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Inside this Issue

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

Employment Law Bulletin

To Our Clients And Friends:

September 27, 2005 was a historic date for organized labor. At its founding convention in St. Louis, **the Change to Win Coalition ("CWC") selected Anna Burger to serve as the first Chair of the CWC, becoming the first woman selected to lead a national labor movement.** She was selected by Andrew Stern, President of the Service Employee's International Union, James P. Hoffa, President of the Teamsters, UNITE HERE Co-presidents, John W. Wilhelm and Bruce S. Raynor, and Laborers' President, Terence M. O'Sullivan. Burger served as Secretary/Treasurer of the SEIU prior to her selection as Chair. Ironically, she was AFL-CIO President John Sweeny's campaign manager when he was elected to that office in 1995. John Wilhelm stated, "I do think having a diverse leadership that is reflective of the members of American unions is extremely important."

CWC unions at their convention approved a constitution and established dues at $.25 per union member per month. The AFL-CIO dues are $.65 per union member per month. CWC unions vowed to train and organize those low income employees displaced by Hurricane Katrina. They are focusing on Louisiana, Mississippi and Alabama – those states suffering the most damage from Katrina.

Will women and minorities be attracted to CWC unions because a woman is now its Chair? Yes, to some degree. Burger's appointment will raise the awareness of women and minority employees about unions, which is a step in the organization's efforts to achieve wide spread organizing gains. **Employers should not be caught flat-footed by thinking that "it won't happen here." Plan during the next several months to conduct an internal vulnerability assessment to organizing activity and other forms of pressure that CWC and AFL-CIO unions might create to reach your union-free workforce.**

AGREEMENT TO SHORTEN TIME FOR FILING SUIT UPHELD

In an important risk management development for employers, the Michigan Court of Appeals on September 13 ruled that an employer could enforce an employee's agreement to shorten the statute of limitations for filing a claim against the company. Clark v. Daimler Chrysler Corp, (Mich. Ct. App, September 13, 2005). The employee signed an employment application that included the following statement:

> "I agree that any claim or lawsuit relating to my service with Chrysler Corporation or any of its subsidiaries must be filed no more than six months after the date of the employment action that is the subject of the claim or lawsuit. I waive any statute of limitations to the contrary".

Under Michigan law, an individual may file a discrimination complaint up to three years after the event occurred. Clark accepted early retirement on August 31, 2001 as part of a workforce reduction and sued in September 2003 claiming age discrimination under Michigan law. In upholding the lower court's granting summary judgment for the company and enforcing the limitations, the court of appeals stated that "Michigan has no general or statutory enactment prohibiting the contractual modification of the periods of limitations provided by statute. **The contractual agreement is clear, unambiguous and not contrary to public policy. In response to Clark's argument that he did not realize he was waiving his right to a three year statute period, the court stated that "The law is clear that one who signs an agreement, in the absence of coercion, mistake, or fraud, is presumed to know the nature of the document and to understand its contents, even if he has not read the agreement".**

This decision is not precedent for employers in states other than Michigan, but it offers a suggestion for employers to consider. Those employers seeking to limit the time by which an employee may bring a claim should evaluate that according to the laws of the states in which it will apply.

ENGLISH ONLY: SI

The EEOC, in a waste of taxpayer money, unsuccessfully challenged a very reasonable "English Only" rule in the case of EEOC v. Sephora USA, LLC (S.D. NY, September 13, 2005). Saphora is a high-end cosmetics store (frequented all to often by our daughters). The company's "English only" policy was that sales employees spoke "English only" to customers and when customers were present on the sales floor. Employees were free to speak other languages either when no customers were in the store or when employees were off of the sales floor. Sephora also required that its sales employees speak English proficiently.

The EEOC filed the lawsuit on behalf of former employees and a potential class of Hispanic employees, alleging that the policy caused a "disparate impact" based upon national origin. **In concluding that the company's policy was job-related and a business necessity, the court stated that "Helpfulness, politeness, and approachability are central to the job of a sales employee at a retail establishment, and are distinct from customers' prejudices".** Accordingly, the "English only" and "English proficiency" requirements were sustained.

Employers with "English only" and English proficiency policies can often substantiate the business necessity of those policies. Be sure the need for the policy relates to the job in question. For example, English proficiency is essential for sales employees, but probably not for employees who work in shipping and

receiving. Also, note that if an employee is on break time and in a non-customer contact area, the National Labor Relations Act would protect an employee's right to speak a language other than English.

UNITE HERE GETS OUT OF THERE (THE AFL-CIO)

The Change to Win Coalition ("CWC") gained further strength on September 14, 2005, when UNITE HERE announced that it was disaffiliating from the AFL-CIO. This brings the total member number of employees represented by CWC unions to approximately 6 million and those represented by AFL-CIO unions to 8.5 million.

