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LABOR & EMPLOYMENT LAW

Employment Law Bulletin

To Our Clients And Friends:

We expect wage and hour claims to continue to increase, particularly once the U.S. Supreme Court rules in the case of IBP, Inc. v. Alvarez. The Court heard oral argument in the case on October 3, 2005. It was the first argument presided over by Chief Justice John Roberts.

This case and a companion case, Tum v. Barber Foods, involve the issue of whether an employer must pay for the amount of time it takes employees to walk to the work area once they arrive at the facility and don safety equipment. In the Alvarez case, the Ninth Circuit Court of Appeals ruled that employees must be paid for the time spent walking from the workstations to the lockers where protective gear is stored. In the Tum case, the First Circuit Court of Appeals ruled that time spent walking from the workstation to the gear distribution center was not compensable.

If the Supreme Court rules that walking between the workstation and the safety distribution center is compensable, we expect claims to arise asserting that once the employee arrives at the employer's premises, the employee should be paid. We will monitor this case carefully and update you as soon as the Supreme Court issues its opinion.

Wage and hour claims do not get the notoriety of harassment and discrimination lawsuits, but they can be very expensive and frequently involve large numbers of employees, as often an alleged violation affects more than the individual making the claim. We encourage employers to contact us to conduct preventative wage and hour compliance audits, which would be led by Lyndel Erwin of our firm, who formerly was the Area Director for the United States Department of Labor, Wage and Hour Division.

NEW FMLA ELIGIBILITY -- NEW CERTIFICATION

On October 17, 2005, the Wage and Hour Division issued an opinion letter addressing when an employer may request another certification of a serious health condition for which the employee had previously provided certification. According to DOL, "It is our opinion that an employer may reinstate the medical certification process with a first absence in a new twelve month leave year. A second and third medical opinion, as appropriate, could then be requested in any case in which the employer has reason to doubt the validity of the new medical certification".

DOL explained that once a new FMLA twelve month period of eligibility begins, the employer's process of determining whether the employee is eligible (such as having worked 1250 hours during the previous twelve months) includes the right to request a certification of the serious health condition. This is true even if it is the same serious health condition that resulted in the employee's absence during the prior year. According to DOL, "Given the statutory focus on the leave year, our interpretation regarding new medical certifications is consistent with our interpretation on retesting the 1250 hours of service eligibility criterion for the first absence in a new 12 month leave year for employees taking interment leave for the same serious health condition." The employer is not required to notify employees of this right; according to DOL, it is inherent in an employer's statutory rights.

THE "APPLICANT" ACCORDING TO THE OFCCP

On October 7, 2005, the OFCCP issued its much-anticipated final rule on the definition of "Internet Applicant." While the final rule does not differ significantly from the proposed rule, the OFCCP did incorporate some important clarifications and distinctions in the final rule. **Recognizing that contractors may need some time to bring their practices into compliance, OFCCP gave us a little breathing room before compliance with the final rule is required; contractors will have to begin to comply with the new definition and record-keeping requirements by February 6, 2006.**

The History:

Prior to November 13, 2000, when Executive Order 11246 was amended, the OFCCP's regulations did not expressly require that contractors maintain information about the gender, race, and ethnicity of applicants and employees. The 2000 regulations, however, required that covered contractors be able to identify, where possible, the gender, race, and ethnicity of each applicant for employment. As use of the Internet for job-seeking purposes skyrocketed, so did confusion about the applicability of this requirement to those who seek employment through non-traditional means. The OFCCP published its proposed rule defining "Internet Applicant," on March 29, 2004.

The Final Rule:

Under the new rule, an "Internet Applicant" is one who:

1. Submits an expression of interest in employment through the Internet or other electronic data technologies;

2. The contractor considers the individual for employment in a particular position;

3. By his or her expression of interest indicates that he or she possesses the "basic qualifications of the position;" and

4. At no point in the selection process (prior to receiving an offer of employment) removes himself or herself from consideration or otherwise indicates that he or she is no longer interested in the position.

