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

Employment Law Bulletin

To Our Clients And Friends:

The AFL-CIO and its 58 member unions continue to undergo further soul searching and analysis. The most recent information from the Bureau of Labor Statistics indicates that **private sector union membership is down to 7.9%, one of the lowest levels since the 1935 passage of the National Labor Relations Act**. The announced merger of the Steelworkers and PACE, to form the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, is indicative of the need for declining unions to merge to sustain their organizing efforts.

The AFL-CIO announced on January 4, 2005 that it created a new section on its website to solicit ideas about how to strengthen the labor movement. The section is called "strengthening our union movement for the future." Information from the site, in addition to other sources for input, will be used by the AFL-CIO at its March 1, 2005 meeting in Las Vegas to consider overhauling how the organization works. Andy Stern, President of the Service Employees International Union, believes that the AFL-CIO should force union mergers and consolidate from 58 unions to fewer than 20 to provide greater resources to the 20 surviving unions for organizing efforts. The Steelworker – PACE merger signals that additional mergers will occur.

Fundamentally, why are employees not interested in unions when unions win approximately 57% of all elections? One would think that job losses would lead employees to seek out unions, based on a "nothing to lose" mentality. In our judgment, employees are concerned about job security and do not find union claims of severance benefits particularly enticing. Rather, employees who feel vulnerable are interested in job and retraining opportunities, neither of which appear to be stressed by unions when they attempt to sign up new members.

EMPLOYER PRECLUDED FROM CHALLENGING FMLA ELIGIBILITY ONCE LEAVE APPROVED

In the case of Sorrell v. Rinker Materials Corp., (6th Cir., Jan. 14, 2005), the employer granted Sorrell's request for FMLA leave to care for his sick wife. Prior to requesting the leave, Sorrell told his supervisor that he would retire and the supervisor accepted that statement. He discussed with his supervisor using his accrued vacation, such that his last date of employment would be at the end of the vacation.

Prior to beginning the vacation time, Sorrell told his supervisor that instead of vacation, he would take FMLA leave to care for his wife. He told the supervisor that he had decided to retire because she needed his care, but now he realized that he was entitled to the FMLA benefit and did not want to retire. The employee complied with all the FMLA leave requirements and the leave was approved by the company.

At the end of the leave, Sorrell contacted his supervisor about returning to work. The supervisor said that his former position was not available, but another position was available 180 miles away. Sorrell turned down the position, was not offered another position and sued, claiming that he was entitled to return to the same or equivalent position upon returning from leave. The employer argued that Sorrell's wife did not have a serious health condition and that he was not taking protected leave to care for her as defined under the Act. The court of appeals vacated the district court's decision granting summary judgment for the employer. According to the court of appeals, the district court needed to consider "the effect of Rinker's unconditional approval of Sorrell's leave on its subsequent ability to contest his entitlement to leave." The essence of the court of appeal's decision is that **an employer who has granted an employee's FMLA leave request may be precluded from arguing that flaws in the employee's request for leave or medical certification preclude reinstatement at the end of the leave, if the employer had not initially brought those flaws to the employee's attention.**

WAGE AND HOUR TIP: CHILD LABOR REGULATIONS

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.

While most employers are still attempting to understand the new "white collar" regulations that became effective in August 2004, the Department of Labor has issued some new Child Labor regulations that could affect the employment of minors. **The regulations, which were published on December 16, 2004, will become effective on February 14, 2005.** There are changes in the type of work that is permitted for employees under the age of 18 in seven major areas.

Restaurant Work

1. Minors 14 and 15 are permitted to cook only with electric or gas grills. They may not cook over an open flame.
2. Minors 14 and 15 may use automated deep fryers that have a device to automatically lower and raise the baskets from the hot oil or grease but they cannot operate deep fryers where the basket must be lowered and lifted manually.
3. Minors 14 and 15 may not use a microwave oven if it has the capacity to heat foods to a temperature above 140° F.
4. Minors 14 and 15 may clean kitchen equipment provided the temperature is less than 100° F.

Job Related Driving

1. No minor under the age of 17 may operate a motor vehicle on public roadways as a part of his job.
2. Seventeen year olds may operate a motor vehicle provided:
   a. Vehicle does not exceed 6000 pounds gross weight
   b. Driving is restricted to daylight hours.
   c. Minor holds a State license for the type of driving involved and has had no moving violations at the time of hire.
   d. Minor has completed a State-approved driver education course
   e. Driving does not involve: towing of vehicle, route deliveries or sales; the transportation for hire of property, goods, or passengers; time sensitive deliveries; or the transporting of more than three passengers.

f. No more than two trips in a single day and is within 30 miles of the place of employment; and

g. Driving is only occasional and incidental (no more than 20% of employee's work time in any workweek).

