# 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:*

President Bush's order to activate military reservists raises issues surrounding employer responsibilities for those with employees on military leave. Following are key points with which you should be familiar:

- The Uniformed Services Employment and Reemployment Act does not distinguish between those who enlist or are summoned, nor does it distinguish between the armed services and the National Guard.
- A sliding scale of reemployment rights applies depending on the length of the military leave. There is also a sliding scale that determines the amount of time the employee has upon his or her return to make themselves available for work. **The three ranges are absences up through 30 days (must return on next full calendar work day), absences between 31 and 180 days (return within 14 days), and absences from 181 up through five years (return within 90 days)**.
- Employees who are absent for military purposes have the right to continuation coverage under COBRA. Furthermore, under defined benefit plans, the length of absence is credited toward total service.
- The employee must be reinstated to the same or an equivalent position, with the level of responsibility and pay the employee would have received had he or she not been on leave. An exception applies if the employer can show that the employee otherwise would have been laid off, transferred or terminated, or if progression to higher pay and responsibility depended on enhanced skills that the employee did not receive in the military.
- Military leave does not have to be paid. If an employer permits the use of vacation for personal leaves, the employer should also permit it for military leave.
- The employee is required to give advance notice of the military leave, unless to do so is not possible.

## EXCLUDING APPLICANTS BASED ON NERVE TESTING RESULTS IN NO ADA VIOLATION, RULES COURT

For several years the Woodbridge Corporation tested applicants for their susceptibility to carpal tunnel syndrome. The test related to a specific job for which the applicants were considered, rather than a broad range of jobs. Nineteen applicants showed an abnormal susceptibility to carpal tunnel syndrome and, therefore, were not hired. The EEOC sued on their behalf, claiming that the employer's refusal to hire the applicants based upon the test results

treated the applicants as though they were disabled. The Eighth Circuit Court of Appeals in the case of *EEOC v. Woodbridge Corporation* (Aug. 24, 2001) upheld the lower court's conclusion that the testing did not violate the ADA.

The issue before the court was whether an individual who is limited from performing a particular job based on the test result was substantially impaired in the major life activity of working. In rejecting the EEOC's position that such a limitation is a disability, the lower court ruled that **"an employer that regards an individual as having an impairment that disqualifies him or her from a narrow range of jobs does not regard him or her as substantially limited in the major life activity of working."** The Court of Appeals stated that "the employer disqualified the nineteen applicants from a specific high speed job that required rapid repetition. However, because there was no evidence that the employer disqualified those applicants from a broader range of jobs, they were not "regarded as disabled under the ADA." The court noted that some of the evaluated applicants were offered other jobs. Furthermore, "there are groups, to include some governmental agencies, who would state that a worthwhile goal for an employer would be to develop protocols that would limit injuries in the workplace and to include tests designed to determine those who may be predisposed to such injuries."

Factors to consider when determining whether an individual is so limited in working and therefore disabled include, according to the Court, "the number and type of jobs from which the impaired individual is disqualified; the geographical area to which the individual has reasonable access; and the individual's job training, experience, and expectations." Because the exclusion in this case was narrowly limited to one particular job, the court concluded that the exclusion was not an ADA violation.

## THE AMERICAN WORKFORCE: A STATISTICAL PROFILE

The Bureau of Labor Statistics recently released information about the American workforce that was both interesting and surprising. Specifically:

- The American employee spends an average of 3.5 years with each employer.
- Employees from ages 18 through 34 will average 9.2 jobs during those 16 years.
- 17.5 million Americans work at more than one job.
- The average American employee works 34.2 hours per week.
- The average full-time employee receives 9.6 days of paid vacation per year, with 20.3 days after 20 years.
- The average American employee receives 9.3 days of paid vacation per year.
- 56% of all employers provide for sick leave.
- 7% of employers provide child care benefits.
- 16% of all jobs are part-time.
- 58% of adult women work full-time or part-time.
- 28% of employees have flexible schedules.

