EMPLOYMENT LAW BULLETIN

THE NEWSLETTER OF LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.
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TO OUR CLIENTS AND FRIENDS:

In the early morning hours of June 23rd, the U.S. Supreme Court announced that it had approved an affirmative action formula for admissions used by the University of Michigan law school. Later that same morning, in a different case also involving the University of Michigan, the Court struck down the university's affirmative action program at the undergraduate level as unconstitutional.

In the first case, the Supreme Court approved of the law school's admissions policy which allowed admissions officers to examine the "whole" candidate when considering him or her for admission — including the candidate's race, among other things. In the second case, the Supreme Court said that it was unconstitutional for the school to use a rigid, mathematical formula which considered race in its admissions process. This, the Court said, was the equivalent of using a quota system, because it was inevitable that some applicants would ultimately be admitted to the school because they received extra admissions points because of their race.

Although these cases exclusively addressed admissions and scholarship programs in an educational setting where the standards allowed consideration of race, it is certainly foreseeable that these decisions could have an impact in other areas, including the employment setting, in the public sector (such as in the military and police and fire departments, where race may be used as part of hiring or promotion criteria).

Although the decisions are not directly applicable in the private sector, the Supreme Court sent a clear message recognizing that there is value in diversity — i.e., if diversity is good for schools, it is also good for businesses and other aspects of society. These opinions figuratively pat employers on the back who have "diversity policies"and recognize the value of diversity in the workforce.

However, these opinions also serve as a warning to employers who seek to achieve their diversity goals using quotas. Employers' diversity goals should continue to reflect the available work force, but should not set aside a specific number of jobs or promotions for employees exclusively because of their race or gender. Further, employers must refrain from basing employment decisions on race or any other protected characteristic for the purpose of creating diversity.

Our firm's EEO consultant, Jerry Rose, has counseled with numerous local, regional and national employers regarding diversity issues. Jerry has presented seminars and provided training initiatives regarding diversity awareness and the value of diversity in the workplace to these clients. Jerry or any of the other attorneys in our office would be happy to discuss diversity issues and/or diversity training for your workplace.

DOL PROPOSES REVISIONS TO COBRA NOTICE REQUIREMENTS

Proposed revisions to the content and timing of COBRA notices were issued on May 27, 2003 by the United States Department of Labor, Employee Benefits Security Administration. The proposed revised regulations would become effective on the first day of the first plan year occurring on or after January 1, 2004. DOL estimates that "up to 50,000 of those eligible for COBRA may miss the opportunity to take the coverage because they did not obtain notices required by the law."

The proposed notice revisions include the following:

- Notices would be issued to qualified individuals within

90 days after coverage. Providing the summary plan description to qualified individuals will be considered sufficient notice.

- Employers would be required to notify plan administrators of employment-related qualifying events within 30 days after the event occurred. Employee or family member notification to the plan administrator for other qualifying events such as divorce, loss of dependent status or legal separation would be required within 60 days of the qualifying event.
- The plan administrator would have to issue the COBRA election notice within fourteen days of notification of the qualifying event.
- The qualifying notice would be required to describe the plan options, payment requirements, consequences if the individual fails to elect COBRA coverage and circumstances when COBRA coverage may be extended.

"GOOD-BYE FOREVER" WAIVER AND RELEASE MAY INCLUDE FMLA CLAIMS

The Department of Labor FMLA regulations state that "employees cannot waive, nor may employers induce employees to waive, their rights under FMLA." The case of *Faris v. Williams WPC - I, Inc.*, (5th Cir. May 27, 2003) substantially limited the impact of that DOL regulation.

Upon termination, Faris was offered one month's pay in exchange for signing a "good-bye forever" release. The release did not specifically include reference to FMLA rights. Faris took the money and sued, claiming that she was retaliated against for using FMLA protected leave. The court upheld the release as broad enough to cover FMLA claims.

