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Lehr Middlebrooks Price & Vreeland, P.C.
2021 Third Avenue North
Birmingham, AL 35203
205-326-3002

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

Employment Law Bulletin

To Our Clients And Friends:

We wish you and your organization a peaceful, safe and prosperous 2006. Toward that end, we remain committed to provide you with prompt, creative, "can-do" advice, counsel and training.

NEW MILITARY LEAVE REGULATIONS BECOME EFFECTIVE ON JANUARY 18, 2006

On December 19, 2005, the United States Department of Labor issued revised regulations addressing the Uniformed Services Employment and Re-Employment Rights Act of 1994 (USERRA). **According to DOL, the deployment of US soldiers worldwide is the greatest it has been since World War II, thus we anticipate employers will face continuing military leave questions and issues. The key provisions of the new regs are as follows:**

1. The regulations clarify USERRA's definition of employer as "any person [who] has control over employment opportunities, "including "a person" to whom the employer has delegated the performance of employment-related responsibilities." The regs state that the term includes individual supervisors and managers who perform these functions. Third-party contractors that perform purely "ministerial" tasks for companies – such as mailing out insurance forms – aren't included as employers.

2. USERRA's discrimination provisions apply to all types of employment, including brief, nonrecurrent jobs. Reemployment provisions apply only when the employee has a reasonable expectation of continued employment in a job.

3. The DOL confirms that USERRA uses the Fair Labor Standards Act's test for distinguishing employees from independent contractors. This test says that if a worker is economically dependent on the employer, he's an employee.

4. The regs now clearly state that vacation accrual is a nonseniority-based benefit, reflecting long-held DOL views.

5. The DOL received a fair amount of comment on regulations covering health-care benefits. In response, it added a completely new section, 1002.167, that spells out when employers may discontinue health coverage for an employee in the military who hasn't made an election on continuation. Discontinuing coverage can be subject to retroactive reinstatement if the employee has paid back premiums and made his election known.

6. The DOL adopted the Americans with Disabilities Act's regulatory definition of a job's essential functions. (1002.198) It declined, however, to adopt the ADA's provisions on "qualified individual with a disability" and "reasonable accommodations" because the populations the ADA and USERRA are written for are too different for those provisions to be used under both laws.

7. The DOL further explained what constitutes just cause to fire a reemployed veteran. The employer must prove either that the discharge was based on the employee's conduct or was the result of some other legitimate, nondiscriminatory reason that would have affected any employee in the reemployed service member's position, regardless of protected status or activity.

8. A large number of comments were made about USERRA's pension provisions. One change to the interim regulations allows employers to make up contributions to a reemployed veteran's defined-benefit pension plan by the later of 90 days after reemployment or the day on which the employer usually makes contributions for the year in which the employee served in the military.

EMPLOYER RIGHTS TO INVESTIGATE OFF THE PREMISES DOMESTIC VIOLENCE

We advise employers to consider employee behavior away from the workplace in assessing what, if any, disciplinary or discharge decision is appropriate. Employee behavior, particularly if violent, has potential workplace implications to justify employer action. This approach was recently upheld by the court in *Rowe v. Guardian Auto Products, Inc. (N.D. OH, December 6, 2005).*

Rowe began dating a co-worker who away from work broke three of Rowe's ribs during an argument. The co-worker was convicted of domestic violence. Rowe did not report the incident to the company. After the co-worker was jailed for driving without a valid license, in violation of the domestic abuse probation, the company became aware of the domestic abuse incident and the co-worker's history of threats against women. The company asked Rowe questions about the co-worker's violent behavior toward her; she refused to answer. The company also asked Rowe if the co-worker

threatened to harm other company employees; Rowe refused to answer those questions. Rowe told the company that these were private, personal matters and none of the company's business. The company terminated her for failing to cooperate with its investigation of a potential workplace violence issue. Rowe sued, claiming that the company violated her privacy rights by asking her questions regarding behavior that occurred during non-work time.

The court found two independent reasons to grant the employer's motion for summary judgment. First, the violent incident against Rowe was a matter of public record and, therefore, did not involve trespassing into Rowe's personal life. Second, the court stated that "The violent incident was a legitimate concern for the company and the questions were relevant to that publicly known event." This case affirms the principle that when an employer has a concern about potential workplace violence, and evaluates whether to risk an individual employment claim or potential violence, err on the side of avoiding the potential violence.

