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Inside this Issue

- FAILURE TO REASONABLY ACCOMMODATE APPLICANT LEADS TO EIGHT MILLION DOLLAR AWARD
- FMLA RETALIATION CLAIM PERMITTED FOR INELIGIBLE EMPLOYEE
- COURT UPHOLDS NON-DEGREED PROFESSIONAL WAGE AND HOUR EXEMPTION
- WAGE AND HOUR TIP: CURRENT WAGE HOUR HIGHLIGHTS
- EEO TIP: HOW TO AVOID COSTLY RISK IN MAKING RIFS
- OSHA TIP: OSHA AND THE TEEN WORKER
- DID YOU KNOW . . .

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

Employment Law Bulletin

To Our Clients And Friends:

Is the AFL-CIO imploding? The organization announced on May 3 that it would lay off 167 of its employees and add 61 new employees to focus on organizing. The net effect is an almost 25% reduction to the organization's total of 421 employees.

In addition to the staff cuts, four labor unions have called for a candidate to replace AFL-CIO president John Sweeny and have mailed to 27,000 locals throughout the United States a position statement explaining their concerns with the AFL-CIO and the labor movement. The unions are the Service Employees International Union, the Teamsters, the Laborers' International and UNITE HERE. Fifty-seven unions are members of the AFL-CIO, but only 15 of those unions control 60% of those who vote for AFL-CIO officers. The following are the key points the dissident unions raised:

- Reduce the amount of money participating unions pay to the AFL-CIO, so those resources can be used for organizing in the field.
- Energize political efforts to focus on retirement security and affordable health care.
- Internationalize the coordination of organizing and labor representation.
- Shift money that has been spent on political support for largely Democratic candidates to launch campaigns against large employers that are considered unfavorable to organized labor.
- Support the largest, most successful unions by industry sector; reduce the number of unions competing for the same non-union workforce.

From our perspective, the dissident union leaders have articulated the most viable approach for unions to end the annual loss of membership, which now is approximately 8.4% of all private sector employees. The dissident unions are among the strongest financially of all AFL-CIO member unions. If they are unsuccessful in replacing John Sweeny, and changing the direction of the organization, we foresee them

breaking off from the AFL-CIO to form their own international organization of labor unions.

FAILURE TO REASONABLY ACCOMMODATE APPLICANT LEADS TO EIGHT MILLION DOLLAR AWARD

Often employer analysis of reasonable accommodation obligations concerns current employees, primarily if they have job related injuries. However, the case of *EEOC v. EchoStar Communication Corp* (D.CO, May 6, 2005) illustrates a risk for employers who fail to comply with ADA reasonable accommodation requirements in the application process. The eight million dollar award occurred after a three day jury trial; the statutory cap under the American's with Disabilities Act is $300,000, so the award will be reduced.

Dale Alton applied for a customer service representative position with EchoStar. Alton is blind. Prior to applying for the job, he received training at the Colorado Center for the Blind for customer service responsibilities. The training involved a computer program that translates text into speech. The user wears a headset where he listens to the customer and the customer's conversation is forwarded to the computer, which then responds to the user who can then communicate with the customer. The system involves processing as many as 700 words a minute, more than most people can read.

After Alton applied for a job, he was told that the company could not "handle blind people". When Alton filed a discrimination charge, the company invited him back and gave him a test in brail that was more complicated than the test for sighted applicants. Furthermore, the company said that the computer system for Alton to use was too complicated.

The ADA requires creating a level playing field, not one more or less difficult for an applicant with a disability. Accommodation of applicants includes the application process, testing and interviewing. Where it is apparent that an applicant has a disability that may limit the applicant's ability to perform the job, the employer is required to engage in an interactive process with the applicant regarding possible forms of reasonable accommodation. **Do not count on common sense to carry the day in defending the position that accommodation was not possible.** Use external resources to assist in an accommodation analysis, so that if accommodation is not possible, the employer can show its good faith efforts and perhaps avoid a claim entirely.

