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:

Compliance with HIPAA Medical Privacy Regulations begins as of April 14, 2003 for health plans with annual receipts of more than $5,000,000. Those plans with annual receipts of less than $5,000,000 have until April 14, 2004 to comply. **Enclosed with this month's bulletin is a "user friendly" question and answer review of HIPAA privacy regulations prepared by Donna Brooks of our firm, whose practice includes HIPAA, COBRA and ERISA compliance and advice.** If you have questions regarding your organization's compliance with these HIPAA regulations, please contact Donna at 205/226-7120.

IMPROPER DOCKING OF PAY MAY NULLIFY WAGE AND HOUR EXEMPTION

Adhering to the principle of "better to learn from the mistakes of others than to make your own," the recent case of *Kennedy v. Commonwealth Edison Company* (C.D. Ill., Jan. 31, 2003) illustrates what employers should not do in pay practices for otherwise exempt employees. The employees in this case earned between $61,000 and $101,000 annually. Comm Ed classified them as exempt from overtime, according to the FLSA's administrative exemption. The court agreed that the employees met the job duty responsibilities for exempt status, but ruled that the employer's pay practices may have nullified an otherwise proper exemption.

The employer's pay practices included docking an employee's pay for time off due to inclement weather when the employee otherwise could not use vacation time. According to the judge, **the threat of a pay deduction because of an uncontrollable absence strengthened the workers' contention that they were not salaried employees as a matter of law.** Furthermore, if employees worked over 40 hours in a week, they received extra compensation based on an hourly rate. According to the court, the additional hourly rate compensation for hours worked beyond the expected 40 hour work week is inconsistent with a salary basis. "The regulations made clear that 'extras' defeat salaried status when their existence is attributable to circumventing the regulatory requirements. There is a critical difference between a 'bonus' [for working long hours] and 'payment for additional hours worked.'"

If an employee qualifies for exempt status based upon job duties, the employer still must adhere to exempt salary pay requirements in order to sustain the exemption. For example, disciplinary deductions of less than a full week are inconsistent with exempt status (although intermittent absences under FMLA may be deducted without jeopardizing exempt status).

COURT LIMITS DEFINITION OF CARING FOR SERIOUSLY ILL FAMILY MEMBER UNDER FMLA

The case of *Gradilla v. Ruskin Manufacturing* (9th Cir. Feb. 14, 2003) involved the question of whether "caring for" a family member with a serious health condition includes accompanying that family member to a funeral. The case arose under the California Family Rights Act, and was analyzed according to FMLA principles.

Gradilla's wife had a serious health condition which necessitated her husband to care for her periodically. Stress worsened the wife's condition, which was heart related and so severe that she awaited a transplant. Her father was killed in an automobile accident and she requested that her husband accompany her to the funeral, because she was concerned that dealing with her father's death would aggravate her heart condition.

Gradilla asked his supervisors if he could leave work immediately to drive with his wife to the funeral. Although Gradilla was ineligible for funeral leave because the leave did not cover a father-in-law, his supervisors granted his request. However, while absent, Gradilla was notified that he needed to return to work for a mandatory overtime day. He missed that day and was terminated.

In rejecting Gradilla's argument that this leave was protected, the court said that **"the purpose and destination of the travel was to travel away from home for personal, not medical reasons . . . the person with a serious medical condition was distancing [her] self from medical treatment."** The court looked to FMLA regulations that defined "caring for" a family member with a serious health condition as including a situation where the family member could not transport herself to the doctor. **The "care for" a family member means that the employee must have "some level of participation and on-going medical or psychological treatment of that condition, either in patient or at home care." However, transportation for reasons unrelated to the medical condition is not covered.** The court added that to reach a different decision would mean that "travel could be for unlimited personal reasons, to any destination, for lawful or unlawful purposes for business or vacation. Courts would then have to decide, in each case, the worthiness of the family member's travel motives. Such a broad scope finds no support in the statute, regulations, or case law." The dissent called the majority decision "uncharitable" and "compassionless conservatism."

EEO TIP: WILL "TELEWORK" WORK FOR YOUR BUSINESS AS A REASONABLE ACCOMMODATION?

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.

