that was already granted.

. . .that a one time verbal attack can be enough sexual harassment to take the case to the jury? *Howley v. Town of Stratford* (2d Cir. June 23, 2000). Howley and William Holdsworth were firefighters who were attending a firefighters benevolent association meeting. To Howley and in front of others at the meeting Holdsworth called Howley a "f . . .ing whining c. . t, " commented about her menstrual cycle, and when he was encouraged to apologize, he said "there is no f. . .ing way I will f . . .ing apologize to that f. . .ing c . . t down there." Holdsworth also told Howley that she did not receive a promotion because she failed to perform sexual acts. The court stated that Holdsworth "did not simply make a few offensive comments; nor did he air his views in private; nor were his comments merely obscene without an apparent connection to Howley's ability to perform her job." Thus, this single incident had lasting effects and could be enough for a jury to conclude that there was sexual harassment at work.

. . . that the AFL-CIO has established "Texas Truth Squads" to talk about life under the leadership of Texas Governor George W. Bush? Between now and August 23, AFL-CIO members from Texas will conduct forums in Louisville, Atlanta, Cincinnati, Cleveland, Las Vegas, Hartford, Albuquerque and Charleston, West Virginia. According to the AFL-CIO, "the purpose of the meetings is to educate its members about the two candidates. We are having real people from Texas, who have lived under Bush's leadership talk about how he fares on workers' issues." The AFL-CIO has endorsed Vice President Al Gore.

. . . that on July 7, Rent-A-Center of San Francisco paid $2.1 million to settle an employee testing lawsuit? Rent-A-Center is the country's largest rent to own retailer. The questions that applicants and employees were asked included inquiries of a sexual and religious nature. The test involved a total of 502 questions. Pre-employment tests are permissible and often advisable. However, be sure that the questions asked do not present the type of risk for which Rent-A-Center ended up paying in this case.

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