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:

The EEOC on August 13, 2002 released statistics showing the increased number of class action lawsuits it has filed so far in this fiscal year (since October 1, 2001). According to the EEOC, of the 150 lawsuits it has filed during the past nine months, 52 were class actions. This is a substantial increase from Fiscal Year 2001. Approximately one-third of all EEOC lawsuits pending are class actions.

Class action litigation brought by the EEOC focuses primarily on promotion decisions based upon gender and race. Factors that the EEOC evaluates when deciding whether to file a class action over promotions include the following:

- What factors determine whether an employee is promotion eligible, and how subjective are those factors?
- Does the employee know what he or she must do to become considered for a promotion?
- Is there a posting system or other method to notify employees that a promotion opportunity is available?
- Statistically, who receives promotions based upon protected class status and what is the protected class status of those who make the promotion decisions?
- Are subjective factors for promotions, such as communication skills and leadership ability, based on objective fact?
- Are tests or other employee selection devices validated; that is, is there a correlation between the test instrument or promotion factor and successful job performance?

Statistically, less than 2% of all discrimination charges result in litigation initiated or joined by the EEOC. According to the EEOC, 90% of the time when it files suit, it either wins, obtains a consent decree or an out of court settlement.

In addition to the Commission's focus on class actions, it also will focus on claims of harassment and retaliation. The harassment claims it has filed have gone beyond sexual harassment to include harassment based upon religion and national origin. For example, on July 5, 2002, a jury awarded in a religious harassment lawsuit brought by the EEOC $270,000 in punitive damages against the owner of what he described as a "Christian company." *EEOC v. Preferred Management Corporation*, (S.D. IN). According to the EEOC, **"Although we know there are other such companies out there, only in the past five or six years have we seen a little more charge activity on religious harassment. It is important for employers to understand that they cannot require from their**

employees the same type of religious beliefs that they hold."

EEO TIPS: THE LIMITATIONS OF IRCA IN RESOLVING NATIONAL ORIGIN PROBLEMS FOR EMPLOYERS

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.

The Immigration Reform and Control Act of 1986 (IRCA) was passed by Congress on November 6, 1986 as an amendment to the Immigration and Nationality Act. Its primary purpose was to stem the rising tide of illegal immigration into the United States. In substance the Act made it unlawful for any person [employers], or entity [labor organizations or employment agencies] to hire, recruit, or refer for a fee any individuals who are not legally eligible for employment. Such individuals in today's parlance are called "undocumented" or "unauthorized" workers," because they have neither been lawfully admitted for permanent residence or authorized by law to work in the United States.

Among other things, IRCA made employers responsible for verifying the eligibility of workers for employment. It provided an amnesty period of approximately two years during which employers were allowed to come into compliance. Of course that amnesty period has now long since past. According to Immigration & Naturalization Service (INS) statistics, as of December 1995 a total of 2,680,257 aliens had been admitted under IRCA's amnesty and verification procedures. INS also states that the number admitted during the past three-year period has declined substantially.

How IRCA and Title VII relate

While IRCA prohibits the hiring or referral of illegal aliens, it protects from discrimination any individual who is not an "unauthorized" alien. . Section 102 of the Act makes it unlawful for an employer or other entity "*..to discriminate against an individual (other than an unauthorized alien) in the hiring, discharge, recruitment or referral ...on two bases: 1) national origin, and 2) in the case of citizens or intending citizens on the basis of citizenship status."* "Intending Citizens" are those who have been lawfully admitted to the U.S., but whose citizenship status is pending for one of several possible, legitimate reasons.

This paragraph in Section 102 of IRCA was inserted to allay the fears of those who believed that the Act would otherwise result in widespread discrimination by employers against persons with foreign-sounding accents or foreign-appearances just to avoid the sanctions provided therein.

