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:

In a rare unanimous opinion dated June 10, the United States Supreme Court ruled that an employer does not violate the ADA when it refuses to hire an individual who imposes a risk of harm to him/herself that cannot be alleviated. *Chevron U.S.A., Inc. v. Echazabal*. Echazabal argued that when an individual who may harm him/herself, but not others, accepts that risk, an employer may not refuse to hire, even if the risk cannot be reduced or eliminated.

Echazabal was a contractor employee for approximately 20 years, working at the Chevron Oil refinery in El Segundo, California. He applied for and offered a job conditioned on satisfactory results of a medical exam (under the ADA, this "conditional offer" is permissible). The exam revealed Echazabal had Hepatitis C and exposure in the job would further reduce his liver function and ultimately could kill him. Echazabal applied for another job, with the same result. Thereafter, Chevron asked Echazabal's contractor employer to remove him from the refinery.

In reversing the Ninth Circuit, the Supreme Court stated that although under the ADA an employer may not generally use qualification standards that screen out individuals with disabilities, an employer may raise as an affirmative defense that such a standard is job related and consistent with business necessity. The qualification standard includes in the statute "a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The EEOC guidelines according to the Supreme Court "carries the defense one step further," in allowing an employer to screen out an individual who poses risks to him/herself. The court stated that "because the ADA defense provision recognizes threats only if they extend to another, Echazabel reads the statute to imply as a matter of law that threats to the worker himself cannot count." The legislative history and language in the statute did not intend to exclude someone who posed a risk of harm to him/herself. The Court remanded the case for a determination whether Chevron followed other ADA requirements before not hiring Echazabal, such as an interactive process with health care professionals to determine whether risk to Echazabal could be reduced or eliminated.

This case affirmed common sense. Due to an employer's obligations under OSHA and efforts to reduce the risk of workers' compensation claims, employers have the right to not hire or retain someone who for medical reasons either posed a risk of harm to him/herself, others or property. However, before concluding that someone cannot be hired or retained, employers should consult with health care professionals to determine whether any form of reasonable accommodation can be made available to avoid the risk of harm. Furthermore, if a current employee cannot be accommodated in the job, reasonable accommodation includes transfer to another job where accommodation is either unnecessary or can occur, even if that job does not pay the same or provide identical responsibilities and opportunities.

GOOD NEWS BAD NEWS FOR UNIONS: WIN RATE UP, ELECTIONS DOWN

On June 14, the Bureau of National Affairs released its annual analysis of national union elections. For calendar year 2001:

- The number of elections decreased to 2,378 from 2,869 in 2000;
- The union win rate increased to 53.6% from 52.7% (steady increases since 1996);
- Among unions with the largest number of petitions, Service Employees International won 65.6% of all elections, International Union of

Operating Engineers won 55.8%, United Food and Commercial Workers' 47.1%, Teamsters 44.8% and International Brotherhood of Electrical Workers' 44.1%

- In Alabama 21 elections were held, down from 28 in 2000. Unions won only 33% of those elections in 2001, down from 64% in 2000;
- The highest percentage of union wins occurred in Alaska (79%), New Mexico (75%), Massachusetts (70%), Louisiana (69%), and Oklahoma (69%);
- States with the lowest percentage of victories and with a minimum of 10 elections were Kentucky (26%) Alabama (33%), Kansas (33%), Wisconsin (38%), and with 43% each, Georgia, Minnesota, and Wisconsin; and
- Other percentages in the Southeast regardless of the number of elections were: Florida (59%), Mississippi (60%), North Carolina (54%), and South Carolina (50%).

Of great significance for employers — the smaller the potential bargaining unit, the greater the likelihood of union success:

- In elections involving fewer than 50 employees (there were 2,378), unions won 59.3%;
- 50 to 99 employees, unions won 45.6%;
- 100 to 499 employees, unions won 38.1%;
- 500 or more employees, unions won 38.5%; and
- 347 de-certification elections were held, down from 350 in 2000. Unions won 38.3% compared to 30.9% in 2000.

Message for employers: First, the number of elections declined because unions require high employee participation before a petition is filed. Second, ensure supervisors know employer rights and philosophies regarding remaining union free and that all employees understand why remaining union free is an important competitive advantage to your organization.