Perhaps the most difficult concept to grasp in the final rule is this: while the final rule appears at first glance to concern only "Internet applicants," in actuality its coverage is more broad. If a search

for a position yields applicants through both the Internet and traditional means, *this rule applies*. Here's how:

In developing the final rule, the OFCCP addressed the concern that it would be difficult keeping up with two separate definitions of "applicant" – "traditional applicants" versus "Internet Applicants" – with only the means that a job-seeker uses to apply for a position determining which definition applies. A provision in the final rule eliminates the "dual standard" for Internet versus paper applicants, but **only** with regard to positions where the contractor considers both Internet and paper expressions of interest. The net result is, if the contractor considers **only** paper expressions of interest for a position, then the "Internet Applicant" definition does not apply. If **both** traditional applications and Internet expressions of interest are considered, the "Internet Applicant" definition applies.

It is important to remember that **either** the "applicant" standard **or** the "Internet Applicant" standard would apply for a position; one position cannot include applications maintained under both standards.

For a comprehensive question and answer review of this rule, visit LMPV.com.

WAGE HOUR TIPS: 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.

- On October 19, the U. S. Senate, by a 51 to 47 vote, defeated an amendment to increase the minimum wage to $7.25 per hour over a two-year period. They also defeated another amendment that would have allowed private employers to use compensatory time in lieu of overtime when employees worked in excess of 40 hours in a workweek.

- The Supreme Court also refused to hear an appeal of a Family and Medical Leave Act case concerning the definition of "where an employee worked." An employee of Healthcare Services was employed as a housekeeping supervisor in a nursing home in Colorado. She was the only employee of Healthcare Services within 75 miles of that worksite; however, the FMLA regulations state that the nearest office of the employer is considered as the worksite of the employee. If that regulation was followed, the employee would have been entitled to FMLA leave. The Tenth Circuit Court of Appeals ruled that section to be invalid and thus the employee was not entitled to FMLA protection, as the employer did not have 50 employees within 75 miles of where the employee worked. Since the Supreme Court refused to hear the case the Circuit Court's ruling stands.

- **An item that is related to the devastation caused by Hurricane Katrina concerns the wages that are required to be paid for reconstruction in the area. The Davis Bacon Act requires that employees working on construction projects funded by the federal government be paid the "prevailing wages" for the area. Because of the way these wages are determined in many instances they are higher than the rates normally paid. On September 8, 2005, President Bush suspended the operation of this statute for all of the counties in Mississippi, all parishes in Louisiana, Baldwin, Choctaw, Clarke, Mobile, Sumter and Washington counties in Alabama. Thus contracts signed after September 8 will not be covered by the Davis Bacon Act; however, contracts that were awarded before that date will continue to be subject to the Act. The FLSA will apply**

to those construction contracts and thus overtime premiums will be required when an employee works more than 40 hours in a workweek. Employees working doing cleanup work on the coast may also be subject to the Service Contracts Act that also establishes a wage rate that is greater than the FLSA minimum. Thus, employers bidding (or working) on clean up operations need to ensure they determine whether the SCA is applicable to their contract and, if applicable, pay the wage rates required by the contract. A South Carolina Senator has introduced a bill to automatically suspend the Davis Bacon Act for a 1-year period any time there is a disaster. Conversely, the Governor of Louisiana and other employee advocates have asked President Bush to reinstate the law.

- An investigation of Hendrick Motorsports, Inc., one of the large NASCAR teams, by the Wage and Hour Division resulted in the team agreeing to pay $350,000+ in back wages to more than 200 employees. The DOL found that the firm had failed to pay salaried production workers overtime when they worked more than 40 hours in a workweek.

- The Ninth U. S. Circuit Court of Appeals has affirmed a decision requiring the City of Los Angles to pay $5.2 million to Paramedics. The City had contended these employees were subject to the partial overtime exemption provided for firefighters; however, the Court found the paramedics were not actually "responsible" for fighting fires as required to qualify for the overtime exemption.

- **The U. S. Supreme Court refused to hear an appeal of a case concerning the off-setting of excess overtime premiums that were paid during one period against the overtime that was due in another period. Thus, the court upheld the DOL position that each workweek stands alone and wages paid in one workweek may not be used to meet the requirements for overtime due in another week.**

- Employers should continually be aware of the child labor requirements of the FLSA and the prohibitions against employing minors in certain occupations. A 14 year old, employed on a salmon fishing boat in Alaska, drowned. As a result the Wage and Hour Division assessed a civil money penalty of $11,700 (the maximum under the current rules). Recently the Administrative Review Board upheld the penalty. Further, the Department of Labor recently sent a bill to Congress asking that the maximum penalty be increased to $100,000 in the cases involving the death of an illegally employed minor.