Section 102 of IRCA also expanded the number of employers subject to federal employment anti-discrimination laws. Under IRCA, employers with between 4 and 14 employees are subject to the act. As is well known, employers with 15 or more employees are subject to the provisions of Title VII. Thus, where IRCA ends its jurisdiction, Title VII begins its jurisdiction. By the same token the provisions of IRCA are enforced by the Department of Justice through a Special Counsel established by the act for that purpose. Title VII, as you know is enforced by the Equal Employment Opportunity Commission (EEOC).

To summarize, there are certain significant differences between IRCA and Title VII:

First, as stated above, **IRCA only prohibits discrimination in hiring, discharging or recruiting on the basis of national origin or citizenship status. Title VII** on the other hand covers the full range of prohibited employment actions **including discrimination with respect recruiting, hiring, and discharging, as well as, wages, promotions, employee benefits and other terms and conditions of employment but only on the basis of national origin.** Title VII does not specifically include "citizenship" as a basis. However, under current case law, where citizenship requirements have the purpose or effect of discriminating on the basis of national origin they could be prohibited under Title VII as well.

Secondly, it is important to remember that while IRCA specifically prohibits the employment of undocumented workers, **Title VII contains no such provision.** Thus, notwithstanding current case law, *Hoffman Plastic Compounds, Inc. v. NLRB,* which precludes back pay or reinstatement as remedies for discrimination against, undocumented workers, **the EEOC still maintains that it is illegal to discriminate against any worker in the United States, regardless of his/her immigration status.** The EEOC recently, as a matter of fact on June 28, 2002, reaffirmed its commitment to protecting undocumented workers from discrimination. In short the EEOC stated that it will respect the holding in the *Hoffman Case* but will not consider a charging party's immigration status when investigating the merits of a charge.

Given the proliferation of undocumented workers during the past few years, employers with over 15 or more employees should look beyond IRCA in trying to resolve their national origin or citizenship discrimination claims.

OSHA TIPS: OSHA PENALTIES: HOW THEY ARE APPLIED AND HOW THEY MAY BE REDUCED

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.

With the passage of the Budget Reconciliation Act of 1990, OSHA's monetary penalties were increased seven-fold. The statutory maximum penalty for a willful or repeated violation became $70,000. The remaining, less severe type violations were increased to a maximum penalty amount of $7,000.

Section 17 of the Occupational Safety and Health Act provides the statutory authority to propose civil penalties. OSHA describes its penalty structure as being designed to provide an incentive toward correcting violations voluntarily and claims that large penalties serve the public purpose under the Act. Whether the substantial increase in penalty level triggered greater efforts to comply is not certain. But it did mean that far more OSHA inspections produced serious-money consequences.

Once a base penalty is set for a violation (derived from a chart in the agency's Field Inspection Reference Manual that purports to reflect the likely severity and probability of an injury due to a

violative condition), a number of adjustments may be made to reduce that amount. One such reduction is for size. An employer with 25 or fewer employees may receive a 60% reduction, followed by smaller reductions as the employer size increases. No size reduction is given for employers with more than 250 employees. A ten per cent reduction for history may be given where the establishment has not been cited by OSHA for serious, willful or repeat violations within the past three years.

An adjustment for "good faith" may be given. This reduction may be up to 25% if the employer has a good safety and health program. Generally, this program must be in writing.

A good, qualifying program will include management commitment and employee involvement; worksite surveys to identify hazards; hazard prevention and control measures; and safety and health training.

Finally, an employer that corrects a violation immediately during the course of the inspection may receive a further 15% reduction. This is a result of the agency's "Quick-Fix" policy designed to promote prompt elimination of hazards.

Most six-figure and above penalty cases involve willful and/or repeat violations. In some rare and particularly flagrant cases, OSHA will treat each instance of a violation as a separate occurrence involving a separate penalty for each. This is known as the agency's egregious or violation by violation citation policy and is set out in agency directive CPL 2.80.

Significant monetary penalties may also arise when an employer fails to correct a citation by the required date. OSHA can assess a penalty for each day an item goes uncorrected beyond the specified abatement date.

