EMPLOYMENT LAW BULLETIN

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"Your Workplace Is Our Work"

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TO OUR CLIENTS AND FRIENDS:

The Bureau of Labor Statistics on May 17, 2001 released data showing that layoffs during the first quarter of 2001 were the highest they have been since BLS began keeping track of this information in 1995. The following are some statistics to consider:

- Extended mass layoffs, which are defined as those that last more than 31 days, totaled 1,664 during the first three months of 2001, resulting in a job loss to 305,227 workers.
- Only 47% of employers who reported a layoff expect to recall employees.
- Sixteen percent of all layoffs were due to permanent closures, affecting 78,838 workers, compared to 44,472 a year earlier.
- Almost half of all layoffs occurred in manufacturing, with the highest number of losses in the West (102,993) and the Midwest (89,679).

A layoff decision should be partially based on correcting hiring mistakes and at the same time evaluating marginally performing employees. Following are some suggestions employers should consider when analyzing which employees should be laid off, such that the layoff decision does not result in litigation or other disruption:

- Determine in advance what qualifications will be needed for those who remain. Past good performance does not mean the employee is necessarily a proper fit within a restructured organization.
- Identify the weight given to the various factors when determining which employees will be laid off. Where job related factors are comparable, consider length of service as a tie breaker.
- For long term employees, are there other opportunities within the organization, even if those positions are not as prestigious or pay less?
- Are employees provided with some outplacement assistance so they can receive guidance on beginning the process of a job search?
- Where severance is provided, are employees asked to sign a comprehensive release to assure that no litigation arises as a result of the layoff?
- Employees who survive a layoff often feel stresses and pressures, wondering about overall business conditions. Keep them informed; will further layoffs be necessary? What are some "mile markers" that the company must reach in order to make decisions about the continued work force? Otherwise, not only does employee anxiety increase, but employers may lose top performers who will seek employment in what they perceive to be a more secure environment.

EEO TIPS: HOW TO RESPOND TO REQUEST FOR INFORMATION PART I

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.

Even though an employer has provided a comprehensive Position Statement in response to a charge filed against it, the Equal Employment Opportunity Commission (EEOC) frequently requests additional information. Such requests are not necessarily an indication that the Commission has taken a dim view of the employer's initial response or is attempting to broaden the scope of its investigation. On the contrary it could be an indication that:

- There is a conflict in the information provided by the charging party and/or the employer that needs to be clarified;
- The Commission does not understand some of the technical details presented by the employer;
- The Commission is close to a decision on the merits of the charge and needs additional information to conclude its determination.

Thus, notwithstanding the burden of providing more information, the employer can use this occasion to bolster both the logic and legality of its position with respect to the charge.

As a threshold matter it should be understood that Requests for Information (RFI's) from the Commission often come in various formats and may be communicated either formally or informally. For example, if the issues are complicated, the Commission will usually send "tailor made" interrogatories requiring detailed, written answers. If on the other hand the case involves only a single charging party and a routine issue, such as hiring or discharge, the Commission, most likely, will send its standard, boiler-plate requests for that issue. If the position statement was very clear and comprehensive, the investigator may simply make a telephone call to request clarification of a given point. Regardless of the format or the means by which the RFI is communicated, the response should be carefully planned. Always remember that the response is a crucial part of defending against the underlying charge and the information given will be used by the Commission in deciding whether to find "reasonable cause" as to the charge in question. **Keep in mind that the Commission's "reasonable cause" standard requires considerably less evidence than would be required to prove the case if litigated.**

How to Respond

1. <u>Always inquire why the additional information is necessary</u>! Assuming that a comprehensive position statement was submitted, call the investigator and ask why the additional information is necessary. Get any details as to why the information which has already been provided is deemed to be insufficient. **The investigator should readily cooperate in explaining and his or her answers should be a clue as to the direction in which the investigation is going.**

