EMPLOYMENT LAW BULLETIN

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

?Your Workplace Is Our Work"

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TO OUR CLIENTS AND FRIENDS:

Within the last few years more and more insurers have entered the Employment Practices Liability Insurance (EPLI) arena, generating competition among insurers to the benefit of potential buyers. We are available to help you evaluate and compare policy benefits and requirements. No longer are there only two or three choices if you want EPLI coverage. This multiplication of EPLI providers makes it easier for employers to negotiate for a policy designed to fit the organization's particular needs rather than settling for a standard policy with provisions more favorable to the insurer.

You should always keep in mind that the insurance company has interests that may differ from yours. **Make sure that the insurance company's goals do not interfere with your interests. Interests which could be jeopardized are the ability to employ experienced employment counsel and the ability to manage the company's litigation.**

We have developed the following list of policy provisions you should consider in evaluating and/or selecting your EPLI coverage:

Preventative Measures. Like HMOs, EPLI insurers have realized that the cost of preventative measures is worth its value in avoiding future problems. Thus, many EPLI providers include certain additional "preventative" services with the policy, such as a Human Resources Best Practices Audit. Be aware that although the insurer may be rightly interested in the outcome of such an audit, the results of the audit should go only to the insured to preserve the possible self-critical analysis privilege which may attach to the results and recommendations of such an audit.

Pre-Paid Legal Consultation. If an employer allowed access to a lawyer to consult regarding employment issues, the lawyer may be able to steer the employer clear of potential problems.

1-800-number. Some insurers provide and/or pay for (within the premiums) a 1-800 service for employees to confidentially report potential employment problems to an independent third-party. This encourages employees to come forward with problems and gets the employer involved at an early stage to undertake damage control (something which is important to insurers, thus their frequently stringent early claim reporting requirements).

Selection of Counsel. Most insurers have established relationships with attorneys whom they hire to represent insureds. This is an area where the EPLI provider itself should be inspected closely. Employment law is a specialized and dynamic area of the law. There are a variety of reasons lawyers

may be chosen to be on a panel. One issue which is of great interest to the insurer is the fees the lawyer charges the insurer. However, as the one to be represented by these lawyers, your primary interests are more likely to be the lawyers' skill and expertise. You should ensure that the panel counsel chosen by your EPLI insurer regularly practice employment law. **If you already have an established relationship with employment counsel, there is often the opportunity when purchasing EPLI for you to negotiate with the insurer to ensure that your regular counsel be designated to defend you in any covered matters or to get your regular counsel appointed to the insurer's panel.** This helps avoid the situation where you consult with your regular employment counsel about a matter before it becomes a claim and, once a claim is made, the matter is forwarded to counsel unfamiliar with not only the matter, but with your company. Some employers reported to us their frustration at not realizing that we would not handle the matter because we were not on the insurer's list. Those employers insisted to the insurer that we represent them and the insurer agreed.

Duty to Defend vs. Indemnity Policy. These are two types of policies. The difference is who controls the litigation. In a duty to defend policy, the insurer provides and manages the defense of the matter. In an indemnity policy, you manage the litigation and the insurance is there to cover the cost of any judgment. This may be an important consideration to companies concerned with the "precedent" value of lawsuits. If the precedent issue (settlement results in encouraging other lawsuits) is of great interest to your company, then you should carefully consider this issue together with the "hammer clause" issue addressed below.

"Hammer Clause." Certain policies contain a clause which essentially gives the insurer the right to force a settlement and, if the insured refuses to settle, the insured must pay any costs above what the case could have been settled for. **If the precedent issue is an important issue for your company, you need to inspect any potential policy for the "hammer clause" and negotiate to have it removed or have the blow softened.** This issue is of particular significance in the employment arena where reinstatement or continued employment of a plaintiff is frequently at issue. For example, the insurer may not be willing to consider that a "goodbye forever" release may be worth the possible increase in settlement value.

Damages. Potential damages in most employment cases include back pay, plaintiff's attorneys' fees and costs associated with their case, damages for pain and suffering, and punitive damages. **Insuring against punitive damages is illegal in some states; make sure you understand which damages are covered under the policy.** Determine whether your policy covers attorneys' fees. The attorney's fees issue frequently arises when the insurer is attempting to evaluate a settlement proposal. Many adjusters for EPLI claims are not familiar enough with employment law to realize that the plaintiff's attorneys' fees should be considered in addition to the value of a potential judgment in evaluating settlement because they are awarded to the plaintiff in addition to any amount awarded by a jury on certain types of employment claims.

