EMPLOYMENT LAW BULLETIN

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

Volume 9, Number 1 ***January 2001***

TO OUR CLIENTS AND FRIENDS:

According to a report released by the U.S. Bureau of Labor Statistics (BLS), unions are experiencing a dramatic decline in membership:

- As of January 1, 2001, 9% of all private sector employees in the U.S. held union cards. In 1999, that figure was 9.4%.
- Today, the total percentage of public and private sector union members is 13.5% -- down from 13.9% in 1999.
- In the 1950s, more than 35% of the U.S. working population held union membership.
- Of the approximately 16.2 million union members nationwide, 9.1 million are in the private sector.
- 15.2% of all employed males belonged to unions in 2000, compared to 16.1% the previous year.
- 11.5% of all employed females belonged to unions in 2000, compared to 11.4% the previous year.
- 13% of all Caucasian employees belonged to unions in 2000, compared to 14.8% in 1999.
- 17.1% of all Black employees belonged to unions in 2000, compared to 19.2% in 1999.
- 11.4% of Hispanic employees belonged to unions in 2000, compared to 13.1% in 1999.
- Among full-time employees, 14.8% belonged to unions in 2000, compared to 15.3% the previous year. Among part-time employees, 6.8% belonged in 2000, compared to 6.9% in 1999.

The BLS also stated that Alaska, Hawaii, Michigan, New Jersey and New York have union membership of more than 20%. In the Carolinas, it's less than 5%. Nationwide, 23 states average about 13.5% union membership and 27% report numbers below that rate. Unions win over half of all representation elections held. Why, then, do their overall numbers continue to decline?

1. The changing face of the American workplace: Today's employers offer cultures in which employees do not feel a need to seek assistance from a union or other outside organizations because they are receptive to using internal dispute and other problem-solving resolution processes.
2. Better communication: Employers are sharing more information with employees, such that the employees understand that job security and financial opportunity depend on job performance and satisfied customers. Union representation is unable to help with either.
3. More changes on the American workplace: For reasons including but not limited to retirement and plant closings, unions have lost hundreds of thousands of members and members gained through election victories are not

nearly enough to make up for that loss. In fact, organized labor needs close to one million new members every year just to stay even.

4. The changing face of the American employee: Surveys show that employees under age 35 view unions as positive for helping those in need. However, they do not view them as helpful to their workplace needs.
5. Changing perceptions: Because the number of union members has been declining, many employers feel that unionization is no longer a risk, when in fact, unionization activity has increased, especially in the Southeast and Mountain states. The only way to assure that unionization is not a risk is to implement effective union-free training and philosophies.

UNAUTHORIZED ACCESS TO EMPLOYEE WEBSITE CREATES WIRE TAP STATUTE VIOLATION

In the case of Konop v. Hawaiian Airlines, Inc. (9th Cir. Jan. 8, 01), plaintiff Konop was a pilot who set up his own password-protected web site to protest the airline's efforts to seek concessions from their pilots. Konop provided access to the site to fellow pilots but not to management nor union representatives. However, a Hawaiian Airlines vice president acquired the password from one of the pilots and shared what he had found with the company president.

After viewing the site, the president called the union president and complained about the site's contents. The union president then called Konop and expressed his concerns. Konop sued the company under the Stored Communications Act and the Electronic Communications Privacy Act of 1986, which originally addressed the recording of telephone conversations. That law, however, had been amended by the Stored Communications Act to forbid unauthorized access to "a facility through which an electronic communication service is provided." The Ninth Circuit Court of Appeals, in reversing the district court, held that a secured web site is considered "electronic communication" and therefore protected from unauthorized interception, and remanded the case for further action.

The same principles apply to employers who search employee e-mail messages. Unless your company has established an Internet and e-mail use policy that specifically reserves the right to search an employee's e-mail, to do so would likely constitute an illegal interception under federal wire tap law.

BUSH ADMINISTRATION FREEZES LAST MINUTE CLINTON REGULATIONS

Shortly after completing the inauguration ceremony on January 20, President Bush froze several last minute Clinton administration regulatory initiatives. According to Bush's spokesman Ari A. Fleisher, President Clinton was a "busy beaver" during the last several weeks of his administration and the Bush administration "wants to review any last minute regulations."

The regulations affected by the Bush administration's action include:

- OSHA recordkeeping requirements issued on January 18, 2001 and due to become effective on January 1, 2002;
- OSHA final rule revising safety

standards regulating steel erection, which is to become effective in July 2001;

- a regulation that narrowed the scope of actions in which labor relations consultants could engage when assisting employers who are responding to union activity;

- a Service Contract Act regulation that exempted certain government contracts from prevailing wage requirements, which is scheduled to become effective on March 19, 2001;

- a final rule issuing new requirements for managed care claims under ERISA, which was to become effective on January 20, 2001, and cover claims filed on or after January 1, 2002. The Bush administration also ordered federal agencies to freeze hiring until further notice.

OFCCP SUES FOR FAILURE TO RESPOND TO EO SURVEY

OFCCP intends to require all federal contractors to complete an equal opportunity survey every two years. This survey has little to do with an affirmative action plan, and a lot to do with whether OFCCP will initiate a investigation regarding whether employer promotion and pay practices comply with Executive Order 11246. On January 12, 2001, OFCCP filed its first lawsuit against a contractor that claimed it was not covered under 11246 and thus was not required to fill out the survey. *OFCCP v. Giant Merchandising*.

