EMPLOYMENT LAW BULLETIN

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

Volume 9, Number 2 ***February 2001***

TO OUR CLIENTS AND FRIENDS:

President Bush on February 17 signed four executive orders which John Sweeney, AFL-CIO President called "mean spirited," "anti-worker." and an appeasement to the President's "corporate contributors" and "right wing ideologues." What is all of Sweeney's rhetoric about?

1. In the U.S. Supreme Court 1988 case of *Communications Workers v. Beck*, the Court ruled that union represented workers who pay agency fees to the union but not union dues could not be forced to pay union expenses that do not relate to collective bargaining, grievance adjustment or contract administration. Examples of unrelated expenses include political contributions. President Bush's executive order requires government contractors to post a notice that informs employees represented by unions of their "*Beck* rights." A similar executive order was issued by President George H. W. Bush in 1992 and rescinded by President Clinton in 1993. The notice must contain the following language:

   "Under Federal law, employees cannot be required to join a union or maintain membership in a union to retain their jobs. Under certain conditions, the law permits a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union costs related to collective bargaining, contract administration, and grievance adjustment."

2. Companies bidding on government construction contracts will not be required to enter into a project agreement as a condition of receiving the work. A project agreement is a contract between an employer or group of employers and a union covering the duration of the project. It is usually agreed to before employees are hired and without employees deciding whether they want the union. According to the executive order, the contractor must be considered for the work even if the contractor is unwilling to sign a project agreement.

3. Government contractors for custodial and other public buildings services are no longer required to provide employees of a predecessor unionized contractor the first option to continue as an employee for the new contractor. This executive order reverses one issued by President Clinton in

1994. Requiring that the contractor offer jobs first to the predecessor's unionized workforce assured that the union would represent the successor contractor's workforce.

4. Government contractors are no longer required to bargain with unions over non-mandatory subjects of bargaining. A 1993 Clinton administration executive order required such bargaining.

President Bush's executive orders arrived at the most inopportune time for organized labor. Reeling over a substantial decline in membership, organized labor had hoped for at best a neutral Bush administration approach toward these issues.

ADA DOES NOT APPLY TO STATE EMPLOYEES, RULES U.S. SUPREME COURT

In a five to four vote on February 21, 2001, the United States Supreme Court ruled that Congress exceeded its authority under the Constitution by extending the ADA to state employees. The Court said that "no pattern of unconstitutional state action [based on disability] had been documented." *Bd. of Trustees of The University of Alabama v. Garrett*. The Court added that "in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here."

State employees are not without remedies for disability discrimination. They may pursue actions under state laws forbidding discrimination based upon disability. However, not all states have enacted disability laws covering state employees that are as comprehensive as the ADA.

EMPLOYER MISAPPLIES SICK LEAVE IN CONJUNCTION WITH FMLA

Russell Strickland was a supervisor with the Birmingham Water Works Board for eighteen years. Strickland had diabetes and on one occasion told his supervisor that his diabetes was interfering with his vision, so Strickland left work early that day. Acting on the supervisor's recommendation, the Board terminated Strickland for leaving the workplace without permission and failing to complete his work that day. Strickland sued, claiming that he was terminated for leaving work due to a diabetic attack, which qualified as a serious health condition under the FMLA. The Board stated that Strickland did not inform management that a diabetic attack was why he left work that day and that he failed to request FMLA. The district court granted summary judgment for the Board, stating that because Strickland had not first exhausted his sick leave benefit, he could not claim FMLA. The Eleventh Circuit Court of Appeals reversed. *Strickland v. Water Works and Sewer Board of Birmingham* (11th Cir. January 22, 2001).

