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:

We are concluding a year where employee anxiety is the highest it has been since the combination of high inflation, interest rates, unemployment and the oil crisis of the late 1970s. **Today, many fear that their jobs will be lost or compensation reduced, retirement accounts diminished and healthcare costs increased resulting in a net loss of pay. These factors contributing work place anxiety do not even include the risk to our security and possibilities of war in the Middle East.**

The risk to employers as a result of these anxieties include a heighten susceptibility to unionization and litigation upon termination. A message to employees that unions create a risk of job loss due to a strike may not be as effective when employees believe that they risk a job loss anyway; they may view unions as a form of "job loss insurance." For terminated employees, the best job they can find might be the one they just lost, thus begins the job search process through litigation. The following are suggestions for employers to consider in order to reduce unionization and litigation risks:

1. This is a good time of the year to "run on your record." Provide each employee with a statement concerning the benefits he or she receives, including those that are required by law for the employer to pay (such as worker's compensation and the employer's share of social security). Provide the employee with a "total value package" of what the employee received during 2002. This information should be communicated to the employee either personally, or send it with a letter to the employee's home. The theme communicated to the employee and the employee's family should be one of thanking the employee for his or her efforts during the year, sharing with the family that although we face challenging times, we believe that continuing to work hard together is the most effective approach for enhancing our competitiveness.

2. Make available to employees the opportunity to meet with specialists who can review with them their 401(k) and other retirement accounts, so employees can learn how to meet their long term retirement plans. The individual who meets with the employee should not be one who sells securities or otherwise has a financial stake in the employee's decision making process.

3. Provide employees in small group meetings information regarding how the organization performed for 2002 and projections for 2003. Review goals, numbers, strategies and employee and employer responsibilities for a successful 2003.

4. If there needs to be a workforce reduction, consider alternatives in conjunction with or in lieu of sending people out the door, such as reduced hours or reduced pay. If a long terms employee needs to be laid off, is the organization saying "good bye forever" or is there another job that the employee would be able to perform, even if it pays less? An employer is not required to displace a less experienced or less senior employee.

5. If individuals are terminated, particularly long term employees, consider a severance package that includes a "good bye forever" release.

MUST E-MAIL BE AVAILABLE FOR UNION ORGANIZING?

This question was answered "yes" by an administrative law judge in the case of *The Prudential Insurance Company of America,* (Nov. 1, 2002). The issue involved an election among 2,000 Prudential agents nationwide. The Office and Professional Employees International Union sought to represent them, but lost by a vote of 811 to 748. Although the company used intra office e-mail to communicate its union free message, it prohibited employees from doing the same. **The National Labor Relations Board has never fully considered employer and employee rights regarding e-mail use during organizing campaigns.** The company's e-mail policy stated that "all users are to adhere to the same standards for e-mail as are expected for written business communications or public meetings. This policy pertains to the transmittal of e-mail either within or outside the company." The company's no solicitation, no distribution rule prohibited employees from soliciting "for any cause or any organization on company property during the working time or during the working time of the employees being solicited," and prohibit non employees from soliciting or distributing on company property at anytime. The company also included a statement that said "this policy pertains to the transmittal of e-mail either within or outside the company."

The unusual feature in this election that contributed to the judge's decision was the fact that the agents worked alone and that "oral communications between the union and all of the prospective voters was virtually impossible because of geographical separation and non access to employees' business phones and knowledge as to all of their private telephones." The judge stated that the objective of communications during an organizing campaign is to provide employees with information in order to make an informed decision. Because employees were unable to receive effectively information from the union, the employer's policy prohibiting the use of e-mail for organizing purposes was ruled invalid.

Note that the National Labor Relations Board has not yet ruled on the use of e-mail during organizing campaigns. The facts in this case were unusual; **employers should still continue to apply consistently the use of e-mail to their no solicitation, no distribution policy.**

ADA UPDATE: EMPLOYER RIGHTS WHEN AN EMPLOYEE DOES NOT REQUEST ACCOMMODATION OR WHEN THE ACCOMMODATION WOULD BE A BURDEN ON ANOTHER

Two recent cases illustrate reminders of employer rights when evaluating reasonable accommodation under the Americans with Disabilities Act. The first case, *Peters v. City of Mauston,* (7th Cir. Nov. 20, 2002) involved a machine operator who asked that another employee perform the heavy lifting of his job as a form of reasonable accommodation. As an alternative, the employee requested that he should try to see if he could do the heavy lifting without accommodation. The employee had permanent lifting restrictions due to two shoulder surgeries.

