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

Employment Law Bulletin

To Our Clients And Friends:

The violent and uncivil behavior of many within our country unfortunately includes behavior at the workplace and in schools. A key component to maintaining a workplace free of violence is to establish and communicate clearly to the workforce a zero tolerance workplace violence policy. Please contact us if you do not have such a policy.

At a recent meeting of the American Bar Association Occupational Safety and Health Law Committee, the following were identified by behavioral specialists as the indicators of an individual becoming potentially violent at the workplace:

- Fascination with or continuing to talk about weapons.
- Substance abuse.
- Stress or severe turmoil in one's personal life.
- Violent behavior history; if an individual was violent as a teenager, he or she is more likely to be violent as an adult.
- Isolation from and poor relationships with fellow employees.
- Significant changes in personal day to day functioning; an individual who writes or communicates incomprehensible or bizarre comments.
- Lack of caring for oneself hygienically and otherwise.
- Significant mood swings and changes in personality.

Even if an employee has a legal right to possess a weapon, the employer has a superceding right to prohibit the employee from bringing a weapon onto company premises, including the parking lot, at any time. We are aware of circumstances where an employee became enraged at work, walked to the company parking lot, took a gun from his vehicle and shot a fellow employee. Notify employees that vehicles and packages entering or brought onto company property may be subject to a random search (as well as packages and vehicles leaving company property).

Note precautions that should be taken in the event of domestic or stranger violence. If an employer is aware of an employee who is receiving threats due to a domestic matter, consider assisting that employee with counseling and aid from law enforcement authorities and placing that employee on leave pending the employer's satisfaction that the matter is no longer a risk. Stranger violence most likely occurs where cash or goods can be removed easily from the premises. Be sure that ingress and egress to the premises are controlled, lighting in parking areas is sufficient, and unusual visits or apparent "casing" of the premises is reported to law enforcement authorities.

FORMER EMPLOYEE MAY PURSUE "WRONGFUL DISCHARGE" CLAIM FOR OBJECTING TO UNSAFE PRACTICES

The National Labor Relations Act protects an employee who speaks up on behalf of others or a group of employees who refuse to work based upon safety concerns. The case of *Stephens v. Valley Industries, LLC* (CA Ct App, February 28, 2006) involved a state law theory for an employee who spoke up on behalf of himself, only, and who was terminated for refusing to perform what he believed to be unsafe job tasks.

The lower court granted summary judgment for the employer, but the court of appeals reversed, permitting this case to go to a California jury. The company is a manufacturer of automobile trailer hitches. There is a chemical containment area in the back of the company's factory. Twice Stephens refused to clean the chemicals in that area and he was terminated after the second time. He claimed that his termination violated "public policy." The company asserted that there was no hazardous waste in the area and that Stephens was trained and capable of performing the clean-up tasks safely. Stephens was issued protective gear, but he still refused to clean up the chemicals, stating that he was "afraid" of those chemicals. In response, the court stated that "Valley Industries failed to establish that this fear was unreasonable or not in good faith." The court also noted that Stephens received no training on chemical spill clean up.

The National Labor Relations Act does not permit a recovery of punitive or compensatory damages, nor is an NLRA case tried to a jury; it is heard by an administrative law judge. **This case suggests that an employee who does not have a viable theory under the National Labor Relations Act may pursue a broad "wrongful discharge" claim to see if a state court will rule that such a discharge could violate public policy.** It is essential to train employees to handle spills and chemicals and to issue protective gear. It is also essential for the employer to maintain proper records proving that both occurred. Furthermore, an employer may want to invite an occupational safety and health "neutral" to conduct an independent assessment of the potential safety risks, particularly if the refusal to perform the work is made by several employees.

CWC AND AFL-CIO ORGANIZING EFFORTS HEAT UP

The Change-To-Win Coalition on March 20, 2006 announced a national organizing effort covering major employers in 35 cities, beginning during the week of April 24. The initiative, called "Make Work Pay!", arose as an outcome of the CWC organizers convention in Las Vegas, attended by over 2,000 organizers and officers. **The organizing effort will focus on transportation, distribution, retail, construction, leisure and hospitality, health care, property services, laundries, and food production and processing industries.** According to Anna Burger, chair of the CWC, "Our country is losing a vibrant middle class" which CWC unions can help restore.

