"Your Workplace Is Our Work"®

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

Employment Law Bulletin

To Our Clients And Friends:

LMPV has once again been honored by Chamber's USA Guide to America's Best Business Lawyers 2005-2006 as being one of the most widely-respected labor and employment law firms in the Southeast.

Chamber's team of 40 independent researchers conducted more than 7,000 interviews over the course of eight months to identify the top law firms in the U.S. Their rankings are based upon extensive surveys of clients and competitors, and reflect the candid opinions of survey participants with regard to the qualities that are most prized by clients, i.e., "technical legal ability, professional conduct, client service, commercial awareness/astuteness, diligence, [and] commitment." According to Chamber's, its rankings and editorial comments about attorneys are independent and objective. Inclusion in the guide is based solely on Chamber's research team's findings. In the words of Chambers, "***no-one can buy their way in***."

From Chamber's USA Guide to America's Best Business Lawyers 2005-2006: "If I had something in Alabama that involved employment law, I would use them for sure," said one client, echoing a general conviction that, in Alabama, this is as good as it gets."

In the Southern regions, this boutique labor and employment firm has really got it covered," added another client, and it was particularly commended for running cases "***lean and mean.***"

The team practices labor and employment law exclusively on behalf of management. Its client base includes many impressive names, such as BP America Inc, which the firm advised on its first strike in North America in the last 24 years.

It is also held in very high regard for its track record of success in jury trials involving discrimination claims, and was hailed as

being particularly good at defeating claims at the decertification stage.

Chamber's specially recognized several of LMPV's lawyers, including David Middlebrooks, who was remarked to be "***one of the leading employment attorneys in Alabama***," with "***a quiet*** confidence ***that allows him to forge great relationships."*** He focuses primarily on employment litigation, and this year has successfully defended Allstate in several critical cases involving discrimination claims.

Richard Lehr was described as a "really ***knowledgeable labor relations specialist"*** and "***an exceptional negotiator with an unflappable style."*** More of a traditional labor lawyer, Lehr has led the firm as chief outside counsel to BP, assisting the company in traditional labor law matters throughout the USA, including union-organizing efforts at its largest refinery.

Al Vreeland was referred to as "***a first-rate lawyer, hard working, academic and with a laid back, gentlemanly way of doing things."*** Appreciating his firm grasp of local conditions, commentators noted that: "***Al is certainly with the Southern way of doing things."*** His work over the year has included representing Benchmark Medical in federal litigation and two arbitrations over disputes arising from a $30 million acquisition.

LMPV looks forward to another exciting and dynamic year of achievement and growth. We value our relationships with our clients, and believe that our ranking in Chamber's is a reflection of our long-term commitment to providing them with the most immediate and cost-effective solutions formulated by our team of problem-solvers and counselors.

As we like to say, ***your workplace is our work***. We're proud that Chamber's knows this, too!

COURT ALLOWS EMPLOYEES TO SUE EMPLOYER FOR HIRING ILLEGAL ALIENS

A recent federal court of appeals decision against the second-largest rug and carpet manufacturer in the United States reflects an emerging sanction against companies who hire undocumented immigrants and pay substandard wages.

You probably already know that illegal workers are gaining a larger share of the job market. **In fact, according to a recent report by Bear Stearns & Co., as many as 12 to 15 million jobs in the U.S. are currently held by illegal aliens, or about 8 percent of the workforce.** What you might not know, is that on Thursday, our federal appeals court ruled that companies who hire undocumented immigrants and pay substandard wages can be sued under the draconian provisions of RICO, the Racketeer Influenced and Corrupt Organizations Act. A law originally intended to combat organized crime, RICO exposes companies to criminal penalties, as well as civil sanctions, including triple damages and attorneys' fees.

Williams v. Mohawk Industries, Inc., No. 04-13740, (11th Cir. June 9, 2005), the first case of its nature in the Southeast, is the latest in a string of class-action lawsuits filed across the country against employers under RICO in an effort to curb American employers' hiring undocumented workers. In this case, a group of current and former hourly employees filed a class-action lawsuit alleging that Mohawk's employment and harboring of illegal workers allowed Mohawk to reduce the number of legal workers it hired, thereby, increasing the labor pool of legal workers and depressing the wages it pays legal hourly workers. According to the plaintiffs, Mohawk employees and recruiting agencies traveled to the U.S. Border to recruit undocumented aliens, who recently entered the U.S. in violation of federal immigration law, and

transported them back to northern Georgia so that they could work for Mohawk. The plaintiffs claim that Mohawk also accepted fraudulent documentation from the illegal aliens and even helped them evade detection during law enforcement inspections at Mohawk's facilities. Our federal court of appeals held that the legal employees could sue employers who hire undocumented immigrants and pay substandard wages.

