EMPLOYMENT LAW BULLETIN

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

Volume 8, Number 11 ***November 2000***

TO OUR CLIENTS AND FRIENDS:

Although membership levels in labor unions continue to remain flat, the recent presidential election resulted in the most significant influence of organized labor at the ballot booth in the past 40 years. For example:

- The AFL-CIO "get out to vote" campaign increased union household participation in the election by 2.5 million compared to 1996. Sixty-three per cent voted for Gore; 32% for Bush.

- Organized labor's influence was particularly pronounced in the critical states of Michigan and Pennsylvania. Forty-three per cent of all voters in Michigan were from union households, 61% voted for Gore and 35% voted for Bush. In Pennsylvania, 30% of the voters were from union households; 65% of the union households voted for Gore and 32% for Bush.

- Nationally, AFL-CIO unions registered 2.3 million additional voters for the 2000 election, compared to 500,000 new voters in 1996.

- AFL-CIO get out the vote volunteers made 8 million phone calls and sent out 12 million pieces of mail.

- After the polls closed on the east coast, union supporters made calls to the households in the west coast where the polls were still open.

Seven union political action committees were among the top ten PAC contributors to the Gore campaign. Why even more support for Gore in 2000 than Clinton in 1996? Gore is considered more pro-labor than Clinton and supports what unions characterize as a "right to organize" amendment to the National Labor Relations Act. This would require employer recognition of unions based upon a majority of employees who signed cards, thus eliminating a secret ballot election.

Whether Bush retains his electoral majority is now up to the courts. However, regardless of who ultimately is inaugurated on January 20, 2001, we believe that Congress during the next two years will focus on achieving success for social security and medicare reform, tax law changes, energy and campaign reform. Labor and employment issues are likely to be low on the list of priorities prior to the 2002 mid-term elections. The more significant impact on employers could occur based upon the philosophy of those appointed to key leadership positions at the EEOC, NLRB, OFCCP and OSHA, and the authority of the President to issue executive orders affecting government contractors.

OSHA ISSUES ERGONOMICS STANDARD; LET THE LITIGATION BEGIN

On November 13, 2000, OSHA issued its final rule on the Ergonomics Standard which becomes effective on January 16, 2001. However, obligations are not imposed on employers until October 14, 2001. Lawsuits have been filed by several organizations claiming that OSHA exceeded its authority by issuing the standard and that the standard is not based on conclusive scientific evidence.

The standard would apply to "all employers" except for those in construction, maritime, agricultural and railroad industries. The standard requires that by October 14, 2001, employers must provide information to employees about musculoskeletal disorders (MSDs) and if there is an "MSD incident," additional requirements are triggered. An MSD incident means that the MSD is work related and requires days away from work, restricted work, or medical treatment beyond first aid, or involves MSD signs or symptoms that last seven consecutive days after the employee reports them to the employer. If the employer and health care professionals determine that the report qualifies as an MSD incident, then the employer must go through an extensive process to screen a job using the "basic screening tool." This involves risk factors for an MSD, such as repetition, force, awkward postures, contact, stress and vibration. If it turns out that these six factors apply to the job, then the employer must meet the standard's action trigger, which involves MSD management for the injured employee and determine whether the job poses an MSD hazard for employees in general.

The standard requires that the employee receive full wages while off of work or if assigned to lesser paying work because of treatment for the MSD. The full wage provision of the standard applies for three months; for those states where worker's compensation does not pay the full amount of the employee's regular pay, the employer would be required to make up the difference.

We will continue to update you regarding the status of the standard and the litigation challenging it.

FAMILY AND MEDICAL LEAVE ACT TIPS

While the Family and Medical Leave Act (FMLA) has been in effect for almost eight years, we find that many employers still have questions regarding proper following of requirements:

Q: Do the 1,250 hours include paid leave time or other absences from work? **No. The 1,250 hours include only those hours actually worked. Paid leave and unpaid leave, including FMLA leave, are not included.**

Q: Can the employee be required to return to work before exhausting the leave? **No. You may not require the employee to return to work early by offering a light duty assignment.**

Q: Are there any restrictions on how the employee spends time while on leave? **Employers with established policies regarding outside employment while on paid or unpaid leave may uniformly apply those policies to employees on FMLA leave. Otherwise, you may not restrict the employee's activities. The protections of FMLA will not, however, cover situations**

where the reason for leave no longer exists, where the employee has not provided required notices or certifications, or where the employee has misrepresented the reason for leave.

