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:

Enclosed with this month's bulletin are several questions and answers regarding the new OSHA recordkeeping rule and copies of the new OSHA forms. This information was prepared by John Hall, formerly Area Director of OSHA, and Stephen A. Brandon, Esq., both with our firm.

FAILURE TO TRAIN MANAGERS CALLED "EXTRAORDINARY MISTAKE" BY COURT

It is essential for employers to train supervisors and managers not only about issues regarding harassment, but also compliance with equal employment opportunity statutes. This point was highlighted by the Seventh Circuit Court of Appeals in the age discrimination case of *Mathis v. Phillips Chevrolet, Inc*. (Oct. 15, 2001). Mathis, who was black and over 40, applied for a job as a salesman with Phillips in response to an advertisement in the newspaper. Mathis had 24 years of related experience. Because Mathis did not hear from Phillips, he reapplied. The application included a question asking for the date when an applicant was discharged from the military, which Mathis answered "1959." Phillips never interviewed Mathis, but hired several younger, less experienced sales people. The case was tried to a jury, which found that Mathis was not discriminated based upon race, but he was based upon age. The jury awarded him $50,000 in compensatory damages, another $50,000 in liquidated damages and of course for Phillips to pay Mathis's attorneys fees.

The court upheld the award of the liquidated (punitive) damages based upon Phillips's complete lack of training managers regarding the laws of equal employment opportunity. According to the court, **"leaving managers with hiring authority in ignorance of the basic features of the discrimination laws is an extraordinary mistake for a company to make, and a jury can find that such an extraordinary mistake amounts to reckless indifference,"** resulting in liquidated damages. The hiring manager testified at trial that he did not know it was illegal to discriminate on the basis of age. Phillips argued that its statement on the application that it was an Equal Employment Opportunity Employer and did not discriminate based upon several protected classes (including race and age) meant that it tried to comply with such laws. In rejecting this argument, the court said that "the jury could easily have concluded that printing this statement on the application but then making no effort to train hiring managers about the ADEA shows that Phillips knew what the law required but was indifferent to whether its managers followed the law."

As the job market becomes tighter, we expect more rejected applicants to raise issues about whether they were rejected based upon illegal reasons. It is essential for employers to inform those who are involved in any aspect of the

interview and selection process about what they may and may not ask to make the best hiring decision without resulting in discrimination or other legal claims.

TEMPORARY EMPLOYEES COVERED BY BARGAINING AGREEMENT, RULES NLRB

On October 18, 2001 in the case of *Tree of Life, Inc.*, 336 NLRB No. 77, the National Labor Relations Board ruled that temporary employees were required to be covered by a bargaining agreement that applied to the employer's regular workforce. Ruling that the user employer and temporary service are "joint employers," the Board stated that the employer "had a statutory obligation to apply to those [temporary] employees the contract that it negotiated, to the extent those terms regulate their working conditions under its control."

Tree of Life is a wholesale distributor of specialty foods. Its workforce consist of drivers and warehouse workers who are represented by the Teamsters. When the employer hired temporary employees for less than 30 days, the union did not object. However, when the company told the union that it would hire approximately 30 temporary employees for a five month period, the union argued that if they were employed for more than 30 days they should be covered by the collective bargaining agreement. The bargaining agreement provided that those employed for more than 30 days must either join the union or pay union dues or fees or else be terminated.

Last year, the NLRB ruled that a bargaining unit may include temporary employees even if the temporary service and the user employer do not consent to include those employees. The Board stated that the traditional "community of interests" test would apply to determine whether temporaries should be part of the bargaining unit. When that standard was applied to this case, the Board concluded that the temporary employees worked with the regular employees, handling the same work load as those employees. Furthermore, the user employer controlled the temporary employees, such as assigning them work, scheduling them, and otherwise directing them. According to the Board, "it is axiomatic that when an established bargaining unit expressly encompasses employees in a specific classification, new employees hired into that classification are included in the unit . . . had the company wished to avoid the result it now confronts, it should have sought an agreement with the union that separately addressed the treatment of temporary employees."