What does this mean for employers? Companies who hire undocumented immigrants now have more to worry about than the comparatively low fines under federal immigration law. The same practice which might have only exposed your company to an insignificant fine under federal immigration law could now result in criminal penalties, as well as civil sanctions, including triple damages and attorneys' fees. This case also shows that compliance with state and federal minimum wage laws alone is no longer a complete bar to employee lawsuits seeking damages for lower wages. One result of this case is that the "minimum wage" now may be defined as "the wage the employer would have paid, but for the presence of undocumented immigrants in the labor pool," at least if your company uses a recruiter or employment agency who hires illegal immigrants. While this type of claim may be hard for the plaintiffs to prove, as the court repeatedly suggests in its opinion, plaintiffs and their attorneys know that these suits will be expensive to defend, since they involve novel and complex claims and almost certainly require a number of expert witnesses. You should make sure that any recruiters or employment agencies you use comply with immigration law and obtain all necessary documentation.

LMPV will be monitoring this issue closely, and we will keep you informed of developments.

FORD TO PAY AFRICAN AMERICAN EMPLOYEES $8.55 MILLION AND REVAMP TESTING PROCEDURE FOR APPRENTICESHIP PROGRAM

Often times it is not a change in the law that prompts a flurry of new lawsuits, but a large jury verdict or settlement. The proposed $8.55 million settlement of a class-action race-discrimination lawsuit against Ford Motor Company on behalf of thousands of African American employees nationwide is almost certain to spawn a new generation of lawsuits against manufacturers and other employers who commonly rely on written application tests for hiring and promotion decisions.

A final hearing was held in federal court in early June on the fairness of Ford's seven-figure settlement on a case in which Ford denies any wrongdoing. If the court grants final approval, the settlement will resolve a lawsuit filed on December 27, 2004 on behalf of a class of African American hourly employees who claim they were denied skilled trades apprenticeships based on a written application test that they allege disparately impacted African American employees.

According to the EEOC, the settlement will apply to all Ford facilities nationwide and provide significant advancement opportunities for African American employees to apprentice for skilled craft positions, such as electrician, pipefitter, machine repair and other jobs. Monetary relief will include approximately $8.55 million for the 13 African American Ford employees who filed Charges of Discrimination with the EEOC, as well as a class of about 3,400 African Americans nationwide who have taken the test since January 1, 1997, and were not placed on the Ford apprentice list. Non-monetary relief will include placing 280 African American test takers on apprentice lists and developing new selection methods for Ford's

apprenticeship program by a jointly selected expert with detailed reporting and monitoring provisions.

"Employers must consider how all aspects of selection processes, including written tests, may adversely impact members of a particular demographic group," cautioned the EEOC in its press release announcing the terms of the proposed settlement. **In light of this significant settlement and the EEOC's warning to other employers to take heed, LMPV is advising employers to take this opportunity to perform a self-critical analysis to consider whether your company's selection criteria might have a disparate impact on a protected class, and remedy any such impact before this new generation of class-action disparate impact lawsuits takes aim at your bottom line.** Undoubtedly, the line of employees and plaintiffs' attorneys eager to duplicate the "results" of the Ford settlement will be long. Thus, if you do not take this opportunity to perform a self-critical analysis, and act upon the results, chances are the EEOC (or private plaintiffs' attorneys) will do the job for you and ask plenty in return!

Before you put on your "DIY" hat and start an in-house audit, we must remind you that in the world of employment law "no good deed goes unpunished." **You could, as a conscientious and law abiding employer, by performing this analysis to insure compliance with Title VII, create evidence that could be used against you in a future lawsuit challenging the company's section criteria.** Thus, you might decide that it is more prudent to retain employment counsel to perform this analysis for you. This way, the results of the analysis would be protected from disclosure by the attorney-client privilege, unless it is waived to support your company's defense or otherwise. Beyond that, employment counsel can help you navigate through the morass of rules, exceptions, and statistics associated with performing such an analysis.

