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

Employment Law Bulletin

To Our Clients And Friends:

2005 will begin a watershed period for organized labor. As membership continues to decline and the number of representation elections also continues to decline, organized labor's "identity crisis" will become more conspicuous. Only 8.2% of all private sector employees belong to unions, a figure that continues to decline annually. Organized labor has political clout well beyond its membership numbers, but that clout has not translated to changes in labor laws that make organizing easier.

Recent statistics issued by the National Labor Relations Board illustrate organized labor's problems. The number of representation elections held through the first six months of 2004, 1,181, declined from 1,212 in 2003. Organized labor's winning percentage was relatively the same — 57.5% in 2004 compared to 57.7% in 2003.

The union with the greatest number of elections is the Teamsters, followed by the Service Employees International, the Operating Engineers, the United Food and Commercial Workers and the IBEW. Unions continue to have the greatest likelihood of winning in smaller units — they won 61.2% of all elections involving units of up to 49 employees, 53% involving units of 50 to 99 employees, 48.9% in units of 100 to 499 and 50% in units of 500 or more.

What will organized labor do to change its impact on the American workforce? We expect over the next several years to see substantial consolidation among labor unions, ending up with approximately 6 to 12 unions overall. For example, a merger of the Steelworkers, Machinists, and Paper Allied Chemical and Energy Employees union would create a union with approximately 1.2 million members. Currently, all three unions are showing substantial decline in their membership. Other possible union mergers include the Service Employees International and Laborers, IBEW, Communications Workers, United Food & Commercial Workers, and Retail, Wholesale and Department Store Union.

Employers seeking to remain union free should remain ever vigilant in doing so. Unions have a 57% chance of winning an election; therefore, developing union avoidance strategies and proactive union avoidance communications with employees should be a long-term priority for all employers.

NOT ALL WHISTLEBLOWING IS COVERED BY SARBANES-OXLEY

A supervisor at American Airlines was laid off after he participated in an investigation where American Airlines managers created a sculpture out of spare airline parts (what else is there to do at work?). In a decision issued on December 9, 2004, *Hendrix v. American Airlines, Inc.*, the administrative law judge hearing the complaint concluded: "The real crux of the issue is whether placement on a lay off list was reasonably likely to deter [Hendrix] from continuing to engage in protected activity. I have no doubt that an employee who is placed on a lay off list reasonably fears that he will lose his job when that list goes into effect. Undoubtedly, an employee would be deterred from blowing the whistle if he fears he will lose his job for reporting the unlawful conduct to his employer."

Hendrix's action were considered protected whistleblowing under Sarbanes-Oxley. However, the judge concluded that Hendrix's participation in investigation occurred because he was asked to by management. According to the judge, "I find it difficult to believe that management would have encouraged [Hendrix's] participation and encouraged him to involve internal security officials if management had something to hide." Furthermore, the company established both valid business reasons substantiating Hendrix's lay off, as well as the consistency with which those business reasons were applied to other employees.

NLRB OVERRULES TEMPORARY EMPLOYEE BARGAINING UNIT DECISION

If you do not like an NLRB decision, just hope that the composition of the board changes and the decision is reversed. Such was the case in *H.S. Care LLC, d/b/a Oakwood Care Center* (Nov. 19, 2004). The NLRB in the case of *MB Sturgis* in 2000 ruled that temporary employees may be considered part of the user employer's workforce for bargaining unit purposes. Prior to *Sturgis*, the board had ruled that a temporary employee may only be part of the user employer's bargaining unit workforce if both the temporary and user employers agree to it. In *Sturgis*, the NLRB said that the temporary employee shall be evaluated for inclusion under the same "community of interests" standard that applies to the user's workforce. Thus, if the temporary employees worked side by side with the user's employees and were supervised by the user's supervisors, they likely would be considered eligible to vote in an NLRB conducted election or become part of an existing bargaining unit.

In reversing *Sturgis,* the NLRB said that Sturgis "was wrongly decided." According to the NLRB, "Congress has not authorized the board to direct elections in units encompassing the employees of more than one employer." The *Oakwood Care* case arose when the Service Employees' International Union filed a petition to represent a workforce supplemented by employees from a personnel-staffing agency. The staffing agency employees were supervised by Oakwood Care supervisors and worked side by side with Oakwood Care employees. The good news now for employers is that temporary employees who may feel among the most vulnerable regarding their employment status and, inclined to support a union at the user employer's workplace, may not do so. Furthermore, we hope this decision indicates that the current NLRB will continue to strive for a level playing field in the application of the National Labor Relations Act.