EEO TIPS: HOW TO AVOID RELIGIOUS DISCRIMINATION CHARGES

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.

The United States has become an increasingly diverse nation, both ethnically and religiously. There are now as many Muslims as Jews, more Buddhists than Episcopalians, and more Hindus than Disciples of Christ in the United States. This burgeoning religious diversity presents a challenge to employers who are subject to the strictures of the federal employment statutes but who also must operate their business in an efficient, orderly manner. While in the past, the most common religious accommodation involved "Sabbath Day" observances, it is likely that employers are now facing accommodation requests involving religious dress codes, special head attire, facial hair and daily prayer rituals. In the next several issues of *THE EMPLOYMENT LAW BULLETIN*, tips on how to address some of the

major religious accommodation problems will be presented in this column including :

- Hiring and selection procedures.
- Alternative accommodations available.
- What constitutes "undue hardship?"
- Religious harassment in the workplace.

As a threshold matter it might be well to review what is required by federal law with respect to religious accommodation. Title VII of the Civil Rights Act of 1964, as amended, makes it unlawful for employers to " fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's ....religion."

Furthermore, Title VII requires employers "to reasonably accommodate...an employee's or prospective employee's religious observance or practice" unless such accommodation would impose an "undue hardship on the conduct of the employer's business." An employer need not incur more than "de minimis" costs in providing an accommodation. However, the employer's hardship, must be real rather than speculative or hypothetical. Also, if an employer regularly permits accommodation for nonreligious purposes, it cannot deny comparable accommodation for religious purposes.

Tips on Hiring and Selection Procedures

The main Title VII hurdle to overcome during the selection process is the prohibition against pre-offer inquiries concerning the need for an accommodation. Under existing case law an employer cannot ask an applicant for such information and an applicant is not required to provide it voluntarily. To minimize the probability that a violation will be found, employers who have a legitimate interest in knowing the availability of prospective employees should **state the normal or specific work hours for the job and ask the applicant whether s/he is available to work those hours**. If the applicant is otherwise acceptable, then accommodation regarding work schedule is not an issue. If the applicant cannot work the schedule for religious reasons, the employer must consider whether reasonable accommodation is possible.

If the applicant is rejected because the employer determines that no accommodation can be made, the key issue is narrowed to whether or not any accommodation would have resulted in "undue hardship" on the employer. This should work to the employer's advantage since the "de minimus" standard of cost is relatively low and, thus, easy to show.

Tips on how to apply the "undue hardship" standard in assessing the impact of providing a religious accommodation will be discussed in a later issue of the *Employment Law Bulletin.*

OSHA REVISED RECORDKEEPING RULE

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Prior to working with Lehr Middlebrooks Price & Proctor, P.C., Mr. Hall was the Area Director, Occupational Safety and Health Administration and worked for 29 years with the Occupational Safety and Health Administration in training and compliance programs, investigations, enforcement actions and setting the agency's priorities
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The long-awaited revision to OSHA's recordkeeping rule was issued on January 18, 2001. Except for two items, the rule will become effective on January 1, 2002. Provisions related to the recording of hearing loss and musculoskeletal disorders have been delayed until January 1, 2003.

As with the old rule, many employers are exempt from the requirement to keep injury and illness records. Employers having fewer than eleven employees at all times in the last calendar

year are exempt. Also, specifically identified low-hazard retail, service, finance, insurance or real estate businesses are exempt. NOTE: Otherwise exempt employers may be notified by the Bureau of Labor Statistics or OSHA that they must keep injury and illness records.

New recordkeeping forms must be used beginning January 1, 2002. These are as follows:

- Log of Work Related Injuries and Illnesses (Form 300)
- Injury and Illness Report (Form 301)
- Summary (Form 300A)

The annual summary of injuries and illnesses must be prepared, certified by a company executive and posted from February 1 until April 30.