Here are a few general guidelines to help you get started on a self-critical analysis of your company's selection criteria:

1. Why Am I Doing This, I Thought Employment Tests Were Protected By Statute: Yes, it is true that Title VII states that employment tests are explicitly protected. The statute plainly states: "nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such tests, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex, or national origin." Of course, as you have undoubtedly learned by now, the law does not always mean what it says. In practice, employment tests are subjected to the same challenges of discrimination as any other employment decision, practice, or policy. This provision of the statute simply means that employers may discriminate on the basis of job-related qualifications.

2. Focusing the Audit: Typically, selection criteria, such as written tests, are not the subject of disparate treatment claims since employers usually do not select a test with the explicit purpose of excluding members of a protected group. Instead, the more common challenge to selection criteria such as written tests involves a plaintiff claiming that the employer's applicant test has a disparate impact on a protected group. That means, of course, that the focus of your audit should be to look for a disparate impact on a protected group, which begins with a statistical analysis of the results of the applicant test (or other selection criteria).

3. Measuring Adverse Impact: Adverse impact is defined as a "substantially different rate of selection" of a protected group in an employment decision. While courts have been willing to entertain more sophisticated statistical analyses, the more common (and generally accepted) disparate impact statistical analysis provides that a selection rate for a protected

group which is less than four-fifths (4/5ths) or eighty percent (80%) of the selection rate for the group with the highest selection rate constitutes adverse impact. A four-step process is used to measure the adverse impact: (a) calculate the rate of selection for each identifiable group; (b) observe which group had the highest selection rate; (c) calculate impact ratios by comparing the selection rate of each group with that of the highest group; and (d) observe whether the selection rate for any group is substantially less (that is, less than four-fifths) than the selection rate for the highest group. This analysis is ordinarily, but not always, applied to the overall selection process, not the individual components. However, if the overall process is found to have had an adverse impact, each component must be evaluated and validated.

4. Employer's Duty to Act on Results: If an adverse impact is discovered, the employer may choose to abandon the test and avoid the burden of validating its use. Alternatively, if the employer prefers to retain the test, it must demonstrate that the test is job related in the sense that the test accurately predicts successful performance. No matter which of these options an employer chooses, an employer recognizing a disparate impact should immediately consult with counsel.

LMPV will monitor this issue closely and we will keep you informed if we identify a trend of disparate impact lawsuits developing from this settlement.

If you have questions or concerns about your selection processes or want to discuss how to determine whether your selection criteria have a disparate impact on a protected class, please call David Middlebrooks or Kellam Warren at (205) 326-3002.

IDENTITY THEFT AND PERSONNEL DOCUMENT RETENTION AND DESTRUCTION

The increasing concern of identity theft brings to the forefront employer responsibilities regarding the proper maintenance and destruction of personnel records. One often thinks that the targets of identity theft are the wealthy, but in fact the reasons for identity theft can be several, and not all related to access to the victim's resources. For example, individuals who have a criminal record or engage in illegal activities may use someone else's identity in order to accomplish this.

An employer has a duty to employees to maintain the security of personnel records. There is a theory known as "negligent maintenance of personnel records," which arises when a current or former employee alleges that he or she suffered harm related to the employer's failure to properly maintain records. An example includes a case where the employer agreed upon the employee's termination to provide a "neutral" job reference, which meant the first and last dates of employment, job titles and compensation. However, when the employee's former supervisor received a call regarding a reference, the supervisor looked in the employee's personnel file and provided information that although true, was negative and thus not neutral. The former employee sued under the theory that the employer owed the employee a duty to limit access to the personnel records in order to fulfill the employer's commitment to provide a neutral reference.

Due to the increased amount of information about applicants and employees available and employer use of such information, and concerns about identity theft, **the Federal Trade Commission implemented effective June 1, 2005 a document destruction rule based upon information from credit reports about applicants or employees.** The rule does not

require that employers destroy such information; it addresses how the information is destroyed should the employer choose to do so. If such information is discarded, it must be destroyed in a manner that protects personal information, such as personal identification, bank account numbers and social security numbers. The employer may choose any reasonable method for destruction, including shredding or incinerating. The FTC encourages employers to adopt policies on document disposal and to review the credentials of any firms hired to dispose of such documents.

