EMPLOYMENT LAW BULLETIN

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

"YOUR WORKPLACE IS OUR WORK"®

Volume 11, Number 7 ***July 2003***

TO OUR CLIENTS AND FRIENDS:

The United States Department of Labor received over 50,000 comments in response to its proposed rules changes to the minimum wage and overtime exemptions under the Fair Labor Standards Act. Initially, DOL intended to issue final regulations in October or November 2003, with implementation effective in either December 2003 or January 2004. Now, DOL is hopeful to issue final regulations within the first quarter of 2004, with the effective date beginning shortly thereafter.

Opponents to the proposed regulations argue that the proposed changes are a "blue print" to eliminate overtime obligations of lower paying employees. Unions argue that the proposed salary levels are too low and the "short test" salary minimum of $65,000 per year should be eliminated altogether. Unions have called the proposed regulations a "massive wealth transfer from workers to employers." They argue that employers would increase the number of hours for exempt employees, thereby reducing the number of overtime hours available to non-exempt employees.

Businesses argue that the minimum salary level for exempt status, $22,100, should be lowered for retail and restaurant employers. According to the National Retail Federation, many exempt employees in small communities earn less than $22,100 and that minimum salary level places an undue burden on many retail or service employers.

Remember that the current regulations regarding exemptions are in effect and there is extensive litigation occurring nationally over the misapplication of these exemptions. Lyndel Erwin, former Area Director of the United States Department of Labor, Wage and Hour Division, outlines the current requirements for minimum wage and overtime exempt status in this month's *Employment Law Bulletin*. We encourage you to read Lyndel's article on page 5 and contact us if you have any questions.

BROAD RELEASE LANGUAGE INSUFFICIENT, RULES COURT

Many employers are comfortable with using a "good-bye forever" release, which employees sign in exchange for receiving a benefit to which they would not otherwise be entitled, such as severance. The recent case of *Seman v. FMC Corporation Retirement Plan*, (8th Cir. July 1, 2003) is an example of how an employer can be surprised when it thought it had a comprehensive release but it did not include such a provision.

Seman worked for FMC for approximately 30 years until he was laid off. He filed an age and disability discrimination charge, which resulted in a settlement of $70,000, attorney fees and 18 months of company paid COBRA benefits. The settlement agreement and general release stated that Seman released FMC from "any and all claims . . . in any way incurred or arising out of any matter or thing whatsoever prior to the effective date of Seman's termination, whether known or unknown." The language certainly seemed broad enough to the employer to say "good-by forever" to Seman and any possible claims by him.

One and one-half years later after signing the agreement and cashing the check, Seman applied for disability retirement benefits under the company's pension plan. FMC, which served as the plan administrator, denied Seman's claim,

concluding that the settlement agreement constituted Seman's full and complete waiver of any and all claims in and out of his employment with FMC. Seman filed suit in district court, and lost on the basis that FMC as plan administrator had not abused its discretion by denying Seman's claim in reliance on the settlement agreement.

Seman appealed. The court of appeals reversed the district court's decision. The court relied on the following sentence which was part of the settlement agreement and general release: "Seman's Thrift and Pension accounts will be handled in accordance with plan provisions and normal distribution schedules using the resignation date of September 18, 1997." The court concluded that Seman should be treated like any other employee who had separated from FMC as of September 18, 1997. According to the court, **"if FMC meant to abrogate Seman's disability retirement benefits while leaving in tact his ordinary retirement benefits, as it now argues it did, FMC was obligated to use language clearer than the oblique phrase 'in accordance with plan provisions and normal distribution schedules' because the Plan in fact includes provisions and schedules governing disability retirement benefits."** The court remanded the case to district court for further review of the plan administrator's decision.

If you have not had your severance agreements and general releases reviewed by counsel recently, it is important to do so to make sure they address all potential issues. You don't want an employee to whom you thought you said "good-bye forever" to return to make another claim.

EEO TIP: ON THE DIFFERENCES BETWEEN THE EPA AND TITLE VII

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.

The Equal Pay Act (EPA) of 1963 is the oldest of a series of federal employment laws enacted by the U. S. Congress during the so-called Civil Rights Era of the 1960's. It preceded the **Civil Rights Act of 1964**, which included **Title VII** and the **Age Discrimination in Employment Act of 1967**. Almost twenty three years later, the **Americans With Disabilities Act** was enacted in **1990** to complete the basic set of anti-discrimination laws intended to address workplace inequities against women, minorities, older workers, and disabled persons. The EPA prohibits 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 in the same establishment."

