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:

Is it possible that an elaborate disciplinary system in a handbook which states that it is not a binding document can be binding? Yes, ruled the Supreme Court of Vermont in the case of *Dillon v. Champion JogBra, Inc.*, (Dec. 27, 2002). **The lesson in this case for employers in all states is to include language in the disciplinary and discharge section of the handbook that also reaffirms an employee's at-will status.**

The employer in question had an appropriate "at-will" statement at the front of the handbook. In describing its disciplinary process, the company stated that managers were required to train and counsel employees and follow a progressive disciplinary approach depending upon the nature of the employee's infraction. According to a majority of the divided court, such a comprehensive disciplinary system requiring certain behaviors on the part of management was "inconsistent with the disclaimer at the beginning of the manual, in effect sending mixed messages to employees. Furthermore, these terms appeared to be inconsistent with an at-will employment relationship."

UNION ELECTION WIN RATES CONTINUE TO INCREASE

According to an analysis prepared by the Bureau of National Affairs, unions during the first six months of 2002 won 57.4% of all elections held, an increase from 54.7% for the previous year. In 1996 the union election win rate was 48.1%; it has increased every year since then.

Examples of union successes include the Service Employees International Union, which won 69% of all elections; the International Union of Operating Engineers, which won 68.8% of all elections; and the International Brotherhood of Electrical Workers, which won 62.7% of all elections. Union successes were highest in the service sector, winning 63.4% of all elections and lowest in the finance, insurance and real estate sector, where unions won only 38.7%. Unions won 60.7% in healthcare but only 39.4% in manufacturing.

Heightened employee concerns about job security and increasing healthcare costs will increase employer vulnerability to unionization. Some employees may consider unions "a nothing to lose" proposition, because they feel that their job is at risk anyway and they cannot afford increased health care costs. This vulnerability will also include administrative and professional employees, who historically have been less inclined to support or join unions. It is important for employers to re-evaluate their strategies for remaining union free, because traditional approaches for remaining union free may not be enough in today's climate.

EEO TIP: RECORDS FOR THE SAKE OF RECORDS

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The first of the year is a good time to get off on the right foot in terms of complying with the record keeping requirements of the various employment-related statutes to which most employers are subject. As suggested last month there are subtle differences in the record keeping requirements of these statutes and it is crucial that employers be aware of the differences.

In the December issue of the Employment Law Bulletin, the basic records retention requirements of **Title VII** and the **ADA** were discussed. This month we will outline the record keeping requirements under the:

Age Discrimination In Employment Act (**ADEA**),
Fair Labor Standards Act (**FLSA**),
Equal Pay Act (**EPA**), and the
Family and Medical Leave Act (**FMLA**).

As a threshold matter it may be helpful to know that under each of the foregoing statutes, **no particular order or form of a record** is required, only that the record itself contain the requisite information. **Thus, if the information required is available in records kept for other purposes, or can be readily obtained by re-computing or extracting it from some other source, no further records are generally required to be made or kept**. Additionally, **this means that employers can utilize space-saving electronic data storage systems as well as actual paper copies in preserving the required records.** Aside from this apparently common trait, the statutes tend to be very specific in terms of the information that is to be captured in the records, themselves.

ADEA Requirements: [*See* generally EEOC Regulations at 29 C.F.R part 1627]. Employers must keep:

A. Payroll records for three (3) years. showing the name, address, date of birth, occupation, rate of pay and compensation earned each week.

B. Personnel or employment records made by an employer which relate to any specified personnel decision for one (1) year after the decision. (e.g. a special hiring or termination decision.) Note that an employer is not required to make any such record, but if one is made, it must be kept for one year after making it.

C. Copies of benefit plans, seniority systems and merit systems during the time the system is in effect and for at least one (1) year thereafter.

D. All records which relate to an applicant or employee if an enforcement action (Charge or lawsuit) is filed until the final disposition of the action; and finally

E. The records must by "kept safe and accessible at the place of employment or business (or at a central storage location) at which the individual to whom they relate is employed or has applied," and must be available for inspection during regular business hours.

FLSA Requirements: [*See* generally 29 C.F. R. part 516]. Under the Labor Department's Regulations an employer must keep the following records for **three (3) years:**

A. **Primary Payroll records** showing the information required by 29 C.F. R. 561.2 and/or 516.3 including, among other things, name, salary, position, and claimed status (exempt or covered) together with certain related payroll information.

B. Certificates, agreements, plans, notices and similar documents.

C. Sales and purchase records (where applicable).

Additionally employers must keep the following records for two (2) years:

A. Supplementary basic records, including basic employment and earning records and wage rate tables;

B. Order, shipping, and billing records.

C. Records of additions or deductions from wages paid.

Finally, the records must be kept in a safe and accessible place, and must be available for inspection within 72 hours.

