"Your Workplace Is Our Work"®

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## Inside this Issue



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

# Employment Law Bulletin

## To Our Clients And Friends:

The number of employment discrimination lawsuits filed during 2003 far outpaced any other civil litigation, according to the Lawyers Commission on Civil Rights. **During 2003, a total of 20,972 employment discrimination lawsuits were filed in federal court, an increase of 4.7% from 20,040 lawsuits in 2002.** Overall civil lawsuits in federal court increased by 0.3% in 2003. A total of 8.2%, approximately 1 out of every 12, of all civil lawsuits filed in the federal court system were for alleged employment discrimination.

Although class action lawsuits receive great notoriety, only 82 class action discrimination lawsuits were filed in federal court in 2003, an increase from 60 such lawsuits in 2002. Wage and hour collective action litigation increased to 121 lawsuits in 2003 up from 91 in 2002 and 71 in 2000.

The total number of trials conducted on average by federal district court judges in 2003 was 19, which includes both criminal and all types of civil claims. The overwhelming majority of civil cases, including employment claims, are terminated through pretrial mechanisms such as summary judgment or settlement.

What do these statistics mean for employers? Note that wage and hour litigation is increasing substantially throughout our country. **There is no requirement prior to litigation to file a wage and hour claim with the United States Department of Labor. Thus, a lawsuit may be the first notice an employer receives regarding a wage and hour claim.** Wage and hour litigation potentially involves a large number of employees, as alleged systemic wage and hour violations often covers employees in multiple classifications and locations. Employers must give serious consideration to conducting their own wage and hour compliance audit to identify and correct possible violations before the violation evolves into prolonged litigation. Furthermore, unless an employer establishes a culture and procedures to internally address discrimination issues before they ever leave the workplace, employees and former employees will increasingly look to our court system as the forum for those concerns.

## NEW REGULATION PROPOSED FOR "INTERNET APPLICANTS"

Just when you thought your definition of "applicant" was safe and your system for tracking applicants by race and gender secure, along came OFCCP and proposed new rules. The March 29, 2004 Federal Register contains a proposed rulemaking by OFCCP that would expressly define an "Internet applicant" for recordkeeping and tracking purposes.

OFCCP regulations require federal contractors and banks to make a reasonable effort to obtain gender, race and ethnicity data from their applicants and employees. Most employers who operate on a paper-based system obtain this information by providing each applicant with a voluntary self-identification "tear off" sheet that is attached to a job application. For years now, OFCCP has struggled to refine the rules applicable to employers who consider applications or resumes via the Internet. OFCCP thinks it has finally done it.

**The proposed rule would define an "Internet applicant" as someone who (1) submits an expression of interest in employment through the Internet or related electronic media, (2) is considered for employment in a particular open position based on that expression of interest, (3) includes in his/her expression of interest sufficient information to indicate that the individual possesses the advertised, basic qualifications for the position, and (4) does not subsequently withdraw him/herself from consideration for employment.** The proposed rule would further require all federal contractors and banks to retain all records of an individual's expression of interest in employment submitted via the Internet.

There are certainly both positives and negatives to the proposed rule. The rule recognizes that there must be an open position. Resumes and other electronic expressions of interest would not constitute an Internet application unless the company has an open position. Also, the individual expressing interest in employment must meet the advertised, basic qualifications for an open position before he becomes an Internet applicant. Although this proposed rule recognizes that an individual must be able to do the basic functions of the job before he can be considered an applicant, the rule's language glosses over the established legal requirement that an individual must meet the minimum qualifications for a job before he can be considered an applicant. In place of "minimum qualifications," the rule inserts "advertised, basic qualifications." Such a rule potentially would require much more thorough job postings and advertisements. Employers may feel compelled to include every minimum qualification in their advertisements to avoid being stuck with a less-than-qualified Internet applicant. Finally, the rule will compel employers to make very thorough assessments of whether or not the electronic submission sufficiently indicates that the individual meets the advertised, basic qualifications. This level of highly personalized scrutiny is typically reserved for someone beyond the initial screener of an application.

