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

Employment Law Bulletin

To Our Clients And Friends:

ARE BUDGETARY AND STRUCTURAL CHANGES BRINGING DISCONTENT AT THE EEOC?

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.

Partly in response to the President's Management Agenda, and partly because of severe budgetary cutbacks, the Equal Employment Opportunity Commission (EEOC), as well as all other federal agencies are proposing significant procedural and structural changes in their operations over the next five years. Under a directive issued by the Office of Management and Budget in May 2001, each federal agency was required to develop a plan to streamline agency operations so as: (1) to provide a closer, more direct delivery of services to citizens, and (2) to "flatten the federal hierarchy" and reduce the layers of government, including the time it takes to make decisions.

In the Commission's case the changes are reflected in the EEOC's "Strategic Plan for Fiscal Years 2004 – 2009.". For the most part, the procedural and structural changes being proposed appear to be more a matter of "focus" rather than the basic "mission" of the agency. The highlights of this plan will be summarized in next month's Employment Law Bulletin.

However, based upon this writer's observations and recent interviews, some of the structural changes and budgetary limitations are wreaking havoc upon the EEOC's current operations. The changes and/or budgetary restrictions have riled many of the EEOC's Administrative Managers in first and second level management positions at the agency. These include Regional Attorneys, Deputy District Directors, Supervisory Trial Attorneys and Compliance Managers who supervise most of the day to day operations at the District Office level.

At this point it is hard to tell whether the budgetary restrictions have precipitated the structural changes or visa versa. In terms of budgetary restrictions, the agency has been put on a hiring freeze for the past two years. Unfortunately, over roughly the same two-year period, the agency nationwide lost 140 investigators which could not be replaced. Since each investigator on the average processed 113 charges per year, the agency lost the capacity to process approximately 16,000 charges per year since that time.

This has resulted in a workload imbalance among the 24 designated district offices, located throughout the country, where the investigative staffs range from 28 to 130 persons. Thus, for several years now the agency has moved charges from one district office to another for investigative purposes in an attempt to offset the imbalance in available investigators. **As might be expected, this circumstance has slowed the investigative process resulting in an ever-increasing inventory of pending charges, an increased workload on the remaining investigators, and an overall increase in the time it takes to resolve charges. All of the foregoing factors will lead to frustration among EEOC staff, charging parties and employers.**

WAGE AND HOUR EXEMPTION REGULATIONS: FROM MOUNTAIN TO MOLEHILL TO VOLCANIC ACTIVITY

The past fourteen months have been most unusual regarding the attention of Congress and advocacy groups on the U. S. Department of Labor's proposed changes to the "white collar" exemptions. In March 2003, DOL proposed substantial changes to the exemptions, which included raising the minimum salary threshold and exempting as professional employees those without a degree who are technicians working in a field also occupied by those with a degree. Based upon the outcry from advocacy groups (primarily organized labor) and several in Congress, DOL on April 23, 2004 issued a revision of the proposed regulations, to become effective on August 23, 2004.

The revised final regulations made a molehill out of the mountain that was created in March 2003. For example, the broadening of the professional employee exemption was eliminated. The salary for the "highly compensated" minimum duties test was increased from $65,000 in March 2003 to $100,000. The minimum salary level for exempt status was increased from $425 per week in March 2003 to $455 per week ($23,660 a year).

Earlier this month, the U.S. Senate passed the Harkin Amendment, which turns the molehill into a volcano. Under the Harkin Amendment, employees who are paid on an hourly basis and in 54 specified job classifications will be covered for exemption purposes by the regulations that are now in effect and not the new ones. The new regulations will apply only to those employees who are (1) not paid hourly and (2) not working at jobs specified in the Harkin Amendment. The practical effect of the Harkin Amendment would be to require some employers to follow two different sets of regulations for maintaining exempt status, those in effect now and those that will become effective on August 23, 2004.

The House has defeated its version of the Harkin Amendment, but efforts will persist for the House to pass it. Where does this place employers between now and August 23, 2004? Prepare to comply with the new regulations. Whether employers will be required to adhere to two separate standards of regulations depends upon (1) the House passing a similar version of the Harkin Amendment, (2) whether the President vetoes such legislation and (3) if there are enough votes to override the veto. Remember regardless of whether the Harkin Amendment passes in the House, as of August 23, 2004, an employee must be paid a minimum salary of $455 per week to be exempt as an executive, administrative or professional employee.