## EEO TIPS: DOES COMPLIANCE WITH THE WOTC CONFLICT WITH THE ADA?

*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.*

No doubt, to some of you the first question is: What is the WOTC? The **Work Opportunity Tax Credit** (WOTC) and the **Welfare-To-Work Tax Credit (WtW)** are federal income tax credits that encourage employers to hire new employees from nine targeted groups who historically have had difficulty finding employment. Among the targeted groups are persons who may have disabilities as defined under the **Americans With Disabilities Act (ADA).** The WOTC and WtW credits are given to reduce the federal tax liability of private employers who have qualified themselves by hiring persons from the various targeted groups. The Taxpayer Relief Act of 1997 re-authorized the **Work Opportunity Tax Credit** and established a new **Welfare-to-Work Credit** for hiring long-term welfare recipients. On December 17, 1999, the **Ticket to Work and Work Incentives Improvement Act of 1999** retroactively extended the WOTC and the WtW tax credits through December 31, 2001. If your firm is not familiar with these two "Employer Friendly" tax credits, you should investigate their applicability to any new hires you may have between now and January 2, 2002. A tax credit of up to **$2,400.00** per employee under the WOTC may be claimed and a tax credit of up to **$8,500.00** per employee may be claimed under the WtW for qualified employees.

The answer to the topical question is:

**No**! There is no real conflict between the reporting requirement of the two statutes.

An apparent conflict exists, however, between the strict prohibitions under the ADA from making any pre-offer inquiries as to an applicant's disabilities, and the need for an employer to know whether an applicant is a member of one of the targeted groups which qualifies the employer for a tax credit under the WOTC, namely, applicants who are " **Vocational Rehabilitation Referrals."** In order to receive the Work Opportunity Tax Credit, the employer must submit a Form # 8850 which among other things requires a declaration from each applicant as to which of the targeted groups he or she belongs. In the case of Vocational Rehabilitation Referrals, many of whom may also be disabled within the confines of the ADA, such a requirement might be tantamount to a prohibited, pre-offer inquiry under the ADA.

Fortunately, the Internal Revenue Service and the EEOC anticipated this dilemma and, at least unofficially, issued guidance to employers on how to approach the problem. First of all, the EEOC has taken the position that the question as to whether the applicant is a Vocational Rehabilitation Referral, as stated on the form, is not "disability related."

According to the EEOC, the inquiry as set forth on Form # 8850 is so broadly stated that it could include persons with or without a qualifying disability under the ADA. And, therefore, consistent with its own guidance, the EEOC states that an inquiry is not disability-related, "if there are many possible answers to a question [pre-offer inquiry] and only some of those would contain disability-related information." *Enforcement Guidance; Pre-employment Disability-Related Questions and Medical Inquiries*. *(*October 10, 1995).

Secondly, the EEOC suggests that in responding to the inquiry on Form # 8850, employers should instruct applicants that they need only indicate whether they could be included in any one of the targeted groups listed without specifying which one. That is all that the form calls for.

Space restrictions herein will not permit a more detailed explanation of how to complete all of the forms necessary to claim the WOTC or the WtW credit. We suggest that if you have any questions regarding whether your firm qualifies for these tax credits, or if you have any problem in completing the necessary forms, please contact this office for assistance.

## OSHA EMPLOYEE TRAINING REQUIREMENTS

*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.*

Failure to effectively train employees is among the most common violations leading to OSHA citations and penalties. **Training oversights can result in higher injury rates and in penalties, such as a proposed penalty of $860,000 for one employer who failed to train employees in lockout/tagout procedures.** While there is no guarantee that training alone will eliminate accidents, there is ample evidence that it can reduce on-the-job injuries. Adages such as, "pay me now or pay me later" and "a stitch in time saves nine," may be apt to this issue.

Frequently, OSHA cites training deficiencies in its investigations of fatal accidents. Training issues may not always harbor the primary cause of workplace accidents but they are often found to be contributing factors. In all cases, employers will face the burden of proof that training was adequate and that it met requirements.

OSHA standards are replete with references to employee training. No fewer than 200 times, employers are advised that employees are to be trained or told that only "trained, authorized, or competent" persons may be allowed to perform certain job functions. Thankfully, since a great many of these apply to specific substances, processes, etc., the number applying to a particular employer is not quite so daunting.

