“Your Workplace Is Our Work”®

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

Employment Law Bulletin

To Our Clients And Friends:

Be sure to register for our Human Resources Leaders and In-House Counsel program on Tuesday, September 26, 2006 at the Barber Vintage Motorsports Museum in Birmingham, Alabama. This program will focus on today's issues and their strategic implications for employers, including pension reform, expanding concepts of workplace retaliation, immigration, employee lifestyle issues, and technology: protecting you organization's use of it and preventing it from becoming a source of a self-inflicted wound during employment litigation. In addition to speakers from our firm, the program will feature nationally renowned plaintiffs' counsel Bob Childs and Dennis Pantazis from Wiggins Childs Quinn & Pantazis and Aleshia Haynes of Haynes & Haynes. For details about the program and registration, please click www.lehrmiddlebrooks.com.

900 PAGE PENSION PROTECTION ACT OF 2006 MADE EASY

On August 17, 2006, President Bush signed the 900-page Pension Protection Act of 2006, representing a sweeping change of U.S. pension law. We'll cover it for you in a page and a half. The law is the product of more than a year of legislative “give and take” between both houses of Congress and the Executive Branch. The Act is primarily intended to shore up the funding of defined benefit plans as well as the PBGC although it includes numerous provisions unrelated to the funding issue.

As noted above, the focus of the 2006 Pension Act is securing the funding requirements of traditional defined benefit pension plans. **Special funding rules (i.e., the deficit reduction**

contribution rules) apply for a plan year in which the defined benefit plan's funded current liability percentage is less than 90 percent. The Act specifies the interest rate and mortality assumptions to be used in this calculation. The allowable interest rate gradually requires more conservative estimates from 2005 to 2007. For plan years beginning after December 31, 2007, the contribution required is determined based on a comparison of the value of the plan's assets (reduced by any prefunding balance and funding standard carryover balance) to the plan's funding target. A plan's funding target is the present value of all benefits accrued or earned as of the beginning of the plan year. Special funding requirements apply where a plan is an "At-Risk" Plan.

The Act makes permanent certain provisions related to the enhanced funding of the PBGC including the $1250 per participant premium enacted as part of the Deficit Reduction Act of 2005 with respect to certain plan terminations. The Act also contains standards, again, that become more stringent each year for determining the amount of unfunded vested benefits. The Act also extends the PBGC "missing participants" program to noncovered plans, including defined contribution plans, meaning that such plans will be permitted, but not required, to transfer missing participants' benefits to the PBGC.

The Act includes changes to current disclosure requirements as well as some new disclosure obligations including several provisions related to defined benefit plans. The Act creates a new notice requirement for defined contribution plans whereby, not later than 30 days before the first date on which a participant is eligible to divest his account of employer securities, the participant must be notified of that right and the notice must describe the importance of diversification. This requirement generally applies to plan years beginning after 2006.

An important component of the Act creates a new prohibited transaction exemption for the provision of investment advice through an "eligible investment advice arrangement" to participants and beneficiaries under a defined contribution plan who direct the investment of their accounts. If the requirements for exemption are satisfied, the following are exempt from the prohibited transaction provisions of both the Code and ERISA: (1) the provision of investment advice; (2) an investment transaction (i.e., a sale, acquisition, or holding of a security or other property) pursuant to the advice, and (3) the direct or indirect receipt of fees or other compensation in connection with the provision of investment advice or an investment transaction. The provisions generally apply with respect to investment advice provided *after 2006*.

Another important aspect of the 2006 Pension Act is a new mechanism for employers to establish an automatic enrollment function for its 401(k). The participants' level of participation (i.e., salary deferral) automatically increases each year absent some action by the participant. A 401(k) plan that satisfies the conditions for automatic enrollment specified under the Act is treated as satisfying the ADP and ACP test. In addition, if the plan consists solely of contributions made pursuant to a qualified automatic enrollment feature, the plan is exempt from the top-heavy rules. Under the Act, a participant will be treated as exercising 404(c) control over the investment of his individual account if the account is invested in a default arrangement in accordance with Department of Labor regulations to be issued until the participant makes an affirmative election. The Department of Labor is directed to issue regulations providing guidance on the appropriateness of certain investments for designation as a default investment within six months of the date of enactment of the Act. It is estimated that the automatic enrollment feature will boost the 401(k) participation rate beyond 90%. The Act also makes permanent certain increases in contribution levels applicable to both 401(k)'s and IRA's.

