EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

If your company discovers that one of your employees is an illegal alien, and you terminate that individual, does he or she have rights that are protected under federal employment laws? Yes. The recent case of *Contreras v. Corinthian Vigor Insurance Brokerage, Inc.*, (N.D. Cal., Oct.5, 2000) illustrates the application of this point under the Fair Labor Standards Act.

Employee Sylvia Contreras filed an administrative claim with the California division of labor standards enforcement, alleging that she was not paid overtime nor regular wages. Three days after filing her claim, the company called the Immigration and Naturalization Service and reported that Contreras was in the country illegally. INS followed up the report by arresting Contreras the next day. The company also notified the Social Security Administration that Contreras was using a fake Social Security number.

Contreras filed a retaliation suit under the Fair Labor Standards Act, alleging that she was reported to INS because of her protected activity claiming overtime wages. The company argued that because she was an illegal alien, she should not be entitled to any protection against retaliation. The district court stated that California wage and hour law follows the Federal law, and under Federal law an individual is protected from retaliation for raising a wage and hour complaint, even if that individual is an illegal alien.

The "no retaliation" provision in this case also applies to claims of discrimination under fair employment practice laws and protected, concerted activity under the National Labor Relations Act. If an employer becomes aware that an individual is an illegal alien, the employer should report that to the Immigration and Naturalization Service. If, however, the employer is aware of that but does not report it until the employee raises claims of discrimination, wage and hour violations, safety issues or engages in union activity, then the employer will be subjected to a claim of retaliatory discharge and INS penalties.

AMERICAN FLIES HIGH WITH $45.5 MILLION AWARD FROM PILOTS UNION

You may recall that in early 1999, American Airlines' pilots initiated a work stoppage that caused 1,600 flight cancellations and cost the company millions of dollars. The work stoppage arose over combining seniority lists with American and its newly purchased Reno Air. In response to the

strike, which was characterized as a sick out, American sought and received a restraining order against the union that ordered the union and its officers to take "all reasonable steps within their power" to discourage and end the sick out. After the court issued its restraining order, the size of the sick out expanded, costing the company more money and canceling more flights. In concluding that the pilots union was in contempt of its previous order, the district court awarded the airline $45,507,280 in damages, which were substantiated as the amount the company lost due to the failure to comply with the order.

The Fifth Circuit Court of Appeals upheld the district court's decision. According to the Court, "based on the testimony of American's damage experts . . . the district court determined that American's overall loss caused by the work stoppage were somewhere between $200 to $250 million. The basis of the district court's award was the actual damage it suffered during the two days the airline pilots association was in contempt. This amount, approximately $51 million, was reduced another 11% for the margin of error in American's estimation [booking passenger's on other flights] that may have occurred."

OFCCP INCREASES COMPLIANCE CHECKS; PLANS TO END ONSITE VISITS

The office of Federal Contract Compliance Programs is taking steps to increase the number of government contractors it reviews by changing some of its current time-consuming practices. One of its proposals would end onsite visits and, instead, increase its "compliance check" approach to evaluate whether an employer is in compliance with OFCCP requirements. The compliance check process requires the employer to provide records and supporting documents to the OFCCP at the OFCCP office.

The OFCCP compliance review approach now involves either a desk audit (which involves a review of the affirmative action plan or records), a compliance check (which is a review of records) and a focused review (where OFCCP looks at one or more of the employer's employment practices). OFCCP now proposes that rather than reviewing information at the employer's premises, the contractor would send the information to the OFCCP.

According to the OFCCP, "Although the proposal would change how the agency intends to implement the compliance check, it would not expand the scope of the examination contemplated under the compliance check procedure." Last year, OFCCP conducted 2,050 compliance checks and wants to substantially increase this number over the next few years.

COURT UPHOLDS EMPLOYER DISQUALIFICATION OF DISABLED APPLICANT WHO CANNOT WORK OVERTIME

On October 10, 2000, the United States Supreme Court let stand a Court of Appeals decision that held that because overtime was an essential function of the job, an employee who was unable to work overtime due to a disability was not qualified under the ADA. *Davis v. Florida Power and Light Company*. Davis had requested that as a

form of accommodation, he should be allowed to decide daily whether he felt able to work overtime. The court ruled that to grant his accommodation would conflict with the company's obligations under a collective bargaining agreement with the International Brotherhood of Electrical Workers. The court explained that a form of reasonable accommodation does not require the employer to take action that would conflict with a collective bargaining agreement. The court noted that every circuit court of appeals that has addressed the decision has agreed that it is unreasonable to expect an accommodation that would diminish the seniority rights granted to other employees under a bargaining agreement.

In another ADA case considering reasonable accommodation, a court ruled that reasonable accommodation is not required when it involved assigning an employee to a job for which he was minimally qualified over a higher qualified non-disabled employee. *EEOC v. Humiston-Keeling, Inc.*, (7th Cir., Sept. 15, 2000). The court stated that "the EEOC does not deny that in every case the applicant chosen for the job was better than Houser (the plaintiff) in the sense of likely to be more productive."

