EMPLOYMENT LAW BULLETIN

THE NEWSLETTER OF LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

"YOUR WORKPLACE IS OUR WORK"

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TO OUR CLIENTS AND FRIENDS:

The 24/7 live news coverage of the war in Iraq raises questions regarding how employers should handle employee interest in discussing or eliciting radio updates regarding the war. Employees who discuss the war during work time or listen to war reports periodically on the radio do not create legal issues for employers to consider. Rather, employers need to be tolerant of employee needs to discuss the war with coworkers or occasionally listen to updates during the workday. **The war, particularly when combined with uncertain markets and job security fears, adds to the anxiety many feel in their daily lives. The opportunity to discuss these events with coworkers or occasionally check the news during the course of the workday is a helpful outlet for many to deal with the concerns of our times.**

Employers should try to balance work expectations with the need for some employees to vent or discuss their concerns with others. Employees should be provided with a sense of confidence that it is acceptable to talk about these matters at work. For those employees who appear to have a particularly difficult time coping with the heightened stress of these times, counsel the employee about the availability of the company's employee assistance program or community resources the employee may seek for counseling and guidance.

MAJOR EEOC RESTRUCTURING IN THE WORKS

The National Academy of Public Administration ("NAPA") was created by Congress to improve the delivery of services provided by governmental agencies and departments. At the request of the EEOC, NAPA conducted a major review of the EEOC's national headquarters and 51 field offices operations. Concluding that the EEOC's structure has remained essentially unchanged throughout its 38 year history, NAPA recommended the following changes to streamline and improve the efficiency of the Agency:

1. **The EEOC should establish a national call center throughout the country**, where a highly trained staff will accept calls from charging parties and employers seeking guidance. Currently, such calls are received at the 51 field offices with inconsistent guidance and recommendations from each office.

2. **Provide for electronic charge filing**. Currently, the EEOC will typically conduct an interview of the charging party at its offices or occasionally over the phone to process the charge. According to NAPA, "Internet-based charge processing would be less expensive than office based interviews . . . Even though EEOC will always maintain some face-to-face charge taking, the more initial contact that can be made via phone or internet, the more time investigators will have for follow-up work and investigation."

3. **The EEOC should consolidate its offices**. "The Commission does not need 51 traditional field office locations to fully serve employers and employees in the private and public sectors." Instead, the EEOC

should establish full service offices where there has historically been a high level of charges filed at that office, and based on demographic and immigration patterns.

EEOC chair Cari Dominguez stated that the Commission will implement several of the recommendations during the next few years. She has appointed an internal task force of representatives from headquarters and some of the 51 field offices to review the recommendations and proceed to implementation.

The change of greatest concern to us is whether filing a charge will be as easy as transacting business at an ATM machine. The EEOC needs to maintain an effective screening process so that potential charging parties realize the significance of claiming that their employer violated the statutes within the EEOC's jurisdiction.

GOOD NEWS - BAD NEWS FOR ORGANIZED LABOR: YES, THEY ARE WINNING MORE ELECTIONS, BUT MEMBERSHIP DECLINES AS FEWER ELECTIONS ARE CONDUCTED

According to the AFL-CIO, total union membership declined by almost 73,000 in 2002 from 2001. The AFL-CIO bases its figures on the per capita tax paid by local union members to those international unions belonging to the AFL-CIO.

The unions that lead the way with declining membership were:

	Members lost
C Steelworkers	50,412
C Machinists	44,647
C UAW	40,23
C UFCW	24,008
C PACE	22,167

The unions that grew in membership last year were:

	Members gained
C American Federation of Teachers	53,712
C American Federation of State, County and Municipal Employees	24,966
C Bricklayers and Allied Craftworkers	20,991
C Service Employees International	14,479

	Members gained
C Transport Workers	12,667
C International Federation of Professional and Technical Engineers	10,537

In an effort to provide enhanced AFL-CIO union participation in the organization's direction, AFL-CIO president John Sweeney created an AFL-CIO Executive Committee. This committee is comprised of the president, vice president and secretary/treasurer of the organization, presidents of its ten largest union members and presidents of seven other union members who will rotate. The executive committee will function like a board of directors, advising the officers regarding strategic and financial commitments to enhance union membership. **John Sweeney knows that, at this time, no legislation will be passed in Washington with an outcome to enhance union organizing. If his organization is to capitalize on its election win rate and increase the number of elections, the work to bring that about will be done at your workplace, not in the halls of Congress.**

EEO TIP: EMPLOYER RESPONSIBILITIES TO MEMBERS OF THE UNIFORMED SERVICES

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.

