"Your Workplace Is Our Work"®

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LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.
LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

Organized labor during 2003 suffered one of its most dramatic membership declines in several years. Total private sector union members sharply declined to 8.2% in 2003 from 8.6% in 2002. Approximately 37% of all public sector employees belonged to unions. This includes federal, state, county and municipal employees. The total union membership including public sector is now 12.9%, compared to 13.3% in 2002.

The decline of heavy manufacturing in our country wiped out hundreds of thousands of union represented employees. Non - union employees, observing that there was virtually nothing unions could do to keep their members employed, were less likely to consider unionization as a job security alternative.

Union representation has been in a precipitous decline over the past twenty-five years. Organized labor considers the political process its last and best hope to change this trend. In particular, if labor can assist in electing a Democrat to the White House and swing the majority in Congress, then labor can pursue legislation to make it easier to organize.

FEDERAL CONTRACTORS BRACING FOR BIG AFFIRMATIVE ACTION CHANGES IN 2004

The Commerce Department's Census Bureau has released the 2000 EEO Special Tabulation that provides data on the race and ethnicity for U.S. workers for nearly 500 census job codes, searchable by geographic area. This is the critical data file that federal contractors use to determine the availability in various recruitment areas.

The OFCCP expected that the data would be released in a gradual process, but the Census Bureau rushed the tabulation in an effort to release the data before the close of 2003.

The EEO Tabulation is available on CD Rom in ASCII or SAS format for a nominal fee by calling the Census Bureau at 301/763-INFO.

Employers should be cautious before jumping into the data. The 2000 Census included an increase in the number of race/ethnic categories and a decrease in job codes from the 1990 Census. The OFCCP announced last week that federal contractors subject to affirmative action requirements may begin using 2000 census data for their 2004 affirmative action plans. However, contractors will not be *required* to use the 2000 census data until 2005. In 2005, OFCCP will begin using the data itself to analyze contractors' employment decisions. Whether or not you use the 2000 data for your 2004 plans is a decision to be weighed carefully. To prepare for the required change in 2005, it may be to your advantage to analyze your workforce using both sets of data in 2004.

Another big New Year's announcement came out of the EEOC, which said that it will delay proposed changes to the EEO-1 (Standard Form 100) until 2005. The Department of Labor has proposed revisions to the form that would incorporate the increase of racial/ethnic and EEO job groups reflected in the 2000 Census.

Although one agency official said the proposed changes are "almost a done deal," the delay was requested by employers who provided written comments and attended a public forum regarding the proposed changes. Among the most vocal opponents of a speedy EEO-1 change are the U.S. Chamber of Commerce and the Society for Human Resource Management, who both want more time for employers to adjust to the proposed changes prior to implementation.

The EEOC said that employers should have a better idea what the new EEO-1 will look like when a final form is released sometime this spring. The result will be new race/ethnic categories for tracking applicants and employees and a new emphasis on certain sub-groupings of the standard EEO-1 categories. Although the rule relates specifically to EEO-1s, employers should prepare for it to alter the categories used in their affirmative action plans, making them more consistent with the 2000 Census data.

Private employers with 100 or more employees and certain federal contractors with 50 or more employees are required to file an EEO-1 each year. The procedure became fully-automated on line for the first time in 2003.

If you have questions about your EEO-1 strategy or need help deciding when to begin using the 2000 Census data, please call David Middlebrooks at (205) 323-9262 or Matt Stiles at (205) 323-9275.

PRESIDENT'S PROPOSED IMMIGRATION REFORM

On January 7, 2004 President Bush announced his plan for proposed immigration reform including a new temporary worker program that would allow alien workers to work for U.S. employers in instances where no U.S. citizens can be found to fill the vacant jobs. Unlike other programs, President Bush's program would be open to persons who are currently in the United States in an undocumented (i.e., illegal) status. The President requested that Congress work with his office to achieve significant immigration reform including the protection of our country's borders, enhancement of the United States economy by matching willing foreign workers with available United States jobs, the promotion of compassion for unprotected workers, providing an incentive for temporary workers to return to their home countries and families, and protecting the rights of legal immigrants while not unfairly rewarding persons who come to the United States unlawfully.

The implications of such a program to employers could be quite meaningful. Currently, with one exception, there is no real

avenue available for employers to hire legally aliens in "non-professional" fields on a temporary basis. The only exception is the somewhat cumbersome H-2A program applicable to seasonal agricultural workers. President Bush's program appears intended to address this long-standing criticism of American immigration policy and, consequently, address projected labor shortfalls during the next decade. Essentially, with one exception, it appears that President Bush's proposal would expand the processes and procedures currently available to "professionals" under the H-1B program to workers in "non-professional" categories. Workers would be approved for a temporary period (likely three years with a single three-year extension available) in instances where they either have a job in the United States or have a job offer from a United States employer. The key difference between the current H-1B program for professionals and President Bush's proposal is that an employer seeking to hire a non-professional employee would be required to first establish that there are no qualified American workers for that available position, a requirement that is not applicable to the H-1B program. Congress faces the challenge of drafting meaningful legislation that complies with this requirement while not creating an economic disincentive for using the new procedure.

