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

Employment Law Bulletin

To Our Clients And Friends:

On Tuesday, February 21, 2006, the United States Supreme Court issued a decision of significant impact for employers. The case, *Ash v. Tyson Foods, Inc.*, involved appeals from an Alabama jury's award of $1.75 million each to two black plaintiffs who alleged they were not promoted because of race. The plaintiffs cited their manager's use of the term "boy" when referring to them as evidence of discriminatory animus. The Eleventh Circuit Court of Appeals stated that the use of the word "boy" by itself could have lots of meanings, but that use of that term was not sufficient to show a discriminatory intent to deny a promotion based upon race. **In overturning the Circuit Court's decision, the Supreme Court stated that whether the term showed a discriminatory intent depends upon the "context, inflection, tone of voice, local custom and historical usage."**

The Eleventh Circuit also said that when comparing qualifications to evaluate a promotion decision, an individual who claims to be as- or better-qualified than the person selected must prove that the superior qualifications were "so apparent as to jump off the page and slap you in the face." The Supreme Court referred to that "standard" as "unhelpful and imprecise." Accordingly, the Supreme Court remanded the case to the Eleventh Circuit to evaluate the evidence in light of Supreme Court's decision.

We think that, throughout the country, a majority of people would conclude that a white manager who refers to black subordinates as "boy" is using a term that historically and currently has racial connotations. **What is the "lesson to be learned" for employers in this case? Stress to managers and supervisors that to treat their workforce with the highest level of respect includes having an awareness of what language, if used to or about employees, may be offensive, derogatory or inappropriate.** In this case, the employer argued that the term "boy" had several meanings.

The Supreme Court responded that although the word would not always be evidence of racial animus, "it does not follow that the term, standing alone, is always benign. Insofar, as the Court of Appeals held that modifiers or qualifications are necessary in all instances to render the disputed term probative of bias, the court's decision is erroneous."

ECKERD FACES 2600 FIXED SALARY FOR FLUCTUATING WORKWEEK VIOLATION CLAIMS

Under the fixed salary for fluctuating workweek pay system, a non-exempt employee is paid a salary regardless of the number of hours worked during the week. If the employee works for 15 minutes that week, the employee receives the regular salary. If the employee works over 40 hours in that week, the employee's pay is divided by the hours worked, and that figure is then divided in half, which equals "halftime." Halftime is paid for each hour worked over 40.

In the case of *Pedlum v. Eckerd Corporation* (E.D. Fla, February 7, 2006), over 2600 managers are challenging Eckerd's fixed salary for fluctuating workweek pay plan.

Assistant managers at Eckerd's were scheduled to work for a 50 hour workweek and they were paid on the fixed salary basis. The employees argue that Eckerd added "non-productive time" to the total hours worked on which their overtime payments were calculated, which reduced the amount of their halftime pay. For example, time that is paid for but not worked (vacation, holiday, sick days) should not be included as hours worked in the determination of the employee's regular hourly rate. Eckerd claims that they paid for productive and non-productive time, which is permissible.

Under the fixed salary for fluctuating workweek pay system, an employer may not deduct from an employee's pay for absences, disciplinary or workload reasons. If an employee is suspended for disciplinary reasons and the employer wants the suspension to be without pay, the suspension must be for an entire week. Furthermore, there must be a clear, mutual understanding between the employer and employee regarding the pay system and how it works. We advise employers to confirm the details of the pay system in writing to each employee covered under this plan.

COURT DECIDES WHO MAY REQUEST AND REVIEW AN EMPLOYEE'S FMLA CERTIFICATION

The case of *O'Reilly v. Rutgers University* (D. N.J., January 16, 2006), involves an unusual FMLA issue. That is, may an employee refuse to provide medical certification to an employer's designated representative, because of confidentiality concerns, even though the employee is willing provide the certification to another manager?

Under the FMLA, the term "employer" is defined to include any individual who acts directly or indirectly on behalf of the employer. According to the court, "this definition may certainly encompass departmental managers and supervisors who function in an administrative capacity, as well as individuals in an office of employee relations or human resources."

The plaintiff, Laurie O'Reilly, was willing to provide certification for her serious health condition under the Family Medical Leave Act, but she did not want her supervisor to see it. The certification involved a statement from her psychiatrist. O'Reilly wanted to provide the certification to the University's medical staff. O'Reilly was told that if she did not provide the form to her supervisor or department manager, she would be terminated. She was also told that the form would be kept confidential, as required under the FMLA and ADA. None of this satisfied O'Reilly, who refused to comply with her employer's request and was terminated.

