EMPLOYMENT LAW BULLETIN

THE NEWSLETTER OF LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.
"YOUR WORKPLACE IS OUR WORK"

Volume 10, Number 12 ***December 2002***

TO OUR CLIENTS AND FRIENDS:

Almost $12,000,000 was awarded by a Chicago area jury on October 30, 2002 to an individual for emotional distress and a violation of the Family and Medical Leave Act *Schultz v. Advocate Health and Hospitals Corp.*, N.D. Ill. This is the highest verdict ever reported involving the FMLA and does not include the plaintiff's attorney fees.

Schultz was employed by the hospital for twenty-six years as a building maintenance technician. In the year prior to his termination, he received the hospital's employee of the year award. He was the first non-physician/non-administrator to receive the award. A year later, after taking intermittent leave to care for his sick parents, Schultz was terminated.

There was no doubt that Schultz's intermittent leave was disruptive to his department. During the course of his leave, Schultz's supervisor established monthly performance standards which Schultz could not meet if he continued to take intermittent leave. The standards were enforced inconsistently and ultimately Schultz's failure to meet them resulted in termination. The jury awarded $10,000,000 in punitive damages under his claim for emotional distress, $750,000 in compensatory damages, and from each of his supervisors: $200,000 in compensatory damages and $250,000 in punitive damages.

Schultz was an ideal plaintiff. He had an excellent work record, long term service with exemplary performance reviews and was indisputably qualified for the use of intermittent leave. According to the jury, Schultz's supervisor acted on his frustration with the intermittent leave by taking steps to either force Schultz to abandon his leave rights in order to satisfy the new expectations or to terminate Schultz for not meeting the new expectations.

Under the FMLA ("Forget My Last Absence"), intermittent leave is often more disruptive to employers than leave for a block period of time. Employers have rights to determine whether intermittent leave is appropriate. If the leave is disruptive, the employer has the right to transfer the individual to another position of comparable responsibilities and pay, even if the individual does not accept the transfer. The transfer may last for as long as the intermittent leave continues.

Employers have rights regarding FMLA administration. Know your rights and also make supervisors and managers aware of reporting to HR or another centralized source employee issues concerning medical related leaves of absences. Also, note that the FMLA is one of the few employment laws where there is a risk of personal liability to a supervisor or manager. Due to the number of laws that affect employee medical issues, we recommend that front line supervisors should not determine what action to take based upon employee medical information, but rather should report that information to HR.

EEO TIP: RECORDS FOR THE SAKE OF RECORDS

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.

Without some clear understanding of statutory recordkeeping requirements, and some organized, systematic procedures for the generation and retention of the records required, an employer could be liable for costly penalties or other serious consequences. Accordingly, in this and the next series of articles on this subject we will present a summary of the basic record-keeping requirements of Title VII, the ADA, the ADEA, the EPA and some of the other closely related federal employment statutes. Additionally we will suggest some tips on how to avoid the pitfalls of inadequate supporting records in the event that a charge of discrimination is filed with the EEOC under one or more of the statutes indicated.

For actions covered by **Title VII** and the **ADA** the EEOC has issued record keeping and reporting requirements which can be found at 29 C.F.R. Part 1602. In substance these regulations require:

A. That employers **with more than 100 employees** file an EEO-1 report **annually.** Basically, the EEO-1 Report is intended to show the race and sex of employees by job categories.

B. That **personnel or employment records** be kept **for at least one year** from the date of the personnel action involved. The year is measured from the date of the record or the date of the personnel action, **whichever is later**.

C. That if a charge is filed, the records be kept **until the charge is fully resolved**. This includes all records which are relevant to the charge.

Some Tips on Good Record Keeping:

1. Make sure that your firm has an established records retention program. A written policy is better than just an established practice. Make a comprehensive review of the types of employment records normally generated, and determine which ones are necessary to comply with the various statutes to which your firm is subject. Assign a specific manager or other employee to generate and maintain the records needed. Management should know at all times where copies of records are kept and by whom. Make certain that the manager or other employees who are responsible for keeping the records are informed of charges or lawsuits which have been filed so that they can preserve the records which are related thereto.

2. Remember that a critical part a good records retention program is a "records destruction program." Records should be maintained at a minimum for as long as may be required by the employment statute involved. In some cases it may be necessary to keep certain records longer in order to support the employer's contractual obligations, for example in worker's compensation cases or to justify a business decision which adversely affected an employee. The records destruction program should be carried out on a regular basis as a part of standard procedures. If done sporadically, it might be viewed with suspicion as an attempt to hide evidence.