Once the employer determines that it has an "Internet applicant," it then has the duty to make a reasonable effort to request the individual's race and gender information. Some contractors have an automated response that requests the data. Other contractors have simply waited until the interview process to obtain the data. Under the new rule, the obligation to track the individual based on race and gender becomes immediate once the employer ascertains that it has an "Internet applicant." This will require employers to implement an immediate response to solicit the race/gender data. Whether it be automated or personalized is up to the contractor. Note however that OFCCP currently takes the position that under no circumstances should the employer wait until

the interview stage to solicit race and gender information.

It is not, however, a foregone conclusion that the proposed rule will become a binding federal regulation. As required by the federal rulemaking process, all interested persons have 60 days from the publication of the proposed rule to provide the agency with comments on the proposed rule. If you would like to submit a comment on the rule, direct your comment to Joseph DuBray, Jr., Director of the Division of Policy, Planning, and Program Development, OFCCP. E-mail is the preferred medium for communicating the comment. Your e-mails should be sent to ofccp-public@dol.gov.

If you have questions or concerns about your own applicant tracking policies and procedures, please call David Middlebrooks or Matt Stiles at (205) 326-3002.

## DECLINE IN UNION MEMBERSHIP PROMOTES MERGER DISCUSSIONS

During 2003, organized labor signed up approximately 400,000 new members, yet its total membership for 2003 decreased by 39,500 members. The decrease is less than the decrease from 2001 to 2002, when total membership decreased by 73,000. According to the AFL-CIO, its current membership level is 13,133,209. This membership figure is based upon the number of dues paying members for whom individual AFL-CIO member union sends a per capita tax payment to the AFL-CIO. It is somewhat understated because organized labor represents more than the total membership number, because in right to work states it is illegal for an employer and union to agree that employees must pay union dues or fees or maintain union membership, or else be terminated.

The non-public sectors unions with the most significant growth during the period were the Service Employees International Union (an increase of 75,000 members), the Laborers' International Union (31,737), and the International Longshoremen's Association (6,174). Unions losing the most membership last year were the Machinists (35,344), the Steelworkers (25,954), the International Brotherhood of Electrical Workers (21,166), the Teamsters (16,811) and the United Food & Commercial Workers (14,049) members.

**As a consequence of declining membership, more unions are pursuing merger discussions**. For example, the Hotel Employees and Restaurant Employees (HERE) and its 260,000 members will merge with UNITE, which has approximately 200,000 UNITE's membership is down from a high of over 300,000 when it was created in 1995 as a merger of the Amalgamated Clothing and Textile Workers' Union and the International Ladies' Garment Workers Union. Both unions' membership has continued to decline even though both unions spent approximately 50% of their annual revenues on organizing efforts.

**Two other declining unions, the Steelworkers and PACE (Paper, Allied-Industrial, Chemical and Energy Workers) announced on March 5 that they are developing a "strategic alliance,"** which they say does not rule out the possibility of a merger in the future. They will work together on coordinated organizing campaigns, safety issues and political action. The Steelworkers have approximately 600,000 members while PACE has 275,000.

## OSHA TIP: OSHA'S HCS INITIATIVE

*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 recently announced a compliance assistance and enforcement initiative with respect to the Hazard Communication Standard (HCS) rule. The Hazard Communication Standard was adopted about 20 years ago and applies to about 650,000

chemicals and around 30 million workers. The purpose of the standard is to ensure that employees know the physical and health hazards of the chemicals to which they are exposed, and how to protect themselves from those hazards. The standard requires that the hazards of all chemicals imported into, produced or used in U.S. workplaces are evaluated and that hazard information is passed along to affected employers and exposed employees.

Employers with employees handling or otherwise exposed to hazardous chemicals at their workplaces must have a **written** program that details how they comply with the HCS requirements at the site. The following components must be addressed in an HCS program:

1. All hazardous chemicals in the plant must be labeled, tagged or marked with the identity of the material and appropriate hazard warnings.