OSHA TIPS: PAPERWORK VIOLATIONS CAN BE COSTLY

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.

One of a litany of criticisms directed at OSHA through the years has been its alleged penchant for fining employers for "paperwork violations." Evidently what many considered only a paper deficiency was viewed by OSHA in many instances as having a direct impact on worker safety and health. An agency directive, CPL 02-00-111, entitled "Citation Policy for Paperwork and Written Program Requirement Violations," was issued in 1995. The policy was to help distinguish between minor or technical paperwork violations and substantive issues that could affect employee safety and health.

The "paper" provisions that were addressed by the above policy include recordkeeping, posting of the OSHA Notice, written program requirements in standards such as lockout/tagout, permit-required confined spaces, bloodborne pathogens, hazard communication, and personal protective equipment. Its guidance provides that only in rare instances would an employer be cited for not having an OSHA poster displayed. Further, citations are not called for when there are only minor inaccuracies or omissions in injury and illness recordings. Where these do result in a citation, no penalties will be assessed unless OSHA can show that the employer had previously been informed of the requirement or where the employer made a conscious decision to not comply. Where certifications or written plans are required by standards and found deficient or absent, citations and penalties will depend upon whether or not employees were thereby exposed, or potentially exposed, to a hazard. For example where an employer had taken all protective measures required by a standard but failed to certify this action as called for by the standard, no citation should be issued.

There remains ample evidence that overlooking or ignoring OSHA paperwork requirements can have severe consequences. This is evidenced in one agency press release stating, "Failure to properly document recordable injuries and illnesses over the past three years has resulted in a $536,000 proposed penalty…" The release goes on to say, "accurate records help reduce injuries and illnesses by helping the employer to pinpoint the hazards that cause them in the first place."

Many instances may be found where OSHA has proposed substantial penalties for written program deficiencies. An OSHA press release

notes that an employer "did not have a hazard communication program to inform and train employees about the chemicals with which they worked." A penalty of $38,500 was proposed. Another case resulted in a proposed penalty of $280,000 for "failure to compile written process safety information."

Be aware that there are a number of OSHA standards requiring that written programs be developed and maintained and that certification records or other documentation be available. Examples include the following:

(1) The Hazard Communication Standard requires a written program describing how employees will be informed about any hazardous chemicals around which they work.

(2) The lockout/tagout standard requires documented procedures that protect employees from unexpected machine startup or release of energy during maintenance or repair activities.

(3) Where employers have more than ten employees, a written emergency action plan may be required.

(4) A written certification of training is required to document a site hazard assessment for personal protective equipment needs.

While your workplace may be squeaky clean, equipment guarded and in top shape, etc., lapses in programs and related documentation may leave you open to substantial OSHA sanctions. Therefore, you should not wait until OSHA shows up to discover that required records are missing or out of date.

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.

As we reach the end of another year there continues to be much litigation involving both the Fair Labor Standards Act (FLSA) and the Family and Medical Leave Act (FMLA). In some instances employers prevail but in many instances the courts are ruling in favor of the employee(s). Thus, I believe employers need to examine their pay and employment policies to ensure that they are complying with the requirements of these statutes. At this time Congress has not completed action on the FY-2006 spending budget for the Department of Labor, however, the House of Representatives has passed a budget that would increase the enforcement funding for Wage and Hour by almost $3 million above the FY-2005 budget. Thus, employers can expect to see more enforcement by Wage and Hour during this year.

One part of the FLSA the many employers tend to overlook is limitations on the employment of minors, especially in seventeen hazardous occupations. An employee must be at least 18 years old to work in any of the occupations. Among the more common prohibited occupations are the operation of a motor vehicle, operating or cleaning power driven meat processing equipment and operating paper bailers and trash compactors. Because the law provides that DOL may assess civil money penalties of up to $11,000 for each illegally employed minor, it is imperative that employers ensure that employees under the age of 18 are not working in prohibited occupations. During 2005 DOL issued press releases indicating that seven Alabama employers paid over $250,000 in penalties for violations the child labor laws. **Further, DOL has requested that Congress**

increase the maximum penalties for illegal employment of minors to $100,000. Employers should remember that the state child labor statutes also address the hours a minor may work during the school day.