If your organization has locations in other states, review whether those states have statutes or regulations that could affect the implementation of the new regulations. The Fair Labor Standards Act and regulations pursuant to it are minimum standards; states may require a higher standard for exemption status. Thus far, eighteen states have legislation or regulations affecting the DOL regulations: AK, AR, CA, CO, CT, HI, IL, KY, MD, MN, MT, ND, NJ, OR, PA, WA, WI, WV.

This a reminder of our complimentary breakfast briefings to review the new regulations. 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. The dates and locations are as follows:

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**	**HealthSouth Conference Center 280**	**8:00 – 9:30 a.m**
06/29/04	**Dothan**	**Holiday Inn**	**8:00 – 9:30 a.m.**

Each attendee will receive a comprehensive handout. You are welcome to bring guests to the meeting. 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.

"BUT MY SALES WERE HIGHER THAN YOUNGER SALES PEOPLE . . ."

When sales employees are terminated as part of a reduction in force or due to declining performance, the key question in a discrimination claim is whether the terminated or laid off sales employee had higher sales than others who were retained. Such is the case in *Cornelius v. ADP, Inc.,* (N.D. ILL, Apr. 30, 2004), where the judge stated that the case should go to a jury.

Cornelius worked in sales for ADP for seventeen years until his termination in 2002. Through 2001, he received various accolades for stellar sales, including six "President's Club" awards and the company's "Eagle Award" in 1999 and 2000. During the last year of his employment, Cornelius failed to meet quota and at 51 years old was also the oldest sales person. He and other sales people were terminated for failing to meet quota, but he alleged that sales people in their 30's who also did not meet quota were retained. **The court stated that evidence suggested the company applied inconsistent standards to Cornelius which resulted in his termination compared to younger sales people who were retained.**

Here's the problem with the termination of a sales person. Often the person terminated does not have the lowest sales compared to all sales people. Other factors affect the termination decision. For example, is the territory of the terminated person more conducive to generating higher sales than others who were retained? Did the sales person who was terminated create new sales compared to those who remained**? Too often, employers end up in the situation where although the reason for a sales person's termination is not due to the sales volume alone, the matter plays out that way in a discrimination claim. If a sales person's job is vulnerable, make clear to that person why; is it due to the sales volume, is it due to lack of new leads and/or is it due to failure to generate more sales in a fertile territory?**

UNINTENTIONAL MISREPRESENTATION COSTS EMPLOYER

William J. Schaeffer was a hospital administrator who suffered from multiple sclerosis. The condition worsened and the hospital accommodated him by permitting him to work at home two days a week. In December 1999, Schaeffer discussed with the human resources department his worsening condition and the possibility of terminating his employment and becoming eligible for

disability benefits. The human resources director told him that if he terminated his employment anytime during 2000, he would become eligible for disability payments. According, Schaeffer resigned on January 8, 2000, only subsequently to learn that he needed to work until February 1, 2000 to become eligible for benefits. *Schaeffer v. Albert Einstein Healthcare Network*, (E.D. PA, May 3, 2004). With a worsening condition, no work and no pay, Schaeffer sued. He claimed that the hospital breached its fiduciary responsibilities to him under ERISA by giving him incorrect information regarding eligibility for disability benefits. In denying the hospital's motion for summary judgment, the court said that a number of facts are disputed which must be heard at trial.

The sympathies in this case of course are with Schaeffer. How can an employer avoid this type of problem from arising in the future? Be sure those responsible for plan administration understand its terms and conditions prior to telling employees what they need to do for plan or benefits eligibility.

EMPLOYER RIGHTS UNDER ADA TO REQUIRE FITNESS FOR WORK MEDICAL EXAM

Employers sometimes confuse the medical exam issue under the ADA with the Family and Medical Leave Act. The general principle under the FMLA is that unless the absence is due to a job related injury, an employer may not require a fitness for duty exam as a condition of the employee returning to work. However, under the ADA an employer may require such an exam, which was the issue in the case of *Rosenquist v. Ottaway Newspapers, Inc.,* (U.S. S.Ct., cert. denied, May 17, 2004).

