EMPLOYMENT LAW BULLETIN

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

Volume 9, Number 3 ***March 2001***

TO OUR CLIENTS AND FRIENDS:

In a 5 to 4 vote on March 21, 2001, the United States Supreme Court upheld the use of mandatory employment arbitration agreements. *Circuit City Stores, Inc. v. Adams*. Adams was hired as a sales person in Circuit City's Santa Rosa, California store. Circuit City's employment application, which Adams completed and signed, contained the following language:

> I agree that I will settle any and all previously unasserted claims, disputes or controversies arising out of or related to my application or candidacy for employment, employment and/or cessation of employment with Circuit City, *exclusively* by final and binding *arbitration* before a neutral Arbitrator. By way of example, such claims include claims under federal, state, and local statutory or common law, such as the Age Discrimination in Employment Act, Title VII of the Civil Rights Act of 1964, as amended, including the amendments of the Civil Rights Act of 1991, the Americans with Disabilities Act, the law of contract and the law of tort.

Three years later, Adams sued alleging breach of contract and discrimination. The district court where Adams brought the case ruled that the arbitration agreement was enforceable. The Ninth Circuit Court of Appeal reversed, ruling that the Federal Arbitration Act does not apply to arbitration agreements in the employment context. The United States Supreme Court reversed the Ninth Circuit Court of Appeals stating "there are real benefits to enforcement of arbitration provisions. We have been clear in rejecting the supposition that the advantages of the arbitration process somehow disappear when transferred to the employment context. Arbitration agreements allow parties to avoid the cost of litigation, a benefit that may be of particular importance in employment litigation, which often involves smaller sums of money then disputes concerning commercial contracts."

In order for an arbitration agreement to be enforceable, it must protect, in both procedure and remedies available, the employee's rights under the state or federal laws covered. If the cost of arbitration is prohibitive, it is unlikely that the agreement will be enforceable. Furthermore, as illustrated in the case of *Prevot v. Phillips Petroleum Company*, (S.D. Tex., March 6, 2001), an arbitration agreement must be in the language the employee understands. In that particular case, the court ruled that the employer could not enforce an arbitration agreement because it was written in English and the employees who signed the agreement only spoke Spanish and did not understand English.

We are available to counsel with employers who may be considering arbitration agreements. An

arbitration requirement is not for every employer, but those who choose it should be sure that the agreement and process are enforceable.

TIPS ON EEOC'S INVESTIGATIVE PROCEDURES

In April 1995, in an effort to cope with a burgeoning workload of more than 100,000 pending charges, the **U.S. Equal Employment Opportunity Commission** (EEOC) rescinded its former "Full Investigation" policy and adopted certain new investigative procedures. The new procedures were embodied in what was called a "**National Enforcement Plan**." In substance, the National Enforcement Plan (**NEP**) set forth the Commission's overall enforcement philosophy including an outline of new investigative and litigation procedures. Among other things, the NEP called for the implementation of **"Priority Charge Handling Procedures" (PCHP)** which were intended to supplant the inherently slow "Full Investigation" procedures of the past. Under the NEP, the Commission categorizes incoming charges according to certain "priority issues" which it has established and directs its limited resources toward the investigation of those charges raising priority issues. Non-priority issue charges, or those which are seemingly flawed, are given minimal attention and disposed of as soon as possible. The Commission's PCHP has been in operation for approximately four years and, apparently, spurred a drastic reduction in the Commission's inventory of pending charges. Currently the Commission has approximately 40,000 pending charges nationwide. Thus, the new procedures seemed to favor employers because of the undeniable rapidity with which charges have been processed. However, that is not necessarily the case. In fact, there are several aspects of the NEP and PCHP about which Employers should be aware in order to be well informed about EEOC procedures.

First, although the EEOC no longer attempts to fully investigate every charge, those which involve "priority issues" are categorized as potential "litigation vehicles." And, just as certain income tax deductions may trigger an investigation by the IRS, the EEOC will look more closely at charges that involve its priority issues. It is therefore imperative that employers know what those priority issues are.

The Commission's NEP sets forth three general "categories of priorities" of charges that will trigger special investigative attention:

- Charges involving repeated or egregious discrimination which may have an impact beyond the parties to the dispute. *For example: Egregious racial or sexual harassment by an employer who operates nationwide.*
- Charges involving issues that may assist in clarifying or advancing current case law on the subject. *For example: Claims of discrimination against Hispanics by an employer who enforces an "English only Rule."*
- Charges involving a challenge to the Commission's enforcement ability or authority. *For example: Allegations of retaliation for having filed a charge with the EEOC.*

For a complete list of the priority issues and other disclosable portions of the EEOC's NEP, you may contact:

Lehr Middlebrooks Price & Proctor, P.C.
c/o Jerome C. Rose, EEO Consultant
P. O. Box 370463
Birmingham, AL 35237
(205) 323-9267

Secondly, under the NEP, each local District office is required to develop a **"Local Enforcement Plan"** which sets forth its local priority issues. Usually, the local priority issues mirror the NEP

priority issues, but some vary widely. Thus, it is important for employers to be aware of the LEP issues as well. The LEP issues will be the subject of a newsletter in the near future. In the meantime, employers should take seriously any charges against them, but particularly those which involve one or more of the NEP priority issues outlined above. Usually, it is prudent to seek legal counsel when responding to them because, in most cases, the EEOC investigates such charges with an eye toward litigation and utilizes District Office Staff Attorneys to assist in the investigation.