3. Finally, keep a record of compliance with your own records retention and/or destruction program in order to show the consistency of its application.

The foregoing tips apply to all the statutes which will be discussed. Next month we will review the record keeping requirements of the ADEA, the EPA, the FLSA, and the FMLA, each of which is slightly different. Also we will discuss the question of whether the records can be kept in paper or electronic form to save time and space.

OSHA TIP: OSHA"S MULTI-EMPLOYER CITATION POLICY

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.

"Not my employee, not my problem." This may not be the best posture in guarding against OSHA citations. Unquestionably the primary focus must be towards preventing exposures to one's own employees. However, **there are circumstances that may lead to an employer's being cited and fined where employees other than its own are subjected to hazards.** This most commonly arises in the construction industry where multiple employers share the same work environment. But it is not exclusive to construction work and may be encountered where service, repair, and other contract work is being conducted at a host employer's work site.

OSHA's 1974 Field Operations Manual (FOM) included the agency's first policy in this area, which was to cite employers who exposed their employees to hazards. This followed with a change to the FOM in 1983 providing that an employer exercising control over a work site could also be cited. Finally, the policy evolved to call for citing an employer who created a hazardous condition at the site and an employer whose job it was to correct a hazardous condition at the site. So now we have four categories of employers: **exposing, controlling, creating and correcting**. An employer can, depending upon the facts at a given work site, occupy any number of these roles simultaneously.

In an effort to clarify its multi-employer citation policy, the agency issued OSHA Instruction CPL 2-00.124 on December 10, 1999. This directive claims to make no change to existing policy but to provide more guidance by offering a number of examples.

Under the existing policy , an **exposing employer** (one whose own employees are exposed to a hazard) may expect to be cited unless all of the following are true:

1. It did not create the hazard.
2. It did not have the ability or authority to correct the hazard.
3. It attempted to get the appropriate party to correct the hazard.
4. It warned its own employees of the hazard.
5. It took reasonable alternative measures to protect its own employees.

A **controlling employer** (one who has contractual or de facto control over a site) including the power to get safety and health violations corrected) may be cited unless it exercises reasonable care to prevent and detect violations on the site. Except for an exposing employer, this is the most common basis for a multi-employer citation. It is also the most complex and contentious due to the issue of "control."

A **creating employer** (one who causes a hazardous condition in violation of an OSHA standard) may be cited without its own employees being exposed. An example given in the directive is where a host employer allows visiting service workers to be overexposed to chemicals that the host had left in uncovered storage drums.

A **correcting employer** (one who has responsibility to correct a hazard at the work site) may be cited where it fails to exercise reasonable care in preventing and discovering violations and in meeting its obligations of

correcting the hazard, i.e. repairing damage to perimeter guardrails it had installed.

The bottom line is that an employer should be alert to the total work environment where it occupies any of the above employer roles. Don't ignore hazards - especially obvious ones - whether or not your own employees are exposed.

ALABAMA SUPREME COURT REDEFINES "SOLELY" IN RETALIATION CASES

Alabama law provides that "no employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits . . ." Alabama is one of only three states in the U.S. that use the "solely" standard in workers' compensation retaliation claims. The case of Alabama Power Company v. Aldridge, decided on December 6, 2002, clarified the definition of "solely" in these retaliation cases.

Aldridge was terminated for misrepresentations regarding reasons for his absences, failing to report absences according to company policy and failing to maintain proper attendance. He had a job related accident and received workers' compensation benefits. The evidence of a misrepresentation was undisputed. Aldridge stated that he needed to be absent in order to make arrangements for repairs to his roof, when no such repairs or arrangements were ever made. The trial court permitted the case to go to the jury, which returned a verdict of $500,000 in favor of Aldridge. The Supreme Court remanded the case to the trial court with an order to enter a judgment in favor of Alabama Power. The Supreme Court established the following key points helpful to employers regarding the "solely" standard:

- "Solely" means that there is no independent lawful reason which would otherwise justify the employer's action. Independent lawful reasons include misrepresentation, falsification of records, poor work performance and other lawful employment actions.

- The employer's assertion of a lawful reason can be challenged by showing that "the stated basis has been applied in a discriminatory manner to employees who have filed workers' compensation claims, that the stated basis conflicts with express company policy on grounds for discharge, or that the employer has disavowed the stated reason or otherwise acknowledged its pretextual status."

- If the employer presents undisputed lawful reasons for the employer's termination, "then the defendant who so moves is entitled to judgment as a matter of law at that point."