Given the normally high degree of patriotism exhibited by most employers in connection with this country's involvement in the war with Iraq,

it was surprising to see an article in the March 20, 2003 issue of USA TODAY with the headline**: *Reservist says company fired him due to military commitments.*** According to the article, a dispute, resulting in a lawsuit, arose between an employee and his employer, an auto parts company, concerning the amount of time being spent by the employee in fulfilling his duties as a reservist. Without going into the merits of this particular case, it might be a good time to summarize the basic rights and responsibilities of employers under the **Uniformed Services Employment and Re-employment Rights Act of 1994 (USERRA).** In substance the act covers members of the Armed Forces, National Guard, Army National Guard, Air National Guard, and the commissioned corp of the Public Health Service or any other designated service or group.

Purposes of the Act. The purposes of the act are:

(1) To encourage non-career service in the uniformed services by eliminating or minimizing the disadvantages to an individual's career or employment resulting from such service;

(2) To minimize the disruption in the lives of persons who serve in the uniformed service, as well as, to their employers and fellow employees by providing for prompt re-employment upon completion of their service; and;

(3) To prohibit discrimination against persons because of their service in one of the uniformed services.

Coverage. Virtually all employers, both public and private, are subject to the Act regardless of size. By the same token all employees are covered. However, employees hired into temporary positions may not be entitled to the re-employment rights granted under the Act.

What Employers are Required to Do

Upon timely notification an employer must grant an employee military leave for active or inactive duty training or to report for active duty, itself. Advance notice should be presented in writing but may be presented orally in an emergency. Under USERRA, such leave can be extended for up to five years on a cumulative basis. The act provides for numerous exceptions and/or exclusions from the cumulative five-year limitation (including service during times of war).

Likewise, upon timely notification an employer is obligated to re-employ an employee who has been granted military leave and place him or her in a ***"position of like seniority, status and pay" that the employee would have attained or occupied, but for the military leave. In the case of an employee who has incurred or aggravated a disability while serving in the uniformed services and is unable to perform his/her former job, the employer is obligated to provide a job which is nearest in approximation in terms of seniority, status and pay which reasonably accommodates the employee under the circumstances.***

Employers are required to continue certain fringe benefits, such as health insurance, to employees on military leave for up to 30 days and on an extended basis in certain circumstances. Also upon reinstatement, an employer must allow a reservist to catch up on payments into pension plans or investment accounts administered on behalf of its employees. Where necessary an extension of time (up to three times the normal period) must be given to the reservist to make up the missed payments.

What Employers Are Not Required to Do

Although they may chose to do otherwise, an employer is not required under USERRA to continue to pay employees on military leave.

An employer does not have to leave a position vacant because of an employee's military leave. However, an employer must be aware of its re-employment obligations under the act.

Some Pitfalls to Avoid

In interviewing applicants for employment, avoid any questions that would indicate a bias against military service, or any questions designed to highlight one's potential status as a member of the uniformed services subject to recall. Avoid any personnel actions which

might be considered retaliatory because of the employee's status as a reservist or member of the uniformed services. For example a failure to promote or train because one's reservist status. Additionally, public and quasi-public employers should be aware that they might have additional obligations under applicable state laws.

OSHA TIP: OSHA TARGETS FALL HAZARDS

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.

Confined spaces, ergonomics, sick building syndrome, robotics, lockout-tagout, and the like, have drawn varying degrees of attention. But through it all, workplace injuries resulting from falls have consistently been a focus of OSHA.

The continuing high number of fatalities in construction work keeps that industry a principal target of OSHA's inspections. About 40% of workplace deaths are in construction and about one-third of these are a result of falls.

Fall hazards and resultant injuries are by no means limited to the construction industry. **The National Census of Fatal Occupational Injuries listed falls as the third leading cause of job-related death in 2001, behind transportation and workplace violence incidents. It also found a ten percent increase over the year 2000 which reflected the highest total since the census began in 1992**. Such incidents range from falls of hundreds of feet from communication towers to a fall from the bottom step of a step ladder.

Falls from zero elevation due to slips and trips also take a tremendous toll. Falls on stairs, for instance, have been said to result in over 30,000 serious work injuries a year. Many back injuries may be attributable to falls due to slipping on walking surfaces.

OSHA's ongoing emphasis on fall hazards may be seen in its press releases which the agency uses to highlight, among other things, target enforcement issues and problems. No fewer than six times in the past few weeks, press releases posted on OSHA's website recount citations issued to various employers with thousands of dollars in penalties for fall hazards at their work sites.

OSHA has numerous standards in both construction and general industry that address fall protection. These include standards that are among the most frequently cited by the agency each year. A few examples of these are as follows:

>29 CFR 1910.23(c)(1) "Every open sided floor or platform 4 feet or more above adjacent floor or ground level shall be guarded by a standard railing..."