On February 28, 2006, the AFL-CIO requested 500,000 union stewards throughout the United States to assist in organizing and political action for the 2006 elections. The political action donations will be conditioned on commitments from candidates to assist unions in organizing. If candidates do not help with organizing, they will not receive AFL-CIO dollars.

Note that the CWC and AFL-CIO organizing approaches are not premised on the historical "Good union, bad employer" model. Rather, their focus is on issues that affect all of the workforce, which include affordable health care, secure retirement, and "If I do a good job today, will I have a job tomorrow."

DOL REPORTS REASONABLE ACCOMMODATION COSTS LITTLE OR NOTHING

Employers are concerned that at times the cost of reasonable accommodation may be unreasonable. Therefore, how can the employer either not hire or retain an otherwise qualified individual with a disability without violating the ADA? According to a survey by the United States Department of Labor, through interviews conducted by its Job Accommodation Network, 50.5% of those nearly 900 employers surveyed reported that accommodation incurred no cost. Forty-two percent reported that they were able to accommodate at a one-time cost of a median average of $600 (half paid more and half paid less). Only 7.5% of those surveyed responded that they needed to spend money on accommodation more than once. **Seventy-six percent of those employers who responded said that the accommodations were effective in increasing productivity and avoiding the cost of hiring or re-training another employee.**

The survey is ongoing and will be completed by September 2007. You may review the survey on the DOL website at http://www.kan.wvu.edu/media/LowCostHighImpact.pdf.

OSHA TIP: OSHA AND PENALTIES

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.

Is noncompliance with federal OSHA standards becoming more costly? While the agency expands exponentially its partnerships and alliances, evidence of its use of punitive measures is abundant.

Frequent news media accounts underscore OSHA's stated commitment to firm enforcement. One such release this month noted how an employee complaint at a former battery plant that was being demolished led to over $381,000 in proposed penalties. The citations issued in this case contained nine violations that were alleged to be willful. (OSHA defines a willful violation as one that the employer knowingly or intentionally commits or a violation that the employer commits with plain indifference to the law. The penalty for each willful violation may range up to $70,000. There is also a minimum penalty of $5,000.)

Earlier this fiscal year, a manufacturing employer was faced with a monetary penalty of $418,000. This citation charged 18 willful violations. The employer was found to have failed to protect workers from numerous hazards that had been identified in several previous inspections.

On February 24, 2006 OSHA issued a notice of citations with proposed penalties of over $218,000 following an inspection of a manufacturer disclosing a number of problems that had been previously cited. The resulting

citations included three willful and five repeat items. (OSHA defines a repeated violation as one where a standard, regulation, rule or order of a substantially similar nature is found on a reinspection. The penalty for each such violation may be up to $70,000. While there is no statutory time limitation, OSHA policy is that a repeated violation may be charged when it is issued within three years of the previous citation.)

In a Department of Labor news release on December 8, 2005, Secretary Chao expressed satisfaction with the sentencing phase in a criminal case. In addition to a three year probation, the judge imposed a maximum $500,000 penalty based upon a finding that the company was guilty of violating five OSHA standards that caused the death of an employee.

Trends indicated in OSHA citation/penalty data for the years 2001-2005 suggest that penalties are increasing based of the type violations being alleged. Over this period, the total of willful citations issued increased by 39 percent. Total repeat citations from 2001 through 2005 increased by 26 percent. This period also saw an increase in alleged serious violations of nearly 17 percent. (A serious violation is defined as one where there is substantial probability that death or serious physical harm could result and that the employer knew or should have known of the hazard. It carries a penalty of up to $7,000.) While showing a fairly dramatic increase in the numbers of high-penalty serious, willful and repeat violations, the percentage of other-than-serious violations decreased by 8.6 percent. (This last category, other-than-serious, normally carries no penalty and is defined as a violation that has a direct relationship to job safety and health, but probably would not cause death or serious physical harm.)

OSHA penalty maximums for willful and repeat violations were initially $7,000, with a $1,000 maximum for a serious violation. These amounts could be further reduced based upon employer size, history etc. Resulting penalties were hardly sufficient to command attention or compliance by larger employers. Congress increased OSHA penalty levels by a factor of ten in 1990, which elevated them from the paltry category.