Equal Pay Act (EPA) Requirements:

[*See* generally 29 C.F. R. 1620.32]. Under this section employers are required to keep records in accordance with the applicable provisions of the Fair Labor Standards Act found at 29 C. F. R. part 516. Thus, in effect the records retention requirements pertaining to general payroll records of three (3) years under the FLSA appear to be applicable to EPA matters. Additionally Section 1620.32 requires that any records made in the regular course of business which relate the following must also be kept, apparently, for three (3) years:

> The payment of wages and wage rates,
> Job evaluations, job descriptions, merit systems;
> seniority systems, and collective bargaining agreements.

Descriptions of practices or other matters which describe or explain the basis for the payment of any wage differential to employees of the opposite sex in the same establishment, and which may be pertinent to a determination of whether such differential is based on a factor other than sex.

A surprising quirk in the regulations is that under Section 1620.32 (c) records which explain the basis for the payment of any wage differential to employees of the opposite sex in the same establishment must be kept for only "...at least two years."

FMLA Requirements [*See* generally 29 C.F.R. 825.500(a)]
Under this section employers must keep records pertaining to the following for three (3) years:

> payroll data, leave policies and requests and employee benefits.

> Records relating to medical certifications, medical histories of employees or employees' family members created for FMLA purposes.

CAUTION: Care should be exercised to make sure that the confidentiality of medical records is maintained. If the ADA is also involved, the records system should be maintained in conformance with the provisions of that act also.

In terms of accessibility, the records are to be maintained at the employer's place of business and made available for inspection, copying or transcription by representatives of the Department of Labor upon request.

Obviously, compliance with all of the records retention requirements under the foregoing acts can become a confusing, complicated process. If there is any doubt as to what the various regulations mandate, competent legal counsel should be consulted.

OSHA TIP: WHAT'S HAPPENING WITH ERGONOMICS?

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.

It's been two years since OSHA's ergonomics standard was repealed. This highly controversial standard was proposed in November 1999, issued as a final standard in November 2000 and became effective on January 16, 2001. For the first time since its passage in 1996, Congress used the Congressional Review Act to "disapprove" the newly issued standard and the President signed Senate Joint Resolution 6 on March 20, 2001. The action also barred the agency from issuing a "substantially" similar rule in the future.

With this action, federal OSHA had again to resort to use of the general duty clause of the OSH Act to address ergonomic hazards. With any such citation came the burden to demonstrate the following: (1) that there was exposure to a hazard (2) that the hazard was causing or likely to cause serious physical harm to employees (3) that the hazard was recognized and (4) that there was a

feasible means to correct the hazard. Two states having state-administered OSHA programs, California and Washington, have adopted ergonomics standards.

Following repeal of its ergonomics standard, OSHA held a series of public forums and on April 5, 2002 announced a comprehensive plan to address musculoskeletal disorders in the workplace. Rather than a new rule, the plan called for a four-pronged approach as follows:

1. **Guidelines** - Industry and task-specific guidelines would be developed to serve as patterns for employers in developing their own programs. The first of these dealt with nursing homes and is being followed with guidelines for retail groceries and poultry processing. Business and industries are being encouraged by OSHA to develop additional guidelines appropriate for their particular work activities.

2. **Enforcement** - Devise a plan to target prosecutable ergonomics violations through use of the act's general duty clause. The agency states it will use specially trained ergonomics teams that will coordinate with Department of Labor attorneys in preparing these cases. (From January 1, 2002 through November 26, 2002 the agency conducted 63 inspections where ergonomics issues were being evaluated. From these cases, 16 hazard warning letters advising employers that they need to make changes to reduce hazards were issued. No citations have been issued. The preceding inspection results were offered by Assistant Secretary John Henshaw while addressing the National Ergonomics Conference on December 11, 2002.)

3. **Compliance Assistance** - Provide outreach and training assistance through use of the OSHA webpage and entering into cooperative programs with employers/associations and the like. Extensive information on ergonomics is available on the agency's website at www.osha.gov. OSHA has entered into six alliances with entities such as the Airlines Association and the American Meat Institute that specifically deal with reducing ergonomic injuries. Other recent alliances typically include an ergonomics component.

4. **Ergonomics Research** - Establishment of an ergonomics advisory committee charged, in part, with the task of identifying gaps in research in this field. Selections to this fifteen-member committee have been named and the first meeting is scheduled for January 22, 2003.