According to the court, "plaintiff's fear that her medical information might be wrongfully disclosed does not permit her to refuse to submit the FMLA certification form to her employer. Nothing has been adduced to suggest any intention by the University to disclose the information wrongfully, had it been submitted. Having refused to provide her employer with her medical certification, Ms. O'Reilly was not entitled to FMLA leave."

Our observation of FMLA compliance is that employers often do not realize their extensive rights under the FMLA. We know the law is frustrating, which is why many refer to it as "Forget My Last Absence." However, employers who assert the rights under the FMLA may hold employees accountable for their failure to comply with legitimate employer requests and expectations.

EMPLOYEE WHO FAILS TO SPEAK UP ABOUT WORKPLACE HARASSMENT LOSES CLAIM

The case of *Bernier v. Morningstar, Inc.* (N.D. Ill, January 31, 2006), once again reinforces the proposition that, where an employer has a proper workplace harassment policy that is effectively communicated to employees, employees who do not report policy violations are out of luck should they sue their employer for harassment.

Bernier believed that his supervisor was making sexual overtures toward him because of the way the supervisor stared at him at a urinal in the men's room. Bernier anonymously sent an e-mail to his supervisor that said "stop staring! The guys on the floor don't like it." Bernier denied sending the message and was terminated for lying about whether he had sent the message.

In rejecting Bernier's claim of sexual harassment, the court stated that "when a plaintiff claims that a co-worker harassed him, an employer can be liable only if it was negligent in discovering or remedying the harassment. An employer satisfies its legal duty in co-worker harassment cases if it takes reasonable steps to discover and address incidents of co-worker harassment."

TIME RUNNING OUT TO PREPARE 2007 H-1B VISA PETITIONS

April 1, 2006 is the first day that USCIS will accept H-1B petitions for the 2007 fiscal year that begins October 1, 2006. The H-1B has evolved into an extremely popular mechanism for U.S. employers to augment their professional workforce with qualified alien employees. Oftentimes, the H-1B is used to continue the employment of a recent graduate of a U.S. college who begins working for an employer in optional practical training.

The impending deadline is important because H-1B visas are available in limited quantities (capped at 65,000 per fiscal year). The H-1B quota for 2005, the first full year that the cap was in place since the mid-1990's, was exhausted in December 2005 – a couple of months *after* the start of the fiscal year. For fiscal 2006, the quota was exhausted in early August 2005 – a couple of months *before* the fiscal year began. Many petitions were returned to petitioning employers because the quota had been exhausted, resulting not only in the employer being unable to employ the alien, but also the alien being unable to remain in the U.S. unless he or she qualified for another applicable immigration status. It is anticipated that the 2007 quota will be exhausted quickly, even within the first few weeks of the filing period, so it is important for employers to prepare and file the petitions on or near April 1st. Employees and candidates for employment who currently hold H-1B visas and have been counted against the cap are not impacted by the cap when they seek to renew their current visa or transfer their employment to another employer. Additionally, certain educational and non-profit entities are exempt from the cap.

Please contact Mike Thompson (mthompson@lmpv.com; 205.323.9278) with your business immigration questions.

OSHA TIP: OSHA ON FIRST AID AND MEDICAL

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.

Several OSHA standards contain first aid requirements. These are directed to construction, shipbuilding/repairing, logging, electrical power generation and other activities. The standard for all general industry, 1910.151(b), states as follows: **"In the absence of an infirmary, clinic, or hospital in near proximity to the workplace which is used for the treatment of all injured employees, a person or persons shall be adequately trained to render first aid. Adequate first aid supplies shall be readily available."** This wording has triggered many questions as to the meaning of "near proximity," "adequately trained" and "adequate" with regards to first aid supplies.

OSHA has addressed the proximity issue in a number of interpretive documents that focus on the amount of time in which medical help could get to the injured employee and the severity of likely injuries. For activities that would likely produce life threatening or permanently disabling injuries, the response time should not exceed four minutes. Where lesser injuries would be anticipated, the acceptable response time is extended to 15 minutes. Should outside medical help be able to meet these response times for a worksite, the employer would not be required to have personnel trained in first aid. If outside medical help cannot be expected to meet such response times, a site employee must be available who has been trained in compliance with OSHA's "Guidelines for First Aid Training" (CPL 02-02-053). It is noted that the American Red Cross and the National Safety Council along with various private institutions are primary sources of first aid training. OSHA does not teach or certify first aid training programs.

