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:

Because of frequent questions concerning employee benefits and employee medical and leave of absence issues, Lehr Middlebrooks Price & Proctor, P.C. has crafted exclusive educational programming on these topics. The program regarding Employee Medical and Leave of Absence Issues: Employer Rights will be conducted by Richard Lehr and Mike Thompson; the program regarding Employee Benefits will be conducted by Terry Price and Donna Brooks. Our programs will be held at the following locations:

February 5, 2002, Birmingham, AL; Mountain Brook Inn (8:30 a.m. -12:00 p.m. — Employee Benefits Briefing; 1:00 p.m.-4:30 p.m. — Employee Medical and Leave of Absence Issues: Employer Rights).

February 6, 2002, Huntsville, AL; Holiday Inn Research Park (8:30 a.m.-12:00 p.m. — Employee Benefits Briefing; 1:00 p.m. - 4:30 p.m. — Employee Medical and Leave of Absence Issues: Employer Rights).

February 6, 2002, Decatur, AL; Holiday Inn (8:30 a.m.-12:00 p.m. — Employee Medical and Leave of Absence Issues: Employer Rights; 1:00 p.m.-4:30 p.m. — Employee Benefits Briefing).

APPEALS COURT ENFORCES NLRB EXTENSION OF RIGHTS TO NON-UNION WORKERS

Since the 1975 U.S. Supreme Court decision of *NLRB v. J. Weingarten, Inc.*, unionized employees have held the right to have a steward present during an investigatory interview which may lead to discipline. On November 2, 2001, the Court of Appeals for the District of Columbia approved the NLRB extension of this right to non-union employees in the case of *Epilepsy Foundation of N.E. Ohio v. NLRB*.

The case arose when two employees wrote a memorandum to the executive director of the agency criticizing their immediate supervisor. When the executive director requested to meet with one of the employees and the immediate supervisor, the employee stated that he would not attend the meeting unless his fellow employee could join him. When the employee refused to meet with the employer unless the employer agreed to this request, the employer terminated the employee. The employee claimed that his Section 7 rights were violated under the National Labor Relations Act, but an Administrative Law Judge disagreed,

concluding that although the employee's expression of concern about his immediate supervisor was protected under the Act, his refusal to be interviewed without the presence of the fellow employee.

The Board disagreed with the judge, and the Court of Appeals supported the Board. According to the Court of Appeals, **"The presence of a co-worker gives an employee a potential witness, advisor, an advocate in an adversarial situation, and ideally, militates against the imposition of unjust discipline by the employer."**

In light of this, here's what you need to know:

1. The employee's request is protected only if he or she is subjected to an investigatory interview which may lead to discipline. It does not cover an interview where the employee is disciplined, nor where the employee is interviewed but not subject to discipline.

2. The employer is not required to tell the employee that he or she has the right to request that another employee attend an investigatory interview which could lead to discipline.

3. Confidentiality, privacy and the integrity of the investigation could be compromised by the presence of a fellow employee during an investigative interview. Therefore, an employer is not required to interview the employee with another employee present; the employer may tell the employee that the interview will be conducted only if the employee attends, alone.

4. Provide due process for an employee who is being investigated, if that employee insists on the presence of another employee at his or her interview, do not conduct the interview. Rather, tell the employee of the circumstances that may result in discipline, and invite him or her to respond in writing, and that any written response will be considered.

5. If another employee attends the interview, he or she may not coach the employee being interviewed nor disrupt the interview.

EEO TIPS: SOME PRACTICAL APPROACHES TO PROVIDING RELIGIOUS ACCOMMODATIONS

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.

This is the second in a series of articles pertaining to religious discrimination. As stated in last month's issue of the *Employment Law Bulletin*, the United States is an increasingly diverse nation, both ethnically and religiously. The reality of this presents a challenge to employers who by law must attempt to provide, if requested, some "reasonable accommodation" to the various religious practices and observances of employees and applicants. That requirement, of course, is tempered by the proviso that the requested accommodation need not be made if it would impose an "undue hardship" on the conduct of the employer's business.