In announcing its decision to disaffiliate from the AFL-CIO, UNITE HERE co-president Bruce Raynor stated that his union disagreed with AFL-CIO organizing strategies and its focus on politics, rather than the workforce. Raynor stated that UNITE HERE will still partner with some AFL-CIO unions on issues of common concern, but that CWC unions share a common vision with UNITE HERE and, therefore, that is the organization where his union belongs. Ironically, UNITE HERE owns the only union owned bank in North America, and a major customer is the AFL-CIO. It is likely that the AFL-CIO will take the action toward UNITE HERE that it encourages unions to take in corporate campaigns, which is to remove its investments from the union's bank (known as Amalgamated Bank, based in New York).

OSHA TIPS: "NOT MY EMPLOYEE… NOT MY PROBLEM"

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.

According to OSHA, an employer's safety responsibilities don't necessarily stop with its own employees. It is fairly well settled that someone's employee must be exposed to a hazard to prompt an OSHA citation. For instance those signs posted in some shops suggesting that OSHA prohibits entry may be misleading. General public or customer exposures to hazards do not create an obligation or duty under the OSH Act, nor with a self-employed individual who might be visiting a plant site to perform a contract activity. However, when employees of another employer, vendor or contractor are exposed to hazards in violation of OSHA standards, there is potential liability for a host or controlling employer.

In one press release, OSHA details citations and substantial penalties issued to subcontractors for not providing fall protection on a construction job. The general contractor for the job was also cited and penalized "for not ensuring that sub-contractors used fall protection." Similar citings of multiple employers is a very common practice. It is also one of the more controversial agency enforcement practices. Initially used in the early to mid-seventies in the construction industry, where it continues to be most prevalent, the practice came to be known as the "multi-employer citation policy." It was subsequently extended to all industry sectors.

The multi-employer policy was set out in the agency's Field Operations Manual and its replacement, Field Inspection Reference Manual, and finally reissued in a compliance directive, CPL 02-00-124, effective on December 10, 1999. The directive was presented as a clarification and continuation of existing policy. It names four categories of employers having responsibilities under the Act. They are as follows: (1) **Exposing** (The employer whose own employees are exposed to a hazard, has primary responsibility and will generally be cited unless an affirmative defense is established.) (2) **Creating** (The employer

whose actions or inactions caused the hazardous condition to exist.) (3) **Correcting** (The employer having the specific responsibility to correct a condition, such as repairing guardrails.) (4) **Controlling** (The employer having general supervisory authority over a worksite.)

In implementing this policy, compliance officers are directed to follow a two step process to determine which employers should be cited for a safety violation. First a determination is to be made as to the above category or categories that apply to the employer. If one or more apply, the employer has obligations with respect to OSHA requirements. Step two is to determine whether the employer's actions were sufficient to meet those obligations. If found lacking a citation will likely be issued.

Applying this policy to "controlling employers," while very common, raises some of the more challenging issues and loudest protests. OSHA acknowledges that the degree of reasonable care to detect and eliminate hazards is less for a "controlling employer" than an "exposing employer." While this is addressed with guidance and examples in the directive, it leaves room for frequent debate.

In addition to the above agency policy, there are specific OSHA standards that place duties upon host or controlling employers beyond those owed to their own employees. Examples include the process safety management standard (1910.119) and the hazard communication standard (1910.1200). OSHA's steel erection standard, published on January 18, 2001, contains several specific duties that are placed upon the "controlling contractor."

At a minimum an employer should be aware of potential liability when employees of other employers are engaged in activities at its, or another common site. Be able to show an OSHA compliance officer evidence of your efforts to observe working conditions and to identify and eliminate hazards.

WAGE AND HOUR TIPS: EXEMPTION REVIEW

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.

As you are aware the Department of Labor, in April 2004, published new regulations covering the exemptions provided for executive, administrative, professional and outside sales employees. They have now been in effect for a year and I believe that I should remind you of the requirements set forth in the new regulations. Below is a brief overview of the new regulations that became effective in August 2004.

Executive Exemption

To qualify for the executive employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary basis at a rate not less than $455 per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and

recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

To qualify for the administrative employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than $455 per week;
- The employee's primary duty must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers; and
- The employee's primary duty includes the exercise of discretion and independent judgment with respect to matters of significance.

Professional Exemption

To qualify for the learned professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less that $455 per week:
- The employee's primary duty must be the performance of work requiring advanced knowledge, defined as work which is predominantly intellectual in character and which includes work requiring the consistent exercise of discretion and judgment;
- The advanced knowledge must be in a field of science or learning; and
- The advanced knowledge must be customarily acquired by a prolonged course of specialized intellectual instruction.