- The five most prominent employer mistakes under the FMLA are:

  1. Failure to verify employee leave eligibility.

  2. Failure to notify employees of their rights under the FMLA.

  3. Failure to verify an employee has a "serious health condition."

  4. Requiring too much or too little medical information.

  5. Failure to reinstate an employee to the same or an equivalent position.

In order to escape these pitfalls I suggest that employers review their FMLA policies and procedures to ensure that they are complying with the Act.

- There continues to be much private litigation under the Fair Labor Standards Act and the Family and Medical Leave 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. If we can be of assistance do not hesitate to contact me.

EEO TIPS: CAUSATION AND DEFENSES TO CLAIMS OF RETALIATION

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.

As stated in last month's article on this subject, 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.

"Causation" is the third prong in the order of proof and is perhaps the most difficult element for a charging party or plaintiff to prove. This is so mainly because it calls for a judgment as to the employer's subjective intent in taking whatever "adverse employment action" was taken. Since employers rarely confess their true intent under such circumstances, the proof is usually based upon circumstantial evidence. However, in the employer's favor, the same type of evidence offered to show that there was no causal connection can also be used to show that the adverse employment action was taken for legitimate, non-discriminatory reasons. Thus, a strong defense, almost automatically, can be based upon the evidence used by the employer to challenge the employee's showing of causation.

While there is general agreement among the courts that the Charging Party or Plaintiff must show a causal link between the protected activity and the adverse employment action that followed, there is no universal agreement as to what should constitute a causal connection in establishing a prima facie case. For example, the Eleventh Circuit Court of Appeals stated: "…we construe the "causal link" element to require merely that the plaintiff establish that the protected activity and the adverse action were not wholly unrelated." Simmons vs Camden County Bd. of Education, (11th Cir. 1985) Thus, in the Eleventh Circuit the standard for showing causation would seem to be fairly low and in my judgment tends to favor the employee who alleges retaliation

On the other hand, the Fifth Circuit Court of Appeals uses the "*but for"* standard which, in my judgment, is significantly higher and more difficult for the employee to prove. In the case of Jack v. Texaco Research Center (5th Cir. 1984) the Court required the employee to prove that "'but for' the protected activity, she [the employee] would not have been subjected to the action of which she [the employee] claims." Other courts have used variations of these standards in determining whether a charging party or plaintiff met their initial burden of proof in establishing a prima facie case of retaliation.

The issue of "causation" also arises in connection with the employee's burden of showing pretext. After establishing a prima facie case of retaliation, the burden of proof shifts to the employer to articulate a "non-discriminatory", legitimate business reason for the action taken. If the employer does so, the burden shifts back to the employee to show pretext. At this point the employee must show that the reasons given are pretextual and that the action in question was in retaliation for engaging in protected activity.

There are two common factors used in showing causation:

1. Temporal Proximity or Time As A Factor: Causation has often been inferred by the courts where the time-period between the protected activity and the adverse employment action in question is relatively short. How long a time? In some cases the time-period has been two hours, two days or several weeks while in others the time-period was as much as three months where causation was found. For example in the case of Berman v. Orkin Exterminating Co., Inc. (11th Cir. 1998) the employee was subjected to a series of unfavorable transfers over several months after engaging in protected activity before he was finally discharged. However, **timing alone, in a situation where the adverse employment action follows shortly after protected activity, does not necessarily show causation if the employer can prove that it planned to take the action before the protected activity occurred**. In some cases a shortness of time will not be enough. The employee will have to prove that the employer would not have taken the adverse action "but for" the protected activity. The courts have been reluctant to find causation where the time-period between the protected activity and the adverse action is significantly long, such as many months or years.