The EEOC regulations would require accommodation to include advancing a person with a disability "over a more qualified non-disabled person provided only that the disabled person is at least minimally qualified to do the job, unless the employer can show undue hardship." According to the court, "We do not agree with the Commission's interpretation of the statutory provision on reassignment. The interpretation [of the EEOC] requires employers to give bonus points to people with disabilities, much as veteran's preference statutes do." This is not required under the ADA.

FAMILY AND MEDICAL LEAVE ACT TIPS

While the Family and Medical Leave Act (FMLA) has been around for almost 8 years, we find that many employers still do not have an established policy and procedures for the granting of FMLA leave as is required by the Act. Following is a series of questions that may help employers determine whether they are properly following the requirements of the Act.

Q: Does the law guarantee paid time off? **No. The FMLA only requires unpaid leave. However, the law permits an employee to elect, or the employer to require the employee, to use accrued paid leave, such as vacation or sick leave. For some or all of the FMLA leave, it may be counted against the 12-week FMLA leave entitlement if the employee is properly notified of the designation when the leave begins.**

Q: Does workers' compensation leave count against an employee's FMLA leave entitlement? **It can. FMLA leave and workers' compensation leave can run together, provided the reason for the absence is due to a qualifying serious illness or injury and the employer properly notifies the employee in writing that the leave will be counted as FMLA leave.**

Q: Who is considered an immediate "family member" for purposes of taking FMLA leave? **An employee's spouse, children (son or daughter), and parents are immediate family members for purposes of FMLA. The term**

"parent" does not include a parent "in-law." The terms son or daughter do not include individuals age 18 or over unless they are "incapable of self-care" because of mental or physical disability that limits one or more of the "major life activities" as those terms are defined in the Americans with Disabilities Act (ADA).

Q: Are employees required to furnish medical records for leave due to a serious health condition? **No. However, you may request that the employee provide a medical certification confirming that a serious health condition exists**.

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.

DID YOU KNOW

. . .that in the case of "that's the way the cookie crumbles," the Girl Scouts have been sued for sex discrimination, claiming that they have a "glass ceiling" prohibiting males from advancement within the organization? *Picca v. Girl Scouts of the USA*, (NY., Sept. 12, 2000). The suit seeks class action status of all men who worked at the Girl Scouts national office who either sought or have not been considered for promotions. The class could total approximately 115. The plaintiffs' attorneys said that the case "is not about scouting, it is about a corporation that is run like any other business."

. . .that there is not an implied contract of employment simply because of a long term employment relationship with raises and merit reviews? *Guz v. Bechtel National, Inc.*, (Cal. Ct, Oct. 5, 2000). The court concluded that an individual's at-will employment was not eliminated based upon receiving positive feedback regarding performance during the course of the employment relationship.

. . .that an employee who claims to be an alcoholic is not entitled to protection under the ADA for showing up to work smelling of alcohol? *Bekker v. Humana Health Plan, Inc.*, (7th Cir. Sept. 27, 2000). A group of hospital employees reported that a doctor showed up for work in this condition. An investigation revealed that the doctor often smelled of alcohol and showed other symptoms of being under the influence. The hospital had referred the doctor for treatment, and she had agreed to be tested periodically as part of that treatment. Yet, the behavior continued and she was terminated. In rejecting her ADA claim, the court concluded that "because a non-alcoholic employee would be terminated if Humana concluded she was under the influence of alcohol while working, [we agree] that Dr. Bekker could be terminated under the same circumstances." The court concluded that Humana provided substantial proof that the doctor posed a substantial risk of harm to patients.

. . .that it is not an unfair labor practice for an employer to state in a handbook that the

employer would "do everything possible to maintain our company's union-free status for the benefit of both our employees and the company?" *NLRB v. Aluminum Casting and Engineering Company*, (7th Cir. Oct. 13, 2000). The NLRB had concluded that such a statement violated the National Labor Relations Act. The statement was in the handbook three years before any union organizing activity began on the company's premises. According to the court, "The objective evidence in this case gives no reason to believe that the employees would have perceived the company handbook statement as something indicated a willingness to use unlawful tactics to keep the union out." Furthermore, "if this statement, drafted long before any organizing campaign was on the horizon, is unlawful because it does not expressly disclaim all illegal activity, then no handbook would pass muster unless it had such an express disclaimer."

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If your organization is a or seeks to become a federal contractor, learn about the unique employment law issues that affect government contractors at Lehr Middlebrooks Price & Proctor, P.C. Government Contractor Audit, scheduled for December 12, 2000 at the Holiday Inn - Research Park in Huntsville, Alabama. The program will be presented by Richard Lehr, David Middlebrooks and Lyndel Erwin. The subjects that will be covered include OFCCP compliance, Service Contract Act, Davis Bacon Act, Walsh-Healy Act and Fair Labor Standards Act issues, unique issues regarding union organizing and bidding on a contract where there is union representation, and current "hot spots" issues affecting government contractor employers. Attendees will receive a comprehensive hand out that will include sample policies. For further information about this program, please contact Ms. Sherry Morton at 205/323-9263.

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