"Your Workplace Is Our Work"®

February 2004
Volume 12, Issue 2

Inside this Issue

Lehr Middlebrooks Price & Vreeland, P.C.
2021 Third Avenue North
Birmingham, AL 35203
205-326-3002

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

Employment Law Bulletin

To Our Clients And Friends:

According to a recent survey, employer reductions of retiree health care benefits are accelerating, and those employers who do not offer retiree health benefits are unlikely to do so for the foreseeable future. The survey was conducted by the Kaiser Family Foundation, in conjunction with Hewitt Associates, and focused on 408 private sector companies with more than 1,000 employees that offered retiree health benefits. The survey field included approximately half of all Fortune 100 companies and 30% of all Fortune 500 companies. Their survey identified the following trends:

- 30% of the companies eliminated retiree health benefits entirely for employees hired in the future or will do so within the next two years.
- Approximately 86% have increased the amount retirees pay for their insurance or will do so within the next three years.
- Those employers offering retiree health benefits continues to decline, from 66% in 1988 to 38% in 2003.
- Approximately 46% capped their future retiree health contributions.
- Approximately 25% are providing access to health insurance benefits but are requiring retirees to pay 100% of the costs.

Those who responded to the survey acknowledged that how medicare prescription drug legislation "plays out" will contribute to determining whether further cuts to benefits or future increases in costs to retiree will be necessary.

Employers desiring to revise or terminate retiree health care coverage should have counsel analyze plan documents and other communications to employees regarding this benefit, to be sure that the employer is within its rights to make these changes. Employers with bargaining agreements also need to consider their rights and obligations under the collective bargaining agreement.

Reduction in retiree health benefits may provoke litigation from a class of retirees, whose retirement decision in part was based upon assumptions regarding employer provided health care coverage and the costs to the retiree of such coverage.

30 YEAR EMPLOYEE MAY PURSUE CLAIM FOR RETALIATORY DENIAL OF SEVERANCE BENEFITS

The case of *Huske v. Honeywell International, Inc.* (D. KN, Jan. 14, 2004) illustrates how timing and tolerance can get an employer into trouble.

Huske was terminated two weeks before her department was downsized. Those whose jobs were eliminated were offered severance; Huske, a thirty year employee, received nothing. Her employer claimed that she was terminated for using a company credit card for personal purchases, in violation of company policy. Huske alleged that she was terminated so her employer would not have to pay her severance benefits as part of a work force reduction.

Huske used a company credit card for approximately ten years. The bill from the credit card company was mailed to her home. Approximately two years prior to her termination, she began using the company card for personal purchases. No action was taken by the company in the few years prior to her termination when she used the card for personal purchases. However, Huske was late in making her credit card payment for June 2001, which resulted in Huske's supervisor terminating her in October 2001 for inappropriate credit card use. In denying the employer's motion for summary judgment, the court stated that "viewing the record in the light most favorable to plaintiff, it appears that she has used her card for personal purchases – in violation of company policy – since 1998. Honeywell took no action with regard to multiple years of misuse. Furthermore, although Huske notified Honeywell promptly of her late payment in June 2001, her supervisor was not notified of this by the company until October 2001, shortly before the planned work force reduction."

There are several morals to this story. First, **if policy has not been enforced consistently or at all, make it clear to employees that the times are changing from this point forward and hold them accountable to the policy, or change the policy to conform to what the company now tolerates**. Secondly, the termination of any employee for a "dramatic incident," particularly a thirty year employee should occur within a reasonable time after the incident has been investigated. **A five month delay in the Honeywell case suggests that termination was an afterthought to try to avoid paying a thirty year employee a substantial amount of severance benefits.** Finally, evaluate the timing of termination in relation to when an employee would have received a severance benefit, bonus payment or other compensation. If the time of the termination is close to when the employee would have received that benefit, be sure that you can show that the termination or demotion decision would have occurred anyway.