In addition to monetary penalties there is the potential for criminal sanctions. Where an employer's willful violation of an OSHA standard causes or contributes to the death of a worker, the U. S. Department of Justice may bring a criminal action against the employer. Upon conviction a sentence of up to 6 months imprisonment, as well as a fine of up to $250,000 for an individual or $500,000 for a corporation, is possible.

Falsifying records, reports or applications may, upon conviction, bring a fine of $10,000 or up to 6 months in jail, or both.

WAGE AND HOUR TIPS: THE "WHITE COLLAR" EXEMPTIONS

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The proper application of these exemptions cause employers more difficulty than any of the other requirements of the Fair Labor Standards Act (FLSA). Executive, administrative, professional, and outside sales employees are exempt from both the minimum wage and overtime requirements of the Act, provided they meet certain duties and responsibilities tests.

Salary Basis: Subject to very limited exceptions set forth in the regulations, in order to be considered "salaried", employees **must receive their full salary** for any workweek in which they perform any work without regard to the number of days or hours worked. This rule applies to each exemption that has a salary

requirement. Outside sales employees, and doctors, lawyers and teachers do not have a salary requirement. Also, certain computer-related occupations under the professional exemption need not be paid a salary if they are paid on an hourly basis at a rate not less than $27.63 per hour).

The amount of salary required is determined by regulations that were issued in 1975. Consequently, the current minimum salary of $250.00 per week is not normally a factor in determining whether an employee meets the requirements for the exemption. Over the years there have been many attempts to revise the salary requirements but no change has actually been instituted. In 1981 President Carter issued some revised regulations that would have taken effect shortly after he left office, however, President Reagan rescinded them for further study. Thus, they now have been studied for over 20 years.

Earlier this year the Department of Labor stated that they would issue a revised regulation by October 2002 but more recently they have delayed the any revisions until January 2003. Stay tuned for the next chapter in the long running saga.

Since the salary requirements in the regulations are not a real factor in determining the application of the exemptions, both the courts and the Department of Labor have been taking a very close look at the duties of the employee. Where the employee does not meet all of the requirements for one of the exemptions they are requiring employers to begin paying overtime to the employee(s) and to pay back wages to the employee(s) involved. Within the past year there have been numerous large judgements against employers who have erroneously claimed one of these exemptions.

The requirements that apply to each category of employees are summarized below.

Executive Exemption: Applicable to employees that meet **all** of the following:

- ! who have management as their primary duty;
- ! who direct the work of two or more full-time employees;
- ! who regularly exercise a high degree of independent judgment in their work;
- ! who receive a salary (250/wk) which meets the requirements of the exemption.

Administrative Exemption: Applicable to employees

- ! who perform office or non-manual work which is directly related to the management policies or general business operations of their employer or their employer's customers, or perform such functions in the administration of an educational establishment;
- ! who regularly exercise discretion and judgment in their work; and
- ! who receive a salary ($250/wk) which meets the requirements of the exemption.

Professional Exemption: Applicable to employees

- ! who perform work requiring advanced knowledge and education;
- ! work in an artistic field which is original and creative;
- ! work as a teacher, or work as a computer system analyst, programmer, software engineer, or similarly skilled worker in the computer software field;

- who regularly exercise discretion and judgment; who perform work which is intellectual and varied in character, the accomplishment of which cannot be standardized as to time;

- who receive a salary ($ 250/wk) which meets the requirements of the exemption (except doctors, lawyers, teachers who do not have a salary requirement and certain computer-related occupations who are paid at least $27.73 per hour); and

Outside Sales Exemption: Applicable to employees

- who engage in making sales or obtaining orders away from their employer's place of business; and

- who do not devote more than 20% of the hours worked by non-exempt employees of the employer to work other than the making of such sales

Employers should remember that in order for the employee to be exempt he must meet **all** of the criteria that are set forth in the regulations. Failure of the employee to meet any part of the regulations makes the employee non-exempt and has the potential to create a substantial liability to the employee. Therefore, employers should be very careful to ensure that the employee meets all of the requirements for the exemption(s) that are being claimed.

