EMPLOYMENT LAW BULLETIN

THE NEWSLETTER OF LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

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TO OUR CLIENTS AND FRIENDS:

In a decision with a potentially profound impact on employer use of temporary employees, the National Labor Relations Board on August 25, 2000 ruled that **temporary employees could be eligible to vote in a union election at their working location, and could potentially be added to union representation at those unionized locations to which they are assigned.** The Board's decision involved two cases, *M.B. Sturgis, Inc.* and *Jeffboat*. The NLRB in these cases overruled its prior decisions that temporary employees could not be included among their assigned employers workforce for union representation unless the temporaries primary employer agreed to such inclusion.

Sturgis involved a petition for a union election covering approximately 35 employees who were regular employees, and 10 to 15 temporaries. The NLRB ruled that whether the temporaries are eligible to vote in the election depends upon the "community of interests" they share with the regular employees. For example, do they work side by side, performing the same work, same work hours, using the same tools and equipment, subject to the same rules and procedures, and with no definite duration to their temporary assignment? The more common denominators temporary employees share with the non-temporaries with whom they are working, the greater the likelihood they could be included in a proposed bargaining unit.

Jeffboat involved a unit of about 600 regular employees represented by the Teamsters, who then sought to add 30 temporary employees to the bargaining unit under NLRB "accretion" standards. The Teamsters argued that because Jeffboat had the authority to discipline the temporaries, monitor their time and for the most part treat them no differently from Jeffboat employees, they should be added to the bargaining unit. The NLRB determined that both cases should be reviewed again by the NLRB regional directors to determine whether in either or both situations the temporaries should be added to the regular workforce for union considerations.

What are some practical suggestions for employers to minimize the impact of this decision?

1. Do not assign the same temporaries to work for an indefinite period of time. Establish a fixed time when temporaries either become regular employees or are replaced.

2. Establish by written agreement with the temporary service that the authority to discipline the temporary rests with the

temporary service and not the user employer. Also, establish with the temporary service that temporary employees who believe they have been harassed or mistreated by user employees should report this to their temporary employer.

3. Temporary employees should not receive handbooks or be included among the user employer's regular employee meetings and functions.

4. Do not conduct performance reviews of temporary employees.

5. If your company provides for bidding and transfer policies, do not include temporary employees in the mix.

Of course, the most effective approach for employers to take in order to avoid this issue is to be sure that the employee relations environment is a positive one in which neither the regular nor temporary workforce would have any interest in or need for union representation.

The issues are more complex for temporary employees working at an assignment where other employees are represented by a union. Often, contract language regarding an employer's use of temporaries or subcontracting will govern the dispute. Otherwise, follow the same procedures as described above and you will enhance your opportunity to use temporaries or contract employees while minimizing the likelihood that they could ever become part of the bargaining unit.

WAGE AND HOUR TIP: DEDUCTIONS FROM EMPLOYEE'S PAY

Employees must receive at least the minimum wage free and clear of any deductions except those required by law or payments to a third party that are directed by the employee. The employer also cannot require or allow the employee to pay the money in cash apart from the payroll system.

Examples of deductions that can be made:

- Deductions for taxes or tax liens.
- Deductions for employee portion of health insurance premiums.
- Employer's actual cost of meals and/or housing furnished the employee.
- Loan payments to a third party that are directed by the employee.
- Employee payments to savings plans such as 401k, U.S. Savings Bonds, IRAs & etc.
- Court ordered child support or other garnishments, provided they comply with the Consumer Credit Protection Act.

Examples of deductions that cannot be made if they reduce the employee below the minimum wage.

- Cost of uniforms that are required by the employer or the nature of the job.

- Cash register, inventory shortages; tipped employees cannot be required to pay the ticket of customers who walk out without paying.
- Cost of licenses.
- Any portion of tips received by employees other than tip pooling plan.
- Tools or equipment necessary to perform the job.
- Employer required physical examinations.
- Cost of tuition for employer required training.
- Cost of damages to employer equipment, such as damaging the employer's vehicle.
- Disciplinary deductions. Employees paid on a salary basis may not be deducted if they work any part of the week. However, employees who are considered as exempt may be docked for "major safety infractions."

If an employee receives more than the minimum wage in non-overtime weeks, the employer may reduce the employee to the minimum wage. For example, an employee who is paid $6.00 per hour may be deducted $.85 per hour for up to the actual hours worked in a week the employee does not work more than 40 hours. Also, the Department of Labor takes the position that no deductions may be made in overtime weeks unless there is a prior agreement with the employee. Thus, employers might want to consider having a written employment agreement allowing for such deductions in overtime weeks.

The Act provides that the Department of Labor may assess, in addition to requiring the payment of back wages, a civil penalty of up to $1000 per employee for repeated and/or willful violations of the Fair Labor Standards Act. Thus, employers should be cautious to ensure that any deductions are permissible.

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ADA PERMITS REJECTING APPLICANTS WITH SUSCEPTIBILITY TO CARPAL TUNNEL SYNDROME, RULES COURT

The case of *EEOC v. Cambridge Industries, Inc.* (N.D. Ill, Aug. 28, 2000) involved a company that rejected applicants based upon susceptibility to carpal tunnel syndrome or cumulative stress disorder injuries. The testing involved applicants for entry level positions. Those jobs required either continuing motion or the use of power tools which continually vibrated.