Employers should work with their benefits specialists and legal counsel to assess the impact that The 2006 Pension Act might have on existing retirement plans and whether it would be beneficial to incorporate aspects of the Act into their overall benefits package to facilitate the recruitment and retention of the highest quality workforce. For further information, please contact Mike Thompson at (205) 323-9278 or mthompson@lehrmiddlebrooks.com.

FAILURE TO TELL REASONS FOR TERMINATION MAY BE EVIDENCE OF DISCRIMINATION

In an unpublished one and a half page decision issued on August 23, 2006, the United States Court of Appeals for the Eleventh Circuit determined that a jury should decide whether failure to tell an employee why he was terminated may be evidence of age discrimination. *Mock v. Bell Helicopter Textron, Inc.*

Where a plaintiff provides circumstantial evidence (no smoking guns—"let's terminate him because of age"), the employer must come forward with a legitimate non-discriminatory business reason for the employer's decision. When the employer does so, the plaintiff loses, unless the plaintiff can show that the real reason may not be what the employer asserts, but rather the employer's reason is a pretext for discrimination.

Mock was able to state a claim for age discrimination and *Bell Helicopter* came forward with business reasons for its decision. However, Mock asserted that those reasons were a pretext for age discrimination and claimed that as evidence of pretext, *Bell Helicopter* refused to tell Mock why he was terminated. Only subsequently, after Mock persisted, did *Bell Helicopter* send him a letter stating that he was terminated due to unsatisfactory performance. According to the court, **"In light of Bell's refusal to tell Mock—at the time they fired him—why his employment had come to an end, a trier a fact reasonably could find that the letter constituted a pretext for discrimination. …We agree with Mock that a genuine issue of fact remains as to whether Bell's announced reason for his termination was a pretext for discrimination. Summary judgment was therefore inappropriate," and the case goes to the jury.**

Most states do not require employers to tell employees the reason for termination; employers may state in general "things just did not work out." However, it has been our long-standing advice that employees should know why they are terminated. The *Bell Helicopter* decision is further support for that business practice.

PRORATED PRODUCTION BONUS DOES NOT VIOLATE FMLA

In a case of first impression, the United States Court of Appeals for the Third Circuit on August 24 ruled that an employee whose production bonus was based upon hours worked could have that bonus lawfully reduced for FMLA related absences. *Sommer v. Vanguard Group* (August 24, 2006).

Sommer was absent under the FMLA for eight weeks. Accordingly, the company prorated his annual bonus, reducing it by $1,788.23. In analyzing the FMLA and its regulations, the court noted that the Act states that a leave "shall not result in the loss of any employment benefit accrued prior to the date on which leave commenced."

The court reviewed a United States Department of Labor FMLA opinion letter, which stated that a bonus may not be reduced unless it is based upon "work time or accrued earnings." The court stated that an employer may not reduce "an absence or occurrence bonus paid to an FMLA leave taker if the employee was otherwise qualified but for the taking of the

FMLA leave," such as a perfect attendance program. However, according to the court, **an employer "may prorate any production bonuses to be paid to an FMLA leave taker by the amount that he lost production (be it hours or other quantifiable measure of productivity) caused by the FMLA leave."**

The Vanguard program was based upon employees working at least 1,950 hours a year, excluding holidays, vacation and sick time. According to the court, "Vanguard's focus throughout its policy appears to be on incentivizing employee to contribute to Vanguard's performance and production by meeting a predetermined hours goal—1,950 hours a year." Accordingly, the court rejected Sommer's argument that Vanguard's policy was an occurrence based attendance policy.

What are the "lessons learned" for employers from this case? First, a productivity bonus may be prorated when it is associated with a productivity or hours worked outcome. Second, a "perfect attendance" bonus may not be prorated for absences due to FMLA. However, if the perfect attendance bonus includes a threshold number of hours that must be worked in addition to perfect attendance, then the employer may prorate that bonus.

