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"YOUR WORKPLACE IS OUR WORK"

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TO OUR CLIENTS AND FRIENDS:

A reminder that beginning next month, you will receive the *Employment Law Bulletin* via e-mail, unless you prefer to continue receiving through regular mail. If we do not hear from you regarding your preference, you will no longer receive the *Employment Law Bulletin*. **Please notify Sherry Morton at smorton@lmpp.com so that we can keep you on our list.**

SUPREME COURT INVALIDATES PENALTY FOR FAILURE TO GIVE FMLA NOTICE

On March 19, the U.S. Supreme Court considered a case in which an employee was out for 30 weeks under company medical leave policy. The employer failed to give the employee notice that 12 of those 30 weeks counted as her FMLA absence. When the employee did not return to work at the end of the 30 weeks, she was terminated and sued, arguing that under the FMLA regulations issued by the Department of Labor, an employee who is not notified of leave counting toward the FMLA is entitled to that full leave amount. Thus, the employee claimed that she was entitled to 42 weeks, not 30. *Ragsdale v. Wolverine Worldwide, Inc.*

The Supreme Court ruled that the DOL provision requiring up to the full 12 weeks, even if the employee received 12 weeks but was not notified of it, is "incompatible with the FMLA's remedial mechanism." The DOL regulation, 29 CFR § 825.700(a) "is contrary to the Act and beyond the Secretary of Labor's authority." **The Court explained that Ragsdale was not harmed by the employer's lack of notice, as she received full FMLA protection for more than 12 weeks; she was just not told about it.** The Court said that "applying the penalty is blind to the reality" that she would have taken the entire 30 week absence even if Wolverine had complied with the notice regulations. The DOL's interpretation conflicts with the FMLA guarantee of a total of 12 weeks, because the DOL interpretation requires employers to provide more than 12 weeks if they do not notify the employee. The Court concluded that this penalty in the regulation exceeded the DOL's authority under the statute. **The Court added that "in so holding we do not decide whether the notice and designation requirement are themselves valid or whether other means of enforcing them might be consistent with the statute.** Whatever the bounds of the Secretary's discretion on this matter, they were exceeded here. The FMLA guaranteed Ragsdale 12 - not 42 - weeks of leave . . ."

What does this mean to employers? According to the Court, a penalty for failing to notify the employee of leave may not be to extend the leave. The Court did not invalidate the notice requirement; it only concluded that the penalty in the regulation for failing to give the notice was invalid. Therefore, employers should continue to comply with the notice requirement. If for some reason an employer should not do so, the penalty will not be an extension of leave. Rather, the employee must show harm by the non-compliance and seek other statutory remedies.

LABOR UNIONS TO TARGET WOMEN

On March 7, several labor organizations announced **"Unions for Women, Women for Unions," a three-year campaign aimed at increasing female membership. During 2001, the number of women joining unions grew by 93,000, compared to a growth of 425,000 from 1997 to 2001.** Women comprise 6.77 million of all private and public sector union members, approximately 40% of the total membership. According to a lead organizer of the campaign, "in order to attract even more women to the labor movement, it is crucial that we break down the barriers that prevent them from joining unions and change the perception that trade unions are not doing enough to meet their needs."

The reasons often attributed to why more women do not join unions include not understanding what unions could do for them, lack of time because of family and work responsibilities, they have not been asked to join, unions are not responsive to their needs and a negative impression of unions in general. **Organizers are focusing in particular on Hispanic women, who comprise 42,000 of the 93,000 new women members for 2001.**

EEO TIPS: AGE DISCRIMINATION AND THE BFOQ DEFENSE

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 *Employment Law Bulletin*, the four basic defenses to an age discrimination charge were discussed, namely, that an employer may assert that:

1. The employment decision or differentiation in question was based on "reasonable factors other than age."

2. Age was a "Bona Fide Occupational Qualification (BFOQ)."

3. The action taken was in keeping with a "bona fide seniority system" or " bona fide employee benefit plan" such as a retirement, pension or insurance plan, or:

4. The action taken involved an employee who is subject to one or more of the "Exemptions" under the act.

As indicated above, the "BFOQ" Defense is the second category of defense available to employers under the Age Discrimination In Employment Act (ADEA). Unfortunately for employers, it may be the most difficult to apply due to severe limitations on its usage. There are circumstances, however, when its use would be entirely appropriate in order to get the right person for the job in question. The challenge, therefore, is staying within the limits of the law is the tricky part.