WAGE AND HOUR TIP: WHO ARE EMPLOYEES?

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.

The Fair Labor Standards Act defines employ as "suffer or permit to work" and the courts have made it clear that the employment relationship under the FLSA is broader than the traditional common law concept. **Mere knowledge by an employer of work done for him by another is**

sufficient to create the employment relationship under the FLSA. Many employers attempt to treat all persons other than full time employees as independent contractors. However, to do so can be very costly in many instances.

While the U. S. Supreme Court has indicated there is no single rule or test for determining whether an individual is an independent contractor or an employee, it has listed several factors that must be considered. No one factor is seen as controlling but one must consider **all** of the circumstances.

- The extent to which the services rendered are an integral part of the principal's business.
- The amount of the alleged contractor's investment in facilities and equipment.
- The alleged contractor's opportunities for profit and loss.
- The nature and degree of control by the principal.
- The amount of initiative, judgment or foresight in open market competition with others.
- The permanency of the relationship.

Further the Court has said that the time or mode of pay does not control the employees' status.

There are several areas that have caused employers problems:

- The use of so-called "independent contractors" in the construction industry.
- Franchise arrangements, depending on the level of control the franchiser has over the franchisee.
- Volunteers - A person may not volunteer his/her services to the employer to perform the same type of service performed by an employee of the firm.
- Trainees or students.
- People who perform work at their home.

The courts have addressed the issue numerous times. Listed below are examples of some of the rulings.

Cases in which workers found to be an independent contractor:

1. Cable television installers performing services for a company whose sole service was cable installation. The employing company had no control over the manner in which the installers executed their assignments, the hours they worked, the job performed, or the assistants they hired. Moreover, the installers' opportunity for profit/loss was independent of the employing company.
2. Individual working for a computer business after he moved from Hawaii to California and whose status changed from salaried employee to hourly consultant. No regularly scheduled contact between the employing business and the individual existed and, the employing business did not dictate the hours worked or the tasks performed. Also, work was distributed on an as-needed basis, and the individual was free to seek other employment.
3. Individuals who distributed telephone-number research to home-workers who performed the telephone research. The employer exercised little control over the distributor's delivery of the cards, the distributors maintained their own records, and the distributors risked financial loss, as well as invested in their business and needed to possess managerial skills.
4. Welders who worked for a gas pipeline Construction Company on a project-by-project basis. The welders were highly skilled, supplied their own equipment, and the employing entity had no control over the methods or details of the welding work.

Cases in which individuals found to be employees:

1. A hotel parking lot valet whose compensation was restricted to tips from hotel guests and a maximum 50 cents gratuity per parked vehicle. The valets' duties included loading and unloading luggage of hotel guests and keeping the hotel entrance clean. Furthermore, the valet wore a hotel-supplied uniform, was covered by the hotel's employee accident insurance, procured a police identification at

the hotel's behest and expense, and received other employee privileges.

2. Waiters and waitresses. The reviewing tribunal highlighted that the waiters and waitresses could only work when the restaurant was open. Moreover, the waiters and waitresses did not invest in the restaurant or share in profits or losses.

3. Unskilled packers and peelers in employer's seafood operation, notwithstanding the fact that these individuals moved from plant to plant. The court expressed that the freedom to move did not deprive the unskilled laborers of the FLSA's protections in the absence of specialized and widely demanded skills.

In order to limit liability, employers should look very closely at individuals considered to be independent contractors to make sure that they are not creating potential liabilities for the company.

New Child Labor Regulations

On December 17, 2004 the Department of Labor issued some revised regulations pertaining to the operation of motor vehicles, scrap paper bailers and cooking that may be done by 14- and 15-year olds in restaurants. The revised regulations will be effective in February 2005 and will be addressed in detail in the January Employment Law Bulletin.

EEO TIP: COPING WITH "INTELLECTUAL DISABILITIES" UNDER THE ADA

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 U. S. Equal Employment Opportunity Commission (EEOC). As Regional Attorney Mr. Rose was responsible for all litigation by the EEOC in the State of Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

Especially at this time of the year, our thoughts and good wishes turn toward those who by chance or circumstance are less fortunate when measured by the generally accepted standards of good health and living conditions. Often this includes sick and impoverished people everywhere. It could include persons with intellectual disabilities. However, many persons in this latter group do not necessarily think of themselves as being "less fortunate." In truth many such individuals are well adjusted and see themselves as being capable and productive in most of their day-to-day activities.