Although there is no ergonomics standard, there is much activity in this area by the agency. Given the intensity of opposition and the fact that the Bureau of Labor Statistics has found a significant decrease in ergonomic-related injuries over the past few years, a new ergonomics standard appears unlikely in the near future. However, employers who are experiencing musculoskeletal injuries at their sites should not ignore the problem. Beyond the medical costs, OSHA will be in an increasingly better posture to support charges of violations of the general duty clause in this area. Employers with high musculoskeletal injury rates may expect to be targeted as is currently happening with the nursing home industry. Employee complaints will also continue to lead OSHA to conduct inspections for ergonomic hazards.

EMPLOYER HELD RESPONSIBLE FOR SUPERVISOR'S FAILURE TO REPORT HARASSMENT

It is absolutely essential for employers to stress to supervisors that they must report any complaint about harassment, even if the employee asks them not to. This point was illustrated recently in the case of *Brunson v. Bayer Corporation*, (D. Conn, Dec. 27, 2002). The case involved an employee who complained to a supervisor about harassment from a co-employee. There was no allegation of supervisory harassment. The supervisor failed to report the harassment, and the court ruled that the matter could proceed to a jury on the issues of harassment and whether the employer was negligent for the failure of the supervisor to report the behavior.

The supervisor argued that the employee specifically asked him not to report the behavior. The court examined the following factors in concluding that the supervisor's inaction could be attributed to the company:

1. Was the supervisor of a sufficiently high level of authority to be considered a company representative?

2. Did the supervisor have a responsibility to act on the knowledge of the harassment and attempt to stop it?

3. Was the supervisor responsible for reporting to the company any harassing behavior?

The court noted that the company handbooks required supervisors to report harassment and the company trained supervisors about harassment.

There are occasions where employees confide in the supervisor about harassing or discriminatory behavior, but ask that the supervisor keep that information confidential. An employee might be concerned about possible retaliation or prefer to handle it themself. No doubt this places a supervisor in an awkward position. **Supervisors must know that when an employee expresses concern about harassment, discrimination or retaliation, the supervisor is required to report the behavior.** Employer policies should mandate reporting the alleged conduct so that employees and supervisors know any such behavior will be reported. As demonstrated by the referenced case, supervisors play an integral role in a company's efforts to prevent and correct discrimination, retaliation and harassment in the workplace. Accepting this role is part of being an effective supervisor and will preserve several defenses for the employer in the event of litigation.

FAILURE TO COVER INFERTILITY IS NOT SEX OR PREGNANCY DISCRIMINATION, RULES COURT

Employee Saks was a manager for Franklin Covey Company from March 1995 until October 1999. She was enrolled in the company's health plan. She was unable to become pregnant until she participated in the fertility procedures.

The company's health plan covered several infertility products and procedures, but it excluded coverage for intrauterine inseminations and in vitro fertilization. The plan refused to reimburse Saks for those procedures and the drugs related to them. Saks argued that the company's actions violated Title VII, as amended by the Pregnancy Discrimination Act. *Saks v. Franklin Covey Company*, (2nd Cir. Jan. 15, 2003).

In upholding the trial court's denial of Saks' claim, the court of appeals stated that **"because reproductive capacity is common to both and men and women, we do not read the PDA as introducing a completely new classification of prohibited discrimination based solely on reproductive capacity. Although the surgical procedures are performed only on women, the need for the procedures can be traced to male, female, or couple infertility with equal frequency. Thus, surgical impregnation procedures may be recommended regardless of the gender of the ill patient."** Men and women were treated equally under the company's plan. Neither men nor women had access under the plan to surgical techniques for impregnation.

WAGE AND HOUR UPDATE: PAYMENT OF OVERTIME USING A FIXED SALARY FOR FLUCTUATING HOURS

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 you are aware litigation is still very prevalent under the Fair Labor Standards Act (FLSA). For instance there were more "collective action" lawsuits brought under this statute during the past year than under any other employment-related statute. An article in the BIRMINGHAM NEWS indicated that approximately one-half of the school systems in Alabama have been recently sued. The area where most of the activity is taking place is on behalf of employees that employers have failed to pay time and

one-half when the employee works more than 40 hours in a workweek.

Many employers operate under the misconception that by paying an employee a salary the employee does not have to be paid overtime. **Unless an employee is specifically exempt from the overtime provisions of the statue, the employee must be paid over time when he works more than 40 hours during a week. One method that an employer can use to pay employees on a salary basis and still comply with the act is to use the "fixed salary for fluctuating workweek" pay plan that is provided for in the regulations.**

Quite often an employee, employed on a salary basis, may have hours of work, which fluctuate from week to week. The salary may be paid pursuant to an understanding with his employer that he or she will receive such fixed amount as straight time pay for whatever hours he works in a workweek.