Due to the size of its staff, DOL attorneys do not bring as many suits as are brought by private attorneys. Wage and Hour litigation has become very profitable to plaintiffs' attorneys as the statute provides that the court may award attorney fees and court costs in addition to unpaid wages and liquidated damages to the employee(s). In may instances the attorney fees may dwarf the amount of the back wages awarded to the plaintiffs. I recently read of a case in another state where the employer, in order to settle pending litigation, agreed to pay some $37,000,000 with approximately one-third of the amount being attorney fees.

A word of caution for employers that are engaged in the business of furnishing "companions" to care for the aged and infirm. Section 13(a)17 of the FLSA provides a minimum wage and overtime exemption for companions that are employed in or about a private residence to care for persons who are aged or infirm. The DOL regulations indicate that the exemption can apply even though a third party such as a sitter service employs the companion. However, the Second Circuit of the U. S. Court of Appeals ruled that if the companion was employed by a third party the exemption does not apply. Recently DOL issued an advisory memorandum to its enforcement staff stating that it still considers the exemption to apply to companions even if they are employed by a third party. In view of the Second Circuit decision it would not surprise me to see suits brought on behalf of companions that are employed by third parties.

There also remains much litigation under the FMLA with employers prevailing on summary judgment in many instances but in other situations the employees have triumphed. Just this month a U. S. District Court in Montgomery allowed an employee's allegation of illegal termination due to his taking of FMLA leave to proceed to trial. The employee's pregnant wife was experiencing some problems so the employee contacted his employer by phone and informed him that the employee needed to care for his wife and thus would not be at work that day. The employee later furnished medical certification regarding his wife's medical problems. The employer has a policy that requires an employee to notify his/her supervisor one hour prior to shift time if the employee will not report to work on that day. On one of the absent days the employee did not call in until 54 minutes prior to the beginning his shift and he was terminated. The judge in the case observed that the litigation appeared to revolve on "a de minimis infraction" of the firm's attendance policy.

The Sixth Circuit of the U. S. Court of Appeals recently issued an opinion regarding medical certification that is required upon returning to work after FMLA leave. The employee presented a note from a doctor stating the employee could return to work but was limited to 40-45 hours per week and her out of town travel limited to one day per week. The employer asked for more detail from the doctor and when the employee failed to provide the information the employee was terminated. The court held that the return to work certification had to state only that the employee "can return to work." The court further stated that the employer may require additional information related to the employee's ability to do the essential functions of the job, but reinstatement cannot be delayed while the employer obtains the additional information.

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

EEO TIPS: OVERCOMING BLIND SPOTS ON VISUAL IMPAIRMENTS – IT'S ALL ABOUT ACCOMMODATIONS

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 hinted in last month's article in the ELB entitled "*Is Your Firm Being Blind to Visual Impairments?"* the matter of employing persons with visual impairments probably evokes more fears, myths and stereotypes with employers than any other type of disability. The general perception is that hiring a blind or visually impaired employee: (a) usually results in higher costs because of equipment and/or or assistive devices (b) usually requires additional personnel to oversee or assist, (c) will cause a slow down in production, or (d) that it will create a danger to the blind employee or a danger to fellow employees.

While arguments can made that some of the foregoing perceptions are true, equally convincing arguments can be made that they are as described above, merely "fears, myths and stereotypes." Whatever theoretically they may be, let it be clear that there is a statutory obligation under the Americans With Disabilities Act (ADA) "to provide a reasonable accommodation to the known physical or mental limitations of persons with disabilities." Thus, before proceeding further it might be well to refresh our collective memory of how the ADA defines the term " accommodation." Under the EEOC's Guidelines an accommodation is described as: [See generally 29 C.F.R. 1630.2(o)]

> "..any modification or adjustment to a job or work environment that will permit a qualified individual with a disability to apply for a job, to perform a job's essential functions, or to enjoy equal benefits and privileges of employment."

Although employers are limited in making any pre-offer inquiries concerning an applicant or employee's visual impairment (or any disability), the starting point for determining whether a reasonable accommodation can be made must begin with the applicant or employee himself or herself. **Normally the applicant or employee must request an accommodation. However if it is obvious that an accommodation may be needed, then it is lawful to ask about an accommodation during the pre-offer stage.**

> TIP # 1: During either the pre-offer or post-offer stages where permissible, it is always best to ask the applicant or employee what accommodation may be needed. Usually such persons know what would be useful and effective for their individual purposes in connection with the job in question. Not all persons with visual impairments need the same accommodation.
>
> TIP # 2: If a test of some type is a part of the application process, make sure that it is appropriate for the job in question. That is, make sure that the test measures the applicant or employee's abilities to perform the essential functions of the specific job at issue, not some general test that could apply to a whole range of jobs. Remember that even during the application process, some accommodation may be necessary.