The employer substantiated that heavy lifting was an essential function of the operator's job. The court ruled that accommodation did not require the employer to shift that job responsibility to another employee. According to the court, "because we do not second-guess the employer's judgment as to the essential functions, we affirm the district court's determination that lifting, heavy or otherwise, is an essential function of the operator's job."

In rejecting the employee's request to "try and see" if he could do the heavy lifting, the court stated that "the employer is not obligated to allow the employee to try the job in order to determine whether some yet-to-be tested requested accommodation may be needed. Absent any other reasonable request for an accommodation, the [employer] need not incur additional liability to "try and see" whether Peters can handle the job despite his permanent lifting restrictions."

In the case of *MacGovern v. Hamilton Sunstrand Corporation* (2d Cir. Nov. 15, 2002), the employee was scheduled for mandatory overtime, but told the employer that he could not work overtime because it affected his depression. He first received this diagnosis in 1991, but did not tell the company until 1997 when he was required to work overtime during a weekend. The company's response was to prohibit MacGovern from working overtime, whether voluntary or not, for six months. Previously, MacGovern had volunteered for overtime. He sued, claiming that the employer's actions were an inappropriate accommodation under the ADA.

In rejecting MacGovern's claim, the court noted that MacGovern failed to request any scheduling accommodation due to depression and also failed during the entire six month period to tell the employer that he was not satisfied with the employer's accommodation. Accordingly, his failure to request accommodation and also notify the employer that he was dissatisfied with the employer's ultimate accommodation resulted in denying his ADA claim.

EMPLOYER FAILURE TO GIVE PROPER COBRA NOTICE TO DIVORCED SPOUSE

COBRA requires an employer to provide a covered beneficiary with notice of coverage termination and the right of COBRA continuation coverage. The case of *Phillips v. Saratoga Harness Racing, Inc.* (N.D. NY, Nov. 4, 2002) involved the issue of what is appropriate notice when an employee becomes divorced from his or her spouse beneficiary. In the instant case, employee Frank Studenroth got a divorce and remarried, then notified his employer that he wished to drop his ex from his insurance coverage. Rather than sending notice to the ex-spouse, the employer gave the notification to Studenroth. The ex underwent surgery, after which she discovered that she no longer had health insurance. The employer argued that providing Studenroth with the written notification of his ex's continuation coverage rights was sufficient notice under COBRA. In rejecting this claim, **the court stated that "handing the [COBRA] notices to a ex husband who married his secretary within 48 hours of divorcing plaintiff does not constitute a good faith attempt reasonably calculated to notify plaintiff of her COBRA rights."**

EEO TIP: ARE FCN'S A LICENSE TO DISCRIMINATE ON THE BASIS OF NATIONAL ORIGIN?

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Because of the proliferation of global business transactions over the last two decades, the United States has sought to improve its international balance of trade by entering into various **Friendship, Commerce & Navigation Treaties (FCN's)** with many countries around the world. As of January 2001, the U. S. had FCN Treaties with over twenty-five (25) countries including for example, Japan, Argentina, Ireland, Taiwan (China), Israel, Korea, Brazil, The Netherlands, Greece, Germany, Saudi Arabia, France, Italy and, surprisingly, even Iraq. Such treaties are of mutual economic benefit to the U. S. and each of the individual countries which are signatories thereto.

As to employment matters, a key provision in most FCN's is typically:

The Companies of either party [Country] *shall be permitted to engage, within the territories of the other party, accountants and other technical experts, executive personnel, attorneys, agents and other specialists <u>of their choice.</u>* (Emphasis added).

In light of Title VII's anti-discrimination provisions, especially those pertaining to national origin, the phrase "**of their choice"** raises many questions about employers who are subsidiaries of or otherwise affiliated with a foreign corporation. For example:

Can an employer in reliance on an FCN Treaty discriminate against American citizens in favor of foreign nationals (often called "expatriates") in hiring or promoting employees to managerial or other technical positions ?

Does the existence of an FCN Treaty allow a foreign employer to bypass Title VII's prohibitions against discrimination on the basis of race, color, sex, religion, or national origin, or the ADEA's prohibitions against age discrimination? The ADA? What about state anti-discrimination laws to the contrary?

According to the courts which have addressed these issues, the phrase "**...of their choice"** does not mean that a company which, is covered by the FCN Treaty has blanket authority to discriminate in employment in this country. However, the language in most FCN's provides a covered company the right to decide which executives, advisors and technicians will manage the Company's investment in the United States, notwithstanding our federal and state employment laws.

Not all companies which have an affiliation with a foreign country are necessarily covered by the FCN Treaty between that country and the United States. To qualify the company must meet the following tests:

- The treaty itself must include specific provisions concerning the preferential employment of expatriates and the positions in questions.
- The Company must be a foreign corporation, not a U. S. corporation.