Personnel files should only be available for review by those whose jobs require that they do so, such as an employee's supervisor and others in the chain of command. Furthermore, under the Americans with Disabilities Act, employee medical information must be maintained in a file separate from the personnel file; this even includes the medical records of former employees. Employers should develop policies or procedures addressing which employment records will be retained and must be retained, how long they will be retained, who will have access to personnel files regarding current or former employees and when and how information about current or former employees will be destroyed.

OSHA TIP: EMPLOYEE SAFETY AND HEALTH TRAINING

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.

Worker training continues to be one of the major challenges to OSHA compliance. **With over 100 specific training requirements included within OSHA's body of standards, it isn't surprising that this is an area of most frequently cited violations.** One press release by the agency reads, "the alleged failure of three companies to train employees and give them adequate gear for working inside confined spaces has resulted in penalties totaling $427,500." Another recent release indicated that an employer had been fined $198,000 for four "willful" violations including one for "untrained personnel operating fork lifts."

There is no general standard that covers all situations calling for safety and health training for employees. The standard that perhaps comes the closest is 29 CFR 1926.21 pertaining to the construction industry. It charges the employer to "avail himself of the safety and health training programs the Secretary provides" and "to instruct each employee in the recognition and avoidance of unsafe conditions."

Some OSHA standards, particularly more recently adopted ones, are specific as to training content, frequency of training, trainer qualifications, and the like. A number of standards assert that only "trained," "certified," or "competent persons," can be permitted to perform certain functions. See the "training personnel" topic in the index to 29 CFR 1910 to help inventory your training needs. Also, you should review OSHA Publication 2254, which is a comprehensive listing of training requirements.

Some of the more widely applicable training requirements include the following:

- 1910.1200(h) requires that employers provide effective information and training to employees about hazardous chemicals in their work area.
- 1910.132(f) requires relevant training for employees who must use a form of personal protective equipment on their job.

- 1910.38 calls for instructing employees about the emergency action plan to be followed at their worksite.
- 1910.95(k) requires employers to provide a training program for employees exposed to noise at or above an 8-hour time weighted average of 85 decibels.
- 1910.147(c)(7) states that the employer's program to control hazardous energy (lockout/tagout) must include a detailed training component and certification of employee completion.
- 1910.178(l) allows operation of powered industrial trucks only by persons evaluated by the employer as meeting specified training criteria.

Of the top 35 most frequently violated standards cited by federal OSHA in fiscal year 2004, virtually all had some training component. Substance-specific health standards such as lead and asbestos include sections specifying "employee information and training."

Absent an applicable standard, the general duty clause is also used to cite significant training shortcomings when conditions warrant. For example, such a citation was issued when an employee working in the vicinity of an overhead crane was struck and killed when the crane bridge was moved by an untrained employee.

Apart from attaining OSHA compliance, a second and probably more compelling argument for an effective safety training program is that it pays. Most employers don't need convincing that a significant amount of training might be bought with a few accidents that didn't happen. There is an abundance of anecdotal evidence that implementing an effective safety and health training program can reduce injury rates. A NIOSH document entitled, "Assessing Occupational Safety and Health Training," looked at the question of whether OSHA training requirements were effective in reducing work-related injury and illness. While noting problems such as isolating the training factor from other issues, the study concludes that much positive evidence exists demonstrating the benefits of training. There are also numerous accounts of fatalities and severe injuries attributable, at least in part, to training deficiencies.

WAGE AND HOUR TIP: CURRENT WAGE HOUR HIGHLIGHTS

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.

Among the current issues relating to the Fair Labor Standards Act and the Family and Medical Leave Act is the fact that several states are increasing their minimum wage. Wisconsin increased its minimum wage to $5.70 per hour on June 1, 2005 and will do so again in June 2006 when it will be raised to $6.50. This makes 12 states that have increased their minimum wage since January 2004. Presently 17 states, covering 45% of the United States population, have a higher minimum wage than the FLSA rate of $5.15. There are also multiple bills in Congress to raise the FLSA minimum wage to as much as $7.25 per hour in two years. It is not known what Congress may decide to do; however, employers should be aware that an increase may happen and should be alert to such a possibility.