The term "intellectual disability" was substituted for the term "mental retardation" by the President's Committee on Intellectual Disabilities in 1997 to update and improve the image of persons with such disabilities and to reduce discrimination against them. The committee also sought to clarify public confusion between the terms "mental illness" and "mental retardation."

According to author and researcher Peter David Blanck, who has written extensively on the subject (as a member of the President's Committee for Intellectual disabilities), an estimated 2.5 million people in the United States have an intellectual disability. These individuals represent approximately 1% of the United States population. Other studies by various scholars at the University of Minnesota dealing with the employment of persons with disabilities indicate that only about 31% of those individuals with an intellectual disability are employed, although many more really wanted to work.

An individual is considered to have an intellectual disability when or if:

1. The person's intellectual functioning level (IQ) is below 70-75;

2. The person has significant limitations in adaptive skill areas as expressed in conceptual, social, and practical adaptive skills (adaptive skills are basic skills needed for everyday life including self-care, social skills, reading, writing, basic math and work); and

3. The disability originated before the age of 18.

As with the individual capabilities of so-called normal people, the capabilities of persons with intellectual disabilities vary in degree from person to person. Accordingly, employers should be cautious in making generalizations about either the capabilities or the special needs of persons with intellectual disabilities. In many instances an intellectual disability will not be apparent from an

employee's or an applicant's appearance, nor will it necessarily be accompanied by some other obvious physical disability.

However, frequently persons with intellectual disabilities have one or more co-existing impairments such as cerebral palsy, seizure disorders, vision impairments, hearing problems and attention-deficit/hyperactivity disorders.

According to the EEOC, many employers are extremely reluctant to hire or retain employees with intellectual disabilities because of "persistent, unfounded myths, fears and stereotypes" as to their attendance, capabilities and insurance risks. **However, studies have shown that individuals with intellectual disabilities are often very dependable and capable of performing a wide range of jobs successfully** including animal caretakers, laundry workers, library assistants, building maintenance workers, messengers, cooks, printers, assemblers, factory workers, grocery clerks, hospital attendants, housekeepers, mail clerks and clerical aides. **Moreover, related studies have shown that the employment of such workers does not directly lead to higher insurance rates or increased workers compensations claims.**

Notwithstanding, the many positive aspects of hiring persons with intellectual disabilities there can be some problems if not handled correctly. For example, the following questions should be addressed when the condition of an applicant or employee qualifies that person as being disabled within the meaning of the ADA:

- At what point in the employment process can an employer ask an applicant or an employee or a third party (such as a parent or family member) questions about an intellectual disability?
- How far does an employer have to go in providing a reasonable accommodation to an individual with an intellectual disability? (E.g. what types of reasonable accommodations may be needed and who should initiate the discussion about them)
- Without violating the ADA or calling needless attention to an individual's specific needs, how should an employer address safety and conduct issues in the workplace?
- What steps if any should an employer take to prevent harassment of employees with intellectual disabilities?

Recognizing that a great deal could be written in response to each of the foregoing questions, some suggestions in response to these questions will be addressed in this column in the January 2005 issue of the *Employment Law Bulletin.*

OSHA TIP: OSHA PROMISES MORE OF THE SAME

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 numbers are in for OSHA's inspection activities for fiscal year 2004 which ended on September 30th. After their review, the agency claims another successful year for their enforcement program.

Commenting on the agency's performance, Assistant Secretary Henshaw said, "We exceeded our inspection goals; we strengthened our compliance assistance through our new Enhanced Enforcement Program (EEP) that focuses on employers who repeatedly ignore their safety and health obligations; and we found more violations and issued more serious and willful citations indicating a more accurate targeting system for workplaces and industries with a high proportion of injuries and illnesses."

During the year, OSHA conducted 39,157 inspections and cited 86,708 violations of OSHA standards. The latter figure represents a 3.8 per cent increase over the previous year. Notably, serious and willful violations increased by three per cent and 14 per cent respectively in FY 2004. The number of repeat violations, those for which an employer has been cited previously within a three year period, rose for the fourth year in a row. OSHA argues that their substantial and growing findings of noncompliance, coupled with declining injury/illness and fatality rates show they are going to the right places and having and impact.

Given the above trends and OSHA's assessment, employers may anticipate that enforcement resources will continue to be targeted similarly as they are at present. This should not be altered by the announced change in the person heading the agency as Assistant Secretary.

OSHA's "programmed" inspections, those not resulting from a fatality, employee complaint, or the like, will continue to be based upon its Site Specific Targeting plan. This plan, which has been utilized for the past several years, directs OSHA inspectors to specific plant sites based upon high injury/illness rates as reflected by the site's own data.