FMLA RETALIATION CLAIM PERMITTED FOR INELIGIBLE EMPLOYEE

If an employee who is not covered under the Family and Medical Leave Act makes a request for leave to begin after she becomes eligible, she may pursue a claim for retaliation if she is terminated prior to the leave. This was the outcome in the case of *Beffert v. Pennsylvania Department of Public Welfare* (E.D. PA April 18, 2005). This case differs from the Eleventh Circuit decision last year in Walker v. Elmore County Board of Education, where the Court stated that because the employee's requested leave would begin prior to completing her one year of eligibility, she could not sustain an FMLA claim. Beffert was hired on July 28, 2003 and in January 2004 told her employer that she was pregnant and the baby was due after July 28, 2004. Although Beffert would not be entitled to any FMLA leave prior to July 28, 2004, she would be entitled to leave under FMLA after that date.

The FMLA regulations provide that an employee should give the employer at least thirty days notice in advance of the necessary leave "where practicable." Within a few weeks after Beffert gave notice of the need for leave, she was subjected to discipline and a poor performance appraisal. Ultimately, she was terminated and among other claims, asserted a retaliatory discharge claim under FMLA.

Her employer argued that because her request for leave occurred before she was considered an eligible employee under FMLA, she should not be entitled to pursue a retaliation claim. In agreeing with Beffert, the district court ruled that an employee does not have to be eligible for leave at the time the employee requests the leave. Beffert complied with the need for at least thirty days notice, and because Beffert's leave would begin when she would become eligible, she was entitled to protection from retaliation.

The message from the case is a clear one: an employee has FMLA rights even when an employee is ineligible for absences to be covered by the FMLA. As claims of retaliation continue to increase involving virtually all employment related statutes, be sure to evaluate the timing of an adverse action involving an employee who recently asserted statutory rights.

COURT UPHOLDS NON-DEGREED PROFESSIONAL WAGE AND HOUR EXEMPTION

Under the Wage and Hour "White-Collar" regulations that became effective in August 2004, an employee classified as a "Learned Professional" is not required to have an undergraduate college degree if that employee gained the same knowledge as a degreed employee through "a combination of work experience and intellectual instruction" and earns a minimum salary of $455 per week. In the case of *Stansoucie v. Reproduction Association of Delaware* (D.Del, May 4, 2005), the court ruled that an embryologist without an undergraduate degree qualified as an exempt professional.

An exempt professional employee must have as the primary duty work that involves advanced knowledge in a field of science or learning, which can be gained through instruction and training, even if not from an undergraduate degree. According to the court, the plaintiff "performed many of the tasks of an embryologist, including semen analysis, sperm and egg processing, and endocrine analysis as an assistant lab manager bar embryologist". The court determined that she acquired advanced knowledge from "several years of schooling, numerous certifications, and several related work experiences". Stansoucie had earned a two year degree in medical technology and fell two classes short of earning a Bachelor's degree from the California College of Health Sciences. Stansoucie also received certifications as a medical lab technician, clinical lab technician and lab practitioner. According to the court, an embryologist is a learned professional that requires advanced knowledge. Stansoucie's experience, training and education resulted in her performing the same tasks as those embryologists with undergraduate degrees. Therefore, she met the learned professional exemption from minimum wage and overtime.

This case is instructive for those employers who believe that an employee without an undergraduate degree may otherwise qualify as an exempt professional. That employee must perform the tasks of a degreed professional working in the same field and have advanced education in that field. "On the job training" alone is insufficient to meet the exemption standards, even if the employee performs sophisticated work.

WAGE AND HOUR TIP: CURRENT WAGE HOUR HIGHLIGHTS

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While Fair Labor Standards Act litigation continues to be prevalent, there also continues

to be much interest in the Family and Medical Leave Act (FMLA). **DOL has indicated they intend to issue some revisions to the FMLA regulations (which were last revised in 1995) in response to a 2002 U.S. Supreme Court decision (Ragsdale v. Wolverine Worldwide, Inc.) invalidating a portion of the regulations. Although DOL had stated they would issue the revised rule by March 2005, nothing has been published at this time.** There are areas where most employers would like to see substantial changes. They are medical certification, the amount of time for intermittent leave and employee notification. Both employer and employee representatives have begun to weigh in on the issue with employers requesting less stringent requirements while the employee groups are asking that no major changes be implemented.