At this time DOL has not issued new FMLA regulations even though there were indications they planned to do so by the end of May 2005. Stay tuned for an update if new regulations are proposed. Both employer and employee representatives continue to weigh in on the issue with employers requesting less stringent requirements while the employee groups are asking that no major changes be implemented.

DOL recently issued two FMLA opinion letters related to medical certification. In the first letter DOL stated that an employer could require that an employee provide "proof of illness that surpasses the FMLA required notice so long as the employee's FMLA leave was not jeopardized." The opinion continued that if an employee failed to provide the information, the employer could deny the use of paid sick leave due to the employee's failure to meet the employer's usual requirement for obtaining paid leave. However, DOL stated that the employee could still choose to substitute accrued personal or vacation leave for the FMLA qualifying leave without being required to provide proof of illness.

The second letter deals with drug testing an employee who is returning to work from FMLA leave. In that opinion, DOL responded that the employee could be required to undergo drug testing within three days of returning to work and if the employee refused to submit to the test, he/she would risk being deemed as insubordinate.

Recently the U. S. Fifth Circuit Court of Appeals issued an opinion regarding the failure of an employee to provide a timely medical certification. An assistant store manager for a larger retailer was scheduled for carpal tunnel surgery. The employee requested FMLA leave for three months after her surgery. The employer asked her for medical certification and granted her twenty days (5 days longer than required by the regulations) to provide the certification. The employee requested an additional fifteen days, which the employer granted. When no certification was received the employer terminated the employee because she had exhausted her non-FMLA medical leave under company policy. The court held that the employer did not violate the FMLA when it terminated her since she failed to provide the required medical certification.

There continues to be much activity under the Fair Labor Standards Act by both the DOL and in the courts. Recently DOL announced that they had conducted an investigation of Hertz car rentals. The nationwide investigation revealed that almost 900 assistant managers were not paid proper overtime on their commission earnings. As a result the firm paid $320,000 in back wages for the two-year period ending in March 2003.

In another case the Denver based Apartment and Investment Management Company agreed to pay $730,000 to 319 current and former employees. The DOL investigation found that the firm had granted maintenance employees compensatory time off rather than paying the overtime that was required by the FLSA and the firm had claimed as wages the rental cost of apartments rather than the actual cost to the employer of furnishing the facilities. Additionally, there were a small number of employees who were misclassified as exempt. DOL stated the firm cooperated fully with their investigation by sending surveys to more than 18,000 employees who had worked for them in the past 2½ years. Further, the firm produced a training video on FLSA compliance that it has shown to its 7000 employees who work at 1700 properties in 47 states.

Insight Enterprises (a firm that deals in computer hardware and software) of Tempe, AZ recently agreed with DOL to pay more than 2000 employees $1.3 million in back wages. The firm had paid nonexempt employees less than their full salary when they worked less than 40 hours in a workweek and had also failed to include incentives and commissions in the regular rate when computing overtime for sales employees.

The Wage and Hour Division has also issued an opinion letter relating to FLSA issues. **In this instance they determined that some health care operators were joint employers. The parent holding company operated two acute**

care hospitals; one nursing home and one combined long-term hospital and nursing home. The employer had requested DOL's opinion regarding a Licensed Practical Nurse who worked at one of the hospitals during the week and at the nursing home on the weekend. In reviewing the policies of the firm, Wage Hour noted that the firm had a common health care plan for the non-union employees and job vacancies were advertised in all of the facilities before being publicly advertised. DOL opined that it believed the various facilities were joint employers and thus the hours worked by an employee at any location must be combined when computing the overtime compensation that is due the employee.

In some recent FLSA litigation employers have won some and lost some. The 9th U. S. Circuit Court of Appeals recently ruled that Auto Finance-Insurance Managers were exempt from overtime under the "commission paid" exemption for employees of retail businesses. Also a U. S. District Court in Delaware found that an Embryologist was exempt as a "learned professional" as she acquired and used advanced knowledge in a field of science or learning.