In ruling that FMLA rights may be waived, the court of appeals stated that FMLA rights that may not be waived are the employee's right to use FMLA protected leave. However, the employee may waive the right to sue. According to the court, "our reading of the regulation is bolstered by public policy favoring the enforcement of waivers and our knowledge that similar waivers are allowed in other regulatory contexts." The court stated that the regulation applies to use of FMLA by current employees, not the waiver of the right to sue over FMLA by a terminated employee.

FREE SPEECH NOT SO FREE

An employee refused to remove from his tool box a sticker of the Confederate flag, after an African-American employee, per the provisions of the company's harassment policy, notified the company that the sticker was offensive to him. The company's harassment policy provides that harassment "may take many forms, including visual conduct such as derogatory posters, cartoons, drawings, or gestures." The company met with Dixon, the employee with the sticker, and asked him to remove the sticker. The company explained why the sticker violated its harassment policy. Dixon refused to remove the sticker. The company offered to buy him a new tool box which he could use at work and thus keep his Confederate flag tool box at home. He refused this request and was terminated. The Fourth Circuit Court of Appeals ruled that Dixon's display of the Confederate sticker was not protected free speech. *Dixon v. Coburg Dairy, Inc.*, (4th Cir. May 30, 2003).

The court stated that the right to "fly the Confederate flag" that one may enjoy as a citizen does not extend to "his employer's privately owned workplace." The court explained that the company had a legitimate concern that permitting Dixon to maintain the flag could expose the company to risk of a Title VII race discrimination or harassment claim. The court noted the efforts the company made to try to resolve the matter. According to the court, **"In an effort to keep conflict among its employees at a minimum, in order to preserve a harmonious and efficient work environment, and in order to avoid any potential liability under federal anti-discrimination laws, Coburg asked that Dixon save his political statements for after work. Never did Coburg suggest that Dixon could not speak out about his views on the Confederate flag. Instead, Dixon's employer merely insisted that he voice those view points in a manner that would be less likely to**

goad one of his co-workers in an emotional confrontation. This is surely a substantial and legitimate interest that supports Coburg's actions."

"Free speech" includes verbal communications, written materials and other expressions of an opinion or belief. A private sector employer has the right to limit those expressions, unless those expressions are protected under a state or federal statute (such as the right to speak up about safety, discrimination or harassment). Examples of free speech that private sector employers may prohibit include offensive bumper stickers on employee vehicles in the company parking lot, offensive or graphic T-shirts, caps or other clothing, or other means of communicating messages the employer considers offensive or inappropriate. Public sector employees have constitutional free speech protection in the workplace, where their employer has few rights to limit free speech.

DOT TAKES STEPS TO PREVENT EMPLOYEE ALTERATION OF DRUG SAMPLES

It is estimated that as many as 25% of employees who are tested by their employers for drugs and alcohol try to avoid the detection of drugs in their urine by adulterating or diluting their urine, or by substituting their urine with another substance. The DOT standard tells labs to consider specimens to be diluted, adulterated, or substituted if the level of a naturally-occurring substance called creatinine is less than a certain amount and the "specific gravity" (the ratio of solids to liquids in the sample) is less than a certain amount. **New medical information tells the DOT that its original standards for assessing urine samples do not adequately consider variations in body chemistry, which may have caused some drug tests to yield "false positive" or "substitute sample" findings among tested employees. To address these issues, the DOT has taken the interim step of requiring medical review officers (MROs) to direct employers to immediately recollect specimens from employees whose previous sample yielded a low creatinine and specific gravity level.** The new specimen is to be collected "under direct observation" and "with no advance notice" by the employer. This step is meant to provide the maximum margin of safety for employees who naturally produce low levels of creatinine from being reported to their employers as having substituted or diluted their specimen.

The amended rule will mostly be an issue for MROs, who will need to take care to properly instruct employers with regard to recollection of samples when testing indicates that it's necessary. The rules regarding the procedures for collecting specimens "under direct observation" remain unchanged.