SUPREME COURT ACTION UPHOLDS EMPLOYEE RIGHTS IN NON-UNION WORKPLACE

On June 10, the U.S. Supreme Court refused to hear the case of *Epilepsy Foundation of Northeast Ohio v. NLRB*, upholding its decision extending *Weingarten* rights to the non-union workplace stands.

"Weingarten rights" evolved from a 1975 case in which the U.S. Supreme Court ruled that in a unionized setting, an employee has the right to union representation at an investigatory interview which may lead to discipline of that employee. The individual attending the interview may not be disruptive or coach the employee. Furthermore, if the meeting is to issue the discipline but not investigative, the employee under the *Weingarten* principle does not have the right to have the union representative present.

The case of the *Epilepsy Foundation of Northeast Ohio* extended these rights to the non-union workplace. Two employees sent to the executive director a memo critical of their immediate supervisor. The executive director then asked to meet with the two individually regarding possible disciplinary action toward them. One individual refused to meet without the other and was terminated. The administrative law judge concluded that, under the current state of NLRB law, *Weingarten* rights did not extend to the non-union workplace. The NLRB reversed the decision and the Court of Appeals for the District of Columbia upheld it.

The outcome of this action (or inaction) by the Supreme Court is that in a non-union setting, an employee has the right to request the presence of a fellow employee to attend an investigatory interview which may lead to discipline. Following are practical suggestions for applying *Weingarten* rights in a non-union setting:

- Employees do not have to be advised of their *Weingarten* rights. You are not required to tell the employee prior to an investigatory interview begins that he/she has the right to request the presence of another employee at the interview.

- The presence of another employee is not required. For example, if you are conducting an interview regarding possible sexual harassment and the alleged perpetrator requests the presence of a fellow employee who is a witness that you want to subsequently interview, you are not required to proceed with the interview and may tell the employee so. If he/she insists on the presence of another employee, state that you will

meet with him/her only for the purpose of discussing issues that are being investigated and that you want him/her to submit responses in writing. If the employee refuses to cooperate, you may treat the him/her as insubordinate.

C The *Weingarten* principle permits employees to request that a non-employee attend the meeting. Non-employees may not attend investigatory interviews without your permission.

EEO TIPS: CLAIMING AN EXEMPTION UNDER THE ADEA

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. Mr. Rose can be reached at (205) 323-9267.

Because fringe benefits are usually given gratuitously by an employer to its employees, it would seem logical to conclude that the extent and degree to which such benefits are provided would be wholly within the discretion of the employer. Under the Age Discrimination in Employment Act (ADEA) that is not the case.

Section 11 (1) of the Act makes it clear that **employee benefits are part of the "compensation, terms, conditions, and privileges of employment" as to which the general prohibition against age discrimination applies.** However, since its inception, the ADEA has allowed certain limited differentials in treatment of some employee benefits based on age.

Section 4(f)(2) of the Act states "...it is not unlawful for an employer....to observe the terms of ...any bona fide employee benefit plan such as a retirement, pension or insurance plan which is not a subterfuge to evade the purposes of this Act, ..." **Basically, this permits appropriate age-based adjustments or reductions in benefits due to cost significant differences to the employer.** Thus, most retirement plans, health insurance plans, or pension benefits would qualify for the exceptional treatment under Section 4(f)(2). It would not apply for example to paid vacations or uninsured paid sick leave since the cost for such benefits is essentially the same for all employees in the same job, grade or pay level regardless of age.

If a given retirement plan, health insurance plan or other benefit qualifies under Section 4(f)(2), the benefit levels for older employees may be reduced as necessary to achieve some reasonable equivalency in cost to the employer for both the older and younger workers. According to the EEOC, a benefit plan qualifies under Section 4(f)(2) if the actual amount of the payment made or the cost incurred on behalf of an older employee is equal to that made or incurred on behalf of a younger employee. This is so even though an older employee may receive a lesser amount of benefits or insurance coverage under the plan than a younger employee. If an employee questions the plan, the EEOC will look to see whether the cost to the employer is essentially the same for all employees. Since Section 4(f)(2) is an exception to the general prohibition against age discrimination, the burden of proof will be on the employer to show that the cost requirements have been met. To satisfy the requirements of Section 4(f)(2) a benefit plan must have met three basic standards:

1. The plan must be a "Bona Fide Employee Benefit Plan." To be bona fide, all of the terms of the plan must be in writing and accurately describe the benefits to be received as well as the responsibilities of the employee; the plan must provide the benefits set forth therein so as not to be misleading to employees; the employer must notify employees promptly of any changes in the plan which might affect them. In general, compliance with the disclosure requirements under the Employee Retirement Income Security Act (ERISA) will satisfy the disclosure requirements under the ADEA.