What should be recorded? Every new injury or illness case that is work related and involves one of the following:

- death
- days away from work
- medical treatment beyond first aid
- loss of consciousness
- a significant injury or illness (such as a punctured eardrum or fractured rib) diagnosed by a physician or other licensed health care professional
- needlesticks and sharps injuries
- tuberculosis
- cases where an OSHA standard requires medical removal

The term "lost workdays" is no longer used. Reference under the revised rule is to days away or days restricted or transferred to another job. Employers are now instructed to count calendar days rather than workdays when recording lost work time.

The revised rule protects employee privacy by prohibiting their names from being entered for such cases as sexual assault, HIV, mental illness, etc.

Also included in the revised rule are provisions to enhance employee involvement. Employers must establish procedures and inform employees about how to report work related injuries and illnesses. Employees are now guaranteed access to their individual 301 forms.

All employers continue, as under the old rule, to be required to report to OSHA all work related deaths and incidences where three or more employees are hospitalized. This must be done within eight hours and must be made orally to OSHA. If the local office is closed, it may be reported by calling 1-800-321-OSHA.

The new forms may be downloaded and much information may be obtained from OSHA's website at www.osha.gov.

WHEN MAY AN EMPLOYER USE A POLYGRAPH?

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.

The Employee Polygraph Protection Act of 1988 (EPPA), which is administered through the Wage and Hour Division affects virtually every employer. The Act prevents essentially all employers from using lie detector tests either for pre-employment screening or during the course of employment. Employers who improperly use a polygraph examination are subject to civil money penalties up to $10,000 for violating any provision of the Act. Employers are also

required to post notices summarizing the protections of the Act in their places of work. The following definitions are found in the Act:

- a lie detector includes a polygraph, deceptograph, voice stress analyzer, psychological stress evaluator or similar device (whether mechanical or electrical) used to render a diagnostic opinion as to the honesty or dishonesty of an individual.

- A polygraph means an instrument that records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory and electro dermal patterns as minimum instrumentation standards and is used to render a diagnostic opinion as to the honesty or dishonesty of as individual.

Prohibitions actions by an employer. An employer shall not:

- Require, request, suggest or cause an employee or prospective employee to take or submit to any lie detector test.

- Use, accept, refer to, or inquire about the results of any lie detector test of an employee or prospective employee. For example, a law enforcement agency may give a polygraph exam as a part of their investigation but the employer may not use the results to take action against the employee

- Discharge, discipline, discriminate against, deny employment or promotion, or threaten to take any such action against an employee or prospective employee for refusal to take a test, on the basis of the results of a test, for filing a complaint, for testifying in any proceeding or for exercising any rights afforded by the Act.

There are some limited exemptions for employees of federal, state or local governments. In addition, the Federal Government may administer polygraph tests to employees of Federal contractors engaged in national security intelligence or counterintelligence functions. The Act also includes a narrow exemption where polygraph tests (but no other lie detector tests) may be administered in the private sector. Subject to certain restrictions polygraph tests may be administered:

- To employees who are reasonably suspected of involvement in a workplace incident that results in economic loss to the employer and who had access to the property that is the subject of an investigation; and

- To prospective employees of armored car, security alarm, and security guard firms who protect facilities, materials or operations affecting health or safety, national security, or currency and other like instruments; and

- To prospective employees of pharmaceutical and other firms authorized to manufacture, distribute, or dispense controlled substances who will have direct access to such controlled substances, as well as current employee who had access to persons or property that are the subject of an ongoing investigation.

Qualifications of examiners

An examiner is required to have a valid and current license if required by a State in which the test is to be conducted, and must maintain a minimum of $50,000 bond or professional liability coverage.

Rights of persons being asked to take a polygraph examination.

An employee or prospective employee must be given a **written notice** explaining the employee's or prospective employee's rights and the limitations imposed, such as prohibited areas of questioning

and restriction on the use of test results. Among other rights, an employee or prospective employee may refuse to take a test, terminate a test at any time, or decline to take a test if he/she suffers from a medical condition. The results of a test cannot be disclosed to anyone other than the employer or employee/prospective employee without their consent or, pursuant to court order, to a government agency, arbitrator or mediator.