FCN Treaties generally do not protect companies incorporated in the United States even though they may be owned by foreign nationals or entities.

However, courts have held that where a local subsidiary is merely carrying out the directions of its parent in giving preferential treatment to expatriate executives, the subsidiary can assert the FCN Treaty rights of the parent, even though the subsidiary was incorporated within the United States.

Current case law is sparse and unsettled as to how broadly an FCN Treaty can be interpreted by a covered employer in terms of giving employment preferences to its own citizens in the United States. Generally it has been held that the preferences extend only to "high level," executive positions, specialists and technicians. Thus, preferences of expatriates for clerical, mid-level and non-specialist positions may not be covered by the FCN Treaty.

Additionally, it has been held that an employer cannot use its FCN Treaty status as a basis for favoring the citizens of a country other than their own, home country. For example, a company covered by an FCN Treaty with Germany cannot claim treaty protection if it fires an American engineer and hires an Italian engineer.

In summary a foreign corporation or other entity whose employment policies are covered by a Friendship, Commerce and/or Navigation Treaty must generally abide by federal and state anti-discrimination laws in the conduct of its business in this country. However, under the terms of most FCN Treaties, such corporations may exercise a preference for citizens of its own country (expatriates) in filling certain executive, high level advisory, and technical positions.

OSHA TIP: OSHA MEDICAL AND FIRST AID

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.

Several OSHA standards contain medical and first aid requirements. These relate to construction, shipbuilding and repairing, logging, electrical power generation and other activities. **The standard relating to all general industry, 1910.151(b), states the following: "In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately**

trained to render first aid. Adequate first aid supplies shall be readily available." This wording has triggered many questions as to the meaning of "near proximity" and "adequately trained".

OSHA has addressed the proximity issue in a number of interpretive documents which focus on the amount of time in which medical help could get to the injured party. For activities that would likely produce life-threatening or permanently disabling injuries (suffocation, severe bleeding and the like), the response time should not exceed four minutes. The rationale is said to be based upon brain death when the heart or breathing has stopped for that period of time. Where lesser injuries would be anticipated, the acceptable response time is extended to 15 minutes. If the employer can meet the four minute time line for outside medical help, it need go no further to comply with this standard. If expected injuries at the site are of the less severe type and medical response can be within 15 minutes, the employer could demonstrate compliance with this standard.

Where an employer cannot meet the above response times and must then ensure that "adequately trained" persons are available to administer first aid, OSHA provides Guidelines for First Aid Training in its Instruction CPL 2-2.53. While asserting that it does not teach or certify first aid programs, OSHA offers in this document elements considered to be essential to such programs. It notes that the American Red Cross, the National Safety Council, and private institutions are the primary sources of first aid training in the United States.

Although it is not a specific requirement, OSHA recommends in its guidelines that cardiopulmonary resuscitation (CPR) training be included as an element of a first aid program. CPR training is specifically called for in some OSHA industry-specific standards. Among others, these include standards for logging and electric power generation, transmission and distribution.

While OSHA's standard may require that the employer ensure that someone at the site is adequately trained to render first aid, it stops short of having him assign that duty. Employees trained and designated by the employer as responsible for administering first aid as part of their job are covered by the bloodborne pathogens standard. This requires that they be trained in the provisions of that standard, provided the necessary personal protective equipment, etc. OSHA considers it a de minimus violation (technical violation only carrying no penalties) if such employees are not offered pre-exposure hepatitis B vaccinations. This is true if providing first aid is only a collateral duty for them, all first aid incidents and exposures are properly reported and vaccine and follow-up are made available to them after an exposure.

WAGE AND HOUR TIP: WAGE AND HOUR LITIGATION UPDATE

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Wage Hour matters are still very much at the forefront of labor issues. **Class action litigation under the Fair Labor Standards Act has become the number one area of employment litigation today.** In many cases employers are prevailing but on the other hand there are situations where employers are having to expend significant resources in defending themselves.

In Alabama, there is an area that has the potential to cause employers to have to expend large amounts in defending themselves and on possible judgements. That is the public school systems in Alabama that have been sued. At last count more than 30 different school systems have been sued by a group of Mississippi attorneys alleging that employees have not been paid proper overtime. These attorneys have previously sued school systems in Mississippi and as a result the school systems have paid over $5,000,000 back wages.