TEMPORARY EMPLOYEES: WHICH EMPLOYER IS RESPONSIBLE FOR WHAT AND WHEN UNDER THE FMLA?

The case of *Mahoney v. Nokia, Inc.* (D.Ct. M.D. FL, July 28, 2006) is a good reminder for employers to be aware of their rights and responsibilities when temporary employees are absent for FMLA. In this case, Mahoney was a temporary employee who worked for the "secondary" employer, Nokia. He worked at Nokia for more than a year, and suffered job related injuries, resulting in his request to work a part-time schedule. Nokia's policy was that temporary employees either work a full-time schedule or not at all. Mahoney's primary employer, the temporary service, removed him from the Nokia site and terminated him, as it had no other placement consistent with his limitations.

According to the court, the Department of Labor states that **when there is a joint employer relationship between an temporary service and its client, the "primary employer" is the one responsible for giving the FMLA notices to its employees, providing the FMLA leave and the continuation of health benefits.** Factors to determine whether the temporary or secondary employer is the primary employer include authority to hire and fire the individual, assign the individual to different jobs, provide the individual with health benefits and pay the individual. The placement agency usually is the primary employer. The fact that Nokia instructed Mahoney on how to do his job for Nokia "does not conclusively demonstrate that Nokia was Mahoney's primary employer."

The regulations address when the temporary employee is out for FMLA as provided by it's primary employer, the temporary service. In that situation, "a secondary employer is also responsible for compliance with the prohibited acts provisions with respect to its temporary/leased employees." This means that if an individual is absent for FMLA reasons, the secondary employer may not refuse to accept the individual's return at the end of leave. Thus, a user of temporary or contract employees is not required to accommodate intermittent leave. Rather, if the secondary employer is not the temporary service, the secondary employer may be required to restore the individual to his or her former position at the completion of the leave.

CURRENT WAGE AND HOUR HIGHLIGHTS

This article was prepared by Lyndel L. Erwin, Wage and Hour Consultant for the law firm of Lehr Middlebrooks & Vreeland, P.C. Mr. Erwin can be reached at (205) 323- 9272. Prior to working with Lehr Middlebrooks & 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.

It is two years since the Department of Labor, in August 2004, adopted new regulations covering the exemptions provided for executive, administrative, professional and outside sales employees. Because of the extensive amount of litigation that continues under the Fair Labor Standards Act I believe that I should remind you of the requirements set forth in these new regulations. Below is a brief overview of the new regulations that became effective in August 2004. **In order for the employee to qualify for an exemption he/she must meet <u>all</u> of criteria set forth for that specific exemption.**

Executive Exemption

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

- The employee must be compensated on a salary basis at a rate not less than **$455** per week;
- The employee's primary duty must be managing the enterprise, or managing a customarily recognized department or subdivision of the enterprise;
- The employee must customarily and regularly direct the work of at least two or more other full-time employees or their equivalent; and
- The employee must have the authority to hire or fire other employees, or the employee's suggestions and recommendations as to the hiring, firing, advancement, promotion or any other change of status of other employees must be given particular weight.

Administrative Exemption

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

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

Professional Exemption

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

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

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

- The employee must be compensated on a salary or fee basis at a rate not less than **$455** per week;

- The employee's primary duty must be the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor.

Computer Employee Exemption

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

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

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

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

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

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

Outside Sales Exemption

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

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

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

In reviewing the requirements for each exemption you will note there is a "primary duty" test regarding the work performed by the employee. While the old regulations tended to define "primary duty" as more than 50% of the employee's time the new regulations state that primary can mean the "major" responsibility of the employee. This change in terminology appears to give employers more leeway in determining who is exempt but you should remember that the burden is on the employer to prove that the employee meets all of the requirements for the exemption.

While there have not been the dire consequences that were predicted regarding who is exempt and who is non-exempt, there are still costs to employers who fail to classify their employees properly. Further, private litigation continues relating to the exempt status of managers in retail stores. Therefore, employers should have an ongoing evaluation of their pay practices to ensure they are correctly classifying all employees, as failure to do so can become very expensive. If I can be of assistance you may reach me at 205 323-9272.