In a related area, two members of Congress have introduced legislation that would require employers to give full-time workers at least seven days of paid sick leave per year that could be used for routine medical appointments, to care for family members or for the employee's own illness. The proposed Healthy Families Act would apply to all employers with fifteen or more employees. The requirements would apply on a pro-rated basis to part-time employees who work at least 20 hours per week.

The U.S. Sixth Circuit Court of Appeals, in April, ruled that the company controller was entitled to the protections of the FMLA even though she suffered no adverse action. The employee had made several requests for maternity leave to which the company did not respond. After the employee's doctor ordered her to stop working, the firm advised the employee that she would receive six weeks of paid leave and that she could use whatever additional leave she had. When the employee returned to work she was required to furnish a 'fitness for duty" certification. Further, she was told that she had the option of remaining with the company or leaving with a severance package and that she would "probably" be demoted. The employee resigned the following day stating that she had been given "no other alternative but to resign immediately." The employee sued alleging that she had been constructively discharged and the U.S. District Court ruled that the firm had incurred technical violations due to its failure to respond in a timely manner to the employee's request for FMLA leave. However, the district court concluded that these technical violations were insufficient to establish a FMLA claim. The circuit court reversed the ruling and stated that she could proceed with her action as the FMLA provides that an employer may be sued for interfering with FMLA protected rights.

In another FMLA case a U.S. District Court in Illinois addressed the issue of joint employment when determining whether an employer meets the 50-employee threshold. The employee was employed by a contractor who had 48 employees to provide maintenance and repair services at a shopping center. Simon Property Group, which operated the shopping center, had at least 10 employees within a 75-mile radius. The court held that the firm was not entitled to summary judgment but that the matter should proceed to trial.

The U.S. Fifth Circuit Court of Appeals recently ruled in another FMLA case that an employee was not protected by the Act. The firm, headquartered in Baton Rouge, LA, was providing construction services on a project in Fernwood, MS. Neither location had 50 employees but the combined number at both locations was 55. The issue before the court related to how to determine the distance between the two locations. The distance was only 68 linear miles "as the crow flies" while the driving distance on public roads was 88 miles. The court found that the DOL regulations specifically stated that distance would be measured by surface miles using surface transportation over public streets, roads … Consequently it was determined that the employee was not protected by the FMLA since

there was more than 75 miles between the two locations and there were not 50 employees at either location.

Many employers may not be aware of the Employee Polygraph Protection Act, which severely limits the ability of employers to have polygraph tests administered to their employees. **The Eleventh Circuit Court of Appeals recently ruled that an employer could not request an employee to take a polygraph test even where no test is ever taken and no adverse employment action is taken as a consequence.** There are some very limited circumstances where such a test may be given, such as to Federal employees, but a contractor for the government may not ask its employees to take a test. Due to the severe limitations on who may be given a test and the procedures that must be followed, it is recommended that employers seek legal assistance before even considering administering such a test.

A recent survey of 400 large and small employers by the Society for Human Resource Management found that the Wage and Hour Division had ever audited only about twenty percent of employers. However, there continues to be much private litigation under the Fair Labor Standards Act. Therefore, employers should be very aware of their potential liability and make sure they are complying with these statutes to the best of their ability.

Employers with direct contracts with the Federal government that are subject to the Service Contracts Act should note that the rate for fringe benefits will increase in June. The rate for all contracts bid after June 1, 2005 will be $2.87 per hour, an increase of $.28 per hour from the current rate of $2.59. The new rate will apply only to contracts that are bid or renewed after that date.

If I can be of assistance please do not hesitate to call me.

EEO TIP: HOW TO AVOID COSTLY RISKS IN MAKING RIFS

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.

Many factors in today's business environment, not the least of which is the competitive, technically advanced nature of the global economy, require American employers to face a number of critical challenges in order to survive. These factors directly impact their personnel policies and practices. Some of the most obvious are as follows:

- A dwindling national economy in which the dollar is shrinking relative to other international currencies.
- Greater competition from foreign firms and the impact of Free Trade Agreements.
- Pressure to meet "Wall Street" expectations.
- The need to merge, consolidate or down-size to maintain market share or just survive as a business entity.
- The influence of illegal but cheap migrant labor on profit margins.