2. The employer "must observe the terms of the plan." If the plan provides lower benefits to older employees, those provisions must be defined and communicated. This presumably gives employees the chance to protest the discriminatory provision. The key purpose of this requirement, however, is to ensure that the employer is "observing" the terms of the plan in acting on the age-based discriminatory treatment of older employees, otherwise the exception

allowed by Section 4(f)(2) would not apply and the employer's actions would violate the ADEA.

3. The plan must not be a "subterfuge" to evade the purposes of the Act. The purpose of the Act is to prohibit age discrimination. The plan would not be a subterfuge if the level of benefits to older workers is justified by age-related cost considerations. The data used in to justify lower benefits must be valid and reasonable. Under EEOC, an employer may provide cost data on a "Benefit-By-Benefit" basis (where the cost of each benefit is measured separately) or on a "Benefit Package" basis (where the cost of the entire package is measured in the aggregate).

The development of a benefit plan which complies with the strictures of Section 4(f)(2) can be complicated and requires a technical knowledge of both the ADEA and the employer's cost accounting systems. We strongly recommend that employers consult legal counsel before implementing any plan that even potentially provides age-related lower benefits to older employees than those provided to younger employees.

THE RIGHT OF AN EMPLOYEE TO REFUSE TO PERFORM A TASK FOR RELIGIOUS REASONS

The recent case of *Diaz v. County of Riverside Health Services*, C.D. Cal. (May 24, 2002) involved an employee who refused to perform a job task due to religious reasons. Diaz was employed as a nurse. Her job responsibilities included providing pregnant patients with a "morning after" pill to cause spontaneous abortion. Diaz and two fellow nurses refused to do this because it conflicted with their religious beliefs. Diaz was terminated during her probationary period. A California jury concluded that her employer improperly terminated Diaz by failing to consider any form of reasonable accommodation of her religious beliefs.

If an employee objects to performing a certain procedure for religious reasons, the employer has an obligation to attempt to accommodate the employee. One example is determining whether it would be feasible to rearrange job duties without causing disruption to the employer. In the hospital's situation, if rearranging the job duties could cause a potential risk of harm to a patient, then the employer would not be required to do that as a form of reasonable accommodation.

Accommodation may also include transferring the employee to another job, even if that job pays less. An employer cannot simply respond to this type of issue with termination without first evaluating whether there is a way to accommodate. If after a good faith analysis an employer concludes that it cannot do so, then termination would be protected.

EMPLOYEE WHO "STONEWALLS" EMPLOYER'S FMLA INQUIRIES LOSES FMLA PROTECTION

The case of *Peeples v. Coastal Office Products, Inc.* (D.Md., May 23, 2002) affirms an employer's rights where an employee has a serious health condition but does not cooperate with an employer for the employer to fulfill its FMLA responsibilities.

Peeples felt pressure at work and sought psychiatric treatment. The psychiatrist concluded that Peeples was suffering from depression, prescribed medication and told Peeples to remain off work for a week. For several weeks thereafter, Peeples missed work and submitted slips from the doctor's office stating he was sick. Peeples provided nothing more to advise his employer of his condition, depression, for which he was under the continuing care of a health care provider, qualifying him for FMLA coverage. When the employer contacted Peeples and asked him when he would return to work, he said he did not know.

The company received Peeples's permission to speak to Peeples's primary care physician. At this point, the company was unaware that Peeples was seeing a psychiatrist. The physician said that there was no limit on Peeples's ability to work but that he could not work for Coastal. Hearing nothing further from Peeples, the company terminated him.