What is "reasonable?" Much depends on the circumstances in each individual case, and that is perhaps the best way to approach the issue.

The term "reasonable accommodation," as it pertains to religious observances, under Title VII, is vastly different from the same term used in connection with the Americans with Disabilities Act. The concepts under the two acts differ widely and should not be confused.

Unfortunately, the underlying federal statute which imposes the obligation to provide a reasonable accommodation (Section 701(j) of Title VII of the

Civil Rights Act of 1964, as amended) does not define the term. Various courts including the Supreme Court have tried to do so, but even their findings are not all-encompassing given the myriad circumstances which could arise to make an otherwise reasonable accommodation unreasonable.

Putting aside for the moment the legal aspects of the problem, there are some practical steps employers should consider to manage religious accommodation needs. For example, you may be able to fulfill your responsibility by allowing for one or more of the following general types of accommodations:

- Flexible arrival and departure time.
- Floating or optional holidays.
- Flexible work breaks.
- Employees to work during lunch breaks in exchange for early departure for religious purposes.
- Employees may make up time loss due to religious observances.
- Voluntary substitutes and swaps of shifts and/or assignments.
- If possible, a lateral transfer and/or change of job assignment.
- Modify workplace practices, policies and/or procedures, if possible to do so without negatively impacting business operations.

The matter of finding a reasonable accommodation for religious purposes can be complicated. An applicant or employee who needs an accommodation also has certain responsibilities that should be met. He or she must:

- Make the employer aware of the need for a religious accommodation at an appropriate time. Provision of the requested accommodation may become impossible if the request is unnecessarily delayed.
- Cooperate with the employer in its efforts to find a reasonable accommodation. This entails using the employee's own initiative in securing voluntary swaps of shifts or job assignments whenever possible.

These are merely some of the more common methods of fulfilling the employer's and the employee's responsibilities in the process of providing religious accommodations. The list is by no means exhaustive and any satisfactory arrangement between the employer and the employee will satisfy the statutory requirements under the law. In our judgment, it would be prudent to address the matter of religious accommodations in the Employee Handbook or some other written policy. This would have the effect of putting all parties on notice as to their distinct responsibilities for such accommodations.

In our next issue we will discuss and answer the question, "*When does a reasonable accommodation become unreasonable*?"

OSHA'S PERSONAL PROTECTIVE EQUIPMENT STANDARD

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.

When employees are exposed to job hazards that can't be eliminated through engineering, work practices or administrative controls, personal protective equipment (PPE) must be used to reduce hazard exposures.

PPE includes all clothing and other accessories designed to protect employees from workplace hazards.

OSHA requires to assure that each employee wears appropriate equipment which protects the eyes, head, feet, and hands from exposure to hazards in the workplace. A workplace assessment must be made by all covered employers "to determine if hazards are present, or likely to be present, which necessitate the use of personal protective equipment." Employers must document, through a written certification, that such an assessment was performed. The certification should include the name of the workplace evaluated, the date of the assessment, the name of the person certifying and the identification of the document as a certification of hazard assessment.

When an assessment of the workplace finds a need for PPE, the employer must select the appropriate type and ensure its use by each affected employee. These employees must receive training in the proper use and care of the required PPE. The employer must then verify that each employee has received and understood this training through a written certification.

OSHA's Compliance officers enforce these standards by determining whether employers have made the required PPE assessment and evaluating PPE training. Further, they are directed to determine whether the employer is in compliance with the following specific standards: (1) Eye and Face Protection (1910.133), (2) Head Protection (1910.135), (3) Foot Protection (1910.136), (4) Electrical Protective Equipment (1910.137), (5) Hand Protection (1910.138).