Accordingly, employers are almost forced to do whatever is necessary just to maintain or even slightly improve their bottom-line profit-indicators. Thus, in contemplating a layoff or a Reduction In Force (RIF), the old "employee inventory" concept of " the "First Hired, Last Fired" does not always work. It follows that the corollary to that mantra, the "Last Hired, First Fired," also is not necessarily the best business decision. Instead employers are attempting to meet these challenges by:

- Limiting the influence of seniority as a primary factor upon which to base layoff-

decisions. That is not making a worker's tenure in any given position sacrosanct when the company is in a layoff posture. Obviously, if the plant or company is unionized or controlled by a collective bargaining agreement, this approach could not be used.

- Basing layoff-decisions on performance-related, objective measures (where possible) such as:
    1. Utilizing individual, Performance Evaluations, for example, over the last three years and making layoff-decisions on the basis of who has performed the best regardless of when they were hired.
    2. Making a determination on the basis of a test or some other objective measuring device as to which employees are the most versatile in terms of skills and/or abilities and basing the decision on who could, for example, perform the duties of more than just one job or position or who possesses the greatest number of useful, job skills, regardless of when they were hired
- Basing their layoff-decisions on performance-related, but more subjective criteria such as:
    1. Selecting for layoff those employees who are "over-compensated" based upon the employer's estimate of their current skill levels and, then, making a judgment as to which jobs they could or could not perform in the future based upon those skills.
    2. Keeping employees who are the most "personable," or have "pleasing personalities" ostensibly to enhance customer satisfaction or maintain a pleasant work environment. Obviously, such criteria could create a firestorm of complaints and/or charges unless properly handled because such determinations necessarily must be subjective.

EEO TIP:

While some of the measures indicated above could become an unlawful employment practice under one or more of the federal anti-discrimination statutes (depending upon how the determinations are actually made), generally, it is lawful for an employer to utilize business-related, subjective criteria in making layoff decisions in those states governed by an "Employment-At-Will" statute.

RISKS TO CONSIDER IN A RIF:

There are five, potentially costly "pitfalls" or traps that an employer may fall into in carrying out a seemingly business related layoff plan which on its face is neutral or otherwise not intended to be discriminatory. For example there are the: (1) *Disparate Impact Trap;* (2) *the Subjectivity Trap;,* (3) *the Overpayment Trap;* (4) *the Favorite Employee Trap; and* (5) *the Retaliation Trap.*

Because of limited space, the first of these traps will be discussed briefly in this current article and the remaining four traps will be summarized in the June Issue of this Bulletin.

1. ***The Disparate Impact Trap.*** Under Title VII, the concept of disparate impact has been recognized for many years. The disparate impact trap presents the greatest hazard to employers in carrying out layoff plans because most layoff plans appear to be neutral on their face, and are not deliberately intended to be discriminatory against any specific employees. Unfortunately, this appearance of fairness and neutrality often masks the disproportionate, adverse impact which the layoff plan, inadvertently, may have on certain protected groups including minorities,

females, disabled employees, various religious groups and/or employees of a certain national origin. **For example, if the plan tends to favor "middle management employees," composed mostly of white males, over "production employees" composed mostly of minorities and females, the plan has a disparate impact on minorities and females. Or if the plan tended to favor younger, subjectively more productive employees under the age of 40, over older, subjectively, less productive employees, the plan would have a disparate impact on the basis of age.** Thus, both plans, most likely, would be unlawful unless justified by business necessity. Even so, the affected employees could question whether or not some equally effective layoff plan might obtain the same business-related results without the disparate impact inherent in the one in question.

Employers are cautioned to "look beneath the surface" of the plan to see if it would disparately impact (favorably or unfavorably) any particular racial group, gender or other identifiable category employees. Afterwards, appropriate adjustments in the plan should be made to minimize or eliminate any disparate impact on any given protected group under the various federal and/or state anti-discrimination statutes.