In concluding that Coastal did not violate the FMLA, the court stated that **"because Peeples never satisfied the threshold notice requirements the FMLA imposes upon employees who would exercise the rights under the statute, defendant's duties and obligations under FMLA were never triggered."** Peeples

refused to provide either a diagnosis or a possible date for his return. Accordingly, ruled the court, "as a matter of law, defendant's termination of Peeples' did not violate the FMLA."

OSHA TIPS: OSHA'S AUTHORITY

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. Mr. Hall can be reached at (205) 226-7129.

Many recurring concerns and misconceptions have circulated throughout OSHA's history bearing on its authority, procedures, and the mandatory standards it enforces. These have survived despite vigorous efforts on the part of the agency to provide an effective public information program. The following represent some of the more pervasive and long-standing of these issues.

Does OSHA jurisdiction extend to all workplaces? Are very small workplaces exempt? While there is no exemption for size, many sites are not subject to OSHA. In the 24 states with a federal OSHA program, political subdivisions are not covered. The remaining states that exercise their option of administering their own OSHA program are required to cover public employees. Sole proprietorships, partnerships, family, and agricultural businesses that employ no outside workers are not subject to OSHA's jurisdiction. Performing or participating in the religious activities of a church is not considered employment under the OSHA. However, secular activities of churches are subject to regulation, as are the functions of charitable and non-profit organizations.

Must you allow an OSHA compliance officer immediate access to your worksite? No. You may require OSHA to produce a warrant before initiating an inspection of the premises. In the vast majority of cases, employers do not elect to exercise their right to require a warrant. Consult with your attorney before making this decision.

Does OSHA have the authority to shut down an operation, manufacturing process, or piece of equipment that it deem extremely unsafe? No. They may, however, post an "imminent danger notice" and request that an employer remove employees from such a hazardous condition. If this does not resolve the situation, OSHA may request federal court injunction.

Should an employer procure equipment that is labeled, "OSHA Approved"? This claim is misleading. OSHA does not test, certify nor approve equipment, materials, etc. The employer should be certain, however, that these items conform to OSHA standards. Often the manufacturer will specify that an item meets or complies with OSHA requirements.

Does OSHA require that employees be given breaks or define the maximum duration of a work shift? No.

Must I purchase OSHA posters to avoid fines? Yes. Required posters are free from any OSHA office. Also, agency policy no longer calls for a fine when a failure to post the notice is found. Rather the employer is to be given a poster.

Do OSHA inspections always result in citations and fines? No. Historically, the range of inspections yielding no violations has been around 35 to 50 percent. Contributing to this is the fact that many inspections are of limited scope and there are no follow-up visits, etc. A complaint inspection may involve a single item found to be invalid or a construction company may have a very small crew and little activity at the time of a site inspection, diminishing the likelihood of violations.

Should I risk an informal conference following an inspection that produced citations and penalties? Yes. A meeting offers the employer a number of opportunities and won't result in further penalties or citations. It can demonstrate that the company is serious about its safety responsibilities and making needed corrections. It provides a chance to ensure that there is a clear understanding of the conditions cited and the adequacy of corrective actions being taken. And there is a possibility of getting the penalties reduced or citations modified in your favor.

ISSUE OF WHEN AN EMPLOYER IS REQUIRED TO COMPENSATE FOR "EXTRA ACTIVITIES" CONTINUES

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 issue of when an employer is required to compensate for "extra activities" continues to confuse many. A recent wage and hour opinion letter and a class action lawsuit addressed these issues.

The opinion letter concerned a nurse who worked for a not for profit hospital and participated in committee meetings and community activities on behalf of the hospital. Although "ordinary volunteerism" is not compensable, the Department of Labor stated that her time in these committee meetings and community service activities was considered working time and she should be paid for it. The DOL stated that **"the nurses cannot classify these activities as volunteer services when they are performed under the direction or control of their employer, the hospital. The time spent in such activities is compensable work time when it is subject to the control of the hospital."** Furthermore, DOL stated that "in light of the sponsorship by the hospital of the nurses' participation in these activities by payment of their fees and expenses, we do not believe the attendance at these functions can be characterized as purely personal." Another factor is whether there would be an adverse inference toward the employee if she did not attend those functions. For example, would there be discipline, an impact on the employee's compensation or performance review.