>29 CFR 1910.22(a)(1)"All places of employment, passageways, storerooms, and service rooms shall be kept clean and orderly..."

>29 CFR 1926.501(b)(1) "Each employee on a walking/working surface (horizontal and vertical surface) with an unprotected side or edge which is 6 feet (1.8 m) or more above a lower level shall be protected from falling..."

>29 CFR 1926.503(a)(1) "The employer shall provide a training program for each employee who might be exposed to fall hazards..."

The agency also uses the General Duty Clause to cite employers for fall hazards not covered by a specific standard. Examples of recent such citations include the lack of fall protection while standing on a tank in one case and on the back of a golf cart in another.

The foregoing should underscore the importance of addressing fall hazards while conducting work site

inspections. You should ensure that ladders are in good condition, stairways have handrails, mezzanines and work platforms that are four or more feet high and open-sided floors are equipped with guardrails. Also, take measures to eliminate slippery conditions on stairs and other walking surfaces.

Diligence in attending to these type of conditions can ward off OSHA citations and, more importantly, prevent costly injuries.

FAMILY AND MEDICAL LEAVE ACT UPDATE

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.

The Wage and Hour Division of the Department of Labor is responsible for compliance issues regarding the Family and Medical Leave Act ("FMLA"). However, an individual does not have to file a complaint with DOL before filing a lawsuit.

The FMLA is now ten years old, having been signed into law in February 1993. As with any new statute, that has been much litigation regarding the application of the law in certain situations. In some instances the employer has prevailed while in other situations the employee has prevailed.

Listed below are results of some recent decisions that may provide you will some guidance regarding how you should treat employees who may be entitled to FMLA leave.

1. Many employers are now having employees being called to military duty. The Department of Labor (DOL) has issued an enforcement policy regarding the employee's eligibility for FMLA leave. They have taken the position that the time the employee spends on military duty counts toward the work hours that the employee must have to be eligible for FMLA leave. For example, for an employee who only worked 840 hours in the 12 months prior to requesting FMLA leave but was also on military duty for 31 weeks, DOL says that the 1240 hours (31 weeks X 40 hours) of military duty must be added to the 840 the employee actually worked to determine eligibility for FMLA leave. As the combined total is well over the 1250 hours required by the statute, the employee is eligible for FMLA leave.

2. Last year the U. S. Supreme Court ruled that an employer's failure to notify an employee in writing that time the employee took off for a serious health condition did not entitle the employee to more than 12 weeks of leave during a 12-month period. **While this decision invalidated some of the DOL regulations, the court did not invalidate the portion of the regulation that requires employers to notify employees that their leave will be considered FMLA leave**.

3. In another case a U. S. District Court issued an opinion regarding whether accrued but unused vacation time can be converted when determining if an employee has worked the necessary 12-months to be eligible for FMLA leave. The employee began work January 17, 2000 and left work, for health reasons, January 5, 2001 with two weeks of unused vacation time remaining. The court held that the vacation time could be counted toward the 12-month requirement and therefore, the employee was entitled to FMLA.

4. In a ruling that favored the employer a court held that vacation and holiday hours did not count toward the 1250 hours that an employee must have worked to be eligible for FMLA leave. The court held that only the hours actually worked should be counted.

5. An Alabama federal district court ruled for the employer where an employee was terminated while on FMLA leave to care for his gravely ill father. While the employee was on FMLA, leave the employer learned that the employee had actually taken a camping trip. The court held that the termination was based on the employer's good faith belief that the employee wasn't using the leave for its intended purpose. Therefore, the termination did not interfere with the employee's FMLA rights nor did the employer retaliate against the employee for exercising his FMLA rights.

6. The Eighth Circuit ruled that an employee was entitled to job reinstatement though he could not perform 100% of his job functions. The employee took FMLA leave for a degenerative disk condition and was certified to return to work with lifting limitations but the employer refused to reinstate the employee. At the trial the employee presented evidence that heavy lifting was not an essential job function. In its ruling, the court stated that the Act requires only that the employee demonstrate that he can do the "essential functions" of his former job, not that he's at 100% capacity.

As shown above there has been considerable litigation under the FMLA with the courts ruling both for and against employers. There is no sign that FMLA is going away. Earlier this year the U. S. Supreme Court heard arguments in a case against the State of Nevada where an employee brought suit under the FMLA. Depending on the Court's ruling in that case, there could be additional litigation filed against state governments.

It is my understanding that DOL is presently reviewing its FMLA regulations and is considering some substantial revisions. Furthermore, there are also bills pending in Congress to amend the act. However, meanwhile, employers should diligently try to ensure that they are complying with the FMLA. I recommend that employers review their Employee Handbook to be certain that it contains information regarding the FMLA; establish a procedure where the Human Resources Department is made of aware when an employee requests (takes) leave that may be covered by the FMLA so that timely written notices may be provided to employees; and provide training for managers and supervisors regarding the requirements of the FMLA.