Incidentally, in March of this year, the Supreme Court in the case of *Smith, et al v. City of Jackson* ruled that disparate impact cases could also be brought under the *Age Discrimination In Employment Act* (ADEA). Thus, any layoff policies or practices which adversely impact employees over 40 years of age disproportionately, even though the criteria was based upon reasonable factors other than age, may be unlawful unless justified by business necessity. Expert legal counsel may be needed to help make such disparate impact determinations.

As stated above, *the Subjectivity Trap; the Overpayment Trap; the Favorite Employee Trap; and the Retaliation Trap* will be discussed in the June Issue of the *EMPLOYMENT LAW BULLETIN.*

OSHA TIP: OSHA AND THE TEEN WORKER

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.

Millions of teenage workers will be employed this summer. Along with the opportunity to gain skills and experience while earning some cash comes the exposure to job hazards and the risk of injury. **About 70 teenage workers die each year from job-related injuries. Approximately 77,000 additional injuries occur in this age group that are serious enough to require emergency medical treatment. Total work-related injuries befalling employees of this age group have been estimated to be 231,000 per year.**

Incidents such as the following are not uncommon. A 15-year old trainee was killed when the forklift he was operating suddenly went into reverse, ran through the loading dock gates, flipped over and plunged four feet onto a concrete floor. The trainee was pinned under the forklift and died on the way to the hospital. Another tragic accident took the life of a 14-year old on the same day he was hired. The teen was pulling material from a roof when he fell through an unguarded skylight 12 feet to the concrete floor below.

Statistics show that new employees are more likely to sustain a workplace injury than those with greater experience. A National Institute for Occupational Safety and Health (NIOSH) study found that workers aged 15 to 17 had a substantially higher rate of work-related injuries

or illnesses than all workers aged 15 or older. The study, based on emergency room data, found 4.9 cases per 100 in the former group as opposed to 2.9 per 100 in the full time equivalent workers.

OSHA has no standards or rules that address the issue of employee age. Age requirements and permissible work activities and hours for young workers is set out in the Fair Labor Standards Act (FLSA). This statute is enforced by the Employment Standards Administration, Wage and Hour Division (ESA/WH). A memorandum of understanding between OSHA and ESA/WH was signed in 1991 that, among other things, committed OSHA to refer potential child labor violations as they come to the agency's attention.

If you employ workers under the age of 18, it is highly advisable that you ensure that their jobs and work hours are allowed under FLSA and that they are trained in conformance with OSHA requirements. OSHA frequently finds training deficiencies with short-term, part-time and new workers. Consequences for an employer can be severe if employees of any age are seriously injured after being placed on a job with inadequate or no safety training. OSHA has made a number of efforts to promote information and training that is directed at young workers. OSHA's website has a "Teen Worker" topic with a number of links to useful information on this subject.

DID YOU KNOW . . .

…that legislation was introduced on May 18, 2005 to raise the minimum wage from $5.15 to $7.25 per hour? Known as the Fair Minimum Wage Act of 2005, it would increase the minimum wage to $5.85 sixty days after the bill is signed into law, $6.55 twelve months thereafter, and $7.25 twelve months after that. An individual who works at minimum wage for 40 hours a week earns on an annual basis $10,700. According to the bill's proponents, "it is a travesty that a family of three earning the minimum wage works five days a week all year round, yet still lives below the poverty line".

…that a court refused to enforce an arbitration agreement where it was not signed by the employer and did not provide the applicant or employee an opportunity to negotiate? *West Virginia Ex. REL. Saylor v. Wilkes (W.Va. May 11, 2005)*. The employer, Ryan's Family Steakhouse, added a third party to administer its arbitration program. The arbitration agreement did not require the employer to submit every claim to arbitration. The Court said there was a "flagrant disparity" in bargaining power between the applicant and the company, which placed the applicant in the position of either signing the agreement or else be rejected for employment.

…that changing an employer's leave of absence policy may violate employee rights under ERISA? *(Moore v. Accenture, D. Ct. Ga. May 6, 2005)*. The company had announced that it was changing its policy regarding how much leave an employee would receive based on years of service. The employee filed a class action claim alleging that the change in policy violated ERISA. The Court concluded that the plaintiff lacked standing, because the policy would not have affected him, but also stated that an ERISA claim could be brought regarding the policy change.

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