To qualify for the creative professional employee exemption, all of the following tests must be met:

- The employee must be compensated on a salary or fee basis at a rate not less than $455 per week;
- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

To qualify for the computer employee exemption, the following tests must be met:

- The employee must be compensated either on a salary or fee basis at a rate not less than $455 per week or, if compensated or an hourly basis, at a rate not less than $27.63 an hour;
- The employee must be employed as a computer systems analyst, computer programmer, software engineer or other similarly skilled worker in the computer field performing the duties described below;
- The employee's primary duty must consist of:

  1) The application of systems analysis techniques and procedures, including consulting with users, to determine hardware, software or system functional specifications;

  2) The design, development, documentation, analysis, creation, testing or modification of computer systems or programs, including prototypes, based on and related to user or system design specifications;

3) The design, documentation, testing, creation or modification of computer programs related to machine operating systems; or

4) A combination of the aforementioned duties, the performance of which requires the same level of skills.

Outside Sales Exemption

To qualify for the outside sales employee exemption, all of the following tests must be met:

- The employee's primary duty must be making sales (as defined in the FLSA), or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and
- The employee must be customarily and regularly engaged away from the employer's place or places of business.

Highly compensated employees performing office or non-manual work and paid total annual compensation of $100,000 or more (which must include at least $455 per week paid on a salary or fee basis) are exempt from the FLSA if they customarily and regularly perform at least one of the duties of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

I recently saw a survey that was conducted by the SHRM that indicated that less than one percent of the employees who were nonexempt under the old regulations became exempt under the new regulations. Conversely, a much larger number were changed from exempt to nonexempt. **Most employers conducted a review of their jobs to attempt to ensure that employees are correctly classified. If you have not done so already I recommend that you have such a review conducted at your** firm as there continues to be much litigation under the FLSA. For example, as I reported last month Merrill Lynch is paying some $37 million to resolve a suit filed by its stockbrokers in California. The firm had considered them as exempt under the administrative exemption but it was determined they were not exempt as they were paid on a commission basis. There was a similar suit filed this month against Morgan Stanley by a stockbroker.

In view of the continued litigation under the Fair Labor Standards Act it is imperative that employers make every effort to comply with the Act. If I can be of assistance you may reach me at 205 323-9272.

EEO TIPS: MORE ON RETALIATION – WHAT MAKES AN ADVERSE EMPLOYMENT ACTION ADVERSE TO AN EMPLOYER?

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 make out a prima facie case of retaliation under Title VII a Charging Party or Plaintiff must be able to show:

- That he or she was covered by the act and engaged in protected activity;
- That he or she suffered an "adverse employment action" by the employer; and
- That there was a causal connection between the protected activity and the adverse employment action taken by the employer.

Having provided some information on how an employer should approach the first prong of the

foregoing burden of proof in the August issue of the *Employment Law Bulletin*, we turn our attention this month to the second prong, namely: *What constitutes an adverse employment action?*

As with just about everything in connection with retaliation, the definition of what constitutes an "adverse employment action" is a moving target. Much depends on the action itself, as well as the employer's timing and intent. (The matter of timing and intent will be discussed in connection with the issue of "causation.") **However, most courts have found that the following types of actions taken against an employee who has engaged in protected activity are adverse employment actions:**

- The employee is discharged or laid off;
- The employee is denied a promotion;
- The employee's wages are reduced;
- The employee's fringe benefits are severely reduced;
- The employee is singled out for ridicule or harassment by a supervisor;
- The employee is subjected to harsh, unjustified, unnecessary disciplinary actions; which so affect the terms and conditions of employment that it results in a constructive discharge;
- The employee is transferred to a new position or a new shift where the opportunities for advancement or greater earning are significantly less favorable.

On the other hand some courts have found that it was not an "adverse employment action for purposes of proving retaliation where:

- An employee was terminated for his refusal to meet with the employer's attorneys, after several requests, to discuss the extent to which the employee had disclosed potentially privileged information during the processing of his charge;
- The employee's termination was scheduled prior to her complaints of discrimination, but the employer terminated her earlier than scheduled and paid her the amount she would have received based on the original termination date;
- An employer refused to reimburse a former employee for pre-paid insurance premiums because the Plaintiff was not an employee at the time;
- An employee was ostracized, ignored or snubbed by co-workers;
- An employee was transferred to another shift without a loss in pay or benefits;
- An employee was given a short suspension without a loss in pay or benefits; and
- An employee was terminated for refusing to sign a mandatory arbitration agreement as a condition of employment where the employee's reasons for refusing to sign were unreasonable under the circumstances.

WHAT THEN CONSTITUTES AN ADVERSE EMPLOYMENT ACTION?