Where there is a clear mutual understanding of the parties that the fixed salary is compensation for all hours worked each workweek, whatever their number, such a salary arrangement is permitted by the Act if:

> The amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable minimum wage rate for every hour worked and if the employee receives extra compensation, in addition to such salary, for all overtime hours worked at a rate not less than one-half the regular rate of pay.

Since the salary is intended to compensate the employee at straight time rates for whatever hours are worked in the workweek, the regular rate of the employee will vary from week to week. The regular rate is determined by dividing the total number of hours worked in the workweek into the amount of the salary to obtain the applicable hourly rate for the week. The overtime is then computed by paying one-half the applicable hourly rate for each hour of overtime worked. **Payment for overtime hours at one-half such rate in addition to the salary satisfies the overtime pay requirement because such hours have already been compensated at the straight time regular rate, under the salary arrangement.**

For example, an employee whose salary of $250 a week, during the course of 4 weeks works 40, 44, 50, and 48 hours, his regular hourly rate of pay in each of these weeks is approximately $6.25, $5.68, $5, and $5.21, respectively. Since the employee has already received straight-time compensation on a salary basis for all hours worked, only additional half-time pay is due for the 44 and 48-hour weeks with no overtime due in the 40-hour week. For the 44-hour week the employee is due $261.36 ($250 plus 4 hours at $2.84, and for the 48-hour week he is due $270.88 ($250 plus 8 hours at $2.61).

However, in the 50 hour week the salary ($250 ÷ 50 = $5.00) fails to yield the employee the minimum wage. Thus, the employee must be brought up to the minimum wage and paid time and one-half the minimum wage for all overtime hours worked. Therefore, he is entitled to $ 283.25 (40 X $5.15 = $ 206.00 + 10 X $5.15 x 1 ½ = $77.25).

In using this pay plan the employer must remember two specific problems that can arise which can invalidate the plan and thereby require the employee to be paid time and one-half for all overtime hours.

First, the salary must always be great enough so that the employee will always earn at least the minimum wage for all hours worked during a workweek.

Second, if the employee works any portion of the workweek he must receive his full salary no matter how few or how many hours he works during the workweek. For example, if an employee who has exhausted his sick leave bank works on the first day of the workweek is out ill for the remainder of the week he is still entitled to his full salary for the week.

While most employers would prefer not to have to pay salaried employees any additional money when they work overtime, this pay plan provides a method that can comply with the FLSA without incurring such a large cost. Please contact us if you have further questions.

DID YOU KNOW . . .

. . . that the number of charges filed last year with EEOC increased by 4,500 to 84,500 compared to 2001? Approximately 35.4% of the charges alleged race, 30.2% alleged sex, 10.7% national origin, 23.6% age, and 19% disability discrimination. The EEOC backlog is the lowest that it has been in 31 years.

. . .that an individual does not have to be disabled to challenge an employer's medical inquiries? *Karraker v. Rent-A-Center, Inc.*, (C.D. Ill, Jan. 8, 2003). The employer conducted pre-employment assessments that included extensive medical questions. Applicants filed a class action alleging among other things a violation of the ADA. The court ruled that under the EEOC Interpretive Guidelines of the ADA, an individual does not have to be disabled to allege that pre-employment inquiries violated the ADA. Remember that questions of applicants which compel applicants to disclose medical information may not be asked until after a conditional offer has been extended to the applicant.

. . . that inaccurate information about an employer on union pickets can be considered defamatory against that employer? *International Union of Operating Engineers Local 150 v. Lowe Excavating Company*, (S.Ct., *cert. denied* Nov. 18, 2002). The sign on the picket stated that the company did not pay its employees prevailing wages and benefits, which is required under certain federal construction jobs. The employer provided the union with information to show that it complied with prevailing wage and benefit requirements, yet the picketing continued. The lower court ruled that information the union communicated publically was defamatory, because the pickets alleged that the company was violating the law, which was untrue.

. . . that the EEOC is developing a pilot program to refer discrimination charges to employers with alternative dispute resolution programs? This program was announced by EEOC chair Cari Dominguez on January 7, 2003. If an individual files a discrimination charge against a company selected by the EEOC for the pilot program, the EEOC will not process the complaint for sixty days to provide the charging party an opportunity to bring the complaint to the employer's internal alterative dispute resolution program. If the matter is resolved under the employer's program, it will be considered binding and enforceable. We suggest that regardless of whether employers establish mandatory arbitration, employers should develop alternative dispute resolution or internal mediation programs so that employees will be encouraged to bring their concerns to the company prior to initiating charge filing or litigation.

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