Although it isn't a specific requirement of its general standard, OSHA recommends in its guidelines that cardiopulmonary resuscitation (CPR) be included in first aid training. CPR training is required in some specific OSHA standards such as those for logging and electric power generation.

While OSHA's standard may require the employer to ensure that someone is adequately trained to render first aid, it does not require that this individual be assigned the duty to administer first aid. Employees trained and assigned first aid duty are covered by the bloodborne pathogens standard (1910.1030) and must be trained in its provisions and be provided necessary personal protective items. Where first aid is a collateral duty for an employee, OSHA considers it only a deminimus violation (technical violation carrying no penalty) if such employees aren't offered pre-exposure hepatitis B vaccinations. However, all incidents and exposures must be properly reported and vaccine and follow up made available.

OSHA does not dictate precisely the content of a first aid kit nor supplies that must be available. The non-mandatory Appendix A to its 1910.151 standard directs employers to the ANSI standard, Z308.1-1978, for a description of minimal contents of a first aid kit. The need to augment such a kit as dictated by the size, type and other characteristics of a worksite is discussed.

Automated external defibrillators (AEDs), medical devices for analyzing and restoring normal heart rhythm by delivering an electric shock to victims of ventricular fibrillation, are not required. OSHA does, however, suggest that

employers consider providing them. The agency has issued a fact card and a technical information bulletin encouraging employers to take advantage of this technology.

With respect to medical requirements, numerous OSHA standards call for various actions such as screening, monitoring or the like. Included in topics addressed by these standards are lead (1910.1025), asbestos (1910.1001), formaldehyde (1910.1048), and respiratory protection (1910.134). OSHA publication 3162, “Screening and Surveillance: A Guide to OSHA Standards," offers a useful checklist on these and other standards having medical requirements. The publication can be accessed on OSHA’s website at www.osha.gov.

WAGE AND HOUR QUIZ: TEST YOUR KNOWLEDGE

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.

In light of the recent Supreme Court decision regarding what constitutes work time; I thought I would start with a quiz that I saw recently.

TEST YOUR KNOWLEDGE ON THE FOLLOWING WAGE PAYMENT QUESTIONS:

1. Employers must pay non-exempt employees for time spent at the beginning and end of a work shift changing into and out of (i.e., donning and doffing) clothes or gear not unique to the employee's job. True or False?

2. Employers must pay non-exempt employees for time spent at the beginning of a work shift waiting in line with other employees to don unique protective gear required for the employee's job. True or False?

3. Employers must pay non-exempt employees for time spent prior to and at the end of their shift donning and doffing unique protective gear required for the employee's job. True or False?

4. Employers must pay non-exempt employees for time spent prior to and at the end of their work shift walking between the company locker room where they don and doff unique protective gear and the employees' workstation. True or False?

5. Employers must pay non-exempt employees for time spent at the end of a work shift waiting in line with other employees to doff unique protective gear required for the employee's job. True or False?

The answers, in many cases, will be (1) False, (2) False, (3) True, (4) True, and (5) True. Of course, as should not be surprising, the answers may change depending on the particular facts of the situation.

If you did not answer each question correctly, you are not alone. The U.S. Supreme Court in the case of *IBP, Inc. v. Alvarez*, 126 S. Ct. 514 (2005), recently resolved previously conflicting answers by lower courts to these five questions. The *IBP* ruling involved two different lower court cases heard together because of the similarity of their issues: *IBP v. Alvarez*, 339 F.3d 894 (9th Cir. 2003) and *Tum v. Barber Foods, Inc.*, 360 F.3d 274 (1st Cir. 2004).

Last month I discussed enforcement activities by DOL and what we anticipated would occur in the remainder of 2006. On January 31, DOL posted on its website a report outlining its activities in FY-2005 and some of the planned initiatives for FY-06. Nationally, DOL will

concentrate on three areas, "off-the-clock" work, overtime security (enforcement of new regulations regarding exempt v. nonexempt employees), and youth employment. In addition, each region and local office will have planned initiatives. A copy of this information can be found on the DOL website at http://www.dol.gov/esa/whd/. The report shows that DOL recovered $166 million for over 240,000 employees during the year.

