"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:

The most significant development in more than fifty years regarding overtime exemptions for "white collar" employees becomes effective on August 23, 2004, unless Congress decides otherwise. In March 2003, the Department of Labor first issued its proposed changes to the overtime regulations, which resulted in over 80,000 comments and opposition from Congress and organized labor, among others. The final rule issued on April 23, 2004 substantially "waters down" the objectionable provisions of the March 2003 regulations, yet still helps employers.

To apprise you in a practical, "employer rights" approach to the regulations, we have scheduled a series of complimentary breakfast briefings throughout Alabama to be conducted by our attorneys and Lyndel L. Erwin, former Area Director of the United States Department of Labor, Wage and Hour Division and for the past four years as a consultant with our firm. The following are the dates, times and locations for the briefings:

06/16/04	**Montgomery - Holiday Inn - Prattville**	**8:00 – 9:30 a.m.**
06/17/04	**Huntsville - Marriott Space Center**	**11:00 – 1:00 p.m.**
06/22/04	**Decatur - Holiday Inn**	**8:00 – 9:30 a.m.**
06/23/04	**Birmingham - 280 HealthSouth Conference Center**	**8:00 – 9:30 a.m.**
06/29/04	**Dothan - Holiday Inn**	**8:00 – 9:30 a.m.**
06/30/04	**Mobile - Admiral Semmes**	**8:00 – 9:30 a.m.**

Each attendee will receive a comprehensive handout. You are welcome to bring guests to the meeting. Please reserve your place by phoning or sending e-mail to Sherry Morton at smorton@lmpv.com or 205/323-9263 or fax the attached form to 205/326-3008.

Note that the Huntsville briefing will be conducted as part of the Management Roundtable group meeting, from 11:00 to 1:00 p.m. (this will include lunch) at the Marriott Space Center Hotel, with a charge of $15.00 per person.

The following are the key provisions of the proposed final regulations:

1. Any currently exempt employee earning less than $23,600 a year ($455 a week) will be non-exempt, unless that individual's pay is raised to the minimum level necessary for exempt status.
2. In a change that is helpful to retailers and the fast food industry, the 40% limitation on the amount of non-exempt work that could be performed by an exempt executive, such as a store manager or assistant manager, is changed to provide that "employees who spend more than 50% of their time performing exempt work will generally satisfy the primary duty requirement. . . nothing in this section requires that exempt employees spend more than 50% of their time performing exempt work."
3. Disciplinary deductions of at least one day or longer may occur from an exempt employee's salary.
4. Exempt employees will have to meet all of the requirements; the "short test" covers only those employees who earn at least $100,000 a year or more. The current "short test" covers employees who earn at least $13,000 annually and meet other requirements.

FAILURE TO DEFINE CLEARLY "AT-WILL" LIMITS EMPLOYER'S RIGHTS

It is a good idea for employers to confirm offers of employment in writing, including a statement that employment is for no definite duration and it may be terminated with or without cause or notice at any time by the employee or the employer. In the case of *Dore v. Arnold Worldwide, Inc.*, (Cal. Ct. App., Mar. 24, 2004), **an employer that thought it had properly stated the termination "at-will" relationship found out otherwise and, therefore, was required to defend against the employee's breach of contract claim.**

The offer letter the company sent to employee Brooke Dore stated that Dore would be an "at-will" employee. The company then added in the letter that "at-will" "simply means that Arnold Communications has the right to terminate your employment at any time just as you have the right to terminate your employment with Arnold Communications at any time." According to the court, if the employer had just stated that the relationship was "at-will," that would have meant that the relationship could be terminated for any reason or no reason. However, the court stated that by defining "at-will" in terms of the timing of the termination but excluding reference to cause or no cause for termination, the term "at-will" as used in Dore's contract did not mean "at any time for any reason," it only meant "at any time."

The court also noted that the letter referred to an initial 90 day evaluation and that at the end of the 90 days there would be a discussion about promotion opportunities, which further supported the employee's argument that termination had to be "for cause." The court stated that when one reads the two provisions together (the sentence stating at-will followed by the sentence defining at-will to mean at any time) and considering the contract interpretation principle that ambiguities are construed against the drafting party (the employer), the court concluded that Dore's case could proceed.

It is important for employers to define "at-will" in offer letters, handbooks and other

communications to include that not only may the employee or employer terminate the relationship at any time, with or without notice, but to add that "at-will" means "with or without cause" or "for any reason or no reason." If an applicant or employee as a condition of employment is asked to sign a non-compete, confidentiality and non-disclosure agreement, be sure that the "at-will" language is also drafted to uphold the rights the employer seeks to protect through those agreements.