What happens when an employee fails to wear PPE that has been provided by the employer? A recurring claim by employers upon being cited for violation of PPE standards is that the particular item was furnished but the employee failed to wear it. Acts of "unpreventable employee misconduct" or "isolated events" are two of the more common affirmative defenses employers may raise against an OSHA citation. Important in establishing this claim is a demonstration by the employer that there is a well-communicated and -enforced work rule in place.

Who pays for PPE? OSHA interprets its PPE standards to require employers to provide and pay for such equipment. However, where the equipment is personal in nature and can be used off the job (i.e., safety shoes) the matter of payment may be left to labor-management negotiations. Some OSHA standards are very explicit on the issue by stating that required PPE is to be provided at no cost to the employee. Other standards make references to employee-provided equipment. The issue was sufficiently unclear to prompt OSHA to propose a revised standard to clarify who is to required to pay for PPE. This Notice of Proposed Rulemaking was issued in March 1999 and final action is still pending. The rule, as proposed, would have employers provide all required PPE at no cost to employees except safety-toe protective footwear and prescription safety eyewear that can be used by the employee off the job.

WAGE AND HOUR TIP: MISCLASSIFICATION OF EMPLOYEES AS EXEMPT: AN EXPENSIVE MISTAKE

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 FLSA exempts executive, administrative, professional and outside sales employees from minimum wage and overtime. **Exemptions are like deductions; they are taken at the employer's own risk. Should an exemption be challenged, the burden of proving that the employee meets the exempt requirements is on the employer.**

Following are problem areas we often experience when conferring with employers who are claiming exemptions:

- An individual's title is one of the least significant factors to determine exempt status. An individual may be called a manager or assistant vice president, yet not be exempt.

- Employees who may qualify for an exemption are not performing exempt duties. For example, those who are exempt as professionals include teachers, nurses and others with college degrees. However, if an individual with a college degree is performing non-exempt work, that individual will not be considered an exempt professional employee.

- Employers without a formal sick leave policy may not dock salaried exempt employees for time missed from work because of sickness.

- An exempt employee's weekly salary may not be reduced for disciplinary or workload reasons. If an employer desires to dock an exempt employee, the employee should not be paid for an entire week.

- Employees who perform routine duties that appear to be related to general business operations often have no bearing on the setting of management policies and, therefore, are not considered exempt.

- Employees with sophisticated job skills but who do not exercise independent judgment are not considered exempt. Examples include draftsmen, some customer service or support representatives, and individuals who may be responsible for purchasing, accounts receivable and accounts payable.

- Exempt employees may not have their salary reduced if they are absent for less than a full day for any reason, unless it is either their first or last week of employment or due to a Family Medical Leave Act absence.

Misclassfication of employees can become an expensive mistake. Potentially, the damages include converting the exempt employees to hourly, which means that the exempt employees would be entitled to overtime. Multiply that by the number of exempt employees and by the statutory period of 156 weeks times two for liquidated damages, you can see that it does not take long for an exemption mistake to turn into a six or seven figure liability.

COURT LIMITS EEOC'S RIGHT TO BROADEN SCOPE OF INVESTIGATION

Does the EEOC have the right to request information about potential sex discrimination when the underlying charge alleges race discrimination? No, according to the Fifth Circuit Court of Appeals in the case of *EEOC v. Southern Farm Bureau Casualty Insurance Company* (Nov. 5, 2001). The charging party claimed that he was discriminated against based upon race. In response to the charge, the company provided a list of employees by name, position and race. When the EEOC reviewed that data, it became concerned that the company may also be discriminating against employees based upon gender. Accordingly, the EEOC broadened the scope of information requested in response to the charge. (*Practical suggestion to employers:* If you are defending a charge that does not allege sex discrimination, provide last name and first initial of employees, only, rather than complete names).