The EPA is also the shortest of the above acts, and, perhaps, the least understood in terms of its far-reaching provisions. For example the above rather bland, innocuous summary of the act doesn't begin to inform an employer that:

- It may be a violation to pay a new employee at a wage rate which is less than the rate paid to a former employee of the opposite sex who performed the same job two or more years ago.
- The fact that wage rates were negotiated under a collective bargaining agreement cannot be used to justify the payment of unequal wages to male and female employees who perform similar work under similar working conditions.
- A violation of the EPA will also be a violation of Title VII, (if the employer has more than 15 employees) but a violation of Title VII is not necessarily a violation of the EPA.
- To correct any inequities, it is unlawful for an employer to reduce the wages of one sex to equalize the pay given to the other sex.

The foregoing are but a few of the unusual quirks found in the EPA. There are many more. Since Title VII also prohibits sex discrimination, it might be well, as a threshold matter, to look at some of the other subtle differences in the coverage and enforcement of the two acts.

Jurisdictional Coverage:

- EPA - Covers all **"employees engaged in …the production of goods for interstate and foreign commerce,"** including those **"closely related"** thereto. This provision has been broadly interpreted to include the employees of businesses with as few as two or more employees. Hence, both large and small employers are subject to the act. Also, although the EPA is a part of the Fair Labor Standards Act (FSLA), it covers employees in administrative and supervisory positions with no exemptions.
- Title VII - Covers employers with 15 or more employees.

Prohibited Forms of Sex Discrimination:

- EPA - Only unequal pay in the form of wages & benefits performed under similar conditions is prohibited.
- Title VII - Discrimination in wages, benefits and all other terms, conditions and privileges of employment are prohibited. Hence Title VII is much broader.

Time Limitations for filing Complaint:

- EPA - Normally 2 years, but up to 3 years for a willful violation. Any person who has knowledge of the violation, not just the employee affected by the discrimination, may file a complaint. The EEOC may investigate without a charge.
- Title VII - The aggrieved person must file a charge with the EEOC within 180 days from the date of violation. The EEOC cannot investigate without a charge.

Defenses:

- Under both the EPA and Title VII, wage differentials between the sexes may be lawful if they are based on seniority, merit increases, quantity or quality production standards, or any factor other than sex.

Remedies for Violations:

- EPA - Individuals may seek injunctive relief and can recover **back pay** (lost wages) for up to two years, or up to three years if a willful violation is found. Additionally, an individual may be entitled to **liquidated damages**, unless the employer can show that it had acted in good faith in setting the wage rates in question. Liquidated damages are defined as an amount equal to any back pay that may be due. Thus, in effect an individual may be entitled to double back pay if bad faith can be shown. **Attorney fees** may also be awarded.
- Title VII - Individuals may also seek injunctive relief and can recover back pay for wages or benefits lost during the relevant time period. Additionally, a court may award compensatory and/or punitive damages and attorney fees.

The above comparisons make it clear that Title VII is somewhat broader in terms of potential issues while the EPA is more focused on a specific form of sex discrimination, namely, unequal wages or benefits based upon sex under similar working conditions. More precisely, the EPA requires the same pay for male and female employees who perform work requiring equal skill, effort, and responsibility under similar working conditions, in the same establishment. There are actually four parts to this requirement that must be examined closely. The terms "**equal skill**," "**equal effort**," "**equal responsibility**," and the **"same establishment"** are terms of art and have very specific meanings under the EPA. For example, the term "equal" doesn't really mean "equal" under case law, and the term "establishment" is not the same as a branch or facility. This tricky language will be the focus of our discussion in this column next month.

OSHA TIP: EMPLOYEE SAFETY AND HEALTH TRAINING

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 standards are loaded with requirements for employee safety and health training. With dozens of standards calling for specific training, it is not

surprising that training is one of the most common deficiencies in OSHA citations. Frequently, OSHA press releases regarding significant enforcement actions include citation items pertaining to training violations.

The challenge of meeting employee training requirements raises many questions. A few of those most frequently asked are as follows:

1. **Who is responsible for training employees provided by a temporary service agency?**

   This could be a shared responsibility between the provider and the host who is utilizing these employees. The latter would be required to provide the necessary site-specific training. The service agency might provide generic training and ensure that the host employer is providing adequate site training.

2. **Are computer and video programs acceptable for meeting employee training requirements?**

   If they are supplemented by the opportunity for trainees to ask questions and they allow for sufficient hands-on experience, such programs are acceptable.