Interestingly, President Bush has included certain incentives for the alien worker to return to his or her home country after his or her approved period expires. Certain of these provisions, at least in the first instance, seem logistically unworkable. For example, included in these proposals would be some type of undefined incentive program whereby the United States would contribute a set amount, presumably the amount that the employee and possibly the employer contributed to Social Security while employed in the United States, to the home country's retirement program on the employee's behalf. Additionally, monetary incentives would be available for alien workers to return to their home country and establish their own businesses.

Many issues, contingencies and mechanics remain to be worked out before President Bush's proposal becomes legislation in Congress and, in turn, subsequently returns to the President's desk for signature into law. In any event, immigration reform is sure to be a key topic during the 2004 elections.

RELIGIOUS ACCOMMODATION DOES NOT PROTECT EMPLOYEE POSTING ANTI GAY SCRIPTURES

The case of *Peterson v. Hewlett-Packard Co.,* (9th Cir., Jan. 6, 2004) involved a conflict between an employee's religious beliefs and an employer's diversity policy. Peterson was a twenty-one year employee of H-P in Boise, Idaho, with an overall satisfactory performance history. HP initiated a diversity campaign, which included posters of HP employees with captions under them such as "black," "gay," "old," "Hispanic," and "blonde." The same employees were also featured in a subsequent poster with the heading "diversity is our strength."

Peterson considered himself a "devout Christian." According to his religious principles, homosexual behavior violated the Ten Commandments and "he was required to expose evil when confronted with sin." He placed in large lettering at his work station biblical scriptures condemning homosexual behavior. He was counseled by HP, but told the company that he believed the company 's diversity campaign targeted heterosexual and fundamentalist Christian employees. He was asked to remove the biblical passages, refused to do so and was terminated.

Although sexual orientation is not a protected class under federal and most state fair employment practice statutes, the court said that "Peterson may be correct that the campaign devoted special attention to combating prejudice against homosexuality,

but such an emphasis is in no matter unlawful. To the contrary, Hewlett's efforts to eradicate discrimination against homosexuals in its workplace were entirely consistent with the goals and objectives of our Civil Rights statutes generally." In upholding summary judgment for Hewlett-Packard, the court also noted that Hewlett-Packard did not criticize or counsel Peterson regarding his letter to the local newspaper critical of the company's diversity efforts. According to the court, the company "simply requested that he remove the [biblical passages] and not violate the company's harassment policy – a policy that was uniformly applied to all employees."

OSHA TIP: OSHA POSTING REMINDER

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, 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 POSTING REMINDER: At the end of each calendar year, you must summarize the information on your OSHA 300 Log by totaling the column entries on the log and entering this information on the OSHA 300-A, the annual summary form. The summary must list the total numbers of job-related injuries and illnesses that occurred in 2003 and were logged on the OSHA 300 form. Employment information about annual average number of employees and total hours worked during the calendar year is also required to assists in calculating incidence rates. Companies with no recordable injuries or illnesses in 2003 must post the form with zeros on the total line. The annual summary must be certified by a company executive and signed and dated. This form (NOT the OSHA 300 Log) **must be posted between February 1 and April 30** of the year following the year covered by the summary **in a conspicuous place where all employees can see it** (for example, on the employee bulleting board where your OSHA Job Safety and Health Protection poster is displayed).

EEO TIP: EEOC ANNOUNCES PLANS FOR 2004

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of Lehr Middlebrooks Price & Vreeland, 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.

According to EEOC Chair Cari Dominguez, the Commission will focus on developing a national call center for charge information and will redefine what is an employment "applicant" during 2004.

The call center approach, recommended by the National Academy of Public Administration, will involve a 1-800 number contact for potential charging parties to receive assistance in filing a charge.

The EEOC anticipates completing in 2004 its three year review on redefining what is a job applicant. The EEOC definition will consider the voluminous number of unsolicited applications employers receive via the internet. The EEOC's revised EEO-1 report will not become effective until 2005, thus allowing employers sufficient time to adjust to the Commission's new definition of a job applicant.

Chair Dominguez also reported on January 7, 2004 that during 2003 the EEOC conducted 44,000 mediations which resulted in 30,000 charge settlements within three months after the charge was filed. Approximately 400 employers nationally have agreed to mediate all of their discrimination charges with the EEOC, provided that the charging party is willing to mediate and also provided that on a case by case basis either the employer or charging party can opt out of the mediation program.