The EEOC issued a subpoena for the information, which the court would enforce if the EEOC

demonstrated "that the information requested is relevant to the charge filed against the employer." However, in this particular case, "even though the EEOC is the agency with primary responsibility for enforcing Title VII, it does not possess plenary authority to demand information that it considers relevant to all of its areas of jurisdiction. Information requested by the EEOC must be based on a valid charge filed by either an aggrieved individual or by the EEOC itself." Therefore, since there was not a valid sex discrimination charge pending against the employee, the EEOC lacked jurisdiction to use a race discrimination charge to investigate sex discrimination. The court noted that the EEOC had the right to file a commissioner's charge, alleging sex discrimination against the employer, but chose not to do so. Had the EEOC filed such a charge, the court then would have enforced the EEOC's request for information related to its investigation of potential sex discrimination.

DID YOU KNOW . . .

. . . that OSHA will not enforce its new recordkeeping provisions for the first 120 days after they become effective? This decision was announced on November 16, 2001 as the result of the settlement of a case brought against OSHA by the National Association of Manufacturers. The regulations become effective on January 1, but OSHA compliance officers will spend the first four months providing employers with compliance assistance. They will not issue citations during that time period "provided the employer attempts in good faith to meet its recordkeeping obligation and agrees to make corrections necessary to bring the records into compliance."

. . . that on October 23, a former president of United Food & Commercial Workers Local 1262 was fined $30,000 and barred from union office for 30 years? *United States v. Rizzo* (D. NJ, Oct. 23, 2001). Rizzo pled guilty to soliciting and receiving bribes from supermarket owners and operators who had bargaining agreements with his local.

. . . that an employer did not violate the FMLA by requiring employees to give five days notice prior to the expiration of the leave if they needed to extend it? *Alexander v. Ford Motor Company* (E.D. Mich, Nov. 5, 2001). The FMLA provides that an employee must give the employer notice within two days of the need to extend a leave. The court said that "the employee is no less absent without leave at the conclusion of a valid FMLA leave than they are during any other point of their employment. Ford has valid reasons for knowing when and if employees are going to return to work. The Department of Labor Regulations only require an employer to allow two days for an employee to request an extension of leave after the employee's leave has expired." Thus, Ford's policy of requiring five days notice before leave expires does not violate the FMLA.

. . . that an employer is not required to accept violent threats as a form of reasonable accommodation for a disabled employee? *Leiss v. Henderson* (8th Cir., September 12, 2001). An employee's psychologist notified the employer that "I have a duty to warn you of the possible threat of harm to you and other members of your staff" based upon threats made by the employee. The employee was terminated, and then claimed that he was not rehired in violation of the Rehabilitation Act. The court agreed with the employer's argument that apprehension about Leiss causing harm to others in the future was a legitimate, non-discriminatory basis for its refusal to hire him.

. . . that an employer was justified in terminating an employee for refusing to submit to a phone voice analysis? *Theisen v. Covenant Medical Center, Inc.*, (Iowa, S.Ct.

November 15, 2001). The employee argued that a voice analysis violated state law prohibiting the use of a polygraph in the workplace. In rejecting the employee's argument, the court stated that the language of the "Polygraph Statute gives no indication that the legislature intended to prohibit the use of methods or devices designed to counter an employee's denial of wrongdoing." The request arose after someone left an obscene message for a nurse at work. The nurse recognized the voice as that of Theisen. The message was reviewed by a voice print analyst, who could not definitely determine whether the voice was Theisen's. The analyst then said that Theisen was needed to submit to a voice print analysis. Theisen declined, claiming that to do so would violate state law prohibiting the use of a polygraph exam at work. According to the court, unlike a polygraph exam, voice print analysis is not intended to determine whether a person is truthful or not, but only whether the voice is likely that of the individual who is examined. "The truth or veracity of the denial cannot be measured by voice print analysis. It remains an identification tool, no matter what the subject's response." Therefore, the employer was justified in terminating Theisen for refusing to submit to the voice print analysis.

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