Earlier this month to highlight the second anniversary of President Bush's *New Freedom Initiative* (NFI), a detailed plan for the integration of disabled persons into all aspects of American life, the EEOC released a fact sheet containing various guidelines for employers who may be interested in establishing a "Telework" Program for reasonable accommodation purposes under the Americans With Disabilities Act. In substance, Telework (or Telecommuting) is any system or program that allows an employee to perform all or a part of the essential functions of a given job at home or at work, generally, by means of a computer. The ADA requires employers to provide a reasonable accommodation, if requested, to an otherwise qualified employee with a disability. Telework is considered to be a key component of the New Freedom Initiative's strategy for increasing the employment potential of persons with disabilities. According to the EEOC, **"Advances in technology are making telework an increasingly important option for employers who want to attract and retain a productive workforce. For some people with disabilities, telework may actually be the difference between having a job and not working at all."**

Under the ADA, an employer is only required to provide a "reasonable accommodation," not necessarily the one desired by the employee. Telework may benefit both the employer and the employee if it can be established without undue hardship. Moreover, the program can be used for persons with only temporary disabilities who would not be covered by the ADA.

How to determine whether Telework is feasible for

your business. This determination can only be made through an "interactive process" between the employer and the employee. To begin with, the disabled employee must be able to explain why his or her disability might necessitate working at home. The explanation should include some of the specific reasons why the limitations from the disability make it difficult to do the job in the workplace, and how it could be done at home with the same proficiency. Additionally, the parties must make the following determinations:

< **First, the employer and employee must identify and review all essential functions of the job to determine whether any or all of them could be performed at home.** The employer does not have to eliminate any essential functions but could re-assign some of the marginal functions if they could not be performed at home.

< **Second, consideration should be given as to whether there is a need for face-to-face interaction or coordination of the work with other employees, clients, or customers.** If so, a determination should be made as to whether such contacts could be made by telephone, video conference, or by mail. Closely related to this consideration is whether the employee must have immediate access to documents, records, special tools or equipment which would normally be located only in the workplace in order to properly perform the duties of the job. This could be a critical determination as to whether the work could be done at home at all.

< **Third, the parties must determine how the employee's performance will be supervised and the standards by which the work product will be evaluated.**

< **Finally, the employer must determine how frequently an employee should be allowed to work at home.** Should it be for a specific period of time, a month, a quarter or should it be only as may be needed to recuperate from the debilitating effects of the disability? The employer may need to obtain outside medical advice or require a medical statement from the employee's physician to make this determination. In some cases the employee may need to work at home on a part-time or even a full-time basis. A schedule should be developed which meets the needs of both the employer and the employee.

In suggesting the foregoing guidelines the EEOC recognized that "...not all persons with disabilities need, or want, to work at home. And not all jobs can be performed at home, but allowing an employee to work at home may be a reasonable accommodation" which is profitable for all concerned.

OSHA TIP: IGNORING SAFETY . . . CAN YOU AFFORD IT?

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.

"OSHA proposes $416,000 in Penalties Against Construction Company".... "OSHA Cites Iron Foundry for Safety and Health Violations; Proposes Penalties of More Than $1 Million." Such press releases may get attention, but they aren't the primary reason an employer should invest in maintaining an effective safety program. Because it's the right thing to do and avoids the stigma of being branded a poor corporate citizen may also be reasons. **But the most persuasive reason may be knowing that the total dollar costs (or savings) that result from the number of employee injury or illness claims come straight out of company profits. The result may in some cases determine the very viability of an enterprise.**

One needs to know the real costs of accidents and the high correlation of such programs with fewer injury claims to fully appreciate the cost-saving potential of effective safety programs.

What about costs? Injuries alone cost U.S. businesses over $110 billion in 1993. Another source finds that **businesses in this country spend $170.9 billion a year on occupational injuries and illnesses. The National Safety Council says that work injuries cost Americans about $132 billion in 2001.**

The cost of injuries and illnesses is demonstrated in a "Safety Pays" interactive software program on OSHA's website (*www.osha.gov*). This program was developed by OSHA in concert with Argonaut Insurance. It factors in the **direct cost** of accidents, such as worker's compensation covering medical claims and indemnity payments with **indirect costs** (may be as much as 20:1 higher than direct costs) which include equipment damage, interruption of production, accident investigation, repairs and corrections, training and compensating a replacement worker, etc. Taking these into account, along with the company's profit margin and the average cost of an injury or illness, it indicates the surprising amount of sales that would be needed to recoup the cost of a specific injury or illness.