Conversely another U. S. District Court has allowed instructors of a national career college to pursue their claim for overtime and bring a "collective action" for all other employees who are similarly situated. In a separate matter a group of "Video Gamers" (employees who provide the technology to create video games) are being allowed to proceed with their overtime claims. According to a former Wage Hour Administrator, Tammy McCutcheon, these cases raise some very important issues regarding the exemption status of technology workers. A different U. S. District Court has found that an employer violated the FLSA by not paying its employees for waiting and/or preparatory time and for time spent in travel between job sites. As a result the court ruled that Akron Insulation and Supply must pay 45 current and former employees almost $95,000 in back pay.

EEO TIPS: MORE ON LOWERING THE 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.

Within the last month a number of Fortune 500 Companies announced that they would be laying off or terminating employees because of buyouts, mergers or economic downturns. For example, General Motors announced that it would layoff 25,000 employees and IBM announced that it would terminate 1,500 employees because of the sale of their Computer Unit to China, and of course there have been many other firms doing likewise.

As stated in last month's article (ELB for May 2005 - ***How to Avoid Costly Risks in Making RIFs***), there are many good, business reasons to effectuate a Reduction-In-Force in today's competitive, global economy. Mergers often result in superfluous branches. Downturns in the economy often require more productivity with fewer employees, and the need to stabalize or increase profits force employers to make some hard decisions about the size and effectiveness of their workforces. Generally if such decisions are based on business necessity, it is lawful for an employer to:

- **Weed out employees who are "dead weight" or "problem employees**" (ostensibly, those who are maladjusted to the work environment).
- **Keep the most productive and/or skillful employees and lay off** the others.

- **Develop and implement a "Meritocracy"** by utilizing Performance Evaluations for both promotions and layoffs.
- **Take steps to streamline the workforce in preparation for any perceived, future economic conditions.**

Except in those industries or companies which may be subject to a collective bargaining agreement, such business related decisions may be made without regard to seniority as a primary determining factor. Of course in Alabama or other states subject to an "Employment-At-Will" statute, an employer can lawfully terminate an employee for any subjective or business reason so long as it does not violate other State or Federal employment anti-discrimination laws.

Thus, the critical question is not whether an employer can implement an effective layoff plan, but whether the plan, despite its non-discriminatory intent, impinges upon the employment rights of certain protected individuals or groups of employees under state or federal laws. As stated in last month's ELB article, there are a number of potentially costly "pitfalls" or "traps" that an employer can fall into in implementing a layoff or RIF. Last month we discussed the **Disparate Impact Trap**. In this article we will touch upon: the **Subjectivity Trap**; the **Favorite Employee Trap**; the **Overpayment Trap**; and the **Retaliation Trap.**

The Subjectivity Trap

This trap can best be described as a situation where the company primarily relies on the individual judgment of certain decision-makers and the criteria used as the basis for terminations or layoffs is almost totally subjective. For example the decision might be based upon such criteria as:

- Whether a given employee has a "pleasant personality," and works well with others,
- Whether the employee is appealing to customers (i.e. "Customer Preference")
- An assessment of the employee's potential future performance and contributions to the company. (An educated guess?)
- Whether the employee is considered to be a "team player," (One who always goes along with the program?)

Aside from the fact that all of the foregoing criteria are somewhat subjective, none is inherently bad and some could be used as "tie-breakers" after considering other, more objective criteria. The evaluation of test scores, skill levels and projections of an employee's future productivity all involve some subjective conclusions. Thus, it is not realistic to think that all subjectivity in planning a layoff or a reduction in force can be eliminated. **However, to avoid or minimize discrimination claims subjective criteria, like those described above, should only be used with fact-based examples which relate to the job.**

The Favorite Employee Trap.

This trap involves the question of whether certain people are kept because of their special relationship to the decision-maker or the company. For example, **were those retained a part of the company's "good ole boy" network?** Were the favorite employees given special mentoring or other training which allowed them to play the game better and move up the corporate ladder faster? **If so, this could be discriminatory against females or minorities who were never allowed to become a part of that network**.

The Overpayment Trap

This trap is subtle because it appears to be an objective assessment of whether a given employee is worth what he or she is currently

being paid. Many times older workers and/or workers with the greatest seniority are affected because they may not be as productive as they were sometime ago. In effect employers are asking "What have you done for me lately? And the way that employers use the answer to that question becomes the key to its lawfulness.