According to the Supreme Court, "the evidence established without dispute the existence of a misrepresentation by Aldridge . . . [who] offered no evidence indicating that termination of employment as a sanction for misrepresenting the reason for an absence from work was applied discriminatorily to employees who file workers' compensation claims. . ." **Under the "solely" standard, an employer should have an enhanced opportunity to defeat retaliation claims through summary judgment if the employer can show a lawful reason for its action and consistency in the application of that reason.**

WAGE AND HOUR UPDATE: NOW IS A GOOD TIME TO REVIEW EXEMPTIONS

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.

As we begin a new year, many employers will be conducting performance discussions with employees and making salary adjustments for the next year. While undertaking this effort I would suggest that the employer review pay practices to ensure compliance with the Fair Labor Standards Act(FLSA). **The areas that I see where most employers have vulnerability is in the proper applications of the "White Collar" exemptions. Specifically the executive, administrative and professional exemptions. In my experience, the administrative exemption is the one that is the most often misapplied. Thus, I would recommend that employers take a very close look at the persons for whom they are claiming this exemption.**

Executive, administrative, professional, and outside sales employees are exempt from both the minimum wage and overtime requirements of the Act, provided they meet the salary requirements and certain duties and responsibility 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. 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 hourly at a rate not less than $27.63 per hour.

The salary required, a determined by regulations that were last revised in 1975, is $250.00 per week. Thus, it 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. However, it now appears that the Department of Labor (DOL) may issue some proposed revisions to the regulation in early 2003.

Since the salary requirements in the regulations are not a real factor in determining the application of the exemptions, both the courts and the DOL have been taking a very close look at the duties of the employee. Where the employee does not meet all of the requirements for an exemption 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).

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 nonexempt 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 nonexempt. If an employee has been improperly classified, the employer can be required to pay the employee back wages, an equal amount of liquidated damages and the employee's attorney fees. Therefore, employers should be very careful to ensure that the employee meets all of the requirements for the exemption(s) that are being claimed.

As you begin the new year, it is a good time to review all of you personnel practices to ensure that your firm is complying with the various statutes.

DID YOU KNOW . . .

. . . that according to the U.S. Department of Labor, the number of OFCCP reviews and amount of compensation recovered dropped in 2002 compared to 2001? In 2002, there were 4,135 reviews of federal contractors compared to 4,716 in 2001. Contractors paid $24,000,000 to settle affirmative action compliance issues in 2002, compared to $29,000,000 in 2001. Only $9,000,000 in each year was paid for backpay. The number of corporate management reviews, which focuses on "glass ceiling" issues, increased from 36 in 2001 to 42 in 2002. One federal contractor was debarred last year; only one other contractor has been debarred since 1996.

. . .that OSHA has delayed the effective date for recording musculoskeletal disorders and hearing loss? According to OSHA, the date for defining musculoskeletal disorders and recording them on OSHA 300 logs will now be effective January 1, 2004.

. . . that a former Teamsters business agent may proceed with his lawsuit of racial harassment and retaliation? *Jackson v. Teamsters Local 705*, N.D. Ill (Nov. 15, 2002). Jackson alleged that his Teamster bosses spoke of him with racial slurs and mimicked his speech patterns. He was terminated three weeks after filing a discrimination charge with the Illinois Department of Human Rights.

. . . that according to the Bureau of Labor Statistics, the number of workplace injuries and illnesses declined by 6.5% to a rate of 5.7 cases per 100 employees, compared to 6.1 cases in 2000? According to the Bureau of Labor Statistics, this is the lowest injury rate since the early 1970's. The highest injury rates were in manufacturing and construction, involving eight cases per 100 employees. Among the lowest were retail and wholesale industries, which totaled 5.6 cases per 100 employees. The number of work days lost also fell. Approximately half of all reported workplace injuries or illnesses resulted in lost time.

. . . that first year wage increases in contracts negotiated during 2002 totaled 3.9%? The median increase was 3.5%. According to the Bureau of

National Affairs, the average manufacturing increase was 2.8%, down from 3% in 2001. The median for manufacturing was 3%, the same as 2001. Construction increases averaged 4.4%, the same as 2001, and a median of 4.2%, compared to 3.9% in 2001. Lump sum payments increased the average first year wage increase of all settlements to 4.2% and the median to 3.6%. In manufacturing, including lump sums the average was 3.6% and the median 3.1% and in construction the average including lump sums was 4.4% and the median 4.2%.

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