Last fall OSHA issued the largest citation and penalty in its history. The employer agreed to pay over $21 million dollars in penalties for safety and health violations that were charged following an investigation of an explosion with multiple deaths at the site. To achieve a penalty of this magnitude the agency used its "egregious or violation-by-violation citation policy." Under this policy, OSHA uses a multiplier, such as the number of workers exposed or the number of machines unguarded etc., to calculate the total penalty. In this case, 296 egregious willful violations were charged. The policy is set out in OSHA Directive CPL 02-00-080.

WAGE AND 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.

For the past several issues I have only discussed issues related to the Fair Labor Standards Act. As there continues to be much activity regarding the Family and Medical Leave Act (FMLA), I thought that I should provide you with an update on some of the latest information.

First**, the Department of Labor has issued two recent opinion letters regarding an employer's responsibility to continue the**

employee's health insurance coverage during the period of FMLA leave.

1. In a January 20 letter, DOL addressed the application of "cafeteria plans" in determining the continuation of health insurance during the FMLA leave. The employer allocated $450 per month to each employee's cafeteria plan. A portion of this money was used to purchase the employee's health insurance coverage with the remainder available to the employee for other health related items such as dental insurance, disability coverage and etc. When an employee was on FMLA leave, the employer was only spending the amount necessary to continue the employee's basic health insurance coverage. DOL opined that the employer must continue to expend the same amount that it was paying prior to the employee starting FMLA leave.
2. In a second letter, released on February 21, DOL stated that an employer was required to continue contributing to the "multi-employer health plan while the employee was on FMLA leave, even though the plan provides for a "disability extension" of coverage.

Recently, a federal court ruled that an employee could proceed with his FMLA claim for "staying home with his wife" who was experiencing difficulties with her pregnancy. The employer had terminated the employee, alleging that he violated a company policy due to his failure to call in at least one hour prior to the beginning of his scheduled shift to report his absence that day. The employee had contacted his supervisor 54 minutes prior to the beginning of his shift. The judge observed in his ruling that the dispute was basically over a phone call "that occurred approximately six minutes late." The court further added, "The court cannot help but wonder if this litigation is warranted over what would appear to be, at most, a de minimis infraction of the company's attendance policy."

An employee who suffered from migraine headaches applied for intermittent FMLA leave. The employee contended that he was unable to perform all activities, including driving, when an attack occurred. Despite three requests from the human resources department, the employee never provided medical documentation to support his request. Three months later on a day when the employee told his employer that he had a severe headache, the employee was observed driving to a gym (spending 30 minutes inside), driving to a video store where he rented a video and shopping at three other stores. The following day he was also observed visiting the gym and shopping. Later that afternoon he called his supervisor and stated he was too ill to work even though he purchased beer and pretzels prior to returning home. The employee was terminated the following day and almost two years later he filed suit against the employer alleging retaliation. Both the U. S. District Court and the First Circuit Court of Appeals ruled that the company had not violated the FMLA in its handling of this matter. There was one additional factor in the employer's favor---the employee admitted that he was unable to return to work at the time he would have exhausted his FMLA leave.

A U. S. District Court in New York recently ruled that an employee may proceed with her claim that her employer interfered with her FMLA rights. The employee orally requested FMLA leave and made a written request for FMLA leave for treatment of depression five days later. Her physician certified that she had a serious health condition and would need time off from work for weekly treatments for about 20 weeks. After a request for clarification her physician stated that she needed two days off each week. During the next five weeks the employee was off about 10 days, which the employer characterized as either annual or sick leave.

The employee then filed for short-term disability and did not work, except for two days, for the next three months. The week she returned to work she was given an evaluation indicating that she met or exceeded expectations in most categories. When the employee requested additional FMLA leave three weeks later she was told she had exhausted her leave and would be disciplined if she took any more leave. The court stated that the employee had met her responsibilities when she made written request for the FMLA leave and the employer's failure to so designate the time, as FMLA leave is not inconsequential.

In another case the employer was found to have violated the FMLA. The employer, a hospital, had a policy that required an employee to give two weeks notice prior to taking paid vacation. An emergency room nurse needed emergency FMLA leave to be with her terminally ill father. The hospital granted her two days of "family ill" leave but refused to grant her request to use vacation time to be with her father, contending that she had not requested the leave two weeks in advance. The FMLA states that an employee on FMLA leave may substitute vacation time for unpaid leave. The court found that the hospital's two-week notice policy was contrary to the FMLA regulations and thus the court required the employer to reimburse the employee for the missed time, pay her liquidated damages and attorney's fee and to cease enforcing the two-week notice policy.