2. There must be a Material Safety Data Sheet (MSDS), obtained from the product's manufacturer, importer or distributor, for each hazardous chemical.

3. Each employee who may be exposed to a hazardous chemical in his/her work must be given information and training regarding the product prior to such exposure, and whenever there is a change in the hazards.

Since its adoption, the HCS rule has consistently ranked as one of the most commonly violated OSHA rules. In fiscal 2003, over 7000 citations including $1.3 million in penalties were issued for HCS violations. While seemingly a simple concept, implementation of this "right-to-know" rule has raised many questions. OSHA has hundreds of letters of interpretation on its web site that address HCS issues. This current initiative is aimed at improving the quality of hazard communication and helping the regulated community comply.

The initiative includes a new page on OSHA's web site dedicated to this topic. A number of OSHA documents are available on the new page and links to other useful information are provided.

Secondly, hazard determination guidance will be provided to help chemical manufacturers and importers in generating the appropriate information and making it available to downstream users.

The initiative will include guidance for preparing MSDSs which would ensure that they are clear, consistent and complete. A sample MSDS format will be included.

With regard to enforcement, the agency is developing a component whereby it's compliance officers will review and evaluate the adequacy of MSDSs. A select number of chemicals will be chosen and their critical elements (phrases, words, etc,) identified as they should appear on an accurate MSDS. When the OSHA representative fails to find the appropriate identifier, the agency will follow up with the manufacturer for correction.

A visit to the Hazard Communication page of OSHA's web site could be very helpful in assessing the adequacy of your program and possibly avoiding future citations.

## EEO TIP: WHEN IS AGE DISCRIMINATION PERMITTED

*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.*

On February 24 the U.S. Supreme Court in the case of *Cline, et al v. General Dynamics Land Systems, Inc.*, interpreted how the Age Discrimination In Employment Act (ADEA) should be applied with respect to older versus younger members within the protected age-group, i.e. applicants or employees over the age of 40. While it has always been clear that the ADEA forbids discrimination in favor of the young over the old, the question in this case

was whether the ADEA also forbids discrimination in favor of older employees over younger employees when both employees are within the protected age group.

In a nutshell the Court held that: (a) discrimination against the "relatively younger" members of the protected age-group in favor of the "older" members of the protected age group was outside of the ADEA's protections; and (b) that, therefore, it would not be a violation of the ADEA to provide certain benefits to workers over 50 years of age that were not being provided to workers between the ages of 40 and 49.

The specific facts pertaining to the *Cline Case* can be summarized as follows:

In 1997 General Dynamics entered into a new collective bargaining agreement with the United Auto Workers Union under which the company's obligation to pay health benefits for subsequently retired employees was eliminated except for current employees who were at least 50 years old. Dennis Cline, for himself and on behalf of 195 other employees, who at the time were between the ages of 40 and 49, filed an EEOC charge alleging age discrimination. The EEOC in keeping with its regulations found reasonable cause in favor of Cline and the putative class. Conciliation failed and Cline filed the underlying lawsuit. The case was dismissed at the District Court level, but the dismissal was reversed by the 6th Circuit's Court of Appeals, thus, setting the stage for the Supreme Court's review.

In substance, Cline argued: (1) that the term "age discrimination" as used in the ADEA works both ways and prohibits discrimination against any members within the protected age group, not just the older members within the group (this was the EEOC's position in finding for Cline and the affected class members during the administrative phase of the case); (2) that the legislative history of the ADEA confirms that all members within the protected age group were shielded from "age" discrimination based upon the remarks of Senator Yarborough, one of the main sponsor's of the act during congressional hearings (Yarborough, in answer to a direct question as to two employees, one 42 and the other 52, stated that *"…the law prohibits age being a factor in the decision to hire as to one over the other, whichever way the decision went*"); (3) that the court should defer to the EEOC's interpretation of the statute under the circumstances in this case because the EEOC is the federal agency charged with enforcement of the act, itself.