For example, to pay for an accident with a total cost of only $500 would require the following:

* A soft drink bottler would have to bottle and sell over 61,000 cans of soda.

* A bakery would have to bake and sell 235,000 doughnuts.

* A ready-mix company would have to deliver 20 truckloads of concrete.

You may quibble about the numbers, but by any account the cost of work-related injuries and illnesses is huge. There is also compelling evidence that this cost can be dramatically reduced by implementing a safety program that minimizes employee exposures to hazards.

Such evidence may be found in OSHA's Voluntary Protection Program (VPP) which now has over 600 participant worksites. (Additionally, over 200 sites are in state-administered OSHA programs.) This program, begun in 1982 with eleven members, recognizes employers with outstanding safety and health programs. In general, a VPP participant is said to experience over fifty percent fewer injuries and illnesses than an average counterpart within its same industry.

Many VPP members, and other employers, have demonstrated the huge financial payoff for their commitment to safety. For example OSHA points to Lucent Technologies in Lisle, Illinois which had a lost workday case rate in 2000 that was ninety-seven percent below the national average for its industry. Also, a plastic products manufacturer in Texas is said to have spent $1 million to improve the safety program at its facility and saw its lost time injuries drop by forty percent in one year. That reduced the company medical costs alone by sixty percent which covered the outlay for safety improvements.

In addition to reviewing their safety programs and procedures, employers should take a close look at injuries and illnesses and their total costs at least annually. Now is a good time to review this data because the 2002 data should be in. Remember that OSHA recordable cases for the past year should be entered on the OSHA 300A summary sheet and posted from February 1 through April 30."

WAGE AND HOUR UPDATE: UNIFORMS UNDER THE FAIR LABOR STANDARDS ACT (FLSA)

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 there has been considerable publicity of late regarding how uniforms should be treated under the act. For example, the BIRMINGHAM NEWS carried an article regarding Honda Motor Company paying back wages in excess of $1,000,000 to employees in its Lincoln, Alabama plant. The payments were required because Honda failed to compensate these employees for the time the employees spent changing into and out of the uniforms at the plant. With respect to uniforms, there are two specific issues that employers must consider. First, even though the FLSA does not require employees to wear uniforms it does not allow uniforms, or other items which are considered to be primarily for the benefit or convenience of the employer, to be included as wages. **Therefore, if the wearing of a uniform is required by some other law, the nature of a business, or by an employer, the cost and maintenance of the uniform is considered to be a business expense of the employer**. If the employer requires the employee to bear the cost, it may not reduce the employee's wage below the minimum wage or cut into overtime compensation required by the Act.

For example, if an employee is paid an hourly wage of $5.15, the employer may not make any deduction from the employee's wages for the cost of the uniform nor may the employer require the employee to purchase the uniform on his/her own. However, if the employee were paid $5.75 an hour and worked 20 hours in the workweek, the maximum amount the employer could legally deduct from the employee's wages would be $12.00 ($.60 X 20 hours). The employer may prorate deductions for the cost of the uniform over a period of paydays provided the prorated deductions do not reduce the employee's wages below the required minimum wage or overtime compensation in any workweek. Additionally, employers may not avoid FLSA minimum wage and overtime requirements by having the employee reimburse the employer in cash for the cost of such items in lieu of deducting the cost from the employee's wages.