COURT PERMITS EMOTIONAL DISTRESS DAMAGES UNDER THE FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act provides for liquidated or "double" damages in the event of a willful violation. Willfulness focuses on the employer's behavior; did the employer deliberately violate the Fair Labor Standards Act, had the employer been cited previously for the same or similar violation, and other such egregious behavior? The provision of the statute allowing for liquidated damages also states that an employer who violates the anti-retaliation provision of the Fair Labor Standards Act "shall be liable for such legal or equitable relief as may be appropriate." The case of *Moore v. Freeman*, (6th Cir. Jan. 13, 2004), permitted and upheld an award of damages for emotional distress caused by a retaliatory discharge.

Moore and two other employees were hired on the same day to perform the same work. Moore, a male, found out that the female hired on the same day was paid $6,000 a year more than Moore and the other male (both of whom were hired at approximately $20,000 a year). Moore raised the concern to his supervisor. The female quit and two days later Moore was terminated. Moore sued for retaliation and was awarded over $10,000 in back pay and $40,000 for mental and emotional distress.

The employer argued that the remedies under the Fair Labor Standards Act do not include emotional distress claims relating to retaliation. The court noted that the section of the law providing for liquidated damages also states that in a claim of retaliation, an employer "shall be liable for such legal or equitable relief as may be appropriate . . ." The court acknowledged that "the provision does not explicitly allow for damages for emotional distress." However, the court added that "a plain reading of the text of the provisions indicates that it does not limit the type of damages that are available. **The statutory scheme contemplates compensation full for any retaliation employees suffer from reporting grievances, and there is no indication that it would not include compensation for demonstrable emotional injuries, as well as economic ones."**

A retaliation claim under the Fair Labor Standards Act may arise from an employee raising a protected wage question to his or her employer; the employee does not have to make an administrative charge or file a lawsuit to be protected from retaliation. The risk to an employer of a retaliation claim is more than back pay; it may also include emotional injuries valued at an amount substantially higher than double back pay.

OSHA TIP: GUARDING AGAINST AMPUTATIONS

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.

A 1990 study by the National Institute of Occupational Safety and Health found that workers who operate and maintain machinery suffer approximately 18,000 amputations each year. Further, Bureau of Labor Statistics data reveal that in the period 1992-1999 there was an average of 21 fatal and 11,000 nonfatal amputations annually. While occurring across the spectrum of industries, manufacturing has accounted for 53% of the nonfatal amputations.

In 1997, OSHA established a national emphasis program for mechanical power presses as part of the agency's strategic goal of reducing amputations in the workplace. Subsequently, the focus was expanded to include all types of power presses (hydraulic, pneumatic, press brakes, etc.), as well as saws, shears, and slicers. This program is set out in OSHA Directive CPL 2-1.35, which became effective on March 26, 2002. It allows the agency to focus additional attention on jobs with amputation risks through enforcement and outreach efforts.

OSHA has numerous standards requiring machine guarding, work practices and training designed to protect against amputation hazards. Key standards are found in 29 CFR 1910, Subparts O and P. The general machine guarding standard is 1910.212, which requires that one or more methods of machine guarding be provided to protect the operator and other employees in the machine area from hazards such as point of operation, ingoing nip points, rotating parts, etc. This standard, along with 1910.213 for woodworking machinery and 1910.217, which addresses mechanical power presses, covers the equipment to which the national emphasis program applies. Failure to comply with these standards has resulted in many amputations leading OSHA to identify the named equipment as the focus of this emphasis program.

Unguarded power transmission equipment, i.e. belts and pulleys, chains and sprockets, etc., present other significant amputation hazards. The OSHA standard governing these is found in 1910.219.

Another significant exposure to amputation hazards arises from unexpected startup of equipment during maintenance and repair work. The hazard can be eliminated by ensuring that equipment is safely deenergized during such activities. The applicable standard is 1910.147.

Amputation injuries are costly. OSHA penalties alone, for violating machine guarding requirements, can be substantial. Associated violations will be classified as serious and frequently will also be alleged to be willful. This means that the resultant penalty can be $70,000.

The following examples of OSHA news releases attest to the agency's aggressive enforcement of machine guarding rules:

"Amputation of Worker's Fingers Leads to OSHA Fine of $295,000." The employer in this case was cited for failure to protect employees from the hazards of mechanical power presses.