Chair Dominguez also reported that for Fiscal Year 2003, the EEOC collected over $380 million in awards for charging parties, compared to $301 million in 2002. Of the total amount obtained in charging party payments and benefits, $236 million was obtained through the administrative process and $149 million was obtained through litigation. The EEOC also reported a slight decline in the number of discrimination charges filed for Fiscal Year 2003, to 81,300 from 84,400 during Fiscal Year 2002. Approximately 35% of all charges filed alleged race discrimination, 30.3% sex discrimination, 23.6% age discrimination, 19% disability discrimination and 10.4% national origin discrimination. These figures are comparable to Fiscal Year 2002.

WAGE AND HOUR TIP: WAGE HOUR FOCUSES ON LOW WAGE INDUSTRIES

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks Price & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks Price & Vreeland, 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.

On December 23, 2003, the administrator of the Wage and Hour Division of the Department of Labor said that their enforcement strategy for 2004 will focus on all "low wage industries." According to the Wage and Hour Division, the low wage industries that will be their focus include health care, agriculture, garment industries, day care facilities, restaurants, guard services, janitorial services, hospitality and temporary help businesses. For Fiscal Year 2003, ending September 30, DOL collected almost $40 million in back wages for 80,000 employees in these industries. The single largest industry affected by this initiative was the restaurant industry, which involved 5,000 separate cases totaling $10 million in back wages for over 22,000 employees.

DOL also stated that it will conduct compliance surveys on a random basis of employers in the health care, grocery, restaurant and agricultural industries. The surveys will be used by DOL to assess compliance with Wage and Hour regulations and determine which industries should receive particular focus from the Department.

Employers in these nine industries vulnerable to investigation are encouraged to conduct self audits to determine compliance. Any employer needing assistance in how to conduct such an audit should feel free to contact me at 205/323-9272.

DID YOU KNOW . . .

. . .that asking for time off to be with a child with attention deficit disorder did not qualify under the Family and Medical Leave Act? *Perry v. Jaguar of Troy*, (6th Cir., Dec. 30, 2003). The employee claimed that he needed to be off during the summer because his son needed closer supervision due to ADD. However, the court said that "the comparative amount of supervision a child needs standing alone does not address the child's ability to engage in regular daily activities." Accordingly, although the child needed to be monitored, the child's daily activities were not so limited as to qualify for protection under the FMLA.

. . . that former leased employees may be entitled to retirement benefits from their lessor employer? *Thomas v. SmithKline Beecham, Corp*, (E.D. PA, Dec. 22, 2003). The leased employees eventually became regular full-time employees. However, the employees argued that the time they worked as leased employees should be counted toward their total time for retirement benefit purposes. The court permitted the class action to continue in order to assess whether the 1,100 formerly leased employees should be treated as regular employees for retirement calculations purposes. Remember that a "leased" or "contractor" employee may still be

considered a regular employee of the employer unless specific guidelines are followed.

. . . that it was not sex discrimination for an employer to prohibit a male employee from wearing an earring? *Pecenka v. Fareway Stores, Inc*., (Iowa, Dec. 17, 2003). The company did not have a written grooming or dress code policy. However, the employee was asked to remove a stud from his ear after the company told him that it does not permit men to wear earrings at work. An alternative to removing the stud was to cover it with a band aid, according to the employer. The employee refused to do either and was terminated. The employee argued it was sex discrimination, since women employees were not prohibited from wearing studs or earrings. According to the court, the laws prohibiting sex discrimination are intended "to stop the perpetuation of sexist or chauvinistic attitudes in employment which significantly affect employment opportunities." The court concluded that a male or female only personal grooming standard had only a minimal impact on the employment relationship and did not in any significant way affect employment activities. Accordingly, it was not sex discrimination for employers to prohibit men from wearing earrings while permitting women to do the same.

. . . that not following through on assurances of job security cost an employer $850,000? *Stewart v. Cendant Mobility Service Corporation*, (Conn., Dec. 23, 2003). A Connecticut jury awarded $850,000 to an employee who relied on her employer's representation of continued employment. The employee and her husband worked for the company. The husband was terminated due to a reorganization. Stewart asked her supervisor whether her husband's reemployment in the same industry would have an impact on her employment with Cendant. She was told that it would be "no problem whatsoever." After her husband began working for a competitor, she was terminated. According to the court, "a promise need not be the functional equivalent of an offer to enter into a contract that Cendant was offering to plaintiff. Consequently, the jury's finding that Cendant did not make an offer to enter into a contract with the plaintiff is not inconsistent with its finding that Cendant had promised the plaintiff that her employment would not be affected adversely if her husband were to accept a position with a competitor."

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