Q: Can an employer make inquiries about FMLA leave during the absence? **Yes, but only to the employee. You may ask questions to confirm whether the leave qualifies for FMLA purposes, and may require periodic reports on the employee's status and intent to return to work after leave. Also, you may require the employee to obtain additional medical certification at your expense during a period of FMLA leave. You may have your health care provider contact the employee's health care provider, with the employee's permission, to clarify information in the medical certification or to confirm that the health care provider provided it. You may <u>not</u> seek additional information regarding the employee's condition or that of a family member, unless you have reason to believe that the condition has changed where the leave is no longer needed.**

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.

OFCCP FINAL REGULATIONS MAINTAIN MANDATORY COMPENSATION SURVEY

Effective December 13, 2000, the Office of Federal Contract Compliance Programs will have the most significant change in its regulatory approach in 30 years. The purpose of the regulations is to streamline the Affirmative Action Plan documentation process (the "carrot"), while requiring employers to complete for submission to OFCCP a compensation survey that it will use as a basis for initiating investigations regarding wage and promotion discrimination (the "stick").

The survey referred to requires government contractors every other year to submit to OFCCP on a departmental basis a compensation report of all employees based upon race and gender. Additionally, the report will require information regarding the length of service and promotion activities concerning those employees. Other changes based upon the new regulations include replacing the workforce analysis, which typically involves a job breakdown of over 20 pages, with a one page organizational profile. Additionally, the "eight factor analysis" will be eliminated. In its place will be two factors for analysis and discussion in the affirmative action plan, external availability and internal availability. Finally, those employers with 50 to 150 employees may choose to use the EEO-1 report categories for their job groups, rather than analyzing the job groups to create their own. OFCCP left unchanged its definition of an applicant, which includes unsolicitated resumes, whether by electronic mail or otherwise, from applicants who are not even minimally qualified for the job.

These and other developments concerning OFCCP will be reviewed at our firm's one day briefing for government contractors on Wednesday, December 13 in Huntsville, Alabama. For more information about the briefing please contact Ms. Sherry Morton at 205/323-9263.

DID YOU KNOW . . .

. . .that a Sheet Metal Workers Local agreed to pay a minimum of $2.6 million to non-caucasian workers it discriminated against in its job referral policies? *EEOC v. Local 638, Local 28 Sheet-metal Workers International Association*, (USDC NY 101700). The total amount of back pay owed could exceed $12 million.

. . .that a court recently ruled it was an illegal regulation by the Department of Labor to extend Family and Medical Leave coverage to an employee to whom the employer failed to respond regarding FMLA eligibility? *Brungart v. BellSouth Telecommunications, Inc.*, (11th Cir. Oct 24, 2000). The regulation in question states that "If the employer fails to advise the employee whether the employee is eligible prior to the date the requested leave is to commence, the employee will be deemed eligible. The employer may not then deny the leave." The court understood DOL's objective to prod employers to respond to employee FMLA requests. However, the court stated that "when an administrative agency seeks to improve legislation by altering the basic coverage provisions that Congress has entered into law, it has gone too far." Thus, an employee who requests FMLA and is ineligible to receive it will not be entitled to FMLA if the employer does not respond to the employee's request in a timely manner or at all.

. . .that a bank had to open the vault to pay a terminated executive so that she would not qualify for retirement benefits? *Benham v. Lenox Savings Bank*, (D.Mass, Nov. 3, 2000). Benham was a senior vice president and the second longest serving employee when she was fired at age 57 for making loans to family members in addition to her declining work performance. She alleged that she was fired because the new bank president wanted to reduce the benefits under the bank's defined benefit pension plan, deferred compensation program and 401(k) plan. Then, according to the court, Benham had acquired significant retirement benefits and was terminated at a time when the bank appeared to be directly concerned with the cost of its retirement programs and had taken efforts to reduce the financial burden those programs created. "The bank president . . . who had made both the decision to reduce or eliminated the benefits plans and the decision to terminated Benham, was aware that Benham was the bank's most costly employee in terms of pension benefits."

. . .that on November 9, 2000, the former president of the Laborers International Union of North America Local 5 in Chicago was indicted for stealing $270,000 of the local union's funds? The money was taken through issuing checks to his wife, who was a part-time clerk at the local, and to the union's secretary treasurer. Over a four year period, Frank B. Zeuberis granted 30 illegal pay raises and bonuses to his wife, the secretary treasurer and himself.

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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 13, 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 covered will 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 handout that will include sample policies. For further information about this program, please contact Ms. Sherry Morton at 205/323-9263.

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