2. <u>Try to narrow the limits of what is being requested.</u> Discuss with the investigator precisely what is being requested. Discuss the nature and scope of the charge to make sure that what is being requested is relevant to the charge both in terms of the main issue and the time-frames pertaining to the new information being requested. For example, if the Commission requests documents and records covering the last two years, make sure that this period

would be applicable in terms of the date of the alleged violation. Question whether the requested information goes beyond the apparent scope of the charge. This may be of critical importance if, for example, the personnel records of all comparators are being requested. Without being indignant ask the investigator to explain how the requested information fits within the scope of the charge. **Always try to obtain an agreement from the investigator as to the proper limits of what is being requested. Be sure to follow any oral agreement with some written confirmation of what was agreed upon.** The confirmation should then be faxed to the investigator after the telephone conversation has been completed.

3. <u>Present the agreed upon information comprehensively.</u> The information requested should be presented persuasively and comprehensively in a manner that will be dispositive of the issue. Every effort should be made to totally defeat the apparent theory of discrimination. For example, if the underlying theory is that the charging party was treated disparately, present clear documentary evidence to show that the work rules have been applied objectively and consistently to all persons who were similarly situated. Where appropriate, indicate that this current information is to clarify or supplement a specific point or bit of information that previously had been presented in the position statement. Notwithstanding any agreement to limit the scope of the request, an employer should always assert, exhaustively, any facts or documents which undermine the allegations contained in the charge.

Next month's article will review how to respond when the EEOC requests to interview witnesses and how to object to EEOC requests for information that are part of a "fishing expedition."

WAGE AND HOUR TIP: SALARY REQUIREMENTS FOR "WHITE COLLAR" EXEMPTIONS

As most of you are aware in order for an employee to be exempt under the Executive, Administrative or Professional exemption the employee must be paid on a salary basis. The regulations generally prohibit the employer from making any deductions for a partial day absence.

Occasionally employers will fail to pay an employee the full salary and thus may have inadvertently destroyed the application of the exemption. However, there is a little known (or used) section of the regulations that allow the employer to correct this mistake and thereby restore the employee(s) to exempt status. This section is sometimes called the "window of correction."

Section 541.118(a)(6) states "The effect of making a deduction which is not permitted under these interpretations will depend upon the facts... On the other hand, where a deduction not permitted by these interpretations is **inadvertent**, or is made for reasons **other than lack of work,** the exemption will not be considered to have been lost if the employer **reimburses the employee for such deductions and promises to comply in the future."**

The employer argued that these were irregular deductions caused by unusual circumstances. Further, in January 2000, the firm issued a memo to employees explaining it was reimbursing the four employees and stating that its policy had been and would continue to be that exempt employees would

not have their pay reduced for partial-day absences. The U. S. District Court granted a summary judgement to the company, holding that even if there were a policy or practice of docking for partial day absences, the firm had corrected any violation by using the "window of correction" provided in the regulation.

The Seventh Circuit overturned the district court's ruling and stated that "we hold that when an employer has a practice or policy of improper deductions... the window of correction... is not available." The Court stated that the correction provision "suggests that an employer must first establish that it was entitled to the exemption, which requires...that the employer demonstrate it was paying its employees on a salary basis." The court's ruling followed the interpretations and arguments the U.S. Department of Labor has consistently taken on this position in both opinion letters and litigation for many years.

Employers are reminded that to make a deduction for any absence of less than a full day from the salary of an otherwise exempt employee can be very costly. Wage Hour allows employers to charge partial day absences against an employee's leave bank although there have been some instances where a court has ruled such deductions as invalidating the salary plan. However, for a salary plan to be valid, even if an employee has exhausted his or her leave bank he or she must continue to receive the full salary even though the employee is absent for a portion of a day. The only exception that allows for a deduction of this type applies to employees who are using intermittent leave under the Family and Medical Leave Act. Deductions for absences of a full day or more may be made without invalidating a salary payment plan.

In view of this decision, employers should consider reviewing their policy concerning deductions from the salary of exempt employees to make sure it complies with the guidelines set by the court. Make sure the payroll department is aware of the policy so they will not inadvertently make deductions that could cause the loss of the exemption for one or more employees.

