EMPLOYMENT LAW BULLETIN

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TO OUR CLIENTS AND FRIENDS:

We at Lehr Middlebrooks Price & Proctor thank you for the opportunity to work with you during this past year. We will continue our commitment to provide you with prompt, quality and creative legal services. We hope that the New Year brings you good health, peace and success.

NON-COMPETE INVALID; NON-DISCLOSURE UPHELD

"Will a non-compete agreement be enforced by the court?" A question we are asked often. Our answer is that several non-compete agreements can be enforced, provided they are reasonable. The recent case of *Robert Half International, Inc. v. Stenz*, (E.D.PA, Nov. 17, 2000) illustrates this point.

Former employee Gregory Stenz signed a non-compete agreement that included confidentiality provisions which forbade him from providing sensitive information or soliciting former clients or candidates for placement. When Stenz began working for the competitor, Robert Half filed suit, requesting that Stenz be precluded from working for the competitor. The court considered the broad preclusion of working for a competitor to be unreasonable, but enjoined Stenz from disclosing confidential information or soliciting Robert Half clients. The court applied a balancing test regarding the competing interests of the employer and employee. Precluding the employee from working in the industry, in the court's view, would be a mechanical enforcement of a non-compete agreement that would cause undue harm to the employee and his family. However, the court recognized that the employee "obtained valuable information or made valuable contacts which will give [him] a competitive advantage that [he] otherwise might not have had." Accordingly, the court enforced the confidentiality and non-solicitation provisions of the agreement.

The enforceability of non-compete agreements is a question of state law because there is no uniform national standard. The following factors should be considered when requiring an applicant or employee to sign a non-compete agreement:

1. Is it specifically written concerning geographical scope, time limitation and the types of services the employee may provide as a competitor or for a competitor?

2. Does it include detailed prohibitions of soliciting the employer's employees and customers, and also prohibit the disclosure or use of confidential information, such as customer lists, pricing lists and strategic plans?

3. Does the agreement describe the harm that would be caused to the employer should the

employee engaged in the activities described in numbers 1 and 2, above?

U.S. SUPREME COURT UPHOLDS ARBITRATION WHERE COST TO INDIVIDUAL IS UNKNOWN

Larketta Randolph signed a mobile home financing agreement which stated that any dispute between the parties would be covered by arbitration. The agreement did not specify how much Randolph would have to pay for arbitration or how those costs would be determined. She filed suit on behalf of a class who claimed that certain provisions of the financing agreement violated the Truth and Lending Act and Equal Credit Opportunity Act; the actual amount in dispute was $15.00.

Although the costs of arbitration were not specified, the Supreme Court stated that "where, as here, a party seeks to invalidate an arbitration agreement on the ground that arbitration would be prohibitively expensive, that party bears the burden of showing the likelihood of incurring such costs." There was no evidence in this case suggesting what the arbitration would cost and, therefore, only conjecture that the arbitration process would be prohibitively expensive to Randolph. However, the Supreme Court was unclear how to determine whether arbitration costs would be prohibitive. *Green Tree Financial Corp. v. Rudolph*, (Dec. 11, 2000).

An important factor for an arbitration agreement to be upheld involves the cost to the individual. If an individual were to file suit and be unable to afford court costs and an attorney, the costs could be waived by the court and an attorney would be appointed. Thus, an agreement to split arbitration costs equally would likely be viewed as prohibitive. Our recommendation to employers is to require that individuals pay a nominal arbitration fee, such as $50 or $75, and the employer pay the arbitrator's fee. Where an arbitration agreement requires the employee to bear an equal share of the arbitrator fees, it is unlikely that such an agreement will be enforced.

WAGE AND HOUR TIP: WHEN IS TRAVEL TIME TO BE CONSIDERED AS WORK TIME?

Many employers have difficulty determining whether an employee should be paid for time spent traveling. Whether this time is compensable depends upon the kind of travel involved. Listed below are several different types of travel and how they should be treated when determining the hours worked by an employee.

- **Home to Work Travel:** An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is <u>not</u> work time.

- **Home to Work on a Special One Day Assignment in Another City:** An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct the amount of time the employee would normally spend commuting to the regular work site. For example, a

Birmingham employee who normally spends one-half hour per day commuting from his home to work is assigned to work in Montgomery for a day. It takes him 2 hours to get from his home to his Montgomery assignment. The employee is required to be paid 1 - ½ hours for the return trip.

- **Travel That is All in the Day's Work:** Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

- **Travel Away from Home Community:** Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly working time when it cuts across the employee's workday. The time is not only work time on regular working days during normal working hours but also during corresponding hours on non-work days. Example: An employee who normally works from 8am to 5pm Monday through Friday is told to travel out of town on Sunday. She leaves on a flight at 3pm and arrives at her destination at 7pm. She must be paid from 3pm to 5pm as that time cuts across her normal workday but she does not have to be paid for the time after 5pm. The Department of Labor does not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

- **Driving time:** Time that an employee spends driving an employer's vehicle is working time. If an employee is directed by the employer to drive the employee's vehicle to transport tools, supplies, equipment or other employees the time must also be considered as work time.

Failure to properly compensate an employee for travel time can result in an employer incurring a substantial liability. Thus, an employer should look very closely at the method being used to pay employees for travel time.