FAILURE TO CONSIDER REASONABLE ACCOMMODATION COSTS UNITED AIRLINES $300,000

United Airlines hired a mechanic who was deaf, and then subsequently terminated him without a reasonable accommodation analysis. The resulting damages totalled $300,000. *Sprague v. United Airlines* (D.MA. August 7, 2002).

Sprague had worked as an airline mechanic for a charter carrier. He applied with United, successfully passed two levels of interviews and received a conditional offer. After he received the conditional offer but before he began work for United, the offer was withdrawn because of concerns expressed by the company's general manager for maintenance operations. He then found employment as a mechanic for AirTran.

The court awarded $200,000 in punitive damages, and $100,000 in compensatory damages for the emotional distress suffered by Sprague and his family. According to the job description provided by United, there were "very few tasks that even utilized, let alone depend on, the faculty of hearing for their accomplishment." The testimony was that line mechanics communicate through hand signals and the tasks that he could not perform because of his impairment were either not essential or could be performed through reasonable accommodation.

United made a stereotyped assumption that it simply was not possible for a deaf line mechanic to work for the airline. Although one might say that this is "common sense," the ADA requires that if such a conclusion is reached, the employer first consult with healthcare professionals or occupational specialists to see whether reasonable accommodation is possible, including the shifting of non-essential job duties.

DID YOU KNOW . . .

. . . that the Senate Health, Education, Labor and Pensions Sub-committee is reviewing steps to protect women from violent attacks at work? According to OSHA, two-thirds of the workplace assaults that occurred in 2001 were directed toward women. Seventy percent of those involved women who were in the service industry, such as healthcare and hospitality. Twenty percent of the assaults occurred in retail settings, such as grocery stores, fast food markets

and restaurants. According to Senator Patty Murray of Washington, "for many women in the workplace, homeland security has a terribly different meaning."

. . .that the AFL-CIO is conducting an organizing summit to focus on specific workplace sectors? The summit is scheduled for early 2003 and was announced by the AFL-CIO Executive Committee on August 6, 2002. The summit involves organizing strategies of splitting American industry into eleven separate sectors, analyzing the current union representation within those sectors and establishing alliances with similarly interested unions to combine organizing skills and resources.

. . . that an appeals court on July 30 upheld a $21,000,000 sexual harassment award against an individual who had been harassed over seven years? *Gilbert v. Daimler Chrysler Corp.* According to the court, the seven years of harassment "caused her to develop major depressive and post traumatic stress disorders." Gilbert was the first female millwright employed at the plant and for one and one-half years was the only skilled trades employee. She was the recipient of such extensive harassment that the court said she attempted suicide. She complained about harassment repeatedly and according to the court, "the company failed to take prompt, remedial action."

. . . that an employee's request for "family time" was insufficient notice under the FMLA? *McCarron v. British Telecom*, (E.D. PA. August 7, 2002). The employee had been absent for several days due to medical conditions which were properly identified and covered under the FMLA. Subsequently, he left a message with his supervisor that he needed "family leave" to handle a "family situation." The supervisor sent him the necessary paperwork for this leave to be considered under FMLA. The employee told the supervisor that he would not provide the company with any information. The supervisor told the employee that unless he did so his absence would be considered unauthorized and a resignation. On the date of his termination, he was hospitalized due to a serious health condition. However, the court ruled that due to his failure to co-operate with the employer's request for information the employer was within its rights under the FMLA to consider the individual's actions as a resignation from employment.

If you have not yet done so, be sure to register for our Firm's *The Effective Supervisor* programs throughout Alabama in September and October. For additional information about the programs or conducting an "in-house" for your organization, please contact Ms. Sherry Morton at 205/323-9263.

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