"OSHA Cites Company Following Double Amputation; Proposes $140,000 Penalty." This incident was reported to OSHA by the local police responding to the scene. An employee had used his feet to tamp down cardboard inside a compactor while it was running. Becoming entangled in the cardboard, he could not remove his legs, and both were severed above the knee by the horizontal ram that functioned to flatten the cardboard.

"OSHA Fines Paper Company $157,000 Following Amputation." This incident involved an employee's arms being caught and amputated in an unguarded paper machine. The worker remained trapped for more than 30 minutes before maintenance personnel could free him.

Most would agree that it's worth a considerable investment in time and effort to avoid the consequences of events such as the above. These accidents are preventable. Be sure to check equipment guarding on each plant safety inspection. Ensure that the manufacturer's guard is attached and that it is not bypassed or modified. When guards are adjustable, allow only the smallest feasible opening to the machine hazard.

EEO TIP: IS MEDIATION WORTH A SECOND LOOK

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.

In December 2003 the Equal Employment Opportunity Commission released the results of its " **…** Investigation **of the Reasons for the Lack of Employer Participation in the EEOC's Mediation Program."** The EEOC's mediation program was actually launched in 1991 as a pilot program in four of its District Offices (Philadelphia, New Orleans, Houston and Washington). However, it was not implemented nationally until 1999. Since 1999, the EEOC states that it has mediated more than 50,000 cases with a success ratio of approximately 70%. Moreover, it claims that on the average mediated cases were resolved within 85 days (less than half the time it takes through the regular investigative process) and that between 13 – 20% of the cases resolved did not include any monetary benefit.

Unfortunately, from the EEOC's standpoint, mediated cases constituted less than 20% of its charge inventory during the same period. This may explain why the EEOC was puzzled as to why more employers were not utilizing this quick, relatively cost-free, service.

The answers the EEOC got from its survey of employers included in the investigation were somewhat surprising even to the EEOC. I will summarize the reasons given by employers for their lack of participation in the mediation process in the space to follow. But first it might be helpful to review briefly how the program works and the expected benefits to employers for resolving charges through the mediation process.

> Note: In general the EEOC only accepts charges which allege individual harm (not involving class issues) for resolution under its mediation program. However, sometimes exceptions are made.

After an eligible charge is filed the mediation process can be summarized as follows:

1) Both the Charging Party and the Respondent are invited to submit the charge to mediation. If both agree, the mediation process is commenced. (If one or the other does not agree, the charge is sent through the regular investigative process.)

2) Charges for mediation are then assigned to a Commission Mediator who explains the process and makes all necessary arrangements for a mediation session.

3) If the mediation is successful, a mediation agreement is signed by the parties and the Commission removes the case from its charge inventory. If mediation fails, the Commission processes the charge through its regular investigative procedures. No records are made of the facts or evidence presented during the mediation process.

Advantages to Employers in Using the Mediation Program

- That the mediation process usually takes less than half the time spent in resolving a charge otherwise.
- That the service is free to both the Charging Party and the Employer.
- That it is less costly in terms of in-house investigative time and expenses including attorney's fees, and
- That there is a good chance the case can be resolved without paying any monetary benefits.

Why then has the program not had more takers?

According to the EEOC's study of the matter, the three basic reasons were as follows:

1) Employers did not believe that the merits of the case warranted mediation.

2) Employers did not believe that the EEOC would issue a "reasonable cause finding." (This directly relates to reason #1 above.)

3) Employers had the perception that mediation always required a significant monetary settlement.

Surprisingly, the EEOC found that the above reasons prevailed even among employers who knew the process well and had no major problems with its structure.

> Note: Even though the EEOC's own study revealed several significant drawbacks, mediation may still be worth a second glance by most employers.

Notwithstanding the results of its own study the EEOC at this point has made no significant changes in its mediation program to entice more employers to participate. And yet it still might be worthwhile for employers to take a second look for the following reasons:

First, despite its flaws, the EEOC's mediation program provides employers with "two bites" at the "early resolution apple": (1) through the mediation agreement, itself, and (2) by supplying valuable information for a possible 'Predetermination Settlement," which could accomplish the same thing.