The FMLA regulations provide that an employee "may elect, or an employer may require the employee, to substitute any of the accrued paid vacation leave, personal leave, or medical or sick leave of the employee for any part of the twelve week of FMLA leave." According to the Court of Appeals, the employer and district court were confused regarding this FMLA regulation. They interpreted the regulation to mean that an individual cannot qualify for FMLA until the

individual exhausts paid sick leave. However, the Court of Appeals stated that if an employee's medical condition qualifies both as a serious health condition under the FMLA and under the terms of the employer's sick leave policy, **"the employer may either permit the employee to use his FMLA leave and paid leave sequentially, or the employer may require that the employee uses FMLA leave entitlement and his paid leave concurrently."** The Court of Appeals explained that under the employer's and lower court's interpretation, if an employee qualified for FMLA but was required to use sick leave before the FMLA applied, the employer could terminate the employee for sick leave absences and thus deny the employee FMLA protection against such a termination. The Court of Appeals remanded the case to the district court.

Remember that under the FMLA:

- The employee does not have to specifically identify the FMLA law in order to receive FMLA protection. Rather, the employee must provide the employer with enough information to put the employer on notice that the FMLA may apply.

- The employer may require the employee to use concurrently with the FMLA unused vacation time and unused sick leave according to the terms of the sick leave policy. For example, if the sick leave policy covers only the employee's absence and not a family member's absence, then the employer may require the employee to use it for the employee's own FMLA absence.

WAGE AND HOUR TIP: SOME TYPICAL OVERTIME PROBLEMS

Last month we reviewed overtime calculations and requirements. This month we will turn our focus to some typical problems that arise in payment of overtime and what steps an employer should take to comply with Fair Labor Standards Act requirements.

Fixed Sum for Varying Amounts of Overtime: A lump sum paid for work performed during overtime hours without regard to the number of overtime hours worked does not qualify as an overtime premium. This is true even though the amount of money paid is equal to or greater than the sum owed on a per-hour basis. For example, a flat sum of $100 paid to employees who work overtime on Sunday will not qualify as an overtime premium, even though the employees' straight-time rate is $6.00 an hour and the employees always work less than 10 hours on Sunday. Similarly, where an agreement provides for 6 hours pay at $9.00 an hour regardless of the time actually spent for work on a job performed during overtime hours, the entire $54.00 must be included in determining the employees' regular rate.

Salary for Workweek Exceeding 40 Hours: A fixed salary for a regular workweek longer than 40 hours does not discharge FLSA statutory obligations. For example, an employee may be hired to work a 50-hour workweek for a weekly salary of $400. In this instance the regular rate is obtained by dividing the $400 straight-time salary by 50 hours, which results in a regular rate

of $8.00. The employee is then due additional overtime computed by multiplying the 10 overtime hours by one-half the regular rate of pay ($4 x 10 = $40.00).

Overtime Pay May Not Be Waived: The overtime requirement may not be waived by agreement between the employer and employees. An agreement that only 8 hours a day or only 40 hours a week will be counted as working time also fails the test of FLSA compliance. An announcement by the employer that no overtime work will be permitted, or that overtime work will not be paid for unless authorized in advance, also will not relieve the employer from its obligation to pay the employee for overtime hours that are worked.

Many employers erroneously believe that the payment of a salary to an employee relieves the employer from the overtime provisions of the Act. However, this misconception can be very costly. Unless an employee is specifically exempt from the overtime provisions of the FLSA, he or she must be paid additional compensation for working more than 40 work hours in a workweek. Failure to pay an employee proper overtime premium can result in the employer being required to pay double damages to the employee and civil money penalties to the U.S. Department of Labor.

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.

"SIGN, OR YOU'RE FIRED" LEADS TO WRONGFUL TERMINATION LITIGATION

When employers begin to require applicants to sign non-competition, non-solicitation agreements, the question remains regarding how to secure the signature of current employees to that agreement. In some situations, employers require current employees to sign the agreement or else be terminated. However, when 17 year employee Frederick Dymock, Jr. refused to sign the agreement and was terminated, the Court concluded that the employer's "sign, or you're fired" approach violated state law and justified Dymock's wrongful termination claim. *Dymock v. Norwest Safety Protective Equipment* (Or. Ct. App. Feb. 14, 2001).

Under the terms of the agreement, Dymock for five years could not solicit customers with whom he had worked nor could he solicit Norwest's employees. In reversing the lower court's dismissal of the case, **the Court of Appeals stated that Norwest's requirement that Dymock sign or be terminated violated state law** because for current employees, a non-compete, non-solicitation agreement can be offered only in conjunction with a promotion. For new employees, the requirement to sign such an agreement may be offered as a condition of employment.