As you can see there are very strict limitations on driving that can be performed by a 17 year old, thus we counsel that the employer not allow anyone under 18 to operate a motor vehicle as a part of his or her work duties. Additionally, employers should also review applicable insurance policies before allowing any employee to drive.

Roofing Work

The new regulations prohibit anyone under the age of 18 from engaging in roofing occupations. These occupations include work in the close proximity to roofs such as air conditioning repair work; maintenance of gutters and downspouts, installation of sheathing, roof trusses or roof bases, television antennas, exhaust and ventilating equipment, heating equipment and similar appliances attached to roofs.

Balers and Compactors

The new regulations will permit sixteen and seventeen year olds to load, **but not unload or operate,** certain paper balers and compactors. In order to load these machines they must meet standards set by the American National Standards Institute, the machine must contain an on-off switch that is controlled by a key lock and the employer must post a notice concerning the operation of the machine.

Explosives

The definition of explosives has been expanded to include "any chemical compound, mixture or device the primary or common purpose of which is to function as an explosive. No employee under the age of 18 is allowed to work in or about plants or establishments manufacturing or storing explosives or articles containing explosive components.

Age Certificates

Employers are required to have on file the date of birth for all employees under the age of 19 and the only document that is considered as proof is an Age Certificate. In Alabama these certificates are issued by the school system that the minor attends or, if home schooled, is zoned to attend. The new regulations state that the age certificate will be sent to the employer. When the minor terminates the age certificate will be given to the minor so that he may present it to his future employer(s).

Civil Money Penalties

Employers who employ minors contrary to the child labor provisions of the Fair Labor Standards Act may be assessed a civil money penalty of up to $11,000 per employee that was subject to a violation of the statute. The amount of the penalty depends on the size of the business, frequency of the violations, the type of violations and the age of the minor. Employers are served a written notice of any penalties that will also explain the appeal procedures. The new regulations also allow the assessment of a penalty for the failure to keep a record of the date of birth of minors under the age of 19.

As stated above these new regulations become effective on February 14, 2005, therefore I would recommend the employers take time now to review the type of work being performed by any employee under the age of 18 to ensure that the minors are legally employed and that any prohibited task is adequately covered after the deadline.

Both Fair Labor Standards Act and Family and Medical Leave Act litigation continues to be very active. Therefore, employers should be especially aware of their potential liability and make sure they are complying with these statutes to the best of their ability. If we can be of assistance do not hesitate to contact me.

EEO TIP: 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.

In order to address certain misconceptions, myths, and stereotypes concerning the employment of persons with "intellectual disabilities" (formerly called "mental retardation") some general information was provided in the December 2004 issue of the *Employment Law Bulletin* as to the positive aspects of hiring or retaining such employees. In summary, it was asserted that certain studies demonstrate that persons with intellectual disabilities frequently prove to be very dependable employees and are capable of performing successfully a wide range of jobs. Additionally, related studies demonstrate that the employment of such workers does not directly lead to higher insurance rates or increased Worker's Compensation Claims. (See EEOC website at www.eeoc.gov/facts/intellectual disabilities.html)

However, notwithstanding the many positive aspects of employing persons with intellectual disabilities there are issues that an employer must address in order to avoid legal problems, to provide any reasonable accommodations that may be needed, and to ensure that intellectually impaired employees are comfortable in the work environment in question. The following basic questions (although there are others) should be addressed whenever an applicant or employee with an intellectual disability qualifies as being disabled within the meaning of the ADA:

- When is it lawful to ask an applicant or employee about the nature or extent of an intellectual disability? Would it be lawful to ask a parent, guardian or spouse questions about the applicant's mental health and/or disabilities?
- How far is an employer required 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?)

Obviously, it would be beyond the scope of this column to provide a truly comprehensive answer to these basic questions. However, the following are some general tips on how to approach the major issues raised by them.

When can an employer ask questions about an applicant's intellectual disability ?

The short answer is that intellectual disabilities must be treated the same as any other type of disability. **An inquiry can be made only after at least a conditional job offer is made to the applicant or employee**.