In other cases around the country there have been several instances where employers are being required to pay substantial amounts of back wages. The Eleventh Circuit of

the U. S. Court of Appeals recently ruled against two Florida produce growers regarding transportation costs Mexican migrant farm workers had incurred. These workers had been required to pay out of pocket expenses for visas and travel costs. The court stated these expenditures reduced the employees below the minimum wage and ordered the employers to reimburse the costs to the point that the workers were paid at least the minimum wage for their first week of work.

In New York a restaurant was found to have an invalid tip pool because it required the tips received by waiters to be shared with "managers." Also, a Colorado-based nation of bagel restaurants was required to pay assistant managers $500,000 in overtime back wages. The firm had considered these employees to be exempt but after an investigation by Wage Hour agreed to change its pay practices and pay these back wages to over 400 employees.

In another case, the Department of Labor sued a Chicago-based chain of seven Chinese buffet-style restaurants for $1.5 million in back wages for 100 busboys and kitchen workers who have not been paid time and one-half when they worked more than 40 hours in a week. Further, a Connecticut court has allowed 281 computer system engineers to proceed with a class action against their employer. These employees have alleged they are nonexempt are therefore entitled to overtime compensation for the hours worked over 40 in a workweek.

Employers should also remember they may not only be required to pay back wages they may be subject to Civil Money Penalties for "repeated or wilful" violations of the Fair Labor Standards Act. Two California garment manufacturers owed over $900,000 in back wages to 260 employees and the firms have now been ordered to pay $337,000 in civil money penalties. The Department of Labor can assess a civil money penalty of up to $1,100 per employee.

Not all recent cases have gone against employers. The Fourth U. S. Circuit Court of Appeals recently ruled that a group of park caretaker-couples in Maryland was properly paid. These caretakers resided at the parks, in free housing, in exchange for providing security in the parks, cleaning restrooms, opening and closing the park and so forth. The court ruled that the value of the housing was sufficient to cover the minimum wage for all hours they worked. In an Ohio case the court ruled that an employer that provided "comp time" to its salaried exempt workers did not violate the Fair Labor Standards Act.

On another positive note DOL has raised the issue of "comp time" for private sector employees. As you are aware, public-sector employers (state and local governments) have been permitted to use comp time since 1985. There have been several attempts to allow comp time for all employers but Congress has never passed such legislation. On September 27 DOL announced that it intends to conduct a survey of one thousand workers by telephone regarding how they would feel about earning comp time in lieu of overtime pay. At this time it is not known when this survey will be conducted.

Employers should continue to be aware of the potential for class action law suits being filed against them and make every effort to ensure they are complying with the Fair Labor Standards Act.

DID YOU KNOW . . .

. . . that Senator Judd Gregg (R-NH) will replace Senator Edward Kennedy as Chairman of the Senate, Health, Education, Labor and Pensions Committee? Gregg's agenda includes narrowing the definition of "serious health condition" under FMLA and permitting private sector employees to receive "comp time" instead of overtime. One of the new committee members is Senator Elizabeth Dole (R-N.C.).

. . .that the NLRB will become a full five member board for the first time since August 2000? This is due to the U.S. Senate on November 14, 2002 approving second terms of Dennis Walsh and Wilma Liebman, and approving the president's nominations of Robert Battista to chair the board, Peter Schaumber and R. Alex Acosta. Battista is a management labor attorney; Schaumber is an arbitrator and Acosta is a former Justice Department employee.

. . . that the U. S. Supreme Court let stand an appeals court ruling that union organizing costs can be charged to non-members? *Mulder v. NLRB*, (cert. denied, Nov. 12, 2002). The case evolved from the Supreme Court's decision in *Communications Workers of America v. Beck*, where the Supreme Court said that non-members can be charged fees for union activities related to contract administration, grievance handling and bargaining. According to the Ninth Circuit in *Mulder*, organizing costs facilitate a union's effectiveness in performing its bargaining, contract administration and grievance handling procedures, "at least when organizing employees within the same competitive market as the bargaining unit employer."

. . . that an employee who was fired after he expressed an intent to file for bankruptcy was not discriminated against under the U. S. Bankruptcy code? *Leonard v. St. Rose Dominican Hospital*, (9th Cir. Nov. 13, 2002). The code provides that an employer may not terminate an individual if the individual is "a debtor or bankrupt under the Bankruptcy Act. . . solely because such debtor is bankrupt or has been a debtor under this title or a debtor or bankrupt the Bankruptcy Act." According to the court, "bankruptcy's fresh start comes at the cost of actually filing a bankruptcy petition. One is not entitled to the law's protections, including employment security and the automatic stay of litigation, before being bound by its other consequences." Thus, an individual who states that he or she will file for bankruptcy will not be retaliated against if an employer terminates the employee for that reason.

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