EMPLOYMENT LAW BULLETIN

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

"Your Workplace Is Our Work"

Volume 9, Number 6 ***June 2001***

TO OUR CLIENTS AND FRIENDS:

"Does an employer have the right to consider an employee's behavior during non-working time, off of the company premises?" is a question we are often asked. Our response is that the employer has the right and in some situations the responsibility to consider such behavior. The recent case of *Crowley v. L.L. Bean, Inc.* (Me., June 16, 2001) illustrates this point.

A jury awarded $215,000 to an employee who alleged that she was sexually and otherwise harassed by a fellow employee at work and away from work during a 22-month period. The behavior away from work included the perpetrator following the employee home from work, leaving gifts for her at her home and entering her home without her permission. The workplace behavior included blocking the employee's car from leaving the premises, approaching her in her work area even though he had no reason to be there, and standing outside the bathroom door waiting for her. The perpetrator received a written warning, but the behavior continued without his termination. Ultimately, Crowley proceeded with her discrimination charge and the trial of her lawsuit.

Employers have the right and the responsibility to evaluate the impact of behavior away from work on an employee's continued employment. Behavior that the employer must consider includes any type of harassing, threatening or intimidating actions. The employer may also consider behavior that it deems to be a poor reflection on the employee and company, even if the employee is not engaged in inappropriate behavior toward another employee. Employers who consider behavior away from the workplace should evaluate the potential implications of that behavior on either the company's reputation, workplace culture or legal responsibilities to employees.

EEO TIPS: HOW TO RESPOND TO REQUEST FOR INFORMATION PART 2

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.

In last month's newsletter, the matter of responding to the EEOC's Requests for Information in general was discussed. In this newsletter we will suggest ways to respond when the EEOC specifically requests: (a) **to interview**

witnesses, (b) **to make an on-site visit**, or (c) **makes a broad, sweeping request for information that arguably goes beyond the scope of the charge.**

Before proceeding, however, following are the major points from last month's newsletter on how to respond to the EEOC's requests for information in general because they are applicable to our discussion here. Keeping in mind that the response is a crucial part of defending against the charge:

- **Always find out why the additional information is necessary.**
- **Try to narrow the limits of what is being requested.**
- **Confirm in writing any agreement reached as to what will be provided.**
- **Present the information agreed upon comprehensively and concisely.**

Responding to Requests for Witness Interviews and/or an on-site investigation. Requests to interview witnesses or for an on-site investigation are, in effect, "requests for information." Employers should exercise a great deal of caution in responding to such requests because it may indicate that the Commission is taking the charge more seriously or needs to resolve important factual questions. As to either of these requests, it is usually wise to involve legal counsel before responding. An employer has a right to have legal counsel present whenever management personnel are being interviewed, whether by telephone or in person. Hence, it is critical that such interviews be planned in advance in order to determine the nature and scope of the questions to be asked and who should be the appropriate spokesperson for the employer. Specifically, the following steps should be taken in preparation for employee-witness interviews:

- Request an explanation from the investigator of the reasons for the requested interviews and the topics to be covered including the time-frames which would be relevant.
- Meet with each witness prior to the investigator's interview to review any relevant facts or documents in question.
- Agree upon some reasonable time-limits for the interviews to avoid their being disruptive to the employer's operations.

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While an employer does not have the right to have legal counsel present when rank and file employees are interviewed, it is wise to involve legal counsel in setting the parameters of such interviews if they are to be held on the employer's premises or during work hours.

How to Frame the Employer's Objections to the Scope or Relevance of Requests for Information. Employers have every right under current case law to object to broad, sweeping requests for information that are tantamount to a "fishing expedition." On the other hand, the Commission has extremely broad investigative authority and need not "close its eyes on unlawful discrimination" which is uncovered during the course of its investigations.

Typically, the EEOC might request, for example, "all records or documents which would show the race, sex and educational qualifications of persons hired into clerical positions during the last three-year period." Depending on the allegations in the charge such a request on its face would seem to be overly broad. First it covers a three-year period which is beyond the 180-day time-frame preceding the filing of the charge. Second, it includes the records of the entire company, not just the department or unit involved in the charge. Third, it requests "all documents and records" which conceivably would show the information in question. Aside from the likelihood that many of the records would be duplicitous, to provide it would be a burdensome, massive undertaking in and of itself.