It should be noted that a number of OSHA's training requirements call for some type of certification or documentation of the specified training as well as refresher training.

A few of the more general training requirements found in OSHA standards are:

*29CFR1910.1200(h) requires that employers provide effective information and training to employees on hazardous chemicals in their work area.

*1910.132(f) mandates training for each employee who is required to use personal protective equipment. The employer must verify that the employee understood the training and so certify.

*1910.178(l) allows operation of powered industrial trucks only by persons evaluated and certified by the employer as meeting specified training criteria.

*1910.95(k) requires that the employer institute a training program for employees exposed to noise at or above an 8-hour time-weighted average of 85 decibels.

*1910.147(c)(7) states that an employer's

program to control hazardous energy (lockout/tagout) must include a detailed training component and certification of employee completion.

*1910.332(a) specifies training for employees who face a risk of electric shock.

*1926.503 is a construction industry standard requiring training for employees whose work exposes them to the risk of falling. A written certification record of such training must be kept.

We are available to assist you in assessing your organization's compliance with OSHA training requirements. Fines and penalties issued by OSHA are least likely to be abated when injuries result from a failure to train employees according to OSHA requirements.

## WHEN ARE AN EMPLOYER'S EFFORTS TO REMEDY HARASSMENT SUFFICIENT TO AVOID LIABILITY?

This question was considered by the court in the case of *Rheineck v. Hutchison Tech, Inc.*, (8th Cir. Aug 16, 2001). The case arose after distribution of a picture similar to plaintiff Reineck in a skimpy bathing suit with her breasts exposed. The employer acted immediately to confiscate the picture, investigated, disciplined those who were involved, and required those who were involved to attend harassment training. The three employees who circulated the picture were also required to apologize to Reineck. Reineck sued, claiming that she had been subjected to a hostile work environment. In upholding summary judgment for the employer, the court considered the following factors to determine whether the employer remedied the harassing environment:

- The time lapse between when the employer first became aware of the harassment and the remedial action that it took.
- The type of action the employer took to correct the problem, including discipline and training sessions.
- Whether the remedial action was sufficient, resulting in end of the harassment.

The employer's actions were prompt, comprehensive and successful in alleviating the hostile environment. On that basis, the court concluded that the employer was protected from liability.

## DID YOU KNOW . . .

**. . . that according to a recent study, smokers compared to non-smokers take more leave and are less productive?** The study was based on an analysis of 300 employees working for one major U.S. airline. According to the leave records for those employees, smokers took 6.1 days of sick leave per year compared to 4.5 for former smokers and 3.86 for non-smokers. Also, when measuring productivity based on the number of calls they received and the length of time clerks were unavailable between calls, former smokers and non-smokers scored 5% higher in productivity..

**. . . that the EEOC reversed its position providing that retirement benefits violate the ADA if they are reduced or end when an employee becomes eligible for medicare?** Referred to as "medicare bridge" cases, the EEOC stated on August 20 that it will no longer litigate those cases. The reason the EEOC reversed its position is that it realized it had the effect of encouraging employers not to provide

any medical benefits to retirees.

**. . . that new EEOC chair Cari Dominguez will seek to increase EEOC mediation efforts?** In an interview on September 18, Dominguez said that her two priorities are to expand the EEOC mediation process and coordinate EEOC enforcement efforts with those of OFCCP and other federal civil rights agencies. Dominguez said that settlements through mediation in its first full year in 2000 totaled $108.4 million.

**. . . that the NLRB on September 12 ordered an employer to issue back pay to strikers who were threatened with discharge, but were not terminated?** *Kolkka Tables and Finish-American Saunas*. The reason for the Board's decision is that otherwise, it would "improperly allow an employer to use an admittedly unlawful threat to intimidate employees in the exercise of their right to strike. Such result is clearly inimical to the exercise of Section 7 rights and therefore inconsistent with the purposes and policies of the National Labor Relations Act." Thus, threatening the striker with discharge for striking means that from the date of threat, the NLRB will seek back pay for the striker. Of course, an employer is not precluded from terminating a striker for violent, threatening or intimidating behavior on the picket line or otherwise violating company policies.


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