EEO TIP: THE EQUAL PAY ACT AND WHAT ITS ALL ABOUT

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.

On June 10, 1963 the **Equal Pay Act (EPA)** of 1963 was signed into law by President John F. Kennedy. Earlier this month various Civil Rights agencies and organizations observed the fortieth (40^{th}) anniversary of the act, hailing it as the forerunner of a series of dynamic federal anti-employment discrimination laws which followed shortly thereafter, including Title VII of the Civil Rights Act of 1964, and the Age Discrimination in Employment Act of 1967. **In substance, the EPA prohibited discrimination on the basis of sex in the payment of wages or benefits where men and women perform work requiring equal skill, effort and responsibility under similar working conditions in the same establishment**.

According to the EEOC, when it was enacted in 1963, the EPA was intended to close the compensation gap between males and females in the workplace. Proponents of the Act estimated that women were paid on the average **fifty-nine cents (.59)** for every **dollar ($1.00)** earned by males who were performing the same work. Since 1963 women have climbed many rungs up the corporate ladder of leadership and now occupy CEO and other top corporate

positions which were once dominated by males. However, there is still a strong sentiment that most females must break through an invisible "glass ceiling" which blocks their upward mobility into the highest echelons of corporate America.

After its enactment, the EPA was enforced by the Department of Labor along with other statutes under the Fair Labor Standards Act. However those enforcement responsibilities were transferred to the Equal Employment Opportunity Commission (EEOC) under the Reorganization Act of 1979. Thus, since 1979 the EEOC has enforced both the EPA and Title VII of the Civil Rights Act of 1964. Title VII of course specifically prohibits any form of sex discrimination in the workplace. Given the broad scope of Title VII to protect against sex discrimination, many questions arise as to whether the Equal Pay Act is still necessary. Depending on one's point of view, there are both positive and negative answers to that question.

The EPA is arguably one of the most powerful weapons against sex discrimination in the federal government's statutory arsenal, and yet it is probably the least understood in terms of its scope. For example, it is not generally known that the jurisdiction of the EPA extends to employers with as few as **two** (2) or more employees. In contrast Title VII only covers employers who have **fifteen (15)** or more employees. Thus, many more small employers are covered by the EPA than are subject to Title VII.

Also, as stated above, the EPA prohibits discrimination on the basis of sex in the performance of work requiring equal skill, effort and responsibility performed under similar working conditions in the same establishment. But the question is: how does case law define each of those terms? What constitutes equal skill, equal effort, and equal responsibility? And what constitutes similar working conditions and the same establishment? In a series of articles to follow an attempt will be made in this column to explain how the provisions of the Equal Pay Act interface with similar, related provisions of Title VII. Additionally an effort will be made to define and simplify the operative terms of the EPA mentioned above.

There are many interesting aspects of the Equal Pay Act which will be covered in the next series of articles. For example did you know that:

- An employee may sue an employer under the EPA without filing a charge of discrimination with the EEOC.
- The EEOC can investigate for a possible EPA violation even though no charge has been filed with it.
- Unlike Title VII's requirement that a violation must be acted upon within 180 days, an EPA violation can be actionable up to two years, and possibly three years if it is a "wilful" violation.
- Virtually all employers engaged in some form of "interstate commerce" are subject to the EPA.

These are but a few of the matters under the EPA that will be explored in upcoming articles. Given the long reach of the EPA to almost all employers, it is imperative that employers become knowledgeable about its basic provisions. Next month we will begin with some practical definitions of the operative terms: equal skill, equal effort, equal responsibility, similar working conditions and what is meant by the term "establishment."

OSHA TIP: USING BIG STICK TO MEET NEW GOALS

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.