Obviously, such a broad, sweeping request should be challenged. In our judgment the best response would be to object to the broadness or burdensomeness of the request and offer in the alternative some more limited, but equally relevant, information of the same type. While the Commission could issue a subpoena for the information in question, it may be reluctant to do so under circumstances where there has been essential compliance with its request.

WAGE AND HOUR TIP: THE SERVICE CONTRACT ACT

The McNamara-O'Hara Service Contract Act (SCA) covers contractual agreements entered into by Federal and District of Columbia agencies, the principal purpose of which is the furnishing of services through the use of "service employees." This can include routine maintenance of government equipment, janitorial service in federal buildings, food service on military bases and so forth. As a rule, these contracts are awarded by the Federal agency involved, either on a bid or negotiated basis, once it has been established that the bid specifications meet the criteria of the SCA. "Service employee" is defined as those who work on a covered contract excluding executives, administrators and professional employees who meet exemption criteria as set forth in the Fair Labor Standards Act regulations (FLSA).

Basic Provisions/Requirements

Where a contractual agreement is in excess of $2500, the SCA requires contractors and subcontractors to pay service employees in various classes no less than the wage rates and fringe benefits in the wage determination issued by the Department of Labor for the area where the contract is being performed. DOL issues revised wage determinations annually for each locale where contracts are being performed. The wage determination should be included in the contractual agreement, specifically outlining rate of pay, and fringe benefits for each classification of employee working on the contract. However, in lieu of furnishing the fringe benefits specified in the wage determination, the employer may opt to pay the cash equivalent directly to the employee. **Contracts awarded since June 1, 2000 have required fringe benefit payments of at least $1.92 per hour. This amount is supposed to be revised on an annual basis but as of June 28, 2001 the new figure has not been established. It is our understanding that the 2001 fringe benefit will be at least $2.02 per hour.**

For contracts of less than $2500, contractors are required to pay the Federal minimum wage (presently $5.15 per hour) and, as required by the Contract Work Hours and Safety Standards Act AND the FLSA, to pay employees at least one and one-half times their regular rate of pay for all hours worked over 40 in a workweek. No part of the contract work may be performed in buildings, surroundings, or under working conditions which are unsanitary, hazardous, or dangers to the health and safety of employees. Plus, employers must either post the wage determination in a prominent place or give a copy to each employee.

Penalties

Violating the SCA may result in contract cancellations and liability for any resulting costs to the government. The Department of Labor can also require the contracting agency to withhold payments in sufficient amounts so as to cover wage and fringe benefit under-payments. Further, the DOL can bring legal action to recover the under-payments as well as seek debarment from future contracts for up to three years. Contractors and subcontractors may appeal determinations of violations and debarment to an administrative law judge and decisions may be filed with the Administrative Review Board (whose final determinations may be appealed and are enforceable through the courts). Although the SCA differs from

the FLSA in that the employee does not have a private right to sue under the statute, DOL is very diligent about enforcing the it. Therefore, failure to comply can be very costly to employers -- not only will you be required to pay back wages, you may also be prohibited from obtaining future contractual work for up to three years. So, when preparing a bid or negotiating contract with the Federal government, employers should fully understand, and comply with, the wage and fringe benefit requirements set forth in the wage determination.

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FAILURE TO PROVIDE CONTRACEPTIVE COVERAGE FERTILE AREA OF LITIGATION

Does an employer violate Title VII by excluding prescription contraceptives from coverage under its employee benefit plan? Yes, according to the recent case of *Erickson v. Bartell Drug Company* (W.D. Wash., June 12, 2001). The plan in this case covered all prescription drugs and birth control devices used by men, but excluded prescription contraceptives for women. The court, therefore, granted summary judgment for the class of women plaintiffs in ruling that the employer violated Title VII. The judge ruled that The Pregnancy Discrimination Act, which amended Title VII, "is a broad acknowledgment of the intent of Congress to outlaw any and all discrimination against any and all women in the terms and conditions of their employment, including the benefits an employer provides to its employees. Male and female employees have different, sex based disability and health care needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception."