Rosenquist in 1996 had a stroke, which limited his ability to perform his duties as a reporter. After several months of rehabilitation and hospitalization, Rosenquist reported to work, but without a doctor's assessment of whether he could perform his job duties. Accordingly, the newspaper asked Rosenquist to be examined by a doctor of its choice. The doctor concluded that Rosenquist was unable to perform the essential duties of a newspaper reporter, with or without reasonable accommodation. Rosenquist asked the newspaper to return him to work on a trial basis to see if he could do the job. The newspaper rejected his request and proceeded with termination.

He sued after the EEOC found cause to believe he was discriminated against based upon his disability. The EEOC determined that there was not a true "interactive process" for reasonable accommodation as required under ADA. The employer was granted summary judgment, which was upheld by the court of appeals. The lower court ruled that if there is medical substantiation that accommodation is not possible, it is unnecessary for the employer to provide an employee with a "trial period" to see whether he or she can do the job.

Note that under the ADA, an employer is not required to accept an employee's physician's authorization for the employee to return to work, with or without accommodation. If an employer has concerns about the thoroughness or accuracy of that medical assessment, the employer has the right to require the employee to be examined by a physician of the employer's choice. Be sure the physician understands the essential job functions and ask the physician to identify (1) whether the employee can perform those functions with or without accommodation and (2) if accommodation is possible, examples of accommodation the physician recommends.

OVERLY BROAD NON-COMPETE UNENFORCEABLE

Non-competition agreements are a valid, often enforced approach to protect an employer's business interests. However, if overly broad, some courts will not enforce the agreement at all, while others courts will modify the agreement and enforce it. Such was the case in *Wright v. Sports Supply Group, Inc.*, (TX Ct.

App., April 29, 2004). Wright was a salesman for Sports Supply for several years, prior to signing a non-competition agreement in November 2001. According to the agreement, Wright would not sell sporting equipment to nor solicit any of Sports Supply's customers, nor would he use any confidential information, such as pricing and customer lists.

Wright in July 2003 left Sports Supply to work for Riddell, a strong competitor. Sports Supply sought to enforce the non-compete agreement. Wright raised a number of issues to avoid the agreement, but ultimately the court concluded that the agreement should be modified because it was overly broad by limiting Wright's contact with customers he did not service while employed by Sports Supply. According to the court, **"a restrictive covenant is unreasonable unless it bares some relation to the activities of the employee. A covenant not to compete that extends to clients with whom a salesman had no dealings during his employment is unenforceable."**

Although the Texas court modified the agreement and enforced it, other courts could determine under the laws of their states that the entire agreement should be unenforceable. Therefore, be sure that the non-compete agreement is drafted as narrowly as possible to protect your organization's business interests and in compliance with state law.

OSHA TIP: OSHA COMPLIANCE REVIEWS

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.

Conducting periodic reviews of programs, equipment, physical plant, accident trends and training is critical to ensuring OSHA compliance and an acceptable overall safety and health program. A cornerstone of OSHA's acclaimed Voluntary Protection Program is a requirement that all participant sites have annual self-evaluations. While not a blanket requirement for all covered employers, such evaluations are encouraged by OSHA. The voluntary Safety and Health Management Guidelines, published in 1989, addresses this: **"Unawareness of a hazard which stems from failure to examine the worksite is a sure sign that safety and health policies and/or practices are ineffective. Effective management actively analyzes the work and worksite, to anticipate and prevent harmful occurrences."**

There are also requirements in various OSHA standards that mandate periodic (annual or other) actions. A few examples of these are as follows:

1. The lockout-tagout standard (1910.147) requires that a periodic inspection of energy control procedures be performed at least annually. A certification record of this action should be available.
2. The standard relating to the training of operators of powered industrial trucks, found in 1910.178, requires that an operator's performance be evaluated at least every three years.
3. Where portable extinguishers are provided for employee use, initial training must be provided those employees with at least annual updates. (1910.157)
4. Employees covered by the bloodborne pathogens standard (1910.1030) must receive annual training.
5. standards applicable to cranes and their components (1910.179) call for daily to annual inspections.