This article was prepared by Jerome C. Rose, EEO consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Prior to his association with the firm, Mr. Rose served for over 22 years as the Regional Attorney for the Birmingham District Office of the EEOC. As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the states of Alabama and Mississippi.

WAGE AND HOUR TIP: WHEN IS ATTENDANCE AT TRAINING MEETINGS WORK TIME?

Wage Hour regulations state that an employee's attendance at lectures, meetings, training programs and similar activities need not be counted as working time provided the following four criteria are met:

(a) Attendance is outside of the employee's regular working hours;
(b) attendance is in fact voluntary;
(c) the course, lecture, or meeting is not directly related to the employee's job; and
(d) the employee does not perform any productive work during such attendance.

If a non-exempt employee fails to meet **any** of the criteria above, the employee must be compensated for these hours. Of course, the employer does not have to provide additional compensation to exempt employees for any time spent attending such training meetings.

Outside the employee's regular working hours - The training meeting must take place during hours or days that are not during the employee's regularly scheduled work hours. For example, consider an employee who is scheduled to work from 8 AM to 5 PM Monday through Friday. In order for the training not to be considered as work time, it would either have to be on Saturday or Sunday or after 5 PM or before 8 AM Monday through Friday.

Attendance must be voluntary – When the employer (or someone acting on its behalf) either directly or indirectly indicates that the employee should attend the training, the attendance is **not** considered voluntary. Thus, the time spent would be considered as work time. However, where a **State** requires individuals to take training as a condition of employment, attendance would be considered voluntary. An example would be the childcare worker who must complete a 40 hour class before he or she can work in the industry. Conversely, if a **State** requires the employer to provide training as a condition of the employer's license, attendance at the training would not be considered as voluntary. Therefore, this criterion would not be met and employer would have to consider the training as work time.

Training must not be directly related to the employee's job – Training that is designed to upgrade or enhance an employee's job performance would be considered as work time while training for another job or a new or additional skill would not. Training, even if job related, that is secured at an independent educational institution

(i.e. – trade school, college & etc.) that is obtained by the student on his or her own initiative would not be considered as work time. Also, training that is established by the employer for the benefit of employees and corresponds to courses that are offered by independent educational institutions need not be counted as work time. An example would be a course in conversational English that an employer makes available to employees at its facility.

The employee performs no productive work during the training course – Training that is conducted away from the employer's facility usually does not pose a problem but training conducted at the employer's business can potentially cause a problem. Many times the employee receives the training using the employer's equipment, which could have some benefit to the employer and thereby make the time compensable.

Prior to a nonexempt employee attending a training course, the employer should ensure that attendance meets each of the four criteria listed above, otherwise be prepared to compensate the employee for the time spent attending the training. Employers should also remember that when the training hours are determined to be work time, this time **must be added** to the employee's regular work time for overtime purposes.

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.

NO COBRA VIOLATION IN TERMINATION OF SEPARATED SPOUSE'S COVERAGE

May an employer terminate the health care coverage under COBRA of a spouse after the couple is legally separated? That was the issue before the court in the case of *Johnson v. Northwest Airlines, Inc.* (N.D. Cal. February 23, 2001).

In March 1995, Northwest mailed a general COBRA notice to Jeffrey and Carol Johnson at their joint post office box, telling them of their rights and obligations in order to continue with health care coverage upon a qualifying event, including a legal separation. In May 1997 the Johnsons were legally separated. The following December, Jeffrey told Northwest to remove Carol from insurance coverage under the company's plan. A surprised Carol then contacted Northwest to notify them that she and Jeffrey were legally separated and her insurance coverage should not be terminated. The court ruled that after sending the informational notice to Jeffrey and Carol in March 1995, they were both on notice of their obligation to let Northwest know if a qualifying event occurred within 60 days of the event. Neither Carol nor Jeffrey notified Northwest of their legal separation. Therefore, Carol could take no action based upon Jeffrey's notification to Northwest in December 1997. Carol also argued that Northwest did not send the notice to the proper address in March 1995. The court stated that Northwest complied with COBRA by mailing the notice to the last known address for the Johnsons at the time.