Issues and Parties Covered. Some policies cover NLRB and OFCCP trials and audits. Be sure you know the scope of disputes that would be covered, who would be covered (supervisors also?), and which entities are covered (subsidiaries, divisions, related entities).

To better serve you and to assist us in providing articles of interest, we are want to know about your experiences with EPLI insurance. We have therefore enclosed a survey which we hope you will fill out and return to us.

EEO TIPS: HOW TO RESPOND TO A REASONABLE CAUSE FINDING

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.

Not withstanding all that an employer may do to avoid a finding of "Reasonable Cause" after a charge has been filed against it, the Equal Employment Opportunity Commission (EEOC) may for a host of reasons, nonetheless, do just that. If it happens, there is no need to panic, but there are certain specific actions which should be taken to minimize the consequences of the EEOC's findings.

As background information for our discussion on how to respond to a "reasonable cause" finding, it might be helpful to review, briefly, the EEOC's procedures leading to its "Letter of Determination" and, also, how the EEOC currently defines the term " reasonable cause," itself.

The Process. The EEOC basically follows the same steps in processing all of the charges filed under the various statutes which it enforces, (i.e. Title VII, the ADEA, EPA and the ADA), namely:

Step One	The charge is accepted for filing
Step Two	The charge is categorized
Step Three	The charge is investigated
Step Four	The findings are set forth in a "**Letter of Determination**"

a) If "No Cause" (i.e, no violation) is found, the charge is dismissed.

b) If "Reasonable Cause" is found - the EEOC must attempt to conciliate the charge.

c) If conciliation fails the EEOC may issue a Right to Sue to the Charge Party or initiate a lawsuit on its own.

What does the term ?Reasonable Cause" actually mean? Under Section 706(g) of Title VII of the Civil Rights Act of 1964, as amended, the EEOC is required to complete its investigation of a charge and issue a "**Letter of Determination**" finding either "no reasonable cause ..... or reasonable cause to believe that a violation has occurred." Obviously then the term "reasonable cause" must mean sufficient evidence to conclude that the statute underlying the charge in question has probably been violated.

But the real question is what legal standard does a reasonable cause finding require — **a scintilla of evidence, a preponderance of the evidence, evidence tending to show that it was "more likely than not" that a violation occurred, or some other standard of proof?** Over the years this has been an elusive concept to the general public because the EEOC has not consistently held to any of the above standards. Currently, in connection with its National Enforcement Plan the EEOC has adopted the "**more likely than not standard**." Thus, to the EEOC a finding of reasonable cause currently means that the evidence in its judgment was sufficient to show that it is more likely than not that a violation occurred. This standard would seem to require much more than a scintilla of evidence, but something less than a preponderance of evidence.

How To Respond. While the EEOC's

determination may have some probative value, it is not tantamount to a finding on the merits by a court of competent jurisdiction. Thus, it is subject to challenge as to the agency's assessment of the underlying facts as well as its interpretation of applicable law to those facts. Accordingly, the following steps should be taken immediately upon receipt of a reasonable cause finding:

U**First of all, examine the Letter of Determination** carefully to ascertain the basis for the reasonable cause finding. Unfortunately, this may not be easy. Usually, the Letter of Determination contains broad, conclusory statements as the reasons for the finding with few if any specifics. However, it may provide a clue as to whether or not certain key evidence was communicated to the investigator.

U**Secondly, review your own records of key evidence** to insure that all such evidence was transmitted to the EEOC during the course of the investigation. If certain key evidence was not transmitted, it could be the basis for requesting a "Reconsideration" of the Reasonable Cause finding. Normally, the EEOC will not reconsider or change its findings unless the Respondent presents some "new evidence." Any key evidence that was inadvertently omitted (or discovered after the fact) would constitute new evidence in the case.

U**Thirdly, call the EEOC Investigator or his/her supervisor and request a review of the evidence** used in making the determination. Use this occasion to determine whether any significant evidence was overlooked or not properly considered. Directly ask whether or not certain key evidence submitted to the EEOC was considered in arriving at the findings in question. If new evidence has been found, describe the new evidence to the Investigator and ask whether it might change the Commission's findings if it were submitted.

U**Fourth, If you are confident that an error was made by the EEOC in arriving at its findings**, make a written request for "Reconsideration" of the Reasonable Cause finding and re-submit any key evidence which you believe was overlooked or otherwise not considered by the EEOC.