Secondly, the mediation process places employers in a win-win posture. Since the cost is free, employers lose nothing but a little time in agreeing to mediation and their chances of settling the charge with little or no monetary relief are favorable - possibly up to 20% or even better. Moreover, it provides a good assessment of the strengths or weaknesses of the Charging Party's case as well as the employer's defenses.

Finally, the EEOC recently indicated that increased mediation would be among the enforcement objectives set forth in its Strategic Plan for 2004 –2005. It considers mediation to be a very important part of its National Enforcement Program. This means that the EEOC will judge its own accomplishments to a large extent by the success or failure of its Mediation Program. That makes it a favorable time to take advantage of it.

WAGE AND HOUR TIP: CURRENT WAGE HOUR HIGHLIGHTS

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.

Employers need to be aware that many Wage Hour issues continue to be in news on a regular basis and should review their pay practices to ensure that they are complying with the Fair Labor Standards Act. Hardly a day goes by that I don't see something regarding either pending litigation or Wage Hour activity under the Act. Some of the recent activities are listed below.

1. The number one issue remains the debate regarding the proposed changes to the regulations regarding the exemptions for executive, administrative, professional and outside sales employees. In late 2003 the Department of Labor stated that they plan to issue the final rule to implement the changes by the end of March 2004. However, Congress is still attempting to get involved in the issue. Even though the 2004 appropriations bill for DOL was passed and signed by the President does not contain any language prohibiting the implementation of the new regulations, there are indications that Congress will attempt to stop the proposed changes.

2. In its FY-2005 budget request the White House has requested a $1.1 Million increase for the Wage Hour Division. This would provide an additional 12 new employees to increase enforcement in "low wage" industries. Also included is a request to increase the penalties for repeated or willful violations of the child labor requirements from $11,000 to $100,000.

3. In early January DOL issued a press release informing employers of ways that they might avoid overtime pay. These included holding employees to a 40 hour week, converting an employee's pay to an hourly rate that is reduced so that the payment overtime will only return an employee to the same pay that he was previously receiving or raising the employee annual salary to $22,100 (the rate in the new proposed regulations) so that the employee would be exempt from overtime. **Note: If you choose the third option you must remember that the payment of the $22,100 salary will not necessarily make the employee exempt, as there are also duty tests that must be adhered to. Stay tuned because I doubt that we have heard the last of this issue.**

4. In a victory for an employer the U. S. District Court ruled that employees who were working for an American company in Antarctica were not entitled to overtime pay. The court found that Antarctica is a foreign country and therefore employees working there are not covered under the FLSA. (Smith v. Raytheon).

5. A U. S. District Court in Michigan ruled that College Field Representatives for a private university were outside sales employees rather than recruiters. Consequently, the employees, whose pay resembled commissions according to the court, were exempt as outside sales employees. (Nielsen v. DeVry, Inc.).

6. A St. Paul, MN based auto parts company is paying some $130,000 in back overtime to 125 employees who had not been paid for all hours worked. The firm also had employed 26

minors (age 16 & 17) as parts runners contrary to the child labor provisions and DOL required them to pay a civil money penalty of $17,400. These violations were uncovered during a self-audit the firm conducted at the direction of Wage Hour.

7. Another area where there continues to be litigation is related to the "donning and doffing" of safety wear and equipment. The most recent filing is by a group of employees of Jennie-O Turkey in Minnesota. Late last year a court in the northwest ruled for a group of employees of Iowa Beef Packers (now owned by Tyson Foods) and Wage Hour has a case pending on the issue against Tyson at its Blountsville, AL plant.

8. The 9th Circuit ruled in an Oregon case that Electric Utility Employees who lived on the premises were entitled to be paid for "on call" time because they were required to respond instantaneously to alerts and calls. The firm was paying the employees 4 hours of "on call" pay for each shift but did not consider the time as work time when determining the overtime compensation for the employees.

9. An Alabama employer, as a result of an investigation by Wage Hour is being required to pay $180,000 in back wages to its production workers. The investigation determined that the employer's production employees were required to work 5 minutes prior to their scheduled shift for which they were not paid. Back wages were computed for ½ hour per week for some 500 employees in three plants.

As we begin a new year, it is a good time for a review of payroll practices to make sure that they are in compliance with the FLSA. If I can provide assistance do not hesitate to give me a call.