3. **Must the annual training required by the Bloodborne Pathogens standard include all of the items specified in 1910.1030(g)(2)(vii)?**

   The main purpose of this annual training is to cover new and emerging healthcare worker issues and the employer policies that address them. Items covered in the initial training may be only quickly reviewed in subsequent annual training.

4. **If a newly hired employee has received required training from a previous employer or other source, must I repeat that training?**

   Employers are obliged to evaluate the new hire to determine his or her knowledge in that particular area. At a minimum, you would be required to provide information and training specific to your work site.

5. **Can Material Safety Data Sheets (MSDS) be stored on a computer to meet employee accessibility under the Hazard Communication Standard?**

   If the MSDSs can be obtained in this fashion in the employee's work area, this would be acceptable.

6. **If an employer has employees who do not understand English, must required training be given in a language that is comprehensible to them?**

   Yes, the trainees must be able to comprehend required information. OSHA has said with respect to the Hazard Communication Standard that, "if the employees receive job instructions in a language other than English, then the training and information required to be conveyed under the HCS will also need to be conducted in a foreign language."

As an employer, you should first identify all of the specific training areas that apply to your site. OSHA Publication 2254, "Training Requirements in OSHA Standards and Training Guidelines" can be very helpful in that regard. A checklist may prove invaluable in tracking multiple training programs. While not all training standards require a written documentation or certification of training, some of them do. Examples of those requiring certifications are 1910.178 (l), Powered Industrial Truck Operator Training and 1910.132, Personal Protective Equipment. Also, OSHA's standards require, variously, initial training, annual (or some other frequency) training, and refresher training. A number of standards mandate that an employee be "authorized," "certified," or designated as a "competent person" to perform particular work functions. Each of these reflects evidence of training.

It is advisable that all required employee training be done, done effectively (consider how they would answer an OSHA compliance officer or accident investigator?), and be documented.

WAGE AND HOUR TIP: CURRENT WAGE HOUR ISSUES

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.

There are two "hot" issues in the Wage Hour realm at the present time. First is a bill, pending the House of Representatives, that would provide private employers with the ability to use "comp time" instead of overtime when an employee works more than forty hours in a workweek. Currently only "public" employers are allowed to use compensatory time in lieu of cash overtime when an employee works more than forty hours in a workweek. The bill was scheduled for a vote by the full house in early June; however, the sponsors pulled it from the House calendar. Apparently, they came to the conclusion that there were not sufficient favorable votes to pass the bill. Thus, the House has not voted on the legislation at this time, although I understand that the leaders still intend to push the issue.

The second matter deals with the proposed revisions to the regulations that define Executive, Administrative, Professional, and Outside Sales Employees. In March the Department of Labor (DOL) published a proposal that, if adopted, would make significant changes to these regulations. The proposal allowed for a 90-day comment period, which ended on June 30. According to what I have read, they have received approximately 80,000 comments from numerous sources. **At this time DOL is in the process of reviewing those comments and according to a statement by the Wage Hour Administrator they expect to publish the final rule in the first quarter of 2004.** Congress is also attempting to get involved in this issue. There was an amendment in the House to the Department of Labor FY 2004 appropriations bill recently to prohibit the proposed changes. The proposed amendment to the appropriations bill, which was defeated by only three votes, could further delay implementation of any new regulations. **In the meantime employers must still follow the requirements that are set forth in the current regulations and ensure they are correctly classifying employees. Below are listed the highlights of the current regulations.**

Salary Basis: Subject to certain very limited exceptions set forth in the regulations, in order to be considered "salaried," employees must receive their full salary for any workweek in which they perform any work without regard to the number of days or hours worked. This rule applies to each exemption that has a salary requirement. Outside sales employees, and certain licensed or certified doctors, lawyers and teachers do not have a salary requirement. Also, certain computer-related occupations under the professional exemption need not be paid a salary if they are paid on an hourly basis at a rate not less than $27.63 per hour.

Executive Exemption: Applicable to employees that meet **all** of the following:

- who have management responsibilities that require the regular exercise of a high degree of independent judgment as their primary duty;
- who direct the work of two or more full-time employees; and
- who are paid at least $250 per week.

Administrative Exemption: Applicable to employees:

- who perform office or non-manual work which is directly related to the management policies or general business operations of their employer or their employer's customers, or perform such functions in the administration of an educational establishment;
- who regularly exercise discretion and judgment in their work; and
- who are paid at least $250 per week salary.