With respect to maintenance and cleaning of uniforms, Wage Hour has established an enforcement policy regarding "wash-n-wear" uniforms that the employee may launder with his/her other clothes. They will accept the payment of $3.35 per week (.67 per day) as an adequate reimbursement to the employee. If the employee is required to have his uniform dry cleaned these costs cannot reduce the employee below the minimum wage. Of course, many employers choose to clean and maintain the uniforms and thereby ensure that it is complying with the FLSA. **As with the cost of uniforms, employees receiving an amount sufficient above the minimum wage to cover the maintenance costs is not required to receive any addition payments.**

The second issue involves the time an employee spends in changing into and out of his uniform. In addition to the Honda investigation, Perdue Farms has paid $10,000,000 to settle a Department of Labor suit regarding clothes changing during the past year. Furthermore, Wage Hour currently has suits pending against two other large poultry processors, Tyson and Georges, Inc. Although both of these are Arkansas businesses, the Tyson suit was filed in Alabama and the George's suit was filed in Missouri as the firms have plants in the areas. There is also some private litigation pending against Iowa Beef Packers (a Tyson subsidiary) regarding the time spent in changing clothes on the premises.

In most situations, employees are allowed to wear their uniforms home. In those instances the time an employee spends changing at home would not be work time as this time is specifically described in the "Portal to Portal" Act as noncompensable "preliminary or postliminary" activities. The current litigation involves situations where the employees were required to change their clothes at the company facilities but were not compensated for this time. When employers require the changing of clothes on the premises, Wage Hour contends that these activities are no longer "preliminary or postliminary" activities but are an integral part of the employee's job and therefore, the employee must be paid for this time.

There is one circumstance where the changing of clothes on the premises of the employer is not considered as work time. That is where there is a Collective Bargaining Agreement (CBA) in effect at the plant that addresses the issue. Section 3(o) of the FLSA states that "...there shall be excluded any time spent in changing clothes or washing at the beginning or end of each workday which was excluded from the measured working time ... by the **expressed terms of or by custom or practice under a bona fide collective-bargaining agreement applicable to the particular employee."** Thus, if a CBA states that the clothes changing time is not compensable, the employer is not required to pay for this time. Further, at least one court has ruled that such time was not compensable even though the CBA was silent regarding payment for this time. The court stated that the employees continuing to work under the contract without raising a question has established a custom or practice of not considering the time spent changing uniforms as work hours.

The situation where I see that employers have the greatest potential liability is where there is no CBA in effect and the employees are required to change clothes on the premises. There are certain circumstances where employers believe, for cleanliness, safety or other reasons, that the employee must change clothes on the premises. However, in doing so, employers may be obligating themselves to compensate the employees for this time. It is my understanding that Honda has chosen to no longer require employees to change clothes on the premises and thereby relieved themselves of the requirement to compensate employees for this time.

Employers that require employees to change into uniforms on the premises should review their pay policies related to the time spend in changing clothes to ensure they are properly compensating their employees for all hours worked as required by the FLSA.

DID YOU KNOW . . .

. . . that the U. S. Labor Department is proposing to increase child labor violations from $11,000 to $50,000? This penalty would occur if children were working at hazardous jobs. Repeat violations would cost $100,000 under the DOL proposal. For Fiscal Year ending September 30, 2002, DOL collected $5.5 million for child labor violations involving 10,000 workers.

. . .that legislation was introduced on February 5, 2003 to expand coverage under the FMLA?. The bill was introduced by Senator Dodd (D - Conn), and would provide for six weeks of paid leave for a sick family member, birth or adoption, lower the threshold of coverage from 50 employees to 25 employees and permit up to 24 hours a year to be used for parent teacher conferences.

. . . that legislation was introduced to amend the Fair Labor Standards Act to permit "comp time" for private sector employees? Introduced on February 5, 2003 by Senator Gregg ® - NH), the bill would permit employees to have the choice of taking time off instead of receiving overtime pay. According to labor secretary Chao, Gregg's bill "is another significant step toward helping working people better balance their work and home lives." This bill and Dodd's bill were introduced on the tenth anniversary of the FMLA. The FMLA-relatedness of Senator Gregg's bill is that comp time may be a preferred choice for employees to deal with serious health conditions of a parent, child or spouse.

. . . that OFCCP has issued an administrative complaint against Whirlpool based upon a pre-employment test that it says has a disparate impact against minority applicants? The case was filed on February 10, 2003. Applicants are required to take a "Test of Adult Basic Education." OFCCP alleges that the test has a discriminatory impact based upon race and is not job related or consistent with business necessity. Whirlpool commented that the test is validated, widely used and in fact is even used by the United States Department of Labor. OFCCP is seeking debarment from federal contracts, back pay, retroactive seniority and lost benefits.

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