In addition to standards such as the foregoing, many other standards require training or other action when there is a change in personnel, materials, procedures, or the like.

Do you know how many of the 100 plus training requirements apply at your site? Are you on OSHA's SST list? What is your company's responsibility for subcontractors

working at your site? You may know the answers to all of these questions and much more but wish to have a second opinion about your OSHA status. We provide OSHA compliance audits tailored to your needs, which include any or all of the following:

- A review and evaluation of your OSHA recordkeeping
- A simulated OSHA inspection
- Review of required programs, such as, Lockout/Tagout, Hazard Communication, etc.
- Identify areas of your OSHA vulnerability
- Provide assistance in responding to OSHA non-formal complaints, inspections, and citations
- Training assistance
- Provide research and information on OSHA standards, policies and procedures
- Oral or written feedback as preferred

Please contact me at 205/226-7129 for further information.

DID YOU KNOW . . .

. . . that the International Association of Machinists drop in membership has brought it below its minimum threshold for financial viability? According to IAM, their budgeting process and viability depend on a minimum of 400,000 members. With the decline of 36,000 members in 2003, the union's membership is now at 376,000. To bolster its membership ranks, the union will shift money from its strike fund to organizing, so that new members will replenish the strike fund. Look for IAM to seek merger possibilities with other declining industrial unions, such as the Steelworkers or PACE.

. . . that pregnancy is not required to be treated with "light duty" assignments compared to other non-occupational injuries or illnesses? *Daugherty v. Genesis Health Ventures of Salisbury, Inc.*, (D. MD., May 10, 2004). Jennifer Daugherty worked as a nursing assistant and requested accommodation to a job that did not require lifting, due to limitations arising out of her pregnancy. The employer refused, stating that such jobs are limited to those with job related illnesses or injuries. In concluding that the employer did not violate the Pregnancy Discrimination Act, the court stated that "plaintiff has failed to marshal any evidence to call into question the bonifides of the defendant's limited 'light duty' policy, although she has argued vigorously that the policy is unfair if not arbitrary. That may be, but plaintiff has not remotely shown that the policy has ever been applied in a discriminatory manner." Furthermore, "an employer is not required to treat a disability arising from pregnancy more favorably than it treats other forms of temporary disability."

. . .that Rep. Charles Norwood on May 12 introduced legislation to prohibit union recognition unless it occurred as a result of a secret ballot election? Known as the Secret Ballot Protection Act, it would be an unfair labor practice for an employer to "recognize or bargain collectively with a labor organization that has not been selected by a majority of such employees in a secret ballot election conducted by the National Labor Relations Board." Rep. Norwood said the purpose of the bill is to raise an awareness of the importance of permitting employees to decide union representation by secret ballot, as opposed to voluntary recognition by an employer or recognition based upon a card check that has been proposed by Rep. George Miller of California.

. . . that a court ruled that time spent in counseling for stress is considered working time? *Schie v. Aurora, ILL*, (M.D. ILL, April 21, 2004). Wage and hour regulations require that an employee who receives medical attention during working hours at the employer's direction must be paid for travel time and actual time spent in the medical exam. This case involved an employee who was advised by her physician to receive counseling due to stress. The

counseling occurred during non-working time, however the court ruled that it was compensable. According to the court, the counseling was ultimately for the benefit for the employer, because the employee would be more productive. Therefore, the employer should pay for the time spent traveling to and from and participating in the counseling session. Note that if an employer requires an employee to engage in activities during non-work hours, usually that must be compensable. For example, requiring an employee to complete a driver's education class would be considered compensable. However, requiring that an employee obtain a license or certification to be qualified to do the job is not compensable. Thus, requiring that a driver obtain a commercial driver's license does not require the employer to pay for the time it takes a driver to obtain that license.

. . . that according to the Families and Work Institute in a report issued on April 20, 2004, flexible work is one of the key ingredients to recruitment and retention in today's workplace? According to the report, flexibility and autonomy create workplaces "where employees are engaged in, committed to, and satisfied with their jobs." The report was based upon a survey of 2,800 hourly and salaried employees. According to IBM, 80% of its employees nationally use these benefits.

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