After an offer is made, the employer may ask questions about the applicant's mental health including his or her disability and may require a medical examination if the same questions and medical examinations are required of other applicants. The questions and medical examination must be job-related.

TIP: Generally, during the pre-offer stage, an employer cannot ask, for example: (1) to what extent the applicant or employee has an intellectual disability; (2) whether the applicant or employee takes medication; or (3) whether the applicant or employee is currently receiving psychiatric treatment. However, an employer can ask questions about the applicant's or employee's ability to perform job-related functions, but must be careful not to phrase the questions in terms of a disability. For example an employer can ask (1) whether the applicant or employee can arrange files or other items in alphabetical or numerical order; (2) whether the applicant or employee can lift a given weight or load; or (3) whether the applicant or employee can read and follow written directions for assembling items or materials, assuming of course that the same questions are asked of other applicants and are related to the functions of the job.

If the applicant voluntarily informs the employer, directly or indirectly through a family member or representative, that he or she has an intellectual disability, or if the disability is obvious, then the employer may inquire as to what kind of a reasonable accommodation would be necessary in order for the applicant to perform the job. Many

times an applicant with an intellectual disability is accompanied by a parent, family member or social worker. If so, remember that during the pre-offer stage, it would be unlawful to ask whoever accompanies the applicant any questions that could not lawfully be directly asked of the applicant.

How far does an employer have to go in providing a reasonable accommodation?

Generally, the ADA requires that employers must provide reasonable accommodations to the known physical or mental limitations of applicants or employees with disabilities unless to do so would impose an undue hardship upon the business entity. How far an employer must go in doing so is unanswerable except on a case by case basis. **The key factor in determining any accommodation is whether or not it is reasonable under the circumstances.** Among other things the EEOC will consider the size of the Company or organization, the cost of the accommodation, and any substantive changes in the work environment in determining whether a given accommodation is reasonable under the circumstances. **Except in extreme cases, cost should not be the basis for denying accommodation based on undue hardship. It simply will not sit well with a jury.**

If not obvious, the request for an accommodation must be communicated to the employer, otherwise the employer would not know that an accommodation is needed. If the disability is obvious, of course an employer can ask whether an accommodation is necessary. Normally, the request should be initiated by the applicant or employee. According to the EEOC, no magic words are needed to communicate the need, just plain English, and it could be done orally or in writing, and as alluded to above, the request could come through a relative, friend or social worker. Moreover, there is no set time for making the request. It can be made any time during the application process or any time the need develops during employment, for example, whenever extra duties are added to a job or position that would make the accommodation necessary.

TIP: An employer is not required to provide the specifically requested accommodation where an alternative accommodation would be equally effective in facilitating the performance of essential functions but less costly or disruptive to the employer's business. Also, an employer does not have to remove or reassign essential functions, lower production standards or provide employees with personal use items such as eyeglasses, wheelchairs or hearing aids.

The following are some specific types of reasonable accommodations that employees with intellectual disabilities may need:

- Job restructuring – (e.g., altering non-essential functions of a job such as the order in which a task is performed.)
- Special Training – (e.g. providing instructions at a slower pace, allowing additional time for an applicant to finish the training)
- Providing a Job Coach – (e.g. providing someone to assist or monitor the employee's progress in becoming proficient in performing job assignments.)
- Modified Work Schedule – (e.g. allowing minor modifications in the employee's work schedule to accommodate the need for counseling or therapy appointments such as letting the employee make up time by extending his or her hours into another shift.)
- Modification of Equipment or Devices – (e.g. enlarging letters or numbers for easier reading, adding a handle or lengthening a lever for opening a drawer or door used in the performance of the job assignment.)

TIP: By engaging in a lively interactive process early on in the employment process to the extent permitted by law, an employer can find the best way to provide a reasonable accommodation that will be beneficial both to the employee and the employer.

To finalize this topic next month, this column will provide tips on how to cope with two critically important issues: (1) how to address safety and

conduct concerns without calling needless attention to an individual's need for an accommodation and (2) how to limit or prevent harassment of employees with intellectual disabilities.

OSHA TIP: POSTING REQUIREMENTS

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OSHA is reminding employers that it is almost time to post their annual injury and illness case totals. The Summary, (OSHA Form 300A), for calendar year 2004 must be posted from February 1, 2005 through April 30, 2005.