This case provides some lessons for employers regarding implementing non-compete agreements:

- Remember that the enforceability of a non-compete agreement depends upon the laws of each state; there is not a uniform federal non-compete law.
- It generally is permissible to require that an applicant sign a non-compete, non-solicitation agreement as a condition of employment.
- In some states, it is illegal to require an

employee to sign a non-compete or else be terminated.

- The most effective approach to obtain the signature from current employees to a non-compete agreement is to offer the agreement in conjunction with another benefit such as a raise, promotion or bonus.

DID YOU KNOW . . .

. . . that in response to declining membership, the AFL-CIO has increased focus on its "Voice at Work" campaign strategy? This strategy involves community activists, religious leaders and elected officials in spotlighting an employer's resistance to unionization efforts. The objective is to secure employer "neutrality" during an organizing campaign. The AFL-CIO also announced that it has allocated $1 million for start up campaigns in 2001 in Florida, Georgia, Louisiana, Texas and Kentucky.

. . . that an employer's failure to establish a clear reporting process resulted in liability for sexual harassment? *Gentry v. Export Packaging Company* (7th Cir. Jan. 25, 2001). The employer's harassment policy directed employees to report harassment complaints to their Human Resources Representative. However, the Court found that "no consensus existed within the management of the company regarding who assumed that position and Export never informed its employees of who held the position . . . . Export appears not to have taken the necessary steps to fully and effectively implement its sexual harassment policy. If Export desired its policy to provide a viable means by which an employee could report sexual harassment, then the company should have made it more evident who assumed the Human Resources Representative position." The complaint arose when Gentry alleged that her supervisor over a period of time hugged her forty times, gave her a kiss on the cheek, gave her shoulder rubs, called her a "sexretary," gave her a calendar with different sexual positions for every day of the year, asked her to spend the night with him and told her that her clothes would look better on the floor.

. . . that it did not violate the ADA for an employer to require applicant to disclose if they used certain prescribed medications? *EEOC v. J. B. Hunt Transportation, Inc.* (Feb. 8, 2001). The EEOC claims that those who took the requested medications were disabled and protected under the ADA. In rejecting the EEOC's position, the Court stated "the fact that claimants might have faced pain, illness, or perhaps even death but for the use of the various medications does not demonstrate that any claimant was substantially limited in a major life activity or perceived as being so by Hunt." Hunt was concerned about safety implications due to its drivers who drove tractor-trailers with a gross weight of 80,000 pounds, ran regular routes, worked in extreme weather situations and often worked without sleep. Certain medications that could create a safety risk resulted in disqualifying the applicant if the applicant could not discontinue taking the medication. According to the Court, "The ADA does not protect people based merely on their use of medications. In the present case, EEOC has presented no evidence that any claimant was actually disabled, that is, substantially limited in any recognized major life activity or was perceived as being so limited by Hunt."

. . . that on February 26, United States Supreme Court refused to review the decision that ordered the Airline Pilots Association to pay American Airlines $45.5 million in damages for an illegal strike? *Airline Pilots Association v. American Airlines, Inc.* (Feb. 26, 2001). This award by a District Court was affirmed September 2000 by the Fifth Circuit Court of Appeals. The Airline Pilots Association said that the Supreme Court's decision not to review this award was not a surprise. No wonder ALPA is seeking major increases to pilots' compensation? It has a long way to go to pay off $45.5 million.

. . . that President Bush proposed to cut discretionary funding for the U.S. Department of Labor from $11.9 billion to $11.3 billion for fiscal year 2002? This proposed budget cut was announced on February 28, 2001. The $11.9 billion for 2001 was a 6% increase over 2000. AFL-CIO President John Sweeney called this budget proposal "the most anti-working family budget in recent history." He alleges that the budget cuts "would affect job training, safety and health enforcement, and other programs important to working people." Organized labor is particularly concerned because the President supports proposals to rescind the Clinton's administrations proposed ergonomics standard.

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