Professional Exemption: Applicable to employees:

- who perform work requiring advanced knowledge and education, work in an artistic field which is original and creative, work as a teacher, or work as a computer system analyst, programmer, software engineer, or similarly skilled worker in the computer software field;
- who regularly exercise discretion and judgment; who perform work which is intellectual and varied in character, the accomplishment of which cannot be standardized as to time;
- who receive a salary of $250 per week (except doctors, lawyers, teachers who do not have a salary requirement and certain computer-related occupations who are paid at least $27.73 per hour).

Outside Sales Exemption: Applicable to employees:

- who engage in making sales or obtaining orders away from their employer's place of business and who do not devote more than 20% of their hours to non-exempt work other than the making of such sales. Note: There is no salary requirement for outside sales employees.

Potential problem areas

- Some problems that are commonly found in the application of the these exemptions are:
- Employers without a formal sick leave policy docking salaried, exempt employees for time missed from work because of sickness.
- Employees not receiving full salary payments each week.
- Employees performing routine production type duties that seem related to general business operations but which have no bearing on setting of management policies.
- Employees who hold a degree performing jobs that are not professional in nature or to which the degree they hold is not applicable.
- Employers confusing job skills with the exercise of independent judgment and discretion.
- Employees placed on salary and classified as exempt without regard to duties or percentage of time spent in exempt duties.
- Employees having their salary reduced for absences of less than a full day or for disciplinary reasons.

There has not been a change in the salary requirements for these exemptions since 1975 when the minimum wage was $2.30 per hour. Thus, today an employee receiving the $5.15 minimum wage would earn more than the minimum salary that is required for these exemptions. Consequently, the proper application today most often turns on whether the employee meets the "duty" tests, and in recent years the courts are looking very "closely at the actual work being performed by the employee.

Employers should remember that in order for the employee to be exempt he/she must meet all of the criteria that are set forth in the regulations. Failure of the employee to meet any part of the criteria makes the employee non-exempt and creates a potential liability for the employer. Consequently, employers should be very careful to ensure that the employee meets all of the requirements for the exemption(s) that are being claimed.

PROPER POLICIES POORLY APPLIED STILL PRECLUDE PUNITIVE DAMAGES

We often suggest that employers develop proper policies regarding discrimination and harassment to prevent or address potential problems before they arise. The case of *Bryant v. Aiken Regional Medical Center*, (4th Cir. June 27, 2003) provides an additional reason for employers to follow our advice: Proper policies, even if not followed by supervisors and managers, can limit on employer's risk of punitive damages.

The medical center's policies included an equal employment policy that was communicated to employees through the handbook, a grievance policy — communicated to all employees — stressing no retaliation for reporting grievances, a diversity training program for all employees; and monitoring of demographics in various departments to determine whether they reflect workforce availability within the hospital's relevant geographical area.

Despite the hospital's effective policies, and communication of those policies, they were not followed in the instant case. Bryant was passed over for promotions several times and "stonewalled" for over a year. A jury awarded Bryant $40,000 for lost wages and $50,000 for emotional distress. It also awarded $210,000 in punitive damages.

The court of appeals upheld the $40,000 and $50,000 damages awards, but reversed the $210,000 punitive award. According to the court, **"in contrast to cases where employers "never adopted any anti-discrimination policy or provided any training whatsoever on the subject of discrimination," ARMC had an extensive implemented non-discrimination policy.** The behavior of the managers involved in denying the promotion opportunities was contrary to the hospital's good faith efforts to comply with Title VII. Although Bryant was denied promotions based upon race, the employer's efforts to prevent such behavior through effective policy implementation and training justified reversing the most expensive part of Bryant's damages, the $210,000 punitive damage award.

WHERE THERE'S SMOKE, THERE'S A NEW ALABAMA LAW

On June 19, 2003, Gov. Bob Riley signed Alabama's statewide law regarding smoking, which covers the workplace. The law becomes effective on September 1, 2003. The key provisions of the law affecting employers are as follows:

1. Smoking in public places is prohibited. Public places are considered "enclosed areas where the public is permitted." This includes elevators, hospitals, theaters, restaurants, educational facilities, sports and recreation facilities, shopping malls, banks, retail stores, service establishments and the workplace. Excluded from the law are tobacco stores, limousines, and hotel rooms.