The Summary should reflect the total number of job-related injuries and illnesses that were recorded on the employer's 2004 OSHA Form 300 for the worksite. Included should also be information about the average number of employees and total hours worked for the year. This data allows the computation of the site's incidence rate.

Even if there were no recordable cases during the year, the employer should still post the summary sheet with zeros entered on the total line. According to OSHA's compliance directive, no citation or penalty will be issued for failing to post when there have been no recordable cases. A penalty of up to $1,000 may be proposed where there are recordable cases and no summary is posted.

Where employees work or report to a fixed site, the summary should be posted in a conspicuous area where such notices are customarily placed for employee viewing. Copies of the Summary should be provided to employees who do not report to a fixed site.

The OSHA 300A must be signed by an executive of the company. An executive, for this purpose, should be an owner (if sole proprietorship or partnership), an officer of the corporation, the highest ranking company official at the worksite or the immediate supervisor of the highest ranking official at the site. The executive's signature certifies that he or she has examined the OSHA 300 Log and has reason to believe, based upon knowledge of the process by which the information was recorded, that the Summary is correct and complete.

As with the 300 Log, an equivalent to the OSHA 300A Summary Form is permitted. If an equivalent form is used, all of the wording set forth in the standard 300A must be included.

The rule requires that the 300A Summary be posted, not the 300 Log which contains basic information about each recorded case. Some employers have, either mistakenly or by choice, posted the 300 Log. OSHA has an interpretation letter on this point. It advises that should the entire 300 Log be posted, it must be in an area accessible only to those granted access under the rule, employees, former employees, and employee representatives. If posted in an area accessible to others, such as the general public, the employer must remove or obscure all names of the injured or ill employees.

DID YOU KNOW . . .

. . . that the ADA also prohibits a "hostile environment" based upon disability? *Lanman v. Johnson County,* (10th Cir. Dec. 30, 2004). Calling it a case of "first impression," the court stated that repeated workplace comments to Lanman that she was "nuts", "crazy," and "mentally ill" violated the ADA. However, the court also said that because Lanman failed to show that she had a disability under the ADA, she could not proceed with her hostile environment claim. "Establishing a disability within the meaning of the Act is the threshold requirement of all ADA claims. Ms. Lanman has failed to cross this threshold."

. . . that two New York courts ruled illegal workers may be entitled to backpay based upon what they would have earned in their own country? *Sanango v. 200 East Sixteenth Street Housing Corporation; Balbuene v. IDR*

Realty, (Dec. 28, 2004). Both claims were brought by laborers who were injured at work. The courts stated that their illegal status should not be rewarded by providing them with full state workers' compensation benefits. However, the court stated that "rather than simply dismiss the lost earnings claim, we limit plaintiff's recovery for lost earnings to the wages he would have been able to earn in his home country, since an award based on prevailing foreign wages would not offend any federal policy."

. . . that the United States Department of Labor, Wage and Hour Division for fiscal year 2004 collected $190,000,000 in back pay, a 49% increase from 2001 and slight reduction from $212,000,000 in 2003? The department last year handled approximately 38,000 wage and hour cases and received back pay for approximately 288,000 workers. The industries with the single largest increase in the amount of back pay awarded were agriculture, janitorial, day care and apparel manufacturing.

. . . that a policy prohibiting profane, abusive and harassing behavior does not violate employee Section 7 rights? In the decision issued on December 24, 2004 in Martin Luther Memorial Home, Inc., the NLRB ruled that "there is no evidence that the challenged rules have been applied to protected activity or that the respondent adopted the rules in response to protected activity. Rather . . . the rules serve legitimate business purposes: they are designed to maintain order in the workplace and to protect the respondent from liability by prohibiting conduct that, if permitted, could result in such liability."

. . . that it does not violate the FMLA when an employee returns to the same job but is required to use different tools? *Mitchell v. Dutchmen Manufacturing, Inc.* (7th Cir. Nov. 23, 2004). During the employee's FMLA absence, the employer consolidated her department with another. She returned to her same job at the same pay and during the same shift, but in addition to her regular duties the employee was required to use equipment that she had not used prior to her leave. According to the court, "given that the new tasks were neither overly time consuming or physically demanding, we agree with the district court's assessment that Mitchell's duties before and after her leave were substantially similar." The court added that "Mitchell's complaints regarding the limited use of small hand tools are the sort of deminimis, intangible, and unmeasureable aspects of a job that the regulations specifically exclude when determining equivalency of jobs."

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