Last May 15, a class action was certified in Alabama against Osmose, Inc., alleging that foremen should be paid for incidental "off the clock" activities. The plaintiffs alleged they were not paid for activities outside of regular scheduled working time that included cleaning and restocking vehicles, transporting workers to and from their homes, paperwork that included submitting payroll information, planning and expense reports, attending meetings and interviewing potential employees. The foremen were hourly and thus do not qualify for the "executive" exemption, which requires that an individual supervise at least two full-time employees and receive a salary.

Usually where work is off the clock and incidental to an employee's regular duties is occasional and *de minimis*, an issue does not arise regarding its compensability. However, where it is recurring, even if only for brief periods of time, employers must include that in the employee's total hours worked and compensate the employee accordingly.

DID YOU KNOW . . .

. . . that an employee had the right to proceed with her claim that she was terminated in order for the employer to avoid paying medical costs for her child? *Smith v. Hinkle Manufacturing, Inc.*, (6th Cir. June 4, 2002). Smith had received raises and promotions, but was terminated two weeks after telling her supervisor that her son had a rare brain condition that required immediate medical care. Her supervisor was alleged to have said that employees like Hinkle cause a "drain on the company." The court of appeals reversed a summary judgment award for the company, concluding that "a reasonable jury could find that the employer was motivated, at least in part, by [Smith's insurance needs], regardless of the employers' proffered reasons for its action."

. . .that a mandatory arbitration agreement was unenforceable because it bound the employee but not the employer? *Meriwhether v. Gemini Associates, Inc.*, (Cal. Ct. App. May 31, 2002). According to the court of appeals, the lack of mutuality made the agreement unenforceable, because it "involves contract terms that are so one sided." The court also concluded that the employee was not told that the arbitration covered employment claims and she was not given ample time to review the agreement.

. . . that the U.S. Supreme Court on June 10, 2002 ruled that it is not a "continuing violation when there occurred individual or discrete acts of discrimination or retaliation," but it does not apply to hostile environment cases? *National R.R. Passenger Corp. v. Morgan.* In a non-hostile environment case, the most recent act "starts a new clock" for filing charges. However, regarding hostile environment claims, the Supreme Court said that it does not affect the claim "if some of the component acts of the

hostile work environment fall outside the statutory time period." If one act fell within the statutory time period, then "the entire period of hostile environment may be considered by a court for purposes of determining liability."

. . . that the Department of Labor will undertake a review of white collar exemptions and proposes to extend comp time to private sector employees? In a statement released on June 20, 2002, Assistant Secretary of Employment Standards Victoria Lipnic stated that the FLSA is long overdue for revision. She said that DOL supports comp time arrangements that are mutually agreed upon by the employer and employee. Furthermore, she stated that Secretary of Labor Elaine Chao "has made it a priority for all of us in the department to look to all of our laws, our regulations and our procedures to try to bring them more in balanced with the Twenty-First Century." She also said that the DOL will try to do everything we can to bring some clarity to the administrative, executive and professional employee exemptions those regulations."

LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

R. Brett Adair	**205/323-9265**
Stephen A. Brandon	**205/909-4502**
Donna Eich Brooks	**205/226-7120**
Michael Broom	**256/355-9151 (Decatur)**
Barry V. Frederick	**205/323-9269**
Richard I. Lehr	**205/323-9260**
David J. Middlebrooks	**205/323-9262**
Terry Price	**205/323-9261**
R. David Proctor	**205/323-9264**
Christopher N. Smith	**205/323-8217**
Matthew W. Stiles	**205/323-9275**
Michael L. Thompson	**205/323-9278**
Albert L. Vreeland, II	**205/323-9266**
Sally Broatch Waudby	**205/226-7122**
Lyndel L. Erwin **Wage and Hour and Government Contracts Consultant**	**205/323-9272**
Jerome C. Rose **EEO Consultant**	**205/323-9267**
John E. Hall **OSHA Consultant**	**205/226-7129**

Birmingham Office:
2021 Third Avenue North, Suite 300
Post Office Box 370463
Birmingham, Alabama 35237
Telephone (205) 326-3002

Decatur Office:
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767

For more information about Lehr Middlebrooks Price & Proctor, P.C., please visit our website at www.LMPP.com.