The employer received the survey in April 2000 but did not submit it within the 30 day deadline. OFCCP notified the employer in June that it was in violation of Executive Order 11246 by its refusal to complete the survey. The company sent a letter stating that it was not a government contractor covered under Executive Order 11246 because it did not reach the dollar threshold of $50,000. When OFCCP asked for evidence to confirm this and the company failed to comply, it filed suit seeking an injunction requiring the company to complete the survey and barring the company from working on any government contracts for six months. **OFCCP will file more lawsuits similar to this one if employers do not comply with the survey request.** The moral of the story: Complete the survey. If your company is not a covered contractor, provide substantiation to OFCCP. Don't allow them to seek the information through litigation.

WAGE AND HOUR TIP: DEALING WITH TYPICAL OVERTIME PROBLEMS.

This is the first of a two part series on issues concerning proper payment of overtime.

An employer who requires or permits an employee to work overtime is generally required to provide premium pay for that work. Unless specifically exempted, covered employees must receive overtime pay for hours worked in excess of 40 in a workweek at a rate not less than time and one-half their regular rate of pay. **Overtime pay is not required for Saturdays, Sundays, holidays, or regular days of rest, unless the employee has worked more than 40 hours during the workweek. Further, hours paid to an employee for sick leave, vacation and/or holidays do not have**

to be counted when determining if an employee has worked overtime.

The FLSA applies on a workweek basis. An employee's workweek is a fixed and regularly recurring period of 168 hours (seven consecutive 24-hour periods). It need not coincide with the calendar week, but may begin on any day and at any hour of the day. Different workweeks may be established for different employees or groups of employees. Averaging of hours over two or more weeks is not permitted. Normally, overtime pay earned in a particular workweek must be paid on the regular payday for the pay period in which the wages were earned.

The regular rate of pay cannot be less than the minimum wage and includes all remuneration for employment except certain payments specifically excluded by the Act itself. Payments for expenses incurred on the employer's behalf, premium payments for overtime work or the true premiums paid for work on Saturdays, Sundays, and holidays are excluded. Also, discretionary bonuses, gifts and payments in the nature of gifts on special occasions and payments for occasional periods when no work is performed due to vacation, holidays, or illness may be excluded.

Earnings may be determined on piece-rate, salary, commission, or some other basis, but in all such cases the overtime pay due must be computed on the basis of the average hourly rate derived from such earnings. Where an employee in a single workweek performs two or more different types of work for which different straight-time rates have been established, the regular rate is the weighted average of such rates. That is, the earnings from all such rates are added together and this total is then divided by the total number of hours worked at all jobs. Where non-cash payments are made to employees in the form of goods or facilities (for example meals, lodging & etc.), the reasonable cost to the employer or fair value of such goods or facilities must be included in the regular rate.

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.

DID YOU KNOW . . .

. . . that according to a survey conducted by the National Association for Business Economics, demand remains strong for transportation, utilities and communications sectors, but dropped to its lowest for goods producing industries since the 1990-91 recession? According the president of NABE, "profit margins remained under pressure and goods producers now seem to be in recession."

. . . that a class action has been filed against Microsoft seeking $5 billion in damages for claims of race discrimination? *Jackson v. Microsoft Corp.* (D. D.C, Jan. 3, 2001)? The class seeks to include approximately 400 black employees who worked for Microsoft since 1992. It alleges that Microsoft discriminated against them in promotion opportunities and pay.

. . . that an employee terminated for using part of FMLA for personal matters is not entitled to protection from termination? *LeBoeuf v. N Y. Univ. Med. Ctr.*(S.D.N.Y. Dec. 20, 2000)?

LeBoeuf began his sick leave approximately one week prior to surgery for a shoulder operation. The surgery and absences incidental to it are protected under the Family and Medical Leave Act. However, the week before, he used sick leave to appear in traffic court. In upholding the employer's termination, "plaintiff fails to produce evidence sufficient to allow a rational fact finder to conclude that defendant's proffered reasons for discharge are pretextual." The court explained that LeBoeuf offered no rebuttal to the employer's claim that he used FMLA for personal reasons.

. . . that according to the EEOC, under the ADA temporary help agencies and their user employers both owe duties of reasonable accommodation to the temporary employee, according to EEOC guidance issued on December 27, 2000? The EEOC states that the staffing firm is responsible for providing reasonable accommodation regarding the application process, and the user firm is responsible for providing reasonable accommodation on the job. The EEOC suggests that "the staffing firm and the client may wish to set out in their contracts how reasonable accommodations will be provided and who will pay for them."

LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

R. Brett Adair	**205/323-9268**
Stephen A. Brandon	**205/909-4502**
Michael Broom (Decatur)	**256/355-9151**
Richard I. Lehr	**205/323-9260**
David J. Middlebrooks	**205/323-9262**
Terry Price	**205/323-9261**
R. David Proctor	**205/323-9264**
Steven M. Stastny	**205/323-9275**
Michael L. Thompson	**205/323-9278**
Tessa M. Thrasher	**205/226-7124**
Albert L. Vreeland, II	**205/323-9266**
Sally Broatch Waudby	**205/226-7122**
Lyndel L. Erwin	**205/323-9272**
Wage and Hour and Government Contracts Consultant	

Birmingham Office:
2021 Third Avenue North, Suite 300
Post Office Box 370463
Birmingham, Alabama 35237
Telephone (205) 326-3002

Decatur Office:
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767