EEO TIP: POTENTIAL COVERAGE PROBLEMS FORM EMPLOYERS WITH EEOC CHARGES

This article was prepared by Jerome C. Rose, EEO Consultant for the Law Firm of LEHR MIDDLEBROOKS & 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 Alabama and Mississippi. Mr. Rose can be reached at (205) 323-9267.

Recently in two separate cases, including one Supreme Court case and one appellate court case, some potentially troubling problems for employers in responding to charges filed with the EEOC were raised. **Each of the cases involved certain statutory interpretations which touched upon jurisdictional matters which for the most part had been taken for granted in favor of employers.** The cases and issues in question were:

- In *Arbaugh v. Y & H Corp.*, dba *The Moonlight Café,* (Supreme Court, Feb 2006) the issue was whether the "numerosity" provisions in both Title VII and the ADA which limited coverage under those acts to employers with 15 or more employees was "jurisdictional" or "substantive." If jurisdictional, than an employer could seemingly raise the issue at any point in any proceeding involving the EEOC Charge in question and challenge the court's jurisdiction. But in the Arbaugh Case the Supreme Court said "not so fast" or in fact "why so slow" to an employer's challenge of the 15-employee limitation.
- In *Buck v Hampton Township School District* (3rd Circuit, June, 2006) the issue was whether a Charging Party (Plaintiff) could proceed to trial based upon an unverified charge notwithstanding provisions in Title VII which require that a charge be verified under oath by the Charging Party.

A closer look at each of these cases should be instructive as to how employers can avoid jurisdictional problems in responding to charges which have been filed against them with the EEOC.

The Y & H Corporation (Moonlight Café) Case.

In this case Jennifer Arbaugh, a bartender/waitress who worked at the Moonlight Café (which was owned by the Y & H Corp.), filed a lawsuit against the Y & H Corporation in the Federal District Court for the Eastern District of Louisiana alleging sexual harassment under Title VII and certain related state law tort claims. The case was tried to a jury, which returned a verdict awarding $40,000 in favor of Arbaugh. Approximately two weeks after the trial court had entered judgment on the jury verdict, Y & H Corporation moved to dismiss the entire action asserting for the first time that the court lacked jurisdiction because the Moonlight Café had less than 15 employees on its payroll, thus barring coverage under Title VII. The trial court granted the dismissal and Arbaugh appealed the dismissal to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed and certiorari was granted by the Supreme Court to review the actions taken by the courts below.

The numerosity provisions in Title VII in question can be found at 42 U. S. C. 2000e (b), the definitions section, which defines an employer in pertinent part as follows:

> "The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding year…" (See 42 U. C. 12111 (5)(A) for a similar provision in the Americans With Disabilities Act.)

It is probably fair to say that since the inception of Title VII, this provision has been interpreted to be "jurisdictional" and constituted a clear limitation on the coverage of those employees under the protections afforded by Title VII. However, the Supreme Court in holding against the Y & H Corporation stated that the "15-employee" limitation was "substantive," in terms of whether Arbaugh, the Plaintiff had established an adequate claim under Title VII, and that an employer with less than the requisite 15 employees had to assert that fact during the proceedings, not after a trial on the merits to defeat the Plaintiff's (Charging Party's) claim for relief.

While the Supreme Court stated this surprisingly new interpretation in terms of whether the "numerosity provisions" were intended to convey "subject matter jurisdiction" or merely "substantive" as a part of a Plaintiff's claim for relief, the strong message in this case is that in defending against a charge under Title VII (or the ADA) an employer cannot be tardy in asserting the numerosity provisions (15-employee limitation) under the statute.

EEO TIP: In any case under Title VII or the ADA where the number of employees is at all questionable, an employer should assert as an affirmative defense, that the Charging Party or Plaintiff has not stated a claim for relief because of the 15-employee requirement of the statute in question. We suggest that any such assertion should be done as early as possible starting with the employer's response to the EEOC's request for a Position Statement or any request for documents.

The Hampton Township School District Case.