The agency has also indicated that it will continue to identify employers with bad compliance records and target them for scrutiny under its Enhanced Enforcement Program (EEP). In fiscal year 2004, 300 such inspections were conducted. The great majority of these involved fatalities and over one half have been in the construction industry.

In keeping with the agency's goal of reducing injuries, illnesses and fatalities, OSHA has identified seven industries for inspection emphasis. These industries have high injury/illness rates with a high proportion of severe injuries and illnesses. The industries selected are as follows:

- **Landscaping and Horticultural Services**
- **Oil and Gas Field Services**
- **Fruit and Vegetable Processing**
- **Blast Furnace and Basic Steel Products**
- **Ship and Boat Building and Repair**
- **Public Warehousing and Storage**
- **Concrete and Concrete Products**

In fiscal year 2004, nearly 3000 inspections were conducted within these industries.

Construction employers, as in the past, will continue to be on OSHA's inspection lists, as will the employers referenced above who have high injury/illness rates. What will the inspectors find when they visit? Most likely they will find many of the same deficiencies that make the "most frequently violated standards list" each year. In FY 2004 it again included such things as defective scaffolding, hazard communication issues, fall protection, lockout/tagout, electrical, respirator and machine guarding problems. If you are a candidate for an OSHA visit, you might want to review your compliance status with the above and other program requirements.

PHYSICIAN'S FAILURE TO SUBMIT FMLA CERTIFICATION RESULTS IN EMPLOYEE TERMINATION

The case of *Urban v. Dolgen Corp of Texas, Inc.,* (5th Cir. Dec. 8, 2004) involved the unfortunate situation where an employee requested her physician to submit an FMLA certification to the employer, but the physician failed to do so. The employer responded by terminating the employee.

The employee requested in May 2002 twelve weeks off for surgery, through August 24, 2002. Her employer told her that she needed to provide medical certification by June 24, 2002. She asked for an extension which the employer granted to July 9, 2002. When her employer failed to receive a certification, the employer terminated the employee once she completed the non-FMLA leave under company policy.

The employee did not realize until she was terminated that her physician failed to forward the certification to the employer. In reversing a lower court's grant of summary judgment to Urban, the Fifth Circuit Court of Appeals entered judgment for the employer, stating that the regulations provide "if the employer finds a certification form incomplete, the employer must advise the employee of the deficiency and provide the employee a "reasonable opportunity to cure any deficiency" however, "it would seem illogical to require an employer to continually notify an employee who failed to submit medical certification within a specific deadline." Accordingly, the employee's termination did not violate the FMLA.

DID YOU KNOW . . .

. . . that a "technician" may not qualify for the administrative exemption under the Fair Labor

Standards Act? *Bowers v. MOL LLC, (*6th Cir. November 22, 2004). In reversing summary judgment for the employer, the court stated that question of fact existed regarding whether plaintiff's primary duty was technical. The employer asserted that the plaintiff's primary duties involved marketing the employer's ultra sound products; according to the court, questions exist whether the employee's primary duties are working as an ultra sound technician, which would be non-exempt work. According to the court, ". . . the record also includes more than a scintilla of evidence supporting Bowers' contention that his primary duties were technical, including his own testimony that he was specifically instructed not to be involved in marketing."

. . . that an employee may proceed with her claim that her employer violated ERISA by misstating to her the enrollment period? *Parks v. Financial Federal Savings Bank*., (W.D. TN, November 30, 2004). Parks was hired on March 4, 2002. She was told on that date that she would have a 30 day period before becoming eligible for the company benefit plans. Parks alleged that she said she needed to become enrolled immediately and that her employer told her the waiting period would be waived. When Parks was involved in a serious automobile accident twenty-six days after she was hired, the employer refused to permit her to process claims under its plan, stating that she had not completed the 30 day waiting period. According to the court, if Parks is correct that she was not told about the thirty-day period, "the omission was a material representation, because it was the equivalent of telling plaintiff that her LTD benefits would start immediately, knowing that they would not." Accordingly, the court denied the employer's motion for summary judgment and the lawsuit continues.

. . . that according to the Bureau of National Affairs, first year wage increases for bargaining agreements negotiated in 2004 were 3.2%, up from 3.1% in 2003? Non-manufacturing, excluding construction, averaged an increase of 3.7% compared to 3.8% in 2003. Construction agreements showed an average increase of 3%, compared to 2.7% in 2003. Manufacturing contracts averaged an increase of 2.8% for 2004, compared to 2.1% of 2003. State and local government employees represented by unions showed an increase of 2.8% in 2004 compared to 2.9% in 2003.

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