Although the clear intent of Congress in framing the ADEA was to "promote the employment of older persons based upon their ability rather than age. . ." it recognized that at some point one's age could become a critical factor in the successful performance of any number of jobs. Thus, notwithstanding the general prohibition of discrimination against persons over the age of 40, the ADEA allows an employer to consider an applicant's or employee's age, where age is "... a bona fide occupational qualification." (BFOQ) For example, the Act specifically recognizes that age may be a factor in the performance of airline pilots and law enforcement officers, whose physical stamina including

eyesight, strength, agility and other physical attributes almost always degenerate with age. Obviously there are many other occupations as to which age is also a critical factor.

Thus, if because of the requirements of a job an employer believes it must limit, specify, or discriminate based on age, the employer has the burden of proving that the age limitation is in fact a bona fide occupational qualification. In the process of proving that age must be used as a proxy for ability to perform the job the employer must show:

1. That the age limit is reasonably justified by business necessity. (For example where an employer advertises for a "teenager who looks like a teenager " to model teenage clothes to other teenagers.)

2. That all or substantially all of the individuals excluded from the job possess the disqualifying trait, namely that they don't look like a teenager. In our example above, all or substantially all individuals over the age of 40 would be disqualified because most 40-year old's do not look like teenagers.

As an alternative to the last requirement an employer could show that at least some of the individuals so excluded possess the disqualifying trait, but that the trait cannot be ascertained except by reference to age. (In our example above this would not apply since one could make the determination of a youthful appearance immediately on a face to face basis.)

As stated above, the assertion of a BFOQ defense can be difficult to sustain unless carefully crafted to fit the particular needs of the job in question. While law enforcement agencies have been the most successful employers in using the defense, their motives can be called into question. If for example, the assertion of a BFOQ is for the sake of public safety, the city or governmental agency must prove that the practice does in fact enhance the safety of the general public and that there are no other acceptable alternatives which can be used to accomplish the same goal without discrimination on the basis of age.

In the private sector, employers have successfully asserted age BFOQ's for various jobs including

< Actors - for certain specific roles
< Athletes - for certain professional sports
< Pilots - for commercial aviation purposes and;
< Bus Drivers - for commercial transportation purposes.

In providing the BFOQ Defense under the ADEA, Congress anticipated that it would have limited scope and application. Furthermore, because it is an exception to the Act, the courts have tended to construe it narrowly. Nonetheless, it remains a viable defense for employers and may be used under appropriate circumstances. Legal counsel should be consulted when in doubt.

DEFINING PAID WORKING TIME

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Proctor, P.C. Mr. Erwin can be reached at (205) 323-9272. Prior to working with Lehr Middlebrooks Price & Proctor, P.C., Mr. Erwin was the Area Director for Alabama and Mississippi for the U. S. 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 Fair Labor Standards Act (FLSA) requires that nonexempt employees be paid for all hours that they actually work. But, how is working time defined? What about time when the employee is on call, but not actually working, or when putting on equipment before beginning the job?

Determining hours worked by an employee is an important calculation to ensure compliance with FLSA minimum wage and overtime requirements. Fortunately, regulations issued by the Wage and Hour Division of the DOL provide fairly detailed guidance for defining hours worked and how to record them. Below, we explore the legal definition of working time.

Basic Definition of Working Hours

The Supreme Court provided the definition for working hours adopted by the FLSA regulations. In its decision in *Tennessee Coal, Iron & Railroad Co. v. Muscoda*, Local No. 123, 321 U.S. 590 (1944), the Court determined that working hours include all time during which an employee is engaged in physical or mental exertion controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and its business. In addition, the time an employee spends after punching in, getting to the job, and preparing for it generally is compensable. However, the time which the employee spent waiting because he or she arrived early is not.

As a rule, employers do not have to pay for any time before and after the employee's "principal activity," unless there is a contract, custom, or practice requiring pay for these activities. However, time spent by employees in activities before or after the regular workday must be counted as time worked if the activities are an integral and indispensable part of the employee's principal activities.

Working hours also may include time when the employee does not actually perform any work but is engaged to wait.

Employees "Suffered" or Permitted to Work

According to the FLSA regulations, an employer who allows or permits employees to work must count this time even if the work was not requested or scheduled by the employer. Therefore, if the employer is aware that an employee is working more time than is required, the employee must be compensated even if he or she did not request the additional work. For example, an employee may voluntarily continue to work at the end of the shift to finish an assigned task. If you know or have reason to believe that the employee is continuing to work, the time is considered working time and must be paid. It is management's responsibility to prohibit employees, through discipline or other means, from working additional time if it does not want to pay for that time. Merely having a rule against extra work is not enough. Every effort must be made to enforce the rule.