HIPAA COMPLIANCE: WHERE DO YOU GO FROM HERE?

Now that April 14, 2004 has come and gone, all health plans (with the exception of self-administered plans with fewer than 20 participants) must be in compliance with HIPAA's Privacy Regulations. You may have a pile of just-implemented policies and procedures stacked up on your desk and you are probably heaving a huge sigh of relief that you got the plan documents amended and the Notice of Privacy Practices issued on time. So what happens now?

Well, **the most important thing to keep in mind is that HIPAA compliance is an ongoing undertaking. You must continue to monitor your plan's policies and procedures and ensure that the steps you have taken thus far are adequately safeguarding the confidentiality of protected health information (PHI).** You need to be vigilant about ensuring that you do not see PHI "pop up" in unexpected places. One of the requirements of the Privacy Regulations is that you mitigate to the extent practicable any harmful effects of an unauthorized use or disclosure of PHI. Therefore, continuing vigilance will be required to comply with the regulations. These initial compliance efforts that have occupied so much of our time leading up to the compliance deadline are truly just the first step in safeguarding the privacy of PHI.

Also, remember the record-keeping requirements under the Privacy Regulations. Any required documentation must be retained – either in written or electronic form – for six years from the date it was created or the date on which it was last in effect, whichever is later. So maintain all of those policies and procedures (even if you end up amending them as you tweak your compliance plan further), maintain your designation of the privacy officer, maintain a job description for the privacy officer, etc. If you have to write something down to comply with the Privacy Regulations, maintain those documents accordingly.

Additionally, keep your eyes and ears open for additional information regarding compliance with HIPAA's Security Regulations. Just when you thought it was safe, another major set of HIPAA regulations is staring you in the face. Final security regulations were issued on February 20, 2003, and they became effective on April 21, 2003. The compliance deadline for the Security Regulations is April 21, 2005, with small group health plans (those with gross annual receipts of less than $5 million) having until April 21, 2006 to achieve compliance. The purpose of the security regulations is to ensure the integrity, security, and availability of electronic protected health information ("EPHI") that is identifiable to an individual. The Security Regulations address EPHI when it is being stored, as well as when it is being transmitted, but do not cover paper records. Stay tuned for more details!

For further information please contact Donna Brooks at 205/226-7120.

OSHA TIP: OSHA UNVEILS 2004 INSPECTION PLAN

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.

The Occupational Safety and Health Administration has released a new site-specific targeting plan. The effective date of the plan is April 19, 2004. It will expire one year from that date unless it is replaced earlier by a new published notice. The plan targets about 4,000 high-hazard worksites for unannounced safety and health inspections.

This marks the sixth year that the agency has used site-specific injury and illness data to identify inspection targets. This year's program is derived from OSHA's Data Initiative for 2003, which surveyed approximately 80,000 employers to attain their injury and illness numbers for the year 2002.

Worksites on the primary list for inspection will be those that reported 15 or more injuries or illnesses resulting in days away from work, restricted work activity, or job transfer for every 100 full-time workers (known as the DART rate). Also included on the primary list will be those sites "Days Away from Work Injury Illness" (DAFWII) rates of 10 or higher (10 or more cases that involve days away from work per 100 full-time employees). Employers with DART rates between 8.0 and 15.0, or DAFWII rates between 4.0 and 10.0, will be placed on a secondary list for possible inspection. The average national DART rate in 2002 for private industry was 2.8, while the national average DAFWII rate was 1.6.

Nursing homes and personal care facilities will be included for inspections under the 2004 plan. For the past two years these sites had been selected for inspections under a separate National Emphasis Program.

As in the past, about 200 workplaces that reported low injury and illness rates will be selected for inspections. These sites will each have 200 or more employees, have DART rates between 0.0 and 4.0 and DAFWII rates between 0.0 and 2.0. They will, however, be from industries having above average DART and DAFWII rates. The purpose of these inspections is to review the actual degree of compliance with OSHA requirements. Completing the agency's primary inspection list will be establishments that failed to respond to the data collection requests.

Establishments that received comprehensive inspections of both safety and health, that were initiated within the past 24 months, should be deleted from the current inspection list.

Escaping the current inspection list will not guarantee the absence of an OSHA visit in the near future. Employee complaints, referrals, followup inspections and unfortunately, accidents, may bring an inspector to your door.