The common principle of proving retaliation is that it must involve an "ultimate employment decision" by an employer, including hiring, granting leave, discharging, promoting, and compensating the employee in question. Thus, the decision signifies a significant change in the employment status of the employee in question. Logically, this would include any reassignment with significantly different responsibilities, or any decision which causes a significant change in benefits. Additionally, in my judgment it would include any decision which significantly alters the employee's terms and conditions of

employment, because of a potential claim of "constructive discharge."

If, as an employer, you feel the need to make some changes in the status of an employee who has filed a charge against you, and you are unsure of the limits of what can be done, it is always prudent to seek legal counsel.

To complete our analysis of the burden of proof in a retaliation case the issue of "causation" together with some employer defenses will be discussed in this column in the next issue of the *Employment Law Bulletin*.

WHEN AN EMPLOYER'S SUSPICIOUS OF FMLA ABUSE LEAD TO EVIDENCE OF MOTIVE AGAINST THE EMPLOYEE

Sorry about that long title, but there's really no other way to headline the lesson learned for employers in the case of Stevens v. Coach USA (D. Conn. September 8, 2005).

This regretful tale began in 2002 when the employee took a leave of absence for a month to recover from Hepatitis C. He provided his employer with a doctor's excuse. He then completed his employer's medical questionnaire that was a requirement for him to return to work. The information that he provided included treatment for mental health issues that were unrelated to his absence. The employer told Stevens that he could not return to work until he provided more medical information, but the employer was not specific in its request. Thus, Stevens thought the employer wanted more information about his absence related to Hepatitis C. Accordingly, he provided details to the employer about the absence. In response to yet another employer request, Stevens' doctor provided a third explanation regarding the absence. The employer then asked Stevens to take a stress test, which he passed, but then the employer told Stevens that he could not return to work until he provided information about his mental health.

It turned out that Stevens' mental health issue was counseling he had received for marital concerns. When he provided that information, it was rejected by the company and Stevens was terminated. In rejecting the employer's motion for summary judgment, the court stated that **"Defendant raised a series of obstacles to Stevens' return to work starting immediately after he tried to return from leave, by never telling him exactly what documentation was necessary for him to be re-certified, and never being satisfied with what he submitted".** The court also stated that Stevens has alleged sufficient unrefuted facts for a retaliation claim under the FMLA, such that a jury could conclude that "Defendants retaliated against Stevens by inventing a series of documentation requirements that effectively prevented him from ever returning to work for Coach".

Employers have more rights under the FMLA than they realize, but employers should be careful not to play "dumb hardball". The employer's continued approach of asking Stevens for "one more thing" before returning to work may suggest to the jury that the real reason for Stevens not returning to work is because of his use of FMLA benefits, not because of a lack of compliance with the employer's requests.

DID YOU KNOW . . .

…that according to a Harris poll released on August 31, 61% of all adults in union households state that unions are doing a "fair" or "poor" job? Those same employees stated that 72% of all companies are also doing a poor job. However, 61% of those in union households believe that they get their money's worth from the dues they pay. Sixty-five percent of union households believe that unions spend too much time and money on politics. Forty-seven percent of those in union households

believe that unions stifle individual growth and productivity.

…that according to OFCCP, government contractors assisting with Katrina-related projects will be exempt from affirmative action requirements for three months? In a statement issued on September 9, 2005, OFCCP explained that the exemption applies only to those contracts and sub-contracts that are Katrina-related, not to contractors with other government contracts. OFCCP stated that "the exemption is intended to help those who fit into that category by relieving them of paperwork requirements that are suited to long term contracts". The three-month exemption may be extended by OFCCP. The focus of the exemption is on service and supply contracts; it does not extend to construction contractors who are not required to develop written affirmative action plans.

…that an incomplete OWBPA notice results in voiding the waiver of age claims? Kruchowski v. Weyerhaeuser Co. (10th Cir., September 13, 2005)? Sixteen former employees claimed that the age discrimination waivers were technically invalid. Agreeing with those individuals, the court stated that "We conclude that plaintiffs' releases were not knowing and voluntary. Accordingly, the releases executed by plaintiffs are invalid and unenforceable with respect to any age discrimination claim". The court stated that the Older Worker Benefit Protection Act has eight technical requirements for a waiver to be valid, and a single error in any of those requirements can result in voiding the waiver. In this case, there were multiple technical failures, such as how individuals were selected for termination and who would remain employed. According to the court, "Defendant's failure to disclose this information rendered the Release ineffective as a matter of law".

…that the House Government Reform Committee voted on September 15 to prohibit federal agencies from discrimination based upon sexual orientation? This is known as the Clarification of Federal Employment Protections Act (CFEPA HR 3128), which proposes to amend the civil service format. There is no federal law that includes "sexual orientation" as a protected class in the private sector.

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