While OSHA continues to forge cooperative alliances, its use of the "stick" (large penalties, negative press, etc.) will continue to be evident along with the carrot. As an example, a recent agency press release identified an employer whose alleged failure to train employees and test the air in a confined space resulted in a proposed penalty in excess of $198,000. An earlier media account related how a construction accident had led to a fine of $224,000. Use of such punitive measures is thought necessary to get the attention of many employers who might not otherwise give worksite safety a high priority. Although injury and illness

rates have shown a downward trend, continued pressure is prescribed to maintain that direction.

In May, the agency announced its new strategic management plan goals for the years 2003-2008. First on the list was "reduce occupational hazards through direct intervention." A primary goal is to reduce workplace fatalities by 15% and workplace injuries and illnesses by 20% by the year 2008. The plan will state incremental goals for each of the intervening years.

OSHA will continue to try to go where the problems are in scheduling its inspections of workplaces. This month, the agency announced its inspection plan for 2003. This plan will continue its site-specific targeting approach that will take inspectors to those sites with reported high injury/illness rates. In addition to these targeted inspections, special emphasis programs will result in inspections of industries or work processes where particular hazards and/or high injury rates are known to exist. An example is the existing nursing home inspection emphasis program, which will continue.

In March of this year, Secretary of Labor Chao announced OSHA's "Enhanced Enforcement Policy." She noted that "while the majority of employers consider the health and safety of their employees a priority, there are some who continually disregard their very basic obligations under the Occupational Safety and Health Act." She stated that this policy was meant for them. OSHA Administrator Henshaw said that "this policy will focus on the high gravity violators and will put more tenacity and teeth in our enforcement practices."

Key features of the Enhanced Enforcement Policy are as follows:

(1) OSHA will normally conduct on-site follow-up inspections at workplaces that receive an OSHA citation with "high gravity willful violations, multiple serious violations of this nature, repeat violations at the originating establishment or a serious violation related to a fatality." Although past agency guidance has proposed that follow-up inspections be conducted for certain citations, federal OSHA has not historically made a very high percentage of follow-up visits. Presumably this policy could increase the number of such inspections.

(2) OSHA will begin to record the name of the overall corporate entity in all inspections and the names will be searchable in the agency's data system. They will then prioritize all facilities on their inspection lists under the corporate identity that received high gravity violations. These sites will receive comprehensive inspections after the citations have become final orders.

(3) Require employers, when entering into settlement agreements involving high-gravity violations, to agree to a number of specified items, such as applying the agreement corporate-wide and reporting future serious injuries to OSHA.

(4) Will apply to federal courts to enforce citations under Section 11(b) of the OSH Act. Where such an order has been entered and the employer still does not comply, OSHA will seek contempt of court sanctions. Heretofore, use of Section 11(b) by the agency has been relatively rare.

WAGE AND HOUR TIP: WHAT TO EXPECT WHEN WAGE AND HOUR CALLS

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.

Although the chances are very small, since Wage Hour only has staff to investigate 1-2% of firms in a given year, you may be one of the "lucky" ones and be scheduled for an investigation by Wage Hour. First, you should understand that Wage Hour has the authority to investigate any employer they choose and are not required to disclose the reason for the investigation.

However, nearly all investigations are conducted because Wage Hour has received information that the employer may not be paying employees correctly, Wage Hour has received information that the employer is employing minors contrary to the child labor requirements or the employer is in a "targeted" industry. Investigations vary in length due

to several factors such as the size of the business, complexities of the firm's pay plan and schedules of both the employer and the investigator. Some investigations may be completed in a day while others may take months.

Wage Hour also has an informal procedure where they will phone (or write) an employer stating that an employee has alleged he/she was not paid properly. They ask the employer to look into the allegation and report back to them. If the parties can resolve the issue through this "conciliation" process Wage Hour will not visit the establishment and conduct a full investigation. If the problem is related to a group of employees or a department, in many instances Wage Hour will ask the employer to rectify the problem with that group of employees rather than instituting a full investigation.