EEOC TIP: NEW RECORDKEEPING GUIDELINES FOR INTERNET JOB APPLICANTS

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 1978 the EEOC together with the Department of Labor, the Department of Justice, and the Office of Personnel Management issued **the *Uniform Guidelines on Employee Selection Procedures* (UGESP)** under Title VII and Executive Order 11246. The UGESP was intended to serve two general purposes: (1) to set forth certain

record keeping requirements pertaining to employment transactions, and (2) to provide detailed instructions on acceptable methods of validating tests and other selection procedures which were found to have a "disparate impact" on minorities or other protected groups.

When the UGESP was issued in 1978, the EEOC and the other federal agencies involved could not have envisioned the extent to which the Internet and other related technologies would be used as major tools in the recruitment and hiring processes of American businesses. Since the early 1990's there has been an unimaginable proliferation of recruitment information, job banks and job opportunities placed on the internet or World Wide Web. According to data obtained by the EEOC, and published on its web-site, surveys of corporations with 500 or more employees in 2003 showed that 85% of such corporations have some form of basic or more extensive career website.

Also during the 1990's there was a rapid development of 'third party" data bases of resumes and job listings. According to the EEOC by 2003 "one industry leader reported having over 22.5 million resumes in its database." There seems to be little doubt that human resource departments are rapidly being overwhelmed with resumes and job applications. For example one major health care employer reported having received 300,000 online resumes in one year, and even a relatively small employer reported that the number of resumes received by it had increased from approximately 6000 to 24,000 in one year because of the internet.

The Problem. The problem for employers in this new age of electronic technology is one of records accountability. For example, how many of the potentially thousands of resumes that may have been received over the Internet are "job applicants" within the meaning of the Uniform Guidelines on Employee Selection Procedures?

Under Title VII and Executive Order 11246, employers and their recruiters must ensure that all aspects of the recruitment and hiring processes are lawful, that is, that they are free from any discrimination on the bases of race, sex, color, national origin, or religion. Specifically, under the UGESP employers are required to " ..*maintain and have available for inspection records or other information which will disclose the impact which its tests and other selection procedures have upon employment opportunities of persons by identifiable race, sex, or ethnic group*

In recognition of this problem, the EEOC together with the Department of Labor, the Department of Justice and the Office of Personnel Management are proposing certain guidelines in the form of "*Questions and Answers To Clarify and Provide a Common Interpretation of the Uniform Guidelines on Employee Selection Procedures As They Relate to the Internet and Related Technologies."*

The term "Internet and related electronic technologies" includes e-mail, third party job or resume banks, electronic scanning technology, and internal data bases.

The proposed new guidelines do not change the existing definition of an "applicant" who completes a traditional "hard copy" job application. Under the UGESP the existing definition of an applicant is:

"…a person who has indicated an interest in being considered for hiring, promotion, or other employment opportunities. This interest might be expressed by completing an application form, or might be expressed orally, depending on the employer's practice."

Under the new guidelines in the context of the Internet and related electronic technologies, the following actions must have occurred in order to qualify as an applicant:

1. The employer must have acted to fill a particular position.
2. The individual followed the employer's standard procedures for submitting an application, and;
3. The individual indicated an interest in the particular position.

It is noteworthy that under the traditional method of submitting "hard copy" job applications, the employer **need not have acted to fill a particular position before an application is submitted**. Traditionally, some employer's accept applications in advance and consider them to be viable for six months or even a year. **However, under the "Internet and related technologies" guidelines, the employer must have acted to fill a particular position before a submission would be considered to be an application.** It is difficult to know at this time whether or not that particular requirement will substantially reduce the number of records that must be maintained under the UGESP. Obviously, employers will be effected differently depending upon the extent to which each uses the Internet or other related electronic technologies for recruitment and hiring purposes. Given the present circumstances, almost any relief should be most welcome.

According to the EEOC, if an employer uses both of the selection methods, the existing record keeping standards will apply to traditional hard copy applications, but the new record keeping standards will apply to the Internet/electronic technologies applications.

Finally, it should be mentioned that if an employment test is found to have a "disparate impact" on any "protected group" under Title VII, it must be validated in keeping with the UGESP whether administered online or in person.

As of this date the new guidelines have not been formally adopted by all of the four agencies in question. As a matter of fact, they are currently in the "comment" stage as required by law. Members of the general public may submit comments concerning the proposed new guidelines to the EEOC on or before May 3, 2004. At some date thereafter the EEOC will formally publish the effective date of the new guidelines in the Federal Register. We will keep you posted in this column as to that date as soon as possible after the EEOC publishes it.

BODY PIERCING AND VISIBLE TATTOOS: RELIGIOUS EXPRESSION THAT MUST BE ACCOMMODATED?