In this age of technology, the following types of accommodations for persons with visual impairments have been found to be reasonable for some, but not all employers:

- Various types of assistive technology including:

1. A closed circuit television for reading printed materials;
2. an external computer screen magnifier;
3. cassette or digital recorders;
4. software that will read information on a computer screen; and
5. an optical scanner that can create documents in electronic form from printed items

- Written materials in readable or otherwise accessible format such as large print, Braille, audio cassettes, or computer disks.

Although they could be more costly, the following types of accommodations for persons with visual impairments may also be reasonable under certain circumstances:

- Modification of the employer's policies to allow the use of a guide dog in the workplace;
- modification of an employment test (e.g from written to Braille);
- a reader;
- a driver or the payment of the cost of transportation to enable the performance of essential functions;
- an accessible website; and
- modified training or special training in the use of assistive technology

TIP # 3: An employer, of course, does not have to provide any specific accommodation that may be requested only one that would be effective without imposing undue hardship on the employer.

Benefits and Privileges

Reasonable accommodations with respect to benefits and privileges include those that may be necessary to provide persons with visual impairments equal access to the employer's overall facilities, training, social events, and promotional opportunities. If the employer, for example, makes temporary assignments of various employees to other facilities (e.g. in another city) for training to gain experience for promotional purposes, then accommodations should be made for employees with visual impairments to gain the same type of experience. Secondly, if job postings and social events are posted on a notice board, then some means should be provided to persons with visual impairments who could not read the notice board to receive the same postings.

Employers should make sure that any accommodation provided would allow the applicant or employee to fairly meet any test requirements, perform the essential functions of the job in question, and have access to any privileges of benefits that other employees may enjoy. As stated above, even if a particular accommodation works for one person, do not assume that the same accommodation will work for all persons with similar visual impairments.

NO RETALIATION FOR TERMINATION DUE TO UNAUTHORIZED COPYING OF PERSONNEL RECORDS

We are often asked whether an employee has the right to see or receive copies of information in his or her personnel file. **Unless required under state law, personnel records are an employer's business record and an employee does not have the right to see or receive copies of those records. This is true even in a pending discrimination claim, noted in the recent case of *Watkins v. Ford Motor Company (S.D. OH, December 15, 2005).***

Watkins had been employed by Ford for thirty years. He stated that he found his personnel files in plain view (not in the cabinet) and they were not marked confidential. He copied the files and brought them to his lawyer, because he believed that the file contained evidence of unlawful employment discrimination. When the

company became aware that he had copied the files and given them to his lawyer, the company terminated Watkins. Watkins alleged that coping was protected activity and that the termination was in retaliation for his concerns regarding discriminatory treatment.

In rejecting Watkins' argument, the court stated that "If the court were to adopt plaintiff's argument that such conduct is protected activity, plaintiffs everywhere would be entitled, under the umbrella of protected activity, to steal company information and as long as they gave the information to their lawyer, not only be able to avoid disciplinary action by their employer, but also be empowered to successfully maintain a claim against the employer if adverse action is taken for the misconduct."

We recommend that in states where employers are not required to permit employees to review or receive copies of documents in their file, permit employees to review those documents in the file which had been or should have been reviewed with the employee (disciplinary actions, appraisals, and letters of accommodation). Permit employees to copy documents they had received copies of previously. Because multiple people may need access to an employee's file, we recommend to maintain confidential or sensitive information, such as investigation, interview notes or summaries or advice from counsel, in a separate, confidential file.

UNIONS WIN MORE ELECTIONS; FEWER ELECTIONS HELD

According to the Bureau of National Affairs, **unions during the first six months of 2005 won a whopping 61.8% of all elections held, an increase from 57.8% the year before**. However, the number of elections held during the first six months of 2005 declined, to 1,140 from 1,212 during the same time period in 2004. As a result of these numbers, only 34,618 employees were organized through NLRB conducted elections, compared to 45,729 in 2004. The number of employees eligible to vote in all elections also declined to 71,225 in 2005, compared to 86,700 during the same period in 2004.