Waiting Time

Whether waiting time is time worked depends on the particular circumstances. The question must be determined by common sense and the general concept of work. The regulations generally distinguish between on duty time, off duty time, and on call time.

On Duty Time

Where waiting is an integral part of the job, the employee is engaged to wait, and the time spent waiting is compensable work time. Typically, the periods of inactivity are of a short duration and unpredictable. However, if the employee cannot use the time effectively for his or her own purposes, the time is work time although the employee is allowed to leave the premises or job site during such periods of inactivity.

Off Duty Time

An employee is considered off duty during periods when he or she is completely relieved from duty and those periods enable him or her to use that time for personal purposes. An employee is not completely relieved from duty unless told in advance that he or she may leave the job and that he or she will not have to begin work until a specified hour has arrived.

On-Call Time

An employee who is required to remain on-call on the employer's premises is working while on-call and must

be paid for that time. In addition, an employee who must remain on-call so close to the employer's premises that he or she cannot use the time effectively for personal reasons is working while on-call. If the employee is not required to remain on the employer's premises but leave word at his or her home or with the employer where he or she may be reached, he or she is not working while on-call and does not have to be paid. For example, an employee who carries a pager or cell phone and is required to respond within 30 minutes would not be considered working during this time.

Preparatory and Concluding Activities

Time spent by employees engaging in principal activities generally is considered time worked. The term "principal activities" includes those which are an integral part of the principal activity. "Among the activities included as an integral part of a principal activity are those closely related activities which are indispensable to an employee's performance." The FLSA excludes from hours worked the time spent by employees performing mere pre - or postliminary activities.

Examples given by the regulations include:

1) If an employee in a chemical plant cannot perform principal activities without putting on certain clothes, changing clothes on the employer's premises at the beginning and end of the work day would be an integral part of the employee's principal activity and counted as working time. Conversely, if changing clothes is merely a convenience to the employee, the activity would not be considered working time.

2) Checking in and out, waiting in line to do so and walking to the employee's work station is not ordinarily regarded integral to the employee's principal activity or activities and, therefore, would not be considered working time.

It is very important that an employer properly compensate employees for all time that is considered "work time" under the Fair Labor Standards Act. Failure to do so can result in substantial liabilities. Remember, an employer cannot only be held liable for unpaid wages. The act also provides that the employee can be awarded liquidated damages and attorney fees for a two- or three-year period. Increasingly, employers are being subjected to class action lawsuits under the FLSA. Consequently, there is potential for very large judgments.

OSHA TIPS: TEMPORARY WORKERS

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 the firm, 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.

Who is responsible for OSHA compliance where temporary or leased employees are involved--the agency supplying the employees or the client employer for whom they are working? Through interpretive letters and compliance directives, the agency asserts that they may be a shared responsibility. The temporary service provided, as a result of an ongoing relationship with the employee, could likely require some recordkeeping and training obligations. The primary responsibility will rest with the client employer who creates and controls working conditions at the workplace. It is the employer who can ensure that machinery is guarded, necessary personal protection is utilized, monitoring is performed to assure employees are not being overexposed to contaminants, and the like. The temporary service

agency would need to maintain all medical monitoring and exposure records created by client employers on agency employees.

This issue of client employer versus temporary service agency responsibility is focused most in the area of employee training. There is no waiver on the various training requirements simply because the temporary employee's assignment is of a short duration. For instance, training or safety instruction must be given to construction employees even for very short-term jobs. OSHA has often found situations where permanent employees were properly trained as required by a particular standard but not their temporary counterparts. This has resulted in citations and significant penalties.

The need to define responsibility frequently arises with the hazard communication standard and its training requirement. Here the temporary service agency would be expected to provide some generic training. The client employer would have to provide the specifics as to the hazardous chemicals used at the site and how the program is implemented. Similarly, the bloodborne pathogens standard would require generic training by the employment agency with site-specific training and implementation by the client employer. Under this standard, the temporary service would also need to ensure that employees receive required vaccinations and follow-up evaluations after exposure incidents.

OSHA points out in interpretive documents that the client employer may wish to specify the qualifications they will require of personnel supplied to them. This could include training in some particular chemicals, use of personal protective equipment, etc. It is also advised that contracts between the parties clearly define their respective responsibilities so that all OSHA requirements will be met.