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FMLA: COURT SICKENS EMPLOYER BY RULING THAT FLU IS SERIOUS HEALTH CONDITION

The Family and Medical Leave Act has several definitions of a "serious health condition," including whether the employee is incapacitated for more than three consecutive days and receives "continuing treatment." Continuing treatment means that in addition to the more than three consecutive days of incapacity, the employee meets with a health care provider at least two times or one time with a series of continuing treatments. The regulations also state that "ordinarily, unless complications arise, the common cold, the flu, earaches, etc. are examples of conditions that do not meet the definition of a serious health condition and do not qualify for FMLA leave."

The case of *Miller v. AT&T Corporation* (4th Cir., May 7, 2001) involved an employee who had an unsatisfactory attendance record and had the flu from December 27, when she was examined by the doctor, through January 1. She was also examined on December 30. She requested FMLA leave and

the employer denied it. In ruling that this instance of the flu qualified as a serious health condition, the court stated that the flu "normally will not qualify for FMLA leave, but under the broad definition of what is a serious health condition, Miller's follow-up treatment to her doctor met the regulatory definition of 'continuing treatment' for there to be a serious health condition." Thus, although the flu and other common minor ailments are generally not considered serious health conditions under the FMLA, there may be a situation where that ailment is more severe for an employee requiring continued treatment and thus meeting the FMLA definition of serious health condition.

UNCLEAR REASON FOR TERMINATION SUPPORTS INITIAL ADA CLAIM

We suggest to employers that employees who are terminated should know why. As a general rule, refrain from ambiguous comments, such as "this just is not working out." Our experience is that when employees understand the specific reasons for their termination, they are less likely to file discrimination charges or lawsuits over that decision. The case of *Smith v. Davis* (3rd Cir. May 7, 2001) is a good lesson for the importance of being specific when terminating an employee.

Smith worked as a probation officer for Luzerne County, Pennsylvania from May 1989 until his termination in November 1995. He was terminated allegedly for "violation of Luzerne County's drug and alcohol policy." The employer did not state what aspect of the policy Smith had allegedly violated; was he impaired when he showed up for work? Did he possess alcohol on the job? Smith had an overall good work record during his six years; upon termination, he filed a discrimination suit alleging that he was terminated based upon his race and disability (alcoholism). In reversing summary judgment granted for the employer by the district court, the court of appeals stated that "it may be that Smith was fired for some other legitimate reason related to alcohol use, but without specific evidence that Smith was fired for such a reason, summary judgment cannot be sustained on those grounds. **"The court added that since the employer "did not tell Smith what he did to bring about his termination, it is not legally sufficient to entitled defendants to judgment as a matter of law."** Thus, the district court's decision was reversed and the case was remanded for trial.

Violation of an employer's alcohol and drug policy is among the strongest reasons to support a termination decision. If an individual is a recovering alcoholic, the ADA does not require reasonable accommodation in the form of excusing alcohol and drug policy violations. However, this case provides an important lesson for employers, which is that one of the most effective ways to minimize the risk of an employment problem is to be specific with the employee regarding why he or she is terminated, be consistent in the use of that reason and be able to substantiate it.

REQUIRING EMPLOYEE MEDICAL EXAMINATIONS: DOES THAT TREAT THE EMPLOYEE AS DISABLED, AND MUST THE EMPLOYER DISCLOSE THE RESULTS?

Two recent cases raise important factors for consideration when requiring employees to submit to medical examinations. The first case, *Tice v. Centre Area Transportation Authority* (3rd Cir. April 23, 2001) involved a claim that a bus driver was "regarded as disabled" based upon the employer requesting the driver to submit to a medical examination. Tice was on a leave of absence for almost two years due to back problems. When he offered to return to work, his employer requested an independent medical exam to confirm

that he was able to do the job. After he ultimately was terminated, Tice argued that his employer regarded him as disabled in part because of its request for a fitness for duty physical before he returned to work. In rejecting Tice's argument, the court stated that **"a request for such an appropriately-tailored examination only established that the employer harbors doubts (not certainties) with respect to an employee's ability to perform a particular job."** Doubts about whether Tice could perform a job did not render him as disabled, because "inability to perform a particular job is not a disability within the meaning of the Act."