2. Knowledge or Awareness As A Factor: Some courts have required that as a threshold matter, the employee or charging party must show that the employer was "aware" of the employee's protected activity. This awareness or knowledge can be imputed to an employer by virtue of the employer's supervisors or managers who have a first hand knowledge of the employee's protected activity. However, some courts have held that where the adverse action was taken against an employee by a manager or supervisor higher up or in a separate chain of command, who had no knowledge of the employee's protected activity, then a causal link may not exist. Not many courts have followed that principle where a good argument could be made that there was "institutional knowledge". Generally, because of the "Participation Clause" under Title VII and a similar clause under the ADEA, an employer's knowledge that the employee has filed a charge is essential to establish a retaliation claim under the Title VII and the ADEA.

Some Useful Defenses Against A Retaliation Charge:

- The employer can assert that there is an absence of a retaliatory motive because of a significant lapse in time, which renders the protected activity too remote from the alleged adverse employment action in question (e.g. several years).

- The employer can produce evidence of an absence of a retaliatory motive by showing that the employee was treated the same as other employees who where similarly situated with respect to the action taken (e.g. a layoff, restructuring or reduction in force).

- The employer can produce evidence of the employee's work performance after the protected activity, which shows:

  - Time and attendance problems;
  - Disciplinary problems;
  - An unsatisfactory quality of work or productivity;
  - Violations of company work rules;
  - Other types of work-related performance problems including a failure to maintain satisfactory interactions with fellow employees.

- The employer can produce evidence which shows that the employee engaged in other prohibited conduct.

Some Tips On What To Do And What Not To Do In Responding to Retaliation Charges

The foregoing suggests the following do's and don'ts in responding to retaliation charges and claims in general:

1. Promptly conduct an internal investigation and get all of the facts as to the protected activity and make a careful determination as to whether the employee in question is covered under the retaliation clauses of one or more of the anti-discrimination statutes involved.

2. If an adverse employment action needs to be taken against an employee who has engaged in protected activity, make sure that it is based on current, objective performance data or other objective criteria that would apply to all employees. Make sure that the Charging Party is treated the same as other employees who have had similar performance problems. Be careful to ensure that the Charging Party is not singled out for adverse action unless absolutely necessary. Carefully document the reasons for the action taken.

3. Never reference the protected activity in connection with the documentation of any adverse action being taken or in any verbal conferences with the Charging Party concerning the adverse action.

The matter of retaliation is a serious allegation and can be complicated. Usually it requires some technical assistance from legal counsel. Please do not hesitate to call us at (205) 326-3002 if we can assist in resolving your retaliation claims.

NEW TEST LEADS TO NEW CLAIMS

Employers have the right to "raise the bar" for the workforce, even if the workforce has been satisfactory or stellar in its performance. The case of Garrison vs. Gambro, Inc. (10th Cir. October 6, 2005) involved sex and age discrimination claims by employees who, as a result of a new standardized test, were unable to meet the employer's new expectations.

The company implemented standardized assessments of assembly and inspections skills, mechanical dexterity and mechanical comprehension. There had been a quality problem at the plant, even though the workforce had received "excellent" scores in their performance appraisals. According to the court, "It was undisputed that serious quality control problems existed…despite the fact that the employees had been given good evaluations in the past and were considered by some to be great employees". The plaintiffs alleged that the testing factors had a discriminatory effect based on age and gender. The court stated that the test was specific to job related factors and it was a necessary ingredient to improve quality. Furthermore, **"There is nothing inherently discriminatory about an employer's decision to use criteria other than past performance evaluations to determine whether its employees can meet the increased workplace expectation that often coincide with a corporate reorganization."**

Often the issue of prior performance appraisals is complicating in the context, where employees are rated at a higher level than what they truly deserve. This case involved a situation where the factors employees were graded on in the past did not apply for the future; past performance was not an indicator of meeting the future expectations. In these situations, it is critical for the employer to be direct with employees regarding what is necessary for successful performance and why the previous factors no longer apply. Employers have the right to change or increase expectations without making a change in pay. Clarity and directness are the keys to making these business decisions without provoking litigation.

DELPHI BANKRUPTCY AND ITS IMPLICATIONS

Delphi, the country's largest auto supplier with 25,000 employees, filed for bankruptcy on

Saturday, October 8, 2005, citing among its reasons the unwillingness of the UAW to negotiate lower wages and benefits. Currently, Delphi employees receive $27.00 per hour, which the company seeks to cut to $10 - $12 per hour. The company also seeks greater employee contributions to healthcare costs. The UAW refused to negotiate cuts but the bankruptcy court may end up doing it for them.