According to the court, rejecting those applicants did not violate the ADA, because the company did not "perceive claimants as being substantially limited from employment generally, rather than from the specific jobs in question." According to the court, if the EEOC could prove that there were limited jobs available within the regional economy, the outcome of the case might have

been different, because rejecting the applicants from these jobs would mean that they were limited from the major life activity of working, and thus considered disabled based upon the employer's actions.

OFCCP TARGETING OF BANK RULED UNCONSTITUTIONAL

Targeting a bank for compliance reviews because it is a large employer and undergoing rapid growth violated OFCCP internal regulations and was unconstitutional, ruled an Administrative Law Judge on August 25, 2000 in the case of *OFCCP v. Bank of America*. OFCCP's internal procedures provide that contractors are identified for a potential compliance review based upon statistical disparities regarding the racial and gender composition of the workforce.

NationsBank, which merged with and is now known as Bank of America, was subjected to a compliance review at its Charlotte, North Carolina headquarters. Based upon finding that there was a disproportionate rejection of minority candidates, OFCCP proposed a conciliation agreement with backpay and hiring objectives for the future. Thereafter, OFCCP initiated investigations at other NationsBank locations. NationsBank asked OFCCP to explain why the other locations were selected. Because OFCCP refused to provide that information, NationsBank refused to cooperate.

In ruling that the OFCCP request for information was an unconstitutional search, the Administrative Law Judge stated that "the search was made as a result of the Bank's selection for a review for compliance with the Executive Order, and was not as a result of specific evidence of an existing violation based upon complaints filed. Therefore, the reasonableness of the search in this case must be established upon a showing that the search is pursuant to an administrative plan containing specific neutral criteria." OFCCP has neutral criteria in its internal Equal Employment Data System Manual, but it was not followed in this case. Thus, the "search" requested of the Bank was not based upon neutral factors and was unconstitutional. The judge stated that **"the undocumented and unexplained process by which the defendant in this case was selected for compliance review is exactly the type of warrantless discretionary review which the courts have held to be unreasonable and in violation of the Fourth Amendment."**

EMBEZZLEMENT DISCLOSURE TO POTENTIAL EMPLOYER NOT REQUIRED

Most employers provide "neutral" references, unless state law requires otherwise. We generally suggest that employers provide a truthful, factual reference when failure to do so could potentially place others at risk. For example, if a company terminates a forklift driver for unsafe driving, should the company disclose that to a school district that is considering employing the individual to drive a school bus? Our view is that such information should be disclosed, even if not legally required.

The case of *San Benito Bank and Trust Company v. Landair Travels, Inc.* (Tx Ct. App. Aug. 24, 2000) illustrates a practical risk but legal protection of providing "neutral" references. Debbie Pena was a bookkeeper

working for an accountant. She embezzled $78,000 from one of the accountant's clients, Landair Travels. The accountant did not report the embezzlement to law enforcement authorities. He paid Landair $30,000 and promised to pay off the remaining amount. Pena then became employed by a law firm, where she forged a check on the firm's trust account for $75,000, which she then used to purchase a cashier's check for $75,000 made payable to Landair. Pena later stole another $20,000 from the law firm and was arrested. The bank and law firm sued Pena's prior employer (the accountant) for failing to warn her subsequent employer (the law firm) about her behavior and failing to report the behavior to law enforcement authorities.

In upholding the trial court's dismissal of the case, the court of appeals stated that "the general rule is that a person has no legal duty to protect another from the criminal acts of a third person." An exception is if the former employer maintains any control over the former employee or the premises where the former employee works and the subsequent criminal act is foreseeable. The court said that to rule otherwise "would effectively force every crime victim to report and prosecute the criminal or risk being liable to a third party injured by that criminal in a similar manner."

If an employer wants to give more than a "neutral" reference, the first person who should know that is the former employee. Additionally, the reference should communicate facts, not opinions. The reference should be communicated to an individual whose job includes the responsibility for receiving the information. Furthermore, an employer may insulate itself from liability when providing a reference by requiring that the former employee sign a broad release authorizing that the information be communicated and waiving any claims that could arise based upon the information.

DID YOU KNOW

. . .that an employer who terminated Hispanic employees for speaking Spanish ended up settling the case for $192,500? *EEOC v. Watlow Batavia, Inc.* (N.D. Ill, Sept. 1, 2000). The case was known as the "buenos dias" case because a Hispanic employee was terminated for saying "good morning" to another employee in Spanish. The company had issued a rule that said no Spanish could be spoken at the workplace. Three months after issuing the rule, the company rescinded it.

. . .that companies with labor problems are six times more likely to face an OSHA inspection? This is based upon a report released on August 31, 2000 by the General Accounting Office. OSHA is required to investigate a complaint that it considers "valid." The reason labor unrest results in over six times the number of complaints, in our view, is because of unions using OSHA to pressure or harass employers.

. . .that according to the Bureau of Employment Statistics, private sector wages rose 4.1% for the second quarter of 2000, compared to 3.6% during the previous twelve months? This is occurring even though recent surveys show a slight easing in the demand for labor. However, employers are still facing difficulty filling technical and professional positions.

. . .that a White House employee on September 13 filed a sexual harassment suit against her supervisor and President Clinton under the 1996

Presidential and Executive Office Accountability Act. (*McCulloch v. Clinton*)? President Clinton was named because he is the employer, not because he is alleged to have engaged in the behavior. McCulloch alleges that she was subjected to repeated unwelcomed sexual advances and retaliated against when she refused. The statute under which she sued extends Title VII to White House employees.

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