The case of *Cloutier v. Costco Wholesale,* (D. Mass., March 30, 2004) involved a conflict between an employee with visible tattoos and body piercings and an employer's dress code. At the time the employee was hired, she had eleven ear piercings (is there enough room for that?) and tattoos on her upper arms. She did not have any facial piercings. After she was hired, she had a variety of facial piercings, including an eyebrow ring. The company asked her to remove the piercings. She then told the company that she was a member of a religion called the Church of Body Modification and that her religious beliefs required that she wear these piercings. The employer said that as a form of accommodation she could cover them with band aids or wear a clear plastic retainer. She walked off the job, refused to do either and sued.

Courts are very generous in defining "religion." If a court can decide a case without determining whether an individual has "sincerely held religious beliefs,", the court will often do so. Such was the outcome in this case.

The court concluded that it need not address whether Church of Body Modification is the

source for former employee's deeply held religious beliefs, as "Costco's offer of accommodation was manifestly reasonable as a matter of law. The temporary covering of plaintiff's facial piercings during working hours impinges on plaintiff's religious scruples, no more than the wearing of a blouse, which covers plaintiff's tattoos. The alternative of a clear plastic retainer does not even require plaintiff to cover her piercings."

Employers have the right to establish dress code and grooming policies that address visible tattoos and body piercings. Whether it is piercings of the nose, tongue, eyebrows or lips, an employer has substantial rights to require that employees project an image according to what the employer determines is appropriate. If an employee raises a religious beliefs exception, the employer should determine whether it is possible to accommodate an individual's religious beliefs. However, an employer has the right to first assess whether an individual's religious beliefs are protected under the law.

DID YOU KNOW . . .

. . . that a court on April 5, 2004 refused to enforce an arbitration clause where the employee was told that she would not receive her paycheck unless she signed the agreement? *United Revenue Service, Inc. v. Prall,* (Cal. Ct. App., April 5, 2004). The court also said that the terms of the agreement made it unenforceable, such as requiring that the individual pay for all of the upfront arbitration costs and limit where the employee could initiate the arbitration, though the company could chose for the arbitration hearing anywhere in the United States. The court concluded overall that the agreement was "shockingly one-sided."

. . . that an employee who was terminated after refusing to sign a company's diversity policy for religious reasons was awarded over $150,000 for religious discrimination? *Buonano v. AT&T Broadband*, (D. Co., April 1, 2004). The company's diversity policy required an employee to sign a statement to "respect and value the differences in all of us." The employee refused to sign, because he said that he does not value religious beliefs other than his own or homosexuality. The employee's position was that "he can respect and value a person and not discriminate against them, but God's word says certain things are sinful." The issue of employees objecting to company diversity policies for religious reasons is an expanding one. The company can hold the employee accountable to comply with the policy, as a condition of continued employment, but apparently requiring the employee to do so in writing was unnecessary and should not have resulted in the employee's termination. As a general principle, employers may hold employees accountable for policies that are distributed to employees even if employees do not acknowledge that they understand and agree to be bound by the policy. The overwhelming majority of states conclude that the employee's continued employment serves as the employee's acceptance of complying with the employer's policies.

. . . that on April 22, the EEOC approved an exemption from age discrimination claims when employers reduce or end medical benefits when a retiree becomes available for Medicare? The regulation has not been issued yet as a proposed rule; there is still an administrative process to follow before it is formally published and comments are invited. This proposed change is one of those rare situations of organized labor and the business community aligning on the same side of an issue. Organized labor is concerned that if employers are not permitted to reduce or eliminate retiree costs in

conjunction with Medicare or state retiree health benefits, employers will reduce or eliminate health benefits for retirees entirely. According to the EEOC, "Because the Commission has determined that its prior policy created an incentive for employers to reduce or eliminate retiree health benefits, the agency has concluded that the public interest is best served by an ADEA policy that permits employers greater flexibility to offer these valuable benefits." An example of an outcome of the EEOC's position is that employers may offer retiree health coverage for only those retirees ineligible for Medicare.

. . . that a lower than hoped for raise is not considered an "adverse employment action" to support a discrimination claim? *Baker v. Pactiv Corporation*, (M.D. Ill., April 14, 2004). The individual argued that he received a 3% raise rather than a 5% raise based upon race. However, the court stated that "only tangible employment actions that cause a significant change in employment status constitute actionable employment actions. . . a lesser merit increase [is not] viewed in the same way as a decrease in wages and [does not] constitute a fundamental change in the terms of employment." Examples of actionable actions include those that are "more disruptive than a mere inconvenience or an alteration of job responsibilities," such as hiring, firing, failing to promote, significant reduction in pay and benefits and a significant reduction of responsibilities.

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