Under the exemption for ongoing investigations of work place incidents involving economic loss, a written or verbal statement must be provided to the employee prior to the polygraph test which explains the specific incident or activity being investigated and the basis for the employer's reasonable suspicion that the employee was involved in such incident or activity.

Where polygraph examinations are permitted under the Act, they are subject to strict standards concerning the conduct of the test, including the pre-test, testing and post-test phases of the examination.

Civil actions may be brought by an employee or prospective employee in Federal or State court against employers who violate the Act for legal or equitable relief, such as employment reinstatement, promotion, and payment of lost wages and benefits. The action must be brought within 3 years of the date of the alleged violation.

The restrictions regarding the use of a polygraph exam are so stringent that it is recommended that no employer have an examination administered without seeking advice from legal counsel.

DID YOU KNOW . . .

. . . that a thirty year employee who was moved from a regular to a part-time position may sue for age discrimination? *Genung v. Northwest Radiology Network* (S.D. Ind, Sept. 21, 2001). The employee was 56 years old. The employer claimed that the employee was reassigned due to a workforce reduction. According to the court, "the evidence shows an older worker who is doing good work and who was the only employee to suffer any adverse action as part of the corporate structuring. From the sum total of evidence, a jury could reasonably find that the employer's explanation for cutting Genung's salary and hours was a false, pretext to mask age discrimination."

. . . that OSHA will delay until January 1, 2003 requirements for more stringent hearing loss criteria? OSHA also announced that it will delay until January 1, 2003 a section of the proposed recordkeeping rule regarding listing musculoskeletal disorders. OHSA has established interim criteria for the 2002 reporting year regarding hearing loss. Employers must record work related changes in hearing acuity that averaged 25 decibels or more at frequencies of 2,000, 3,000 and 4,000 cycles per second measured in either ear. Employers that operate their own safety and health plan regarding hearing loss are permitted to maintain those policies, according to OSHA.

. . . in a case that is so hard to believe, a fugitive can sue its employer for a wage and hour violation? *Barnett v. Young Men's Christian Association, Inc.,* (8th Cir., Oct. 15, 2001). Barnett was not paid the minimum wage, as required under law. He was working for the YMCA while living in a halfway house as part of his parole. However, he ran away from the halfway house and could not be found. The court stated that he can proceed with his case, even though he cannot be found.

. . . that a court refused to endorse a DOL regulation under the FMLA that once an employer approves leave, the employer cannot challenge the employee's eligibility for the leave? *Woodford v. Community of Action of Greene County, Inc.* (2d Cir., October 10,

2001). The employer had informed Greene that she was eligible for FMLA, but she actually did not qualify because she had not worked enough hours during the previous twelve months. A DOL regulation provides that once an employer grants FMLA, the employer may not change its mind if the employer determines that the employee is ineligible. In rejecting the DOL regulation, the court stated that the regulation "impermissibly expands the scope of eligibility because it compels employers to treat as eligible employees who have not met the statutory requirements of twelve months of employment and 1250 hours work prior to the leave."

. . . that an illegal alien allegedly terminated for union activity may be entitled to back pay? The U.S. Supreme Court on September 25, 2001 decided to consider this question in the case of *Hoffman Plastic Compound, Inc. v. NLRB.* An employee who was trying to unionize the employer was terminated the day the employer found out that he lied about his identity and was not authorized to work in the United States. In trying to balance NLRB concerns with retaliatory discharge with the Immigration Reform and Control Act requirements, the NLRB approved the award of limited back pay. Arguing that the Immigration Reform and Control Act "makes it unlawful for any person to obtain employment by presenting documentation which falsely represents his immigration status," the company claimed that no back pay remedy was appropriate. The principles of this case extend to other claims that could be brought by illegal aliens, including claims of discrimination or retaliation for raising issues under wage and hour and safety and health laws.

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