Justice Souter in writing for the Court rejected all three of Cline's foregoing arguments. As to the first argument Souter stated that:

> "*While none of this court's cases directly addresses the question presented here, all of them show the Court's consistent understanding that the text, structure and history point to the ADEA as a remedy for* [any]*unfair preference based on relative youth,*[thus] *leaving complaints of the relatively young outside the statutory concern.*

In short the provisions of the ADEA were not intended to protect members within the protected age group from each other, but only to protect the older employees from unfair preferences of the relatively younger employees (whether they were within or without the protected age group).

As to the legislative history of the ADEA with respect to the remarks of Senator Yarborough, the Court stated that his isolated comment was insufficient to "*unsettle*" the Court's holdings because a "*single outlying statement cannot stand against a tide of context, history…[and] 30 years of judicial interpretation*" to the contrary.

Finally, the Court stated that the EEOC's interpretation of the ADEA on this point was not entitled to the deference normally given to administrative regulations because in this case the EEOC ". . . is clearly wrong."

Apparently in interpreting Section 623 (a)(1) of the ADEA, the EEOC included an explanation of how an employer should resolve intra-age preferences involving employees over the age of 40 in its regulations found at 29 C.F.R 1625.2(a) (2003):

> *If two people apply for the same position, and one is 42 and the other 52, the employer may not lawfully turn down either one on the basis of age, but must make such decision on the basis of some other factor.*

Justice Souter flatly rejected this interpretation of the Act. The EEOC will have to revise its regulations on this point and issue some guidance to employers which is consistent with the Court's decision.

## WAGE AND HOUR TIP: CURRENT WAGE AND 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 are likely aware that wage and hour issues continue to be in the news on a regular basis. Employers 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 and hour activity under the Act. Some recent activity is chronicled below.

First, as stated in last month's article, the number one issue continues to be the debate regarding the proposed changes to the regulations regarding the executive, administrative, professional and outside sales employee exemption. In a meeting on March 8th, the Wage Hour Administrator informed the Society of Human Resource Managers that the regulations were nearing completion and should be released before the end of March 2004. However, the following day a DOL source indicated that it might be April before the new regulations are issued. Once issued the new regulations will not take effect immediately. The Administrator indicated that the final regulations would contain several changes from the proposal issued last year. It is expected that Congress will attempt to block these changes. On March 12th Senator Tom Harkin's office indicated that he would introduce an amendment to a pending Export Tax bill that would prohibit the Department of Labor from expending any funds to implement the new regulations.

Second, the Sixth Circuit Court of Appeals recently awarded a former employee of the City of Chattanooga $40,000 for "emotional stress" in a retaliation case. The employee (who was male) had been terminated after complaining that he was being paid less than another employee (who was female). The Court also found that the employee was due $7200 in lost wages in addition to the damages for emotional stress. This is the fourth Court of Appeals that has awarded an employee damages for emotional stress even though the Fair Labor Standards Act does not specifically mention this type of award. **Employers should be very careful about taking an action against an employee who has exercised rights (either by filing a complaint with Wage Hour, bringing private litigation or merely requesting overtime).**

Third, in a ruling affecting only police officers that care for canines, the Ninth Circuit also awarded back wages to an employee for time spent caring for her dog at home. Typically these officers keep their dogs at home and must care for the basic needs of the animal. The city instead of seeking to get the employee's input regarding the time spent in caring for the dog paid the employee an additional $30 per week. The employee alleged that she spent 28 hours per week in these activities. The court found that the city had made no reasonable attempt to determine

the time the spent in these activities and thus had failed to properly compensate the employee.

Fourth, an Alabama poultry processor was found not to have paid two employees for time spent in pre-shift tasks of calibrating equipment and paperwork. The employees had also alleged they were due to be paid for time spend in "donning and doffing" garments, protective gloves and arm guards. The plant operates under a collective bargaining agreement, which contained no provision requiring the employer to pay for this time. Consequently, the court found that the employees were not entitled to pay for the donning and doffing time. Within a week after the ruling the parties reached a settlement on the matter and the case was dismissed.