If you have questions regarding the proper application of the FMLA please call our office.

AND YOU THOUGHT A LEASED EMPLOYEE WAS NOT YOUR EMPLOYEE

The case of *Piano v. Ameritech/SBC,* (N.D. Ill, Feb 5, 2003) involved a 51 year old temporary services employee who was assigned to work at an Ameritech location. She alleged age and sex discrimination, because other temporary employees who were male and younger received opportunities to become regular Ameritech employees and she did not. The company argued that it was not her employer under Title VII and the Age Discrimination in Employment Act.

In determining whether Ameritech, the temp agency or both were Piano's employers, the court considered whether Ameritech had "supervision and control" over Piano. According to the court, **"The joint employer theory should apply in cases in which an individual is employed by a temporary employment agency, but suffers discrimination by the employer to which he or she is assigned, when that employer exerts a significant amount of control over the individual**. Failure to apply the joint employer theory in this context would permit an employer that would otherwise be subject to Title VII's constraints to avoid liability for discrimination while maintaining total control over the work of its employees, merely by hiring them through agencies in a temporary capacity. Such a result would ill-serve the remedial purposes of the anti-discrimination statutes." The court concluded that Ameritech was a joint employer based upon the following facts:

- Ameritech had sole responsibility for directing Piano's work and supervising her.
- Ameritech assumed responsibility for shifting Piano from one job classification to another, thus also indicating substantial control over her work.

- Ameritech trained her in conjunction with the temporary service.
- Ameritech set or approved her hourly rate proposed by the temporary service.

The court determined that the temporary service employer's placement of Piano at Ameritech, recording her absences and counseling her regarding absenteeism was not sufficient exclusive control to preclude Ameritech from becoming a joint employer. Accordingly, the case was able to proceed against Ameritech and the temporary service.

Employers are less likely to be considered joint employers with a temporary service when a particular function is contracted out, rather than placing temporary employees in the same or similar job classifications as regular employees. For example, if an employer decides that maintenance services will be provided by a maintenance contractor, then those employees will likely be the contractor's employees, exclusively. However, if an employer supplements its existing maintenance employees with maintenance employees from an agency, then the employer is more likely viewed as a "joint employer" under the laws prohibiting discrimination as well as the National Labor Relations Act.

DID YOU KNOW . . .

. . . that a former employee on March 7, 2003 was awarded $7.8 million for age discrimination? *Sadowski v. Phillips Medical Systems*, (Cuyahoga Ct., OH). Sadowski was a 54 year old engineer when he was terminated as part of a reduction in force in 2000. He applied for six other job openings within the company, and was offered none of them. The company policy stated that those employees who are part of a RIF receive priority in filling other vacancies. The three employees who were terminated in Sadowski's department were age 54 or older. A 23 year employee, Sadowski had received regular merit increases and promotions.

. . . that on March 19, 2003 an employer paid $1.1 million to settle a harassment case brought by the EEOC on behalf of Muslim employees? *EEOC v. Herrick Corporation, d/b/a Stockton Steel*, (E.D. Cal.) The four employees were repeatedly harassed due to their religion and national origin. Their supervisor called them derogatory names such as "camel jockey" and "rag head." The employees were ridiculed regarding their prayer obligations and denied promotion opportunities. In addition to the financial settlement, the agreement imposed a discipline structure on supervisors who engage in religious or national origin harassment, established an annual one hour training program for all employees on equal employment opportunity, and imposed discipline on non-supervisory employees who engage in similar behavior.

. . . that Pepsi agreed to a $17 million wage and hour settlement on March 12, 2003? *New Jersey Department of Labor v. Pepsi-Cola Company*. The case involved delivery drivers who were classified by the company as exempt outside sales people. They obtained orders from customers and made sure that customers' shelves were fully stocked with Pepsi products. However, unlike true outside sales people, they did not make initial sales. Therefore, the 700 current and former employees were improperly classified as exempt and owed $6 million of overtime. The New Jersey Department of Labor also charged $8 million in penalties and fees and ordered Pepsi to pay $3 million to cover the attorneys fees for the 700 employees.

. . . that a Republican Congressman agreed to return campaign donations to the Teamsters because his comments were critical of unions? Representative Joe Wilson (R-S.C.) received $8,300 in campaign contributions from the Teamsters and other labor political action committees. Wilson stated that union dues helped to support "violent organizing drives and a limousine lifestyle for union bigwigs." These comments were made in a solicitation distributed by the National Right to Work Committee. Teamster President Hoffa thought that Wilson "had moved beyond the sort of petty politics that lead our members to believe the republican is anti union."

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