Unions during the first six months of 2005 won 66.8% of all elections in healthcare, 81% in finance and insurance, 78.1% in construction, 60.6% in wholesale, and 59.9% in transportation, communications and utilities. Unions were least successful in manufacturing (39.3%) and retail (31.8%). The Service Employees International Union had the highest win rate (69.3%) of any union, and organized through elections the highest number of employees, 8,251.

Several conclusions can be drawn from these statistics. First, the key for employers is to be sure there is no election. Second, although the union message appeals to eligible voters, unions must continue to seek non-voting approaches to organize new members, such as "neutrality" agreements. Finally, the most rapidly growing industry in our country (healthcare) results in the highest rate of organizing success, while an industry that has suffered (manufacturing) had low organizing success. Why the difference? In healthcare, employees know their jobs cannot be sent overseas. In manufacturing, employees believe their jobs can be exported and there's nothing unions can do to stop it.

DID YOU KNOW . . .

…that according to Bureau of National Affairs, the average first year wage increase of all settlements in 2005 was 3.2%, the same as 2004? The median increase was 3%, also unchanged from 2004. The average increase in manufacturing was 2.1%, down from 2.8% in 2004. The average increase in construction was 3.4%, an increase from 3.0% in 2004.

When factoring in lump sum payments, manufacturing increases for the first year of 2005 were 3.6%, the same as 2004 and construction increases where 3.5%, an increase from 3.0% in 2004.

…that workplace profanity has increased, according to a survey conducted by WorldWIT? The survey was conducted of 4,000 women professionals. It asked whether workplace profanity had increased during the past five years. 71% stated that it had, 29% stated that it had not. Approximately 80% said they did not mind it or had grown accustomed to it.

…that Chico's agreed to pay $800,000 in damages for requiring its sales employees to wear Chico's clothing? Villanueva v. Chico's FAS, Inc. (CA. Sup. Ct, December 1, 2005)? Employees argued that the company's requirement to wear Chico's clothing was the same as requiring them to wear a uniform at the employee's expense. California's anti-coercion law prohibits an employer from requiring an employee to purchase something of value from the employer. The $800,000 settlement includes $200,000 for attorney fees.

…that discrimination charges filed in 2005 with the EEOC declined for the third consecutive year? The EEOC's fiscal year ended September 30. They received 75,400 charges for fiscal year 2005, compared to 80,000 in 2004, 81,300 in 2003 and 84,400 in 2002. The monetary benefits received for charging parties also declined in 2005, to $378 million from $415.4 million during 2004. However, the EEOC obtained more financial benefits for charging parties at the administrative level than the previous year, $271.5 million compared to $251.7 million. According to EEOC chair Cari Dominguez, 2005 was "a banner year in getting employers to agree to mediation." 36% of all discrimination charges alleged race discrimination; 31% sex discrimination; 20% disability discrimination; 18% age discrimination; and 11% national origin discrimination. The EEOC filed 134 class actions for 2005, an increase from 124 in 2004.

LEHR MIDDLEBROOKS PRICE & VREELAND, P.C.

Brett Adair	205/323-9265
Stephen A. Brandon	205/323-8221
Donna Eich Brooks	205/226-7120
Michael Broom (Of Counsel)	256/355-9151 (Decatur)
Jennifer L. Howard	205/323-8219
Daniel M. Hurst	205/323-9274
Richard I. Lehr	205/323-9260
David J. Middlebrooks	205/323-9262
Terry Price	205/323-9261
Michael L. Thompson	205/323-9278
Albert L. Vreeland, II	205/323-9266
J. Kellam Warren	205/323-8220
Sally Broatch Waudby	205/226-7122
Lyndel L. Erwin Wage and Hour and Government Contracts Consultant	205/323-9272
Jerome C. Rose EEO Consultant	205/323-9267
John E. Hall OSHA Consultant	205/226-7129

Birmingham Office:
2021 Third Avenue North
Post Office Box 11945
Birmingham, Alabama 35202-1945
Telephone (205) 326-3002

***Decatur Office*:**
303 Cain Street, N.E., Suite E
Post Office Box 1626
Decatur, Alabama 35602
Telephone (256) 308-2767

Mississippi Office:
Plaza Building, Suite 510
120 North Congress Street
Jackson, Mississippi 39207
Telephone (601) 948-1408

For more information about Lehr Middlebrooks Price & Vreeland, P.C., please visit our website at www.lmpv.com.