In the proposed budget for DOL in FY-2007, the President has asked for an addition $6 million for the agency and the hiring of an additional 39 investigators to strengthen enforcement programs. On January 30, the President also nominated Mr. Paul DeCamp to be Administrator of the Wage and Hour Division. He is currently serving as a senior policy advisor for Assistant Secretary of Labor for Employment Standards, Ms. Victoria Lipnic. Prior to joining DOL, Mr. DeCamp was an employment attorney in private practice.

Several states continue to increase their minimum wage. The latest to do so is Maryland. It increased its minimum wage to $6.15/hour on February 16, 2006. The Maryland State Department of Labor estimates that 55,000 private workers will benefit from the increase, which will cost employers an additional $61 million annually. There are now 18 states that have a minimum wage greater than that required by the FLSA, with another 24 states having a minimum wage equal to the FLSA minimum wage. Two states, Kansas and Ohio, have a minimum wage of less than $5.15/hour. Alabama is one of only 6 states that do not have a minimum wage. According to an article published by the Bureau of Labor Statistics in January, there were more than 140 minimum wage bills introduced in 42 states during 2005. The last increase in the federal minimum wage occurred in 1996. This is the longest period without an increase since the FLSA was passed in 1938.

One item of note for Alabama employers is that employees may no longer be required to use various types of leave for time spent in jury related activities. Alabama also requires that full-time employees be paid their regular pay (less any jury fees received) for time spent on jury duty.

DOL continues to enforce the FLSA with vigor. Since the first of February, I have seen articles indicating that DOL has investigated five separate firms where the employers ended up paying almost $3 million in back wages. This included restaurants, janitorial firms and assisted living facilities. In one of the cases, the federal court also issued an injunction against the employer requiring it to comply with the FLSA. Also, UBS, the Swiss financial services giant, has agreed to pay $93 million to resolve class action suits in several states (which could affect as many as 25,000 current and former employees) regarding financial advisors and trainees that had been claimed as exempt from overtime. This is the second brokerage firm to pay back wages and there are suits pending against several of the other major firms.

In another loss for employers, the Eighth Circuit Court of Appeals ruled on an employer's sick leave buy back plan. The plan allowed employees to "cash out" unused sick leave at the end of the year. The court held that such payments were for a general or specific work-related duty and must be included in the regular rate for overtime computation purposes.

In view of Wage Hour's continued enforcement activities and private litigation, employers should continue to 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 us.

EEO TIP: HIGHLIGHTS OF REVISIONS TO THE EEOC'S EEO-1 FORM

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.

On January 27, 2006, the Equal Employment Opportunity Commission (EEOC) gave final approval to a number of significant revisions to the "Employer Information Report," generally known as the EEO-1 Report. The EEO-1 Report is an annual report which must be filed with the EEOC by September 30th of each year by certain employers which in substance provides a count of employees by job category, sex, race and/or ethnicity. The EEO-1 Report must be filed by:

- Employers who have 100 employees or more (regardless of whether or not they have a contract with the federal government), or
- Employers who have 50 or more employees and also one or more contracts with the federal government totaling $50,000 or more.

The report is submitted both to the EEOC and the Office of Federal Contract Compliance Programs (OFCCP), an agency under the U. S. Department of Labor. The EEOC uses the report for enforcement purposes as added information in its investigations and to monitor employment trends with respect to minorities and females. The OFCCP also uses the report in its investigations regarding compliance with Executive Order 11246 pertaining to affirmative actions with respect to females and minorities by contractors with contracts totaling $50,000 or more. To a large extent, the OFCCP uses statistical data from the EEO-1 Reports to determine which employment facilities to select for compliance evaluations. Both agencies are required by law to keep the information contained in the EEO-1 Report information strictly confidential.

Revisions to the EEO-1 Report

At the outset it should be stated that the revisions to the EEO-1 Report are effective for the "survey period" due by September 2007. The survey period is "any pay period between July and September for the year in question." Employers must use the number of employees by job category, race, sex and/or ethnicity from any pay period between those months. The reports are due by September 30th of each year. For the survey period due by September 30th 2006, employers must continue to use the old form.

SPECIAL ALERT:

The filing deadline of September 30, 2005 for the 2005 EEO-1 Report has been extended to March 31, 2006 for employers (companies) in the geographic areas which were affected by Hurricane Katrina, namely, New Orleans, Louisiana; Biloxi, Mississippi; and Mobile, Alabama. The extension also applies to those companies which are headquartered outside of the designated geographic areas but have facilities within the geographic area. Contact us for more information at (205) 323-9267 or the EEOC directly at (866) 286-6440.