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. 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.

"TERMINATION AT WILL" DOES NOT PROTECT DOT COM FRAUD

The case of *Cohen v. entangible.com*, (D.MD Nov. 17, 2000) is a good example of how an employer's termination at will statement will not protect it from fraudulent misrepresentations during the hiring process.

entangible is based in Boise, Idaho. Charles Cohen was a salesman for a key entangible customer, Holt Paper and Chemical Company, which was based in Baltimore. entangible was apparently impressed with Cohen's work, such

that the president of entangible contacted Cohen about extending him a job offer. entangible brought Cohen to Boise, Idaho. They agreed to a starting salary, a two year contract, a company car, stock options and just about everything you could imagine for a "wish list" offer.

Once Holt Paper became aware of Cohen's decision, Holt called entangible expressing its displeasure for "stealing" Cohen. After that call, Cohen and entangible exchanged offer and acceptance communications through e-mail. Then Cohen and his wife quit their jobs. Shortly thereafter, entangible withdrew the job offer. The Cohens tried to get their former jobs back but were unsuccessful.

entangible argued that since Cohen was terminable at will, its withdrawal of the offer was permitted. The court stated that entangible "misses the point." Once entangible received the phone call from Holt expressing its dissatisfaction with entangible hiring Cohen, entangible continued to make representations to Cohen that he could still pack up for the move to Boise, which was fraud.

Following are some suggestions for avoiding claims of fraudulent misrepresentation in the hiring process:

1. If the offering employer changes its mind, tell this immediately to the candidate.

2. If the offer is contingent on other information or decisions about the candidate, make the candidate aware of that. Also, make the candidate aware if the offer is contingent on certain events developing, such as expanding a division or purchasing another entity. Do not hide facts from the candidate that could place the candidate in a better position to evaluate whether the offer should be accepted.

3. Do not leave the offer open ended; specify how long the offer will remain open.

U.S. SUPREME COURT UPHOLDS ARBITRATOR'S REINSTATEMENT OF EMPLOYEE WITH TWO FAILED DRUG TESTS

In a unanimous decision, the United States Supreme Court on November 28, 2000 concluded that an arbitrator did not exceed his authority by ordering reinstatement of a driver who tested positive for drugs 14 months after his initial positive test. *Eastern Associated Coal Corporation v. United Mine Workers*. After the first termination, the employee was reinstated by an arbitrator with the termination converted to a 30 day unpaid suspension. The employee was also required to submit to random drug testing for five years.

The employee tested positive 14 months later and was terminated. The employee said that he had a momentary lapse because of family problems. Another arbitrator reinstated the employee, provided the employee give the company a signed undated letter of resignation which the company could fill out any time in the next five years if the employee tested positive. The employer sought to overturn the arbitrator's decision based upon public policy considerations evolving from the Ominous Transportation Employee Testing Act of 1991. The Supreme Court concluded that there is not an "explicit, well defined and dominant public policy as ascertained by reference to positive law" that justified setting aside the arbitrator's decision.

Employers with bargaining agreements should negotiate language such that the union agrees not to arbitrate terminations for a positive drug test result where the drug test protocols have been followed.

DID YOU KNOW . . .

. . .that an individual who claims disability discrimination must provide "comparator evidence" to the non-disabled? *Maynard v. Pneumatic Prods. Corp.*, (11th Cir. Nov. 22, 2000). In the instant case, the plaintiff alleged that he was substantially limited in the major life activity of walking. However, he did not provide comparative evidence regarding how far an average person can walk. Without such comparator evidence, the individual fails to state a *prima facie* case of disability discrimination.

. . .that an employee claimed that her "fear of snakes" was a basis for coverage under the ADA? *Anderson v. North Dakota State Hospital* (8th Cir. Nov. 14, 2000). The employee heard that there were snakes in her work area, but she did not see any. The employee claimed that her fear of snakes made her uncomfortable in her work environment. According to the court, "for Ms. Anderson to show that her ability to work has been substantially limited by her fear of snakes . . .she must show that she cannot work in a broad class of jobs."

. . .that a local union president of the United Food and Commercial Workers Union in New Jersey allegedly accepted bribes from employers over a 13-year period? *U.S. v. Rizzo*, (Indictment filed on Nov. 15, 2000)? The case alleges that the president solicited bribes from supermarket owners with whom the UFCW had collective bargaining agreements. In exchange for the bribes, the president said the employers would have labor peace. According to the indictment, "the payments were intended to avoid unfavorable treatment of employers by Local 1262 with respect to employees' wages, hours, and other terms and conditions of employment."

. . .in an arbitration setting that was an alternative to a jury trial, an arbitrator awarded $2.4 million to two sales people who were discriminated against based upon age? *Kaulfman and Broad of North California, Inc.* (Oct. 31, 2000)? The arbitration, which was intended to be an alternative to litigation, lasted 15 days. There were 46 witnesses and a dozen expert witnesses. One individual was awarded $840,000 in front and backpay and emotional damages, the other was awarded $534,700 in back pay and emotional damages, and over $1 million in attorney fees were awarded. The plaintiff's attorney said after the case "it seems to me the lesson here is arbitration is not the panacea and don't force people into it. It may come back to bite you, which it did for the company in this case. They had no appeal."

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