Fifth, there also continues to be a substantial amount of litigation under the Family and Medical Leave Act. A U.S. District Court in Iowa recently found that a manufacturing plant worker who suffered from depression gave his employer sufficient notice of the need for FMLA leave. The employee's psychiatrist had stated the employee was able to perform "household chores or work for another employer" but had also written the employee's employer that the employee "could not work there until further notice." Therefore, the Court has allowed the action to proceed.

One area of the FMLA that causes many headaches for employers is the use of "intermittent" leave. The employee must make a reasonable effort to schedule planned treatments so as to prevent disruptions. However, typically treatments are only available during normal working hours causing the employee to miss time from work. The employer may require a medical certification of the need for the leave but must allow the employee to take the amount of time needed for the treatment. If an employee is gone for two hours then he/she may be charged with only two hours of FMLA leave. Under certain circumstances the employee may be transferred to another position during this time; however, the employee must continue to receive the same pay and benefits. As you know typically an "exempt" employee's pay may not be reduced for absences of less than a day but the FMLA regulations allow for deductions to be made for partial day absences when the employee is using FMLA leave without affecting the employee's exempt status.

Fair Labor Standards Act and Family and Medical Leave Act litigation continues to be an active matter thus employers need to ensure that they are complying with both statutes. If I can be of assistance please give me a call.

## DID YOU KNOW . . .

**. . . that municipal corporations and quasi public entities are covered by the WARN Act.?** *Castro v. Chicago Housing Authority,* (7th Cir., Mar. 10, 2004). The WARN Act's legislative history addresses "business entities." However, Department of Labor regulations define employer to include "public and quasi public entities which engage in business and which are separately organized from the regular government, which have their own governing bodies and which have independent authority to manage their personnel and assets." This case arose when the Housing Authority closed its police and security departments without providing sufficient notification under the WARN Act. As a result of its WARN Act violation, the Housing Authority was responsible for backpay damages of approximately of $1.27 million.

**. . . that the United States Department of Labor issued its final rule regarding postings government contractors are required to make to inform employees about the use of union dues?** Executive Order 13201 requires government contractors and subcontractors to post the following notice: "Under federal law employees cannot be required to join a union or maintain membership in a union in order to retain their jobs. Under certain conditions, the law permits

a union and an employer to enter into a union-security agreement requiring employees to pay uniform periodic dues and initiation fees. However, employees who are not union members can object to the use of their payments for certain purposes and can only be required to pay their share of union cost related to collective bargaining, contract administration, or grievance adjustment." Furthermore, the notice should state that employees are entitled to a refund if they believe that their union dues have been used for organizing or political purposes. The notice should direct employees to contact the National Labor Relations Board for more information about their rights.

**. . . that according to the Bureau of Labor Statistics, the total number of strikes and lockouts during 2003 declined, but the total number of days lost increased?** There were only 14 major work stoppages during 2003, but those work stoppages resulted in a total of 4.1 million work days lost. In 2002, there were 19 stoppages that resulted in 660,000 work days lost. The single largest work stoppage involved the west coast grocery store dispute with the United Food & Commercial Workers, covering over 67,000 employees. Historically, there were 317 work stoppages in 1973, 81 in 1983 and 35 in 1993. There have not been more than 50 work stoppages in a year since 1989, nor more than 100 since 1981.

**. . . that approximately 15% of the total U.S. Workforce works from home at least one day a week?** The 15% equals approximately 19.8 million employees. This information is based upon a survey conducted by the Employment Policy Foundation, released on March 11, 2004. The survey predicts that the number will grow, due to the use of high speed internet and e-mail. Approximately 17% of the total employees working at home do so as part of a formal arrangement with their employers. The remaining number of those who work at home do so because either they are self employed or they take work from the office to their home. Approximately 20% of all sales employees work at home at least one day a week and almost 30% of all managers and professionals work from their home at some point during the week.


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