Please note that Wage Hour receives complaints from many different sources including current employees, former employees, competitors, employee representatives and other interested parties. Wage Hour has a policy of not disclosing the name(s) of the complainant unless the complaining party has given written permission for Wage Hour to do so. Therefore, unless they are only looking at the pay practice related to a single employee, Wage Hour will not tell you if there is a complaint and will not identify the complaining party.

Child labor investigations, are normally scheduled for one of two reasons. First, Wage Hour targets one industry each year, fast food restaurants for example, that has a history of employing minors contrary to the requirements of the Act and investigates employers within that industry. The other reason for a child labor investigation is that Wage Hour has received information that a minor was injured while working for the firm. A copy of each Workers Compensation Accident Report relating to the injury of a minor is forwarded to Wage Hour for review. If they have reason to believe the minor was employed in a prohibited activity they will schedule an investigation.

In addition to the above reasons for investigations each year Wage Hour selects a few industries to target for enforcement. Wage Hour typically selects industries that have a history of noncompliance with the Fair Labor Standards Act and will investigate a large number of employers in the industry. A few years ago they selected the poultry processing industry and investigated approximately 1/3 of all processing plants in the country. In recent years they have looked at the health care industry, fast food establishments and construction industry. Although some targeted activities are nationwide, in most cases they vary from state to state. For example, during the past year there has been concerted activity in Alabama targeting public schools.

Although on rare occasions Wage Hour will make an unannounced visit, the employer will normally be contacted by phone or letter to schedule an appointment to begin the investigation. Once the appointment is confirmed, Wage Hour will travel to the employer's place of business to begin the investigation. The investigator will begin the investigation by conducting a conference with the person in charge to gather information regarding the firm's ownership, type of activities, and pay practices. The employer may have whomever he would like at this conference including legal counsel. It is always advisable to be cooperative and courteous.

After the conference, the investigator may ask to tour the establishment so that he/she may better understand how the business operates. At one time, this tour was standard operating procedure for the investigator but now I understand that many times it is not done. The investigator will next ask to review a sample of the payroll and time records for the past two years. Wage Hour realizes that many employers have their payrolls maintained by a third party or prepared at another location. If this is the situation the employer can authorize the investigator to review the records at another location or it can arrange to have them brought to the establishment. The investigator may ask the employer to photocopy certain records. Although the employer is not required to make copies, the investigator has the authority to gather this information and copying the requested information will expedite the investigation process. Thus, most employers find that it is beneficial to furnish photocopies. It is suggested that the employer also retain a copy of all records provided to Wage Hour in case the matter is not resolved and litigation is initiated.

After the review of the records is completed, the investigator will want to conduct confidential interviews with a sample of the current employees at the establishment during normal working hours. The employer is <u>not</u> required to allow the investigator to do this at the establishment; however, the investigator will contact the employees away from the business. Most employers find

that allowing the investigations to be conducted at the establishment is better than forcing the investigator to contact the employees at home or other locations. Again the easier it is for the investigator to complete his assignment the quicker he will be finished and gone.

After the fact-finding phase of the investigation is completed, the investigator will schedule another conference with the employer to discuss the findings. As with the beginning conference the employer may have a legal representative at the conference. If the investigator determines that the employer has not complied with the FLSA he will discuss the issues and ask for an explanation of the matter. The employer will then be asked to agree to make changes in his pay system to comply with the Act and, once an agreement has been reached for the future, the employer will be asked to pay back wages to the employees that have not been paid correctly. In many instances, as provided by the regulations, the employer will be asked to compute the amounts due each employee and submit them to the investigator for review. If the investigator agrees with computations that were submitted, he will negotiate a payment schedule with the employer to distribute the back wages to the employees.

Note: Wage Hour does not have the authority to force an employer to pay back wages except through litigation. If the employer (or his representative) and the investigator cannot reach an agreement for resolving the matter, the employer may request a meeting with the investigator's supervisor. If no agreement is reached at that level, listed below are some of the options for Wage Hour.