In a finding favorable to employers, the U. S. Tenth Circuit Court of Appeals found that a one-time treatment for an illness did not necessarily meet the definition of a "serious health condition." Two years after the employee began work for the Denver Public Schools, he fell at home and injured his back. After missing three days of work he was told he needed a doctor's note to return to work so on the fourth day he went to his doctor and received a cortisone shot for his back pain and obtained a note allowing him to return to work. At that time his doctor scheduled a follow up visit in three weeks. The employee intended to return to work the following day, however, he became ill with the flu. The employee was then fired for "unreliable attendance record." The court found that he was not eligible for FMLA leave because he did not have a "serious health condition" since his one doctor's visit before he was able to return to work did not qualify as a "continuing regiment of treatment."

As you can see the Family and Medical Leave Act continues to be a subject of much litigation, and in many cases the employer is found not to have complied with the act. In many cases employers are hit with back wages, liquidated damages and attorney's fees. Thus, it behooves employers to make a diligent effort to become aware of the requirements of the FMLA and to follow its regulations. If I can be of assistance please give me a call.

EEO TIP: THE STATUS OF UNDOCUMENTED IMMIGRANTS IN DISCRIMINATION LAWSUITS

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.

Given the focus on "homeland security" and "illegal immigrants" during the last several months, it would seem paradoxical that the Equal Employment Opportunity Commission and at least one court have taken the position that the status of "undocumented immigrants" should not be a factor in investigating national origin charges or in adjudicating a lawsuit filed under Title VII or possibly any of the other federal anti-discrimination laws. However, that is exactly what has happened.

In the case of *EEOC v. KCD Construction, Inc.* (D. Minn. February 28, 2006), the court granted a Motion For A Protective Order filed by the EEOC aimed at "prohibiting [the] KCD Construction [Company] from seeking discovery regarding the Hispanic employees' citizenship, immigration and work permit status." In substance the court ruled that discovery into the citizenship or legal status of the alleged victims of discrimination would not be permitted. **The reasoning of the EEOC in interpreting Title VII was that an employer could not discriminate against employees, after hiring them, and then use their immigration status as a sword over their individual or collective heads to threaten them if they complain about discrimination.** Of course a potential employee's immigration status may very well be a factor in the decision process before hiring.

Actually, the EEOC's position on this matter has not changed substantially during the last four years. In June 2002, the Commission voted unanimously to rescind its "*Guidance on Remedies Available to Undocumented Workers Under Federal Employment Discrimination Laws"* (issued in 1999) as a result of the U. S. Supreme Court's holding in *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board, 122. S. Ct. 1275 (2002)*. In the Hoffman case, the Supreme Court held that "federal immigration policy precludes an award of back pay to an undocumented worker under the National Labor Relations Act (NLRA)." Prior to that time the EEOC's guidance allowed undocumented workers who were charging parties to collect back pay in addition to any other appropriate relief. As a result of Hoffman, the EEOC rescinded its back pay provisions but stated that "it will not, on its own initiative, inquire into a worker's immigration status, or consider an individual's immigration status when examining the underlying merits of a charge."

Thus, the EEOC made it plain that while it necessarily had to revise its guidance with respect to remedies, it was reaffirming its commitment to enforce the federal anti-discrimination statutes pertaining to national origin cases involving the protection of undocumented workers. However, the EEOC has been uncharacteristically silent on this matter since 2002, and the KCD case, referred to above, has been one of only a few to challenge the EEOC's position since that time.

The EEOC's position raises the question as to whether there is any cognizable difference in the federal anti-discrimination laws between:

- Non-discrimination on the basis of "national origin," per se, which at least historically assumed citizenship, and
- Non-discrimination against undocumented, and increasingly, illegal immigrants who are not citizens.