Revisions to the EEO-1 Report's Ethnic and Racial Categories

The following revisions have been made to the way ethnicity and race will be reported on the EEO-1 Report beginning in September 2007:

1. A new category entitled "*Two or more races*" has been added.

2. The category of "Asian or Pacific Islander" has been divided into two separate categories, namely: "*Asian"* and

"Native Hawaiian or other Pacific Islander."

3. The racial category of *"Black"* has been changed to *"Black or African American"*

4. The ethnic category of "*Hispanic"* has been changed to *"Hispanic or Latino"*

Additionally, the report form, itself, encourages employers to allow employees to "self-identify" with respect to their race or ethnicity as opposed to visual identification by personnel in the Human Resources Department or by the employer.

Revisions to the EEO-1 Report's Job Categories

The major revisions to Job Categories on the EEO-1 Report were to the "Officials and Managers" job category which was divided into two sub-categories based upon the Manager or Official's "responsibility and influence with the company" as follows:

1. The first sub-category of Officials and Managers has been called: "Executive/Senior Level Officials and Managers." This sub-group has been defined as those Officials and Managers who plan, direct and formulate policy, set strategy and/or provide overall direction for the firm or company. In larger organizations such Officials and Managers would be within two reporting levels of the Chief Executive Officer (CEO).

2. The second sub-category of Officials and Managers has been called: *"First/Mid-level Officials and Managers"*. This sub-group has been defined as those Officials and Managers who direct the implementation of policies or operations within certain specific parameters set by the Executive/Senior Level Officials and Managers, or oversee day-to-day operations of a branch, plant or facility.

Additionally, business and financial occupations (e.g. economists, accountants, finance officers) were removed from the "Officials and Managers" Category to the "*Professional*" Job Category in order to improve employment data pertaining to employment trends in the mobility of minorities and females as Officials and Managers.

The EEOC does not encourage the use of paper forms in filing EEO-1 Reports. Paper EEO-1 Forms will be supplied on request only, and then only in those cases where the Internet is not accessible to the employer in question. It strongly recommends that all such reports be filed electronically or through its online filing system. Employers can obtain instructions on how to file EEO-1 Reports on the EEOC's website at: http://www.eeoc.gov/eeo1survey/howtofile.html.

Remember that the revised EEO-1 Form with the changes outlined above is scheduled to be used for the first time in reporting on the survey due September 2007. The old form is to be used in reporting for the survey due in September 2006. Please call us if you have any questions concerning the revised job categories or any other EEO matters at (205) 323-9267.

DID YOU KNOW…

…that a hospital was required to terminate fourteen nurses for refusing to pay union dues? *St. John's Mercy Health System v. Norb* (8th Cir. February 1, 2006). The collective bargaining agreement with the United Food and Commercial Workers Union covered approximately 1400 RNs. The agreement provided for "union security," which meant that the hospital was required to terminate an RN who either did not become or remain a union member or failed to continue to pay union dues. The union brought the issue of the employer's refusal to terminate the 14 nurses who refused

to pay their dues to arbitration and prevailed.

Even though there are national and regional nursing shortages, the court stated that the hospital was obligated to follow the terms of the bargaining agreement that it agreed to, including the union security provision.

…that an employer providing an employee with housing may require the employee to vacate the housing during FMLA leave? This is based upon a United States Department of Labor Wage and Hour opinion letter issued on February 2, 2006. The DOL explained that if an employee on unpaid leave for other reasons is required to vacate company paid housing, then the employer may apply the same standard toward to an unpaid Family and Medical Leave absence. However, if employees on unpaid leave for other reasons are allowed to remain in the employer's housing, then the employer may not treat those on unpaid FMLA absences differently.

…that two officials for the United Food and Commercial Workers Union were sentenced for embezzling from their local? On February 2, the former president of the Local 990 in Greeley, CO, Ronald Bush, and his son, Stephen, were sentenced to home detention and probation for stealing over $25,000.00 from the Local. They were issued credit cards for union related business. They charged personal travel and home purchases, such as plasma televisions, to the Local.

…that a court enjoined a former employee from disseminating personal information about former co-employees? *Honeywell International v. Nuget* (D. AZ, January 31, 2006)? The company became aware that a former employee was disseminating payroll data and social security numbers about his former co-workers. The former employee had posted this information on a third party website. In addition to gaining the injunction, Honeywell also sued the former employee for violating the Computer Fraud and Abuse Act. The company provided unlimited credit monitoring and one year of identity theft insurance to those employees whose information was improperly disclosed.

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