Wage Hour may bring an action in federal court to compel the employer's compliance with the FLSA and to pay the back wages that are due the employees. If this action is taken Wage Hour will typically sue for a three-year period (vs. a two-year period), as and allege a willful violation of the Act. In addition, Wage Hour will seek liquidated damages in an amount equal to the amount of back wages that are due.

Wage Hour may assess penalties for repeated and/or willful violations of the minimum wage and overtime provisions of the Act of up to $1100 per employee. If minors are found to be illegally employed, Wage Hour may assess penalties of up to $11,000 per minor.

In situations where Wage Hour chooses not to pursue litigation, they may notify the employees of the fact that they are due back wages of the employee's right to bring a private suit to recover back wages. Additionally, the employee will be informed of his right to recover liquidated damages, attorney fees and court costs.

Employers should also be aware that employees may bring a suit under the FLSA without contacting Wage Hour. There has been more private FLSA litigation in recent years than under any of the other employment statutes.

In summation, if you are one of the "chosen" ones it is strongly suggested that you cooperate and be courteous to the investigator so that the investigation can be completed as quickly as possible. However, you should only provide the information requested and only respond to the questions that are asked. Further, if you are asked a question that you do not feel comfortable answering, stall the investigator while you seek guidance from your legal representative. If I can be of assistance while you are undergoing an investigation, please do not hesitate to contact me.

DID YOU KNOW . . .

. . . that the EEOC is proposing changes to individual and job categories for the EEO-1 Report? Employers with 100 or more employees and government contractors with 50 more employees are required annually to file an EEO-1 employer information report. The proposed changes would not become effective until 2004. The changes would increase the number of racial categories from five to seven and also increase the number of job categories by dividing the current "officials and managers" into three categories: executive/senior level officials and managers, mid level officials and managers and low level officials and managers. The purpose for the change is for the EEOC to review more specifically employer utilization of minorities in different job categories.

. . . that walking to obtain uniforms and equipment and standing in line to do the same is not considered "working time" under the Fair Labor Standards Act? *Tum v. Barber Foods, Inc.*, (1st Cir. June 3, 2003). Walking from one station to another to dress for work is not considered compensable, but time spent dressing and

undressing safety gear is likely compensable. The court also said that standing in line to clock in or out is not considered compensable time, either.

. . . that an individual on leave as a form of reasonable accommodation under the ADA is not entitled to reinstatement if his job is eliminated for business reasons during the absence? *Crano v. Graphic Packaging Corp.*, (10th Cir. June 5, 2003). The employee had been on a medical leave of absence for approximately two years. The company assured employees on leave that for up to one year, they could return to their current or available job for which they were qualified. During the employee's two year absence, his job was eliminated. At the conclusion of his absence, he asked for reinstatement rights, which were denied. The employee was eligible to reapply when he returned from leave after the one year reemployment period. No job was available and, according to the court, the employer was not required to create the job for the individual.

. . . that an employer's refusal to hire more than 100 applicants who identified themselves as union organizers violated the National Labor Relations Act? Fluor Daniel, Inc. v. NLRB, (6th Cir. June 9, 2003). Jobs were available, the union organizer applicants were qualified, yet they were not hired. According to the court, the employer's reasons for not hiring the organizers were discriminatorily applied; other non-organizer applicants were hired for the same reasons that were used to disqualify the organizers. According to the court, "The NLRB cited many instances of disparate treatment between the discriminatees and other applicants, noting in each case not that Fluor Daniel should have conducted business differently, but rather how Fluor Daniel treated discriminatees in a manner different from other applicants."

. . . that OFCCP during the next several months will conduct 2,000 compliance reviews of 10,000 government contractors that submitted a pay survey? The survey was mandated by the Clinton administration for government contractors, so OFCCP could determine whether there may be discrimination toward women and minorities. OFCCP has not yet used the survey. OFCCP will analyze the survey to determine "whether the survey works and whether it can be relied on. If it gives a lot of false positives or false negatives, we'll know it doesn't work."

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