Based on the EEOC's position in KCD Construction there is no difference for enforcement purposes as to whether the employee is a citizen or not. The key to enforcement from the EEOC viewpoint is whether the individual in question is an "employee" within the meaning of the law. Unfortunately, the courts have not provided consistent guidance on this point and have generally failed to reconcile Title VII and the other federal anti-discrimination statutes with the Immigration Reform and Control Act (IRCA) which specifically was intended to curb the employment of illegal aliens by setting certain standards and providing penalties for violations.

Additionally, the United States Senate will consider certain controversial legislation aimed at restricting illegal immigration within the next few weeks. One of the bills sponsored by Senator James Sensenbrenner would, among other things, "crack down heavily on businesses that hire people illegally and impose heavier fines" and possibly jail sentences on anyone who smuggles illegal immigrants or assists them in entering the country illegally. Thus, there has

been some stirring on the question posed above.

So What Should Employers Do?

For the time being (until the law is clarified), the key to what to do starts with the hiring process. Employers should be very careful to avoid the following:

1. **Don't set up any specific ethnic or national origin preferences in your hiring plans.**

2. **Don't hire for the wrong reasons hoping to avoid a problem.** Many employers believe that by hiring undocumented immigrants they can pay them less, that the undocumented immigrants will perform more risky, possibly hazardous work assignments, work longer hours without overtime compensation or other benefits, or accept lesser terms and conditions of employment than regular workers. However, as the KCD Construction case clearly indicates, it would be unwise to assume that undocumented immigrants will not complain about discriminatory terms and conditions of employment, and it is not unthinkable that a charge or complaint to the EEOC by such persons might take the form of a class action. While back pay may be limited, other remedies or types of relief presently are not, and a lawsuit could be costly.

The whole question of the status of undocumented immigrants is in a state of flux. While the EEOC on the one hand maintains that such "employees" are covered by the prohibitions against discrimination on the basis of National Origin under Title VII, the U.S. Fourth Circuit Court of Appeals has already begun to refine that definition and deny protection to certain types of undocumented immigrants, and it is likely that other courts will follow. Moreover, it is expected that Congress will address this issue in the near future. We will keep you informed of any developments. Please call the number above if you have any questions.

DID YOU KNOW…

…that an employee violated the Computer Fraud and Abuse Act by deleting secure company files without authorization? *International Airport Centers v. Citrin* (7th Cir. March 8, 2006). According to the court, the Computer Fraud and Abuse Act is violated by an individual who "causes the transmission of a program, information, code, or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer [including laptops]." The court stated that although the Act was intended to reach the "hacker," it also included the deletion of files without authorization. Citrin's behavior occurred after he was terminated but before he left the employer's premises. He violated the CFAA when he "resolved to destroy files that incriminated himself and other files that were also the property of his employer, in violation of the duty of loyalty that agency law imposes on an employee."

…that failure to pay employees for "pre-shift" work cost an employer almost $353,000? *Chao v. Convergys* (D. Az, March 6, 2006). The DOL investigation involved almost 1400 employees at a call center. Employees were requested to perform duties prior to the beginning of their shift, but they were not paid for them, nor was that time counted toward overtime compensation. Usually, de minimis tasks before or at the conclusion of the work day do not have to be compensated, but tasks that are regularly assigned or expected are considered "working time" for wage and hour compliance purposes for non-exempt employees.

…that a Michigan jury convicted the former executive secretary of the Michigan Regional Counsel of Carpenters for soliciting and accepting payments for reducing the cost of building his personal home? *United States v. Mabry* (E.D. Mi, February 27, 2006). Walter Mabry faces a jail term for up to five years and fines of $250,000.

…that a hospitalized employee was not required to give notice under the FMLA when the employer knew she was in the hospital? *Robertson v. Hilton Hospitality, Inc.* (S.D. Ohio, February 28, 2006). The employee was a supervisor at Embassy Suites. One day she did not arrive at work and a fellow employee told the employer that Robertson was in the hospital due to a "nervous breakdown." The employer responded by sending Robertson flowers at the hospital. Robertson did not show up for work the next day, nor did she give her employer notice. Six days later, Robertson provided her employer with FMLA notice and support for her absence. When Robertson subsequently was absent, her employer suspended her, to which she angrily replied that she quit. According to the court, "Plaintiff's condition and the manifestations of that condition were not amenable to providing 30 day's notice. As such, the timeliness of the plaintiff's notice must have been made as soon as practicable in light of the circumstances surrounding this case. The court finds the plaintiff did so."

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