Within days after the Delphi bankruptcy filing, the UAW reached an agreement with General Motors for health insurance benefits changes that will save the company a net of over $1 billion a year. Our assessment is that these concessions will be insufficient to help General Motors turn around struggling operations. How do these events affect employers in other industries throughout the country?

These events bring to the forefront an employee's sense of vulnerability regarding healthcare and retirement benefits. We do not suggest that the workforce will look to these events as an example of where unionization could be helpful; in fact, they may conclude quite the contrary. However, vulnerability, if not addressed, could lead to employers losing employees they want to retain and also provoke litigation among employees who believed that representations were made regarding the sanctity of retirement and healthcare benefits. We recommend annual individual meetings with employees addressing their overall benefits package, where they stand, what their options are, and security or lack thereof of the benefits programs. Consider offering employees choices of healthcare plans, where, for example, a "bronze" plan is a bare-bones catastrophic event form of coverage which may cost the employee nothing, compared to the "gold" family plan that has all of the "bells and whistles." This approach gives employees a choice; they can decide whether they want to spend their money on a more comprehensive plan or participate in the employer's less comprehensive plan at no cost.

THANKSGIVING --- A GOOD TIME FOR A GOOD MESSAGE

Since we began our firm in May 1993, we have sent our clients and friends a card on Thanksgiving to express our thanks and appreciation for the relationships we enjoy. We believe the Thanksgiving theme is an excellent one for employers to communicate to the workforce. Either send a letter to the employee's home or have leadership meet with employees at the workplace to thank employees for their efforts and commitment during the past year. We like the message that says something to the effect that as we reflect on Thanksgiving and what we have to be thankful for, among the things that we are thankful for are the opportunity to work together and the type of workforce and workplace culture we have established together. You can tell employees that, as they sit down to enjoy their Thanksgiving meal, you hope that among the things that they will feel thankful for are our working relationship and the privileges we enjoy together at work and in our country. Too often, employers "never miss an opportunity to miss an opportunity" to express appreciation to the workforce at a time when it is not expected.

DID YOU KNOW . . .

…that an employer may be liable for terminating an employee based on the employer's conclusion that employee made a false harassment claim? Gilooly v. Missouri Department of Health and Senior Services (8th Cir. August 31, 2005). The employer believed that Gilooly was lying about his claims of workplace harassment, even though other employees corroborated his claims. Employers have the right to terminate an employee for filing a false claim, but be absolutely sure the claim is false if that is the reason for termination, otherwise a retaliation claim is on the way.

…that the Service Employees International Union is offering $200,000 for the "best ideas" to improve the lives of working families in the United States? The winner will receive $100,000 and the two runners up will each receive $50,000. The SEIU announced this on October 5, 2005, intending to provoke "a public conversation centered on improving jobs in communities." The union wants to bring to the forefront "issues of the day that affect the American workplace and American workers." The ideas can relate to childcare, eldercare, healthcare --- any issues that would benefit workers and their families. The judges will be comprised of a diverse panel including executives, politicians, and government officials.

…that an employer paid $750,000 to settle sexual harassment claims brought against them by fourteen teenage male employees? EEOC v. Carmike Cinemas, Inc. (E.D. Md, September 26, 2005). The employees alleged they were subjected to unwelcome touching and sexual advances by a male manager, who turned out to be a convicted sex offender. In addition to the monetary award, the settlement includes annual training regarding sexual harassment and retaliation for managers, supervisors and employees, and a revision of the company's workplace harassment policy. Note that if you have managers or supervisors who work with teenagers, you have the right to conduct a criminal background check and we recommend you do so, particularly in healthcare, retail and hospitality industries.

…that on November 8, Californians will vote on proposition 75, which would forbid public sector unions from spending dues money on political contributions without gaining prior written consent from the membership? This proposal is on the ballot at the request of Governor Schwarzenegger. Passage of this proposition would be a major setback for organized labor, as the prior consent process would impair labor's political influence. If this proposition passes, expect it to be raised in other states.

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