U**Above all it would be prudent to engage legal counsel** to assist in making all of the above responses so as to insure that a proper legal foundation is made for challenging the EEOC's Letter of Determination should the case ever proceed to a trial on the merits.

As stated above, whenever reasonable cause is found, the EEOC by statute must attempt to resolve the charge by "conference, conciliation and persuasion." Thus, conciliation is the next step in the overall process. In the next issue of the bulletin, we will offer some tips on how employers can use the conciliation process to their advantage in resolving a charge.

WAGE AND HOUR TIP: THE RETAIL INDUSTRY UNDER THE FAIR LABOR STANDARDS ACT

Although the Fair Labor Standards Act (FLSA) covers almost all employers there are several specific exemptions that apply to some industries. Due to the effect these exemptions have, I believe it would be beneficial to discuss their application to a particular industry.

Some examples of establishments which may be retail are: automobile repair shops, bowling alleys, gasoline stations, appliance service and repair shops, department stores and restaurants. Examples of establishments that are <u>not</u> considered retail under the FLSA are accounting

firms, medical and dental clinics, construction companies and radio and television stations.

All employees of a retail establishment that is part of an enterprise with an annual dollar volume of sales of at least $500,000 are covered. Further, an employee who is engaged in interstate commerce activities is "covered" on an individual basis. Examples of such activities include: ordering goods from out-of-state, verifying and processing credit card transactions, using the mail or telephone for interstate communications, keeping records of interstate transactions, or handling, shipping, or receiving goods moving in commerce. Thus, a cashier in a small clothing store would be covered under the act if he processes credit card transactions although the firm's gross volume of sales is less than $500,000.

Overtime exemption for commissioned employees: If an employer elects to use the Section 7(i) overtime exemption for commissioned employees, three conditions must be met:

- the employee must be employed by a retail or service establishment, and
- the employee's regular rate of pay must exceed one and one-half times the applicable minimum wage for every hour worked in a workweek in which overtime hours are worked, and
- more than half the employee's total earnings in a representative period must consist of commissions.

If the employee is paid entirely by commissions, or draws and commissions, or if commissions are always greater than salary or hourly amounts paid, the-greater-than-50%-commissions condition will have been met. If the employee is not paid in this manner, the employer must separately total the employee's commissions and other compensation paid during the representative period. The total commissions paid must exceed the total of other compensation paid for this condition to be met. To determine if an employer has met the "more than one and one-half times the applicable minimum wage" condition, the employer should divide the employee's total earnings attributed to the pay period by the employee's total hours worked during the pay period.

Hotels, motels and restaurants may levy mandatory service charges on customers that represent a percentage of amounts charged customers for services. If part or all of the service charges are paid to service employees, that payment may be considered commission and, if the other conditions are met, the service employees may be exempt from the payment of overtime premium pay. Conversely, tips paid to service employees by customers are not considered commissions for the purposes of this exemption. However, there is a separate exemption for tipped employees that allows them to be paid a cash wage of $ 2.13 per hour provided they receive sufficient tips to ensure that the employee earns at least the minimum wage of $5.15 per hour. A tipped employee must receive at least $30.00 per month in tips for this exemption to apply and the employee must report the amount of tips received to the employer. **The employer may not claim more tip credit than the amount of tips reported to him by the employee.** Employees may be required to pool their tips among all of the tipped employees such as wait staff, bus staff and bartenders but they cannot share them with kitchen employees or hostesses.

As these exemptions have specific limitations on their application employers should be very careful in their use. An employer who fails to apply them properly could expose the firm to a substantial liability for back wages, liquidated damages, civil monetary penalties and/or attorney fees.

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WHEN IS REASONABLE ACCOMMODATION UNREASONABLE?

This was the question the court considered in the recent case of *Lucas v. W.W. Grainger, Inc.*, (11th Cir. July 17, 2001). Lucas was a customer service representative at the company's Atlanta warehouse. His job duties were quite physical and included the lifting of heavy weights. Lucas was injured at his job and was able to return to work with restrictions of not lifting more than ten pounds and avoiding bending or stooping on a repetitive basis for two weeks. Lucas was accommodated temporarily by working at a desk position, but his back problems persisted and he took another more extended leave of absence. When he returned to work, he asked to be transferred to an office position. The company told him that no positions were available at the same location, but that he could interview and apply for positions at other locations, which he did. However, he was not hired. Lucas requested the company to place him in the office position, even though to do so would displace current employees.