In general it is quite lawful to layoff or terminate inefficient, under-performing workers who are getting paid more than they are worth regardless of whether they are a part of any protected class or group**. However, the mistake that some employers make is in not carrying out that same rationale throughout the ranks in the company as a whole.** Laying off production or low-level employees based upon a "current worth" criteria, while not applying it to management or high-level employees could adversely affect minorities and females who tend to occupy those lower-level jobs. **This trap can be avoided by simply being consistent in applying the concept of current worth throughout the ranks or the company, itself.**

The Retaliation Trap

In contemplating a reduction in force it is natural to think that this would be a good time to get rid of all "problem employees." Employees with time-and-attendance problems, production problems, loners, "non-team players," as well as those who challenge the system or frequently complain about schedules or other work matters are often lumped together and considered to be "problem employees" for layoff purposes. Depending upon what the so-called "grumblers" or "complainers" were complaining about, the employer's scheduling them for termination may be viewed as retaliation for protesting an unlawful employment policy or practice. The "trouble makers" or "problem employees" could become more of a problem if they could prove that they were designated for layoff simply because **they protested what they believed to be unlawful employment practices.**

Conclusion

Implementing a reduction-in-force or layoff is probably the easiest part of the process. The hardest part will be planning it so as to avoid the kind of traps indicated above and minimizing charges of discrimination and unfair surprise. Legal counsel should be involved in the planning process to assist in making the critical decisions as to adverse impact on protected groups under the various state and federal anti-discrimination laws.

DID YOU KNOW . . .

…**that the California Court of Appeals on May 27, 2005 upheld a $1.1 million damages award to an auto parts manager who received a fraudulent offer from his new employer?** Helmer v. Bingham Toyota Isuzu, (Cal.Ct.App.,May 27, 2005). Helmer was earning approximately $70,000.00 a year at his current employer when he interviewed with Bingham. The manager with whom he interviewed told him that had he worked for Bingham, he would have earned $70,000.00 over nine months, or $93,000.00 for the year. He accepted the job offer, but then his pay check on a monthly basis was approximately $1,300.00 less than he had earned at his previous employer. When he raised a concern about this, he was terminated. According to the court, the testimony substantiated Helmer's claim of promissory fraud. Remember: it is a good business practice to put offers of employment in writing and state in the offer letter that "This offer supercedes all previous discussions we have had regarding your terms and conditions of employment".

…that a pre-employment personality test violated the Americans with Disabilities Act? Karraker v. Rent-a-Center, Inc. (7th Cir.,June 14, 2005). The court concluded that the test was actually a pre-employment medical exam, in violation of the ADA. Although a psychologist did not review the test, the court said that the test "Had the effect of excluding employees with

mental disorders from promotions". The Minnesota Multiphasic Personality Inventory (MMPI), which is widely used in retail, is a 502-question test that is intended to measure personality traits. According to the court, "the mere fact that a psychologist did not interpret the MMPI is not dispositive. …the practical effect of the use of the MMPI is similar no matter how the test is used or scored – that is, whether or not RAC used the test to weed out applicants with certain disorders, its use of the MMPI likely had the effect of excluding employees with disorders for promotions".

…that a survey released by the American Management Association on May 18 found seventy-six percent of those employers surveyed monitor employee internet use? Over half of all employers surveyed monitor the content of their employees' internet use, the time they spend on it and the key strokes they are entering. Over half stated that they store and review employee e-mail messages. The overwhelming majority of those employers that responded stated that they had in place an established internet and e-mail use and search policy so that employees did not have an expectation of privacy and were also aware that discipline up to and including termination could occur for a violation of that policy.

…that on May 31, 2005, the U.S. Court of Appeals for the District Court of Columbia upheld the new rules regarding specific financial disclosure by unions under LM-2 reports? AFL-CIO v. Chao (May 31, 2005). The new form requires unions to identify how much money is spent on organizing, political activities and negotiations. The court ruled that the Department of Labor was within its authority to revise and increase the burden regarding the specificity with which unions must provide this information. However, the court overturned a new Department of Labor compliance process referred to as Form T-1, which requires unions to report any "significant trust" involving the union. For employers, the LM-2 is the critical report, as this report contains specifics regarding union income, expenditures and every union employee with his or her base salary and expenses for the previous calendar year.

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