DID YOU KNOW . . .

. . . that legislation was introduced on February 12, 2004 to substantially amend Title VII, the Equal Pay Act and the Age Discrimination in Employment Act? Called the "Fairness Act," The Civil Rights Act 2004 is sponsored in the Senate by Senator Kennedy (D. Mass) and in the House by Representative John Lewis (D. GA). The bill would prohibit mandatory arbitration of employment disputes, eliminate the cap on punitive damages that now exist under Title VII, permit compensatory and punitive damages under the Equal Pay Act and permit disparate impact claims to be brought under the Age Discrimination in Employment Act.

. . . that according to the National Association of Manufacturers, non farm employment during 2004 will increase by 1.8 million jobs? This information is based upon a report issued by NAM on January 15, 2004, stating that as part of the economic recovery gross domestic product will increase in 2004 by 4.1%. According to NAM, the combination of tax cuts and low interest rates has contributed to this economic growth. NAM believes that an additional 250,000 jobs in manufacturing will be created during 2004, particularly in sectors regarding fabricated metals, industrial machinery, electronics and transportation equipment. Those four sectors alone lost 1.4 million jobs since July 2000.

. . . that the rate of inflation increased by the lowest amount in 43 years, according the United States Department of Labor Bureau of Labor Statistics? Based upon a report issued on January 15, 2004, BLS said that the total cost of living increase in 2003 was 1.9%, compared to 2.4% for 2002. What is referred to as the "core" cost of living increase by only 1.1%. The core figure exclude food and energy. The 1.1% increase for 2003 was the lowest since 1960. Overall medical costs increased in 2003 by 3.7%, the lowest since 1999.

. . . that vague references to caring for grandchildren due to their father's military obligation was insufficient for FMLA coverage? The case of *Cool v. BorgWarner*, (S.D. Ind, Jan. 12, 2004) involved several FMLA issues, including a grandmother acting with authority of a parent due to her son's military obligations. Cool on three different times told her employer she needed to have time off for "family problems." She had not disclosed to her employer the nature of those problems. She resigned from work to be with her grandchildren, but subsequently asked for Family and Medical Leave due to the children's emotional problems. Without addressing the issue of whether her resignation terminated the FMLA issue, the court stated that medical certification regarding the grandchildren's condition proved that the illness was not a serious health condition. According to the court, the stress condition reported by Cool to the children's doctor [crying, sullen, acting out and abdominal pain], is similar to conditions such as the common cold, the flu, . . . illnesses that do not meet the definition of a serious health condition under the FMLA."

. . . that ADD does not qualify as a disability under the ADA? So ruled the court on February 3, 2004 in the case of *Prentice v. County of Lancaster* (D. Neb.). Prentice, a sixteen year employee, was terminated after extensive absences she claimed were due to Attention Deficit Disorder. According to the court, "there is no evidence that would support a finding that the plaintiff's impairment constitutes a significant barrier to employment or has significantly reduced her meaningful employment opportunities." The court characterized Prentice's condition as "limiting," which was accommodated by the employer. However, the court said that there was no evidence to suggest that Prentice was substantially limited in a major life activity or that the employer treated her as disabled based upon "exaggerated conclusions and interpretations of the plaintiff's condition." The employer was able to show that termination for her extended absence was a legitimate, non-discriminatory one that was applied consistently to other employees.

. . . that on February 24, 2004, the U. S. Supreme Court ruled that the Age Discrimination in Employment Act (ADEA) does not protect employees younger than 40? Justice Souter authored the opinion in a 6 – 3 decision in the case of *General Dynamics Land Systems, Inc. v. Cline*. Justice Souter wrote: "In a world where younger is better, talk about discrimination because of age is naturally understood to refer to discrimination against the older . . . the enemy of 40 is 30, not 50."

LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.

Brett Adair	**205/323-9265**
Stephen A. Brandon	**205/909-4502**
Donna Eich Brooks	**205/226-7120**
Michael Broom (Of Counsel)	**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**
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
Post Office Box 11945
Birmingham, Alabama 35202-1945
Telephone (205) 326-3002

***Decatur Office*:**
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767

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