The EEOC in December 2000 stated that an employer who provides coverage for Viagra but not for contraceptives violates Title VII. On May 21, 2001, a federal judge in Minnesota permitted a lawsuit to proceed alleging that the United Parcel Service violated Title VII by excluding oral contraceptives from its drug plan coverage. However, it is our position that if an employer's plan excludes all birth control methods, unless prescribed for a medical condition and not for the purpose of birth control, such exclusion would not violate Title VII because it is gender neutral. Thus, employers need to review their plans to accurately assess whether exclusion of oral contraceptives from coverage creates a Title VII risk.

UNION ELECTIONS DECLINE, BUT UNIONS WIN MORE OF THEM

According to the Bureau of National Affairs, unions won 52.1% of all representation elections held in 2000, up from 51.3% for 1999. The total number of elections declined to 2,849 from 3,114 in 1999, an 8.5% decrease. Due to the retirement of union members, layoffs and plant closings, organized labor needs approximately 800,000 new members a year just to stay even regarding its total percentage of the private sector American workforce. The following election information is organized by unit size and industry:

No. E'ees	Union Win 2000	Union Win 1999

1 - 49	56.4%	55.9%
50 - 99	48.4%	47.7%
100 - 499	41.2%	39.9%
500 or more	30.4%	41.2%

2000 Results by Industry:

Finance	71.4%
Services	67.1%
Retail	64.5%
Healthcare	64%
Wholesale	58.8%
Construction	54.7%
Transportation, Communications, & Utilities	52.6%
Manufacturing	33.3%

The most successful unions were those that were not affiliated with the AFL-CIO. Non- affiliated unions won 58.1% of all election in 2000, compared to 47.4% the year before. AFL-CIO member union won 53.3% in 2000 compared to 54.4% in 1999. The Teamsters won 44.8% in 2000, compared to 41.2% in 1999. Additionally, the Teamsters have more elections than any other union. They had 804 elections in 2000 (and 903 in 1999).

Unions are desperate to organize. We anticipate further mergers and consolidations of unions to try to combine resources. We anticipate that their primary emphasis will be on employers where they have a presence at some locations, but not all. Also, they will only step up their efforts to organize healthcare, professional and technical employees.

DID YOU KNOW . . .

. . . that according to a recent survey by Training magazine, 81% of the companies surveyed provided training regarding sexual harassment, 80% performance appraisals and 70% on hiring and interviewing? Approximately half of the companies surveyed conducted their training in-house, 12% used outside training sources exclusively and 40% combined both. Not all employees need to be trained in all areas of employment law, however we recommend that all employees receive training regarding harassment and workplace violence.

. . . that on June 6, 2001 the Oregon senate passed a law restricting the amount of overtime registered nurses may work at hospital facilities? The bill provides that overtime may not be more than two hours beyond the nurse's scheduled work day and that no nurse may work more than 16 hours in a 24-hour period. There are exceptions for emergencies and rural hospitals.

. . . that an employee who is unable to perform the essential job functions is not required to receive intermittent leave under the FMLA? *Hatchett v. Philander Smith College*,(8th Cir. June 1, 2001). Hatchett was the business manager for the college. However, due to an accident she was unable to perform her essential job tasks, but asked to continue working on an intermittent leave basis. She was told that part-time work in another classification was available, but that she would not be able to continue in her current job. In upholding the employer's decision, the court said "while the

employee is at his or her job, the employee must be able to perform the essential functions of the job."

. . . that Sales Incentive Compensation Act was introduced on June 6 to exempt inside sales representatives from overtime requirements? The bill has been referred to House Subcommittee on Workforce Protections. Inside sales employees would be exempt if they make sales "predominantly to clients with whom the employee already has a working relationship" and if the employee earns a minimum of $22,500 per year in base wages and overtime.

. . . that 71% of employees experienced workplace harassment or potential violence during the past five years according to research conducted by two DePaul University professors? The survey was comprised of 1,167 employees of the Eighth Circuit Court of Appeals. According to the survey, 71% of those who responded experienced behavior that they considered to be rude, offensive or threatening from either their peers or supervisors. The survey also indicated that those who did not speak up about the behavior were more likely to suffer long-term anxiety and depression. Thirty percent who claimed that they were retaliated against said that the retaliation was to be treated as a social outcast, while 36% claimed that they were retaliated against regarding pay, promotions and performance appraisals.

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