In rejecting Lucas' claim that the company failed to reasonably accommodate him, the court stated that the ADA "does not mandate that employers promote disabled employees in order to accommodate them," nor is the employer required to displace other employees in order to achieve an ADA accommodation. Furthermore, the fact that the employer temporarily displaced other employees to accommodate Lucas after his first absence did not require the employer to continue to do so. The court explained that "an employer who goes beyond the demands of the law to help a disabled employee incurs no legal obligation to continue to do so."

COURT FINDS RELIGIOUS AND RACIAL HARASSMENT; EMPLOYER ACTIONS INSUFFICIENT

As our Country becomes increasingly diverse regarding religious practices and beliefs, employers need to be aware of potential religious harassment issues that could arise in the workplace. A recent example of such harassment is the case of *Shanoff v. Illinois Department of Human Services*, (7th Cir. July 25, 2001).

Shanoff, who is Jewish, reported to Riperton-Lewis, who was not. Problems began when Riperton-Lewis asked Shanoff to identify his religion (first mistake -- there is no reason to ask such a question in the workplace). Shanoff replied that he was Jewish, but asked Riperton-Lewis why she would ask the question. She responded that she had the right to ask that question.

On another occasion, Riperton-Lewis told Shanoff that he looked like a "haughty Jew." He told her he found this offensive, and Riperton-Lewis, who was black, said that Shanoff should not act in a manner that would "see this nigger get angry." On another occasion, when Shanoff asked for time off to observe the Rosh Hashanah and Yom Kippur

holidays, Riperton-Lewis said that "I don't give a damn about your holidays." She also told Shanoff that "you know damn well I know how to handle white Jewish males like you."

In reversing the lower court's summary judgment in favor of the employer, the Seventh Circuit stated that Riperton-Lewis "used her supervisory position to bully, intimidate, and insult Shanoff because of his race and religion, which is the type of extreme harassment that is the hallmark of a hostile environment claim." Shanoff had reported the incidents and requested a transfer to another supervisor, which was not accommodated. The court stated that Riperton-Lewis' comments went beyond those of the workplace that would be inappropriate, insulting, demeaning or annoying. Furthermore, the court said that her comments were not merely due to "insensitivity," rather due to an overt hostility to Shanoff based upon his religion and race.

DID YOU KNOW . . .

. . . that Cari Dominguez was confirmed on July 19, 2001 as the new Chair of the EEOC? She previously was director of OFCCP and Assistant Secretary of the Department of Labor. One out of the five EEOC commissioner positions remains unfilled, as is the position of EEOC General Counsel.

. . . that the United States Department of Labor, Wage and Hour Division is considering new regulations to address when donning and removing protective gear should be considered working time? Courts have recently split regarding when such time is considered working time. DOL will also address whether the difference between mandatory and optional protective clothing is a distinction for determining whether the time spent is considered working time.

. . . that the United Supreme Court will hear its first case concerning the Family and Medical Leave Act in the matter of *Ragsdale v. Wolverine Worldwide, Inc*.? Ragsdale's claim against Wolverine was dismissed. She was on medical leave for seven months, but Wolverine did not tell her that the leave would be counted toward the twelve week leave provisions of the FMLA. When she returned to work after seven months, she then requested twelve weeks of FMLA, which the employer denied. The employer told her that she exhausted all of her leave, including the FMLA leave. The issue the Supreme Court will decide is whether the Department of Labor exceeded its authority by issuing a regulation that provides that an employer who fails to notify an employee that an absence is covered under FMLA cannot count that absence against the employee's twelve weeks of FMLA.

. . . that the House Judiciary Committee's Subcommittee on Immigration on June 27 approved two bills to permit the spouses of some temporary foreign workers to work in the United States? One bill would permit spouses of the L Visa holders to work in the United States. This involves an individual who has been transferred to the United States as an employee of a multi-national company. The second bill addresses E Visa holders, which are those highly schooled foreign workers brought into the United States as a result of a treaty with another country.

. . . that according to a survey released on July 16, 2001, 43.6% of all plaintiffs who won their lawsuits in the United States Federal District Courts had those victories reversed on appeal? This compares to only 5.8% of those employers who won at the lower court level and lost on appeal. The study was

conducted by two Cornell University law school professors. The Fifth Circuit Court of Appeals has the highest percentage of plaintiff's reversals at 60.8%, and the Fourth Circuit has the lowest percentage at 33.3%. The Ninth Circuit has the highest percentage of employer reversals, 10.6%, the Fourth Circuit has the lowest percentage, 1.2%. The survey was sponsored by plaintiff employment law firms, who claimed that appeals courts hold plaintiffs to a higher standard on appeal than defendants.

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