In *Judy v. Hanford Environmental Health Foundation* (WA Ct App, April 24, 2001), the court found that the employer was negligent for failing to notify an employee of the results of her medical examination, but the employer had no reason to know that harm or injury to the employee was likely to occur. The employee was a manual laborer. All manual laborers were required to take a physical test to determine whether they could perform the physical tasks of the job. Her employer was told that she did not have the grip strength and lifting capacity necessary in order to perform the job satisfactorily. Judy was not informed of these results and the employer took no action based upon them; she continued to work as a laborer. Subsequently, she became injured on the job and sued her employer and the physician for failing to notify her that she had a particular susceptibility to injury, based upon the physical examination. Rejecting her claim, the court stated that the physical assessment did not "impart actual knowledge that injuries will occur;" only that she was unlikely to meet the physical responsibilities for the job. The court added that "the examination failed to reveal any existing abnormal condition requiring treatment, and, therefore, disclosure to the employee was not required."

Whether disclosure is required is a secondary issue. Our recommendation to employers is as a general rule, provide an applicant and employee with the results of a physical test or medical examination. Individuals expect to be notified of those results, particularly when the results indicate that there is either a potential limitation in the individual's ability to perform the job or an indication of a possible medical problem.

DID YOU KNOW . . .

. . . that on May 10, President Bush nominated Cari Dominguez to chair the Equal Employment Opportunity Commission? Dominguez will serve a five year term that expires on July 1, 2006. Prior to this nomination, Dominguez was director of OFCCP and Assistant Secretary of Labor for Employment Standards in the previous Bush administration.

. . . that according to the American Management Association, approximately one-third of all job applicants lack basic literacy and math skills? The AMA survey was based upon results from 1,627 organizations that tested an average of 278 job applicants in 2000. According to the AMA, "new technologies have raised the bar in terms of necessary skills for many jobs, and higher levels of reading and math are required in job applicants," even with recent downsizing.

. . . that a police department's "no pin" policy was justification for denying an officer the right to wear a cross on his uniform? *Daniels v. City of Arlington, Tx* (5th Cir. April 9, 2001). According to the court, "visibly wearing a cross pin - religious speech that receives great protection in civilian life -- takes on an entirely different cast when viewed in the context of a police uniform. A police department cannot be forced to let individual officers add religious symbols to their official uniforms. Although personal religious conviction obviously is a matter of great concern to many members of the public, in this case it simply is not a matter of public

concern as the term of art has been used in the constitutional sense."

. . . that Sheet Metal Workers' Local 28 in Manhattan has been ordered to set aside $2.6 million for its own discriminatory practices toward members? *EEOC v. Local 638, Local 28 Sheet Metal Workers' International Ass'n* (2nd Cir. April 16, 2001). The case began 30 years ago in 1971, when the union was accused of discriminating against non-white members in application and referral practices. As an outcome of losing the case, the union must place $1 million in escrow immediately and an additional $1.6 million in six months. The amount ultimately that is owed by the union is expected to exceed $12 million in back pay.

. . . that on May 21, 2001, the U.S. Supreme Court let stand a decision invalidating an FMLA notification rule? *Brungart v. BellSouth Telecommunications, Inc.* According to the DOL, when an employee gives two days or less notice of the need for an FMLA absence, the employee will be eligible to take the leave if the employer does not respond within two days of receiving the notice. However, the Eleventh Circuit Court of Appeals ruled and the Supreme Court let the decision stand that an employee who does not meet the statutory eligibility requirements for FMLA cannot be entitled to FMLA if the employer fails to respond to the FMLA request within two days.

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