2. In certain circumstances public places, including the workplace, may provide for smoking. However, the following rules must be obeyed:

   a. The smoking area must be enclosed, well ventilated and less than one-fourth of the total space footage. Where that is not possible, such as in elevators, health care facilities, restrooms and in other common areas, smoking must be prohibited. Employers are required to provide no smoking signs and smoking signs where there is a smoking area. Note that employers are not required to provide smoking areas, but if they do so, it must be under the terms of this Act. Employers who do not comply will be subject to fines.

3. Employers are encouraged to provide a written smoking policy by December 1, 2003, but are not required to do so. If a policy is provided, it must state that smoking is prohibited in all common areas, unless a majority of the employees who work in a common area vote to designate it as smoking or unless a smoking area is designated, and that all employees have the opportunity to designate their own work area as non-smoking with signs provided by the employer.

4. Those employers with smoke free workplaces are not required to do anything under this law. If employers allow smoking at work, those employers must comply with the law.

DID YOU KNOW . . .

. . . the AFL-CIO has announced that it will spend $400 million to finance the building of low cost apartment housing? The AFL-CIO expects to complete approximately 30 projects by 2005 creating up to 4,000 new apartment units in 12 different U.S. cities. According to the AFL-CIO, the housing boom has left the lower wage earner behind. The money will be paid for through the AFL-CIO Building Investment Trust, which is a $1.5 billion real estate fund.

. . . that a release was not valid when signed by an employee taking medication for depression? *Knoll v. Merrill Corp.*, (S.D. NY, July 9, 2003). Knoll was diagnosed as clinically depressed and was taking Paxil and Xanax. He was terminated and asked to sign a release at the time he was taking these medications. He signed the release and, in fact, negotiated better terms before the final agreement was executed. Subsequently, he sought to void the release based upon his mental capacity at the time he signed them. According to the court, "certainly it might not seem fair to ask a person diagnosed with clinical depression who was just terminated from his position to think fully through the consequence of waiving all future claims. The totality of the circumstances amounted to "duress" and "could have clouded his judgment."

. . . that completing the EEO-1 survey can now be done through the Commission's web based filing system? The filing deadline for this year is September 30. In order to complete the EEO-1 via the web, access the EEOC website at http:\\www.eeoc.gov\eeo1survey\. Private employers with 100 or more employees and some federal contractors with 50 or more employees are required to complete the survey.

. . . that 9 out of the top 10 fortune 500 companies have policies to prohibit discrimination and harassment based upon sexual orientation? According to the Human Rights Campaign, a Washington, D.C. gay rights organization, ExxonMobile is the only fortune top 10 company without such a policy. The companies usually include sexual orientation as part of training regarding non-discrimination or non-harassment, and their non-discrimination and non-harassment policies have been revised to include sexual orientation as a protected class.

. . . that the United Auto Workers and Ford, General Motors, and Daimler-Chrysler began negotiations on

July 21, for a new agreement in one of the most difficult economic times the industry has faced? The current agreements expire on September 14, 2003. Health care costs will be a key issue at the table; UAW president Ron Gettelfinger stated that "we're not going to go backward in health care." An additional issue will be pension funding. GM has two and one-half retirees for every active employee and $19 billion in underfunded pension liabilities. 60% of the UAW represented employees working at GM will be eligible to retire during the next five years.

LEHR MIDDLEBROOKS PRICE & PROCTOR, P.C.

Brett Adair	**205/323-9265**
Stephen A. Brandon	**205/909-4502**
Donna Eich Brooks	**205/226-7120**
Michael Broom	**256/355-9151 (Decatur)**
Barry V. Frederick	**205/323-9269**
Jennifer L. Howard	**205/323-8219**
Richard I. Lehr	**205/323-9260**
David J. Middlebrooks	**205/323-9262**
Terry Price	**205/323-9261**
R. David Proctor	**205/323-9264**
Matthew W. Stiles	**205/323-9275**
Michael L. Thompson	**205/323-9278**
Albert L. Vreeland, II	**205/323-9266**
J. Kellam Warren	**205/323-8220**
Sally Broatch Waudby	**205/226-7122**
Debra C. White	**205/323-8218**
Lyndel L. Erwin **Wage and Hour and Government Contracts Consultant**	**205/323-9272**
Jerome C. Rose **EEO Consultant**	**205/323-9267**
John E. Hall **OSHA Consultant**	**205/226-7129**

Birmingham Office:
2021 Third Avenue North, Suite 300
Post Office Box 370463
Birmingham, Alabama 35237
Telephone (205) 326-3002

Decatur Office:
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602

For more information about Lehr Middlebrooks Price & Proctor, P.C., please visit our website at www.LMPP.com.