A recordable injury or illness to a temporary worker should be entered on the client employer's OSHA 300 log if he or she performs the day-to-day supervision of the worker. The temporary labor service should not record the case. OSHA regulation 1904.31 suggests that client employers and labor supply services coordinate their recordkeeping to ensure that a case is recorded only once.

"I'M DISABLED," BUT I'M OFF TO PLAY SOFTBALL AND OPERATE HEAVY EQUIPMENT!

The case of *Jeseritz v. Potter* (8th Cir., Mar. 4, 2002) involved an individual who was off work, receiving monthly disability payments for a job related injury. Jeseritz was a letter sorter for the U.S. Postal Service and developed problems with his wrists as a result of that task. For several years, he received a monthly payment of $2,317 in addition to a lump sum payment of $49,430. During the time that Jeseritz was absent due to work restrictions, his employer videotaped him pitching at softball games and operating a sod cutting machine that causes extensive vibration to the wrists. He was terminated, and alleged that his termination violated the Rehabilitation Act.

According to the court, "contrary to Jeseritz's suggestions, the USPS did not have an obligation to bring his admittedly 'problematic activities' to his attention at the first opportunity or to 'prevent' him from playing softball." He also alleged that he was subjected to a hostile work environment because somebody wrote his name on an informational poster regarding workers' compensation fraud claims. The court said that although it did not recognize a hostile work environment under the ADA or Rehabilitation Act, even if such a claim existed, the behavior Jeseritz described did not rise to that level.

When Jeseritz was confronted by the employer regarding his activities, he denied them. Then he saw the film, and stated that he played softball with his physician's approval. Upon further investigation, the USPS discovered that the physician was completely unaware of Jeseritz's activities.

Two points employers should remember about this

case. First, although this court ruled that a hostile environment did not apply to the ADA or Rehabilitation Act, other courts have determined that such claims are available. Second, employers have the right to investigate employee activities away from work if employers have reason to believe that those activities are inconsistent with the reasons for the employee's absence. If the investigation reveals that inconsistency, provide the employee with the information, ask for a response and investigate the response (such as "the doctor said it was okay") before deciding on what action to take.

DID YOU KNOW . . .

. . .**that an employee who signed a broad release as part of a severance agreement cannot later bring a sexual harassment claim?** *Melanson v. Browning - Ferris Industries, Inc.*, (1st Cir., Feb. 19, 2002). When Melanson was laid off, she received a severance package of $1,600 and in exchange signed a comprehensive release. She subsequently claimed that she was sexually harassed by her supervisor and initiated a sexual harassment lawsuit. In precluding her from preceding, the court stated that her release was "knowing and voluntary" and thus enforceable. The court considered her education, the clarity of the release, the consideration for the release and that she had an opportunity to study the release before signing it.

. . . that recently a state court upheld an 18- year front pay award of $862,000 for a violation of the Family and Medical Leave Act? *Williams v. Rubicon, Inc.*, (LA Ct. App. Feb. 15, 2002). The reason for the front pay award was because the court agreed that the discharge of the employee would continue to affect his opportunity for continued employment until his retirement at age 65. According to the court, "although front pay of 18 years seems generous, it is warranted based on the unique circumstances of this case."

. . . that according to the American Staffing Association, staffing companies during 2001 reported a decline of 14% in average daily employment? According to the survey, 19.6 million workers are employed as temporaries and worked an average of 11.8 weeks per job in 2001, compared to 10 weeks per job in 2000. The average daily employment and revenues received by temporary agencies dropped in the fourth quarter of 2001 compared to the first three quarters of the year.

. . . that the EEOC is reviewing its EEO-1 reporting form and definition of a job applicant? EEOC chair Cari Dominguez on March 12 stated that the Commission is close to a proposal of a "job applicant" that would consider the realities of how people apply for jobs in today's times, including through e-mail. Furthermore, the EEOC is considering revising the "officials and managers" category of the EEO-1 form, which includes everyone from executive officers to first level supervisors.

. . . that House Democrats are pushing for legislation to provide subsidies of up to 75% to workers who are receiving COBRA due to layoffs? The legislation was introduced on March 13 by Rep. Jim McDermott (D- WA). This is a follow-up to legislation signed on March 9 that extended unemployment benefits for those who were laid off. According to McDermott, "What we passed last week was woefully inadequate. This Congress has not relinquished its obligation to our Nation's unemployed workers because we passed a bad compromise last week."

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