EMPLOYER'S REQUIREMENT TO SPEAK ENGLISH ONLY ON THE JOB UPHELD

Employers must consider several issues when establishing language requirements. For example, if a job does not require that an employee speak English, requiring that only English be spoken can be a source of employment discrimination. Furthermore, if an employee does not understand English, it is the employer's responsibility to issue policies to that employee in the employee's language. Otherwise, for example, an employer cannot defend a harassment claim from that employee by saying that the employee failed to report the harassment according to the company procedure.

The case of *Rosario v. Cacae,* (N.J. Sup. Ct., March 9, 2001) involved a doctor's practice where office employees were required to speak English only on the job.

The plaintiff was hired as a secretary and medical assistant for Dr. Cacae, a Spanish and English speaking neurologist. Rosario was bilingual. The person to whom she reported, the office manager, did not speak Spanish. The office manager told Rosario that she should not speak Spanish unless speaking to a patient who only spoke Spanish. Rosario refused to comply with this instruction and was terminated. The court ruled that, under the New Jersey law prohibiting discrimination in employment, Dr. Cacae's termination of Rosario for refusing to speak English was justified. The court stated that "a plaintiff who could prove that an English only or English mainly rule is used as a surrogate for discrimination on the basis of national origin, ancestry or any other prohibitive grounds, would qualify for relief. . ." However, the rule in this case not to speak Spanish unless it was necessary with a Spanish speaking patient was put in place "so that all persons in the office could readily understand what was being said by others." Rosario's supervisor did not know Spanish, and thus the court ruled that it was reasonable for the supervisor to require that, unless necessary to deal with a patient, English only must be spoken.

AFL-CIO DIRECTS ATTENTION TO TECHNICAL AND PROFESSIONAL EMPLOYEES

As union membership continues to decline nationally, the AFL-CIO is continuing to seek potential pockets of union support that could be prime for organizing efforts. Thus, their focus has been on the Southeast and Mountain West regions, where the population is rapidly growing and, most recently, on expanding their efforts to organize professional and technical employees. According to a recent AFL-CIO report, 20% of all professional and technical employees are now represented by unions, compared to 14% of the overall private and public sector workforce. There are approximately 19.8 million professional employees in the workforce, a figure that is expected to reach 25 million by 2008 according to the AFL-CIO report. The technical workforce is expected to increase from 4.9 million to 6 million in 2008. Examples of technical employees include drafters, licensed practical nurses, and technicians in the medical, engineering and computer fields. The professional employees include nurses, teachers, scientists, engineers, computer professionals, telecommunications professionals and technicians and college professors. According to the AFL-CIO report, 36% of professional and technical employees would support a union if given the chance.

DID YOU KNOW . . .

. . . that an effort to require the Bush administration to promulgate its own ergonomics rule was attached to and then dropped from the recent federal bankruptcy bill? The bankruptcy reform legislation that was passed on March 15 included, until the last moment, a proposal that would require the Bush administration to issue its own ergonomics proposal within two years. This of course is a follow-up to Congress' unprecedented act of overturning the Clinton administration's ergonomics rule under the Congressional Review Act of 1996. In fact, Congress' decision to overturn the Clinton administration's ergonomic rule is the first time the 1996 statute has been used to overturn such a rule.

. . . that on March 8, legislation was introduced to tighten some of the abuses under the Family and Medical Leave Act? The bill was proposed by Sen. Gregg (R-NH) to amend the definition of a "serious health condition" under the FMLA. The proposed bill would add language to state that "the term [serious health condition] does not include a short term illness, injury, impairment, or condition for which treatment and recovery are very brief." The proposed bill would also amend the FMLA to permit employers to charge intermittent leave at a minimum of 4 hour time increments. Currently, if an employee is 15 minutes tardy for reasons that are covered under the definition of a serious health condition, only 15 minutes may be charged against the employee's total eligible number of FMLA days.

. . . that a federal judge is permitting members of the United Auto Workers to file suit against their leadership for prolonging a strike to gain personal financial rewards for the local union's officers? *Garrish v. UAW*, (E.D. Mich. Feb. 7, 2001). The UAW members allege that a 1997 strike was prolonged by 87 days because the UAW insisted on receiving $200,000 in "overtime" payments from GM to UAW officers. GM ultimately paid the money to end the strike. The UAW members are seeking $550,000,000, representing the $10,000 to $20,000 each of the 6,000 local members lost during that additional 87 days of the strike.

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	
Jerome C. Rose	**205/323-9267**
EEO 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

THE ALABAMA STATE BAR REQUIRES THE FOLLOWING DISCLOSURE:

"No representation is made that the quality of the legal services to be performed is greater than the quality of legal services performed by other lawyers."

27785.wpd