In the case of *Buck v. Hampton Township School District* (3rd Circuit, June 2006) the Plaintiff's attorney had filed a charge with the EEOC alleging certain violations of the Americans With Disabilities Act (ADA). Notwithstanding the clear provisions found in Section 1601.9 of the EEOC's Procedural Regulations, the charge was never verified. However, there is some question as to who is responsible for verification of a charge. The EEOC's Regulations are unclear as to whether the EEOC should have accepted the unverified charge in the first instance. Normally such charges are held pending the "perfection" of the charge by requiring the charging party to complete a signed copy. "Perfected" charges then relate back to the date they were initially filed. Verification in substance consists merely of having the Charging Party swear or affirm upon penalty of perjury that the allegations contained in the charge were true to the best of the charging party's knowledge or belief. Various courts have held that verification is required to protect employers from the expense of responding to charges unless the Charging Party is serious enough to swear or affirm to his or her own hurt (i.e. under penalty of perjury) that the allegations therein were true.

In this case the EEOC notified the School District that the charge had been filed, sent a copy of the unverified charge with the notice and requested a Position Statement. Upon receipt and review of the Position Statement the, EEOC, apparently, found that the charge lacked merit, dismissed it and issued a Right To Sue Letter to the Charging Party. Shortly thereafter Buck, the Charging Party, filed a lawsuit in federal district court alleging a violation of the ADA. After the lawsuit had been filed, the Defendant, Hampton Township School District, filed a Motion to Dismiss asserting the fact that the underlying charge had never been verified. The trial court granted the School District's Motion, but the Third Circuit Court of Appeals reversed, holding that the requirement of verification had been waived by the School District because it had failed to make a timely objection to the fact that the underlying charge had not been verified.

The Third Circuit rationalized that if it allowed an employer to assert the statutory verification requirement after the Charging Party had already filed suit, that there might be an incentive for employers to defeat any such charge by merely waiting until the Charging Party had been issued a Right To Sue and could no longer amend his or her charge to correct the relatively minor imperfection of its not having been filed under oath. The Third

Circuit held that although the verification requirement was required by statute, it was not jurisdictional. Thus, it could not be raised at just any time during the proceedings, but must be done on a timely basis. By timely it is assumed that the Court meant during the "administrative processing" of the charge.

EEO TIP: As a threshold matter carefully check any charge received from the EEOC to ensure that the charging party has actually inscribed his or her signature in the signature box on the charge form and that the box contains words to the effect that the signature is given "under penalty of perjury." If the box contains no signature, respectfully indicate in response to the EEOC's request for a position statement or other documents that no response will be given until a verified charge is received.

Please contact this office at the telephone number above if you have any question about how to respond to a charge received from the EEOC. To avoid problems it might be wise to have our staff review all charges received for technical deficiencies.

OSHA RECORDKEEPING AND HIPAA

This article was prepared by John E. Hall, OSHA Consultant for the law firm of Lehr Middlebrooks & 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.

A concern has been raised that complying with OSHA's recordkeeping rule might get an employer in trouble with the Health Insurance Portability and Accountability Act (HIPAA). **One of many agency interpretation letters pertaining to OSHA recordkeeping speaks to this issue. In answer to a question, OSHA responded, "We do not believe that HIPAA provides a basis to remove employees' names from the Log (OSHA 300) before providing access. Even if HIPAA is implicated by the employer's disclosure of the OSHA Log, the statute and implementing regulation expressly permit the disclosure of protected health information to the extent required by law. See 45CFR 164.512(a)."**

In June 2006 OSHA responded to the following question, "if an employee is sent home because no restricted work was available, should it be recorded as "days away from work" or "job transfer or restriction?" The agency answer was to record it as "days away from work."

Should a back injury suffered by an employee who slipped on a company sidewalk while enroute to his office to begin work be recorded? "Yes" says OSHA because the sidewalk was part of the company's establishment for recordkeeping purposes and the injury was work related. A follow-up question asked whether it would make a difference if the event occurred on a sidewalk of a construction site. In a response letter dated May 12, 2006, OSHA states that the injury would still be recordable since the site is part of the work environment.

Another letter describes a case where an employee was sent to the hospital to have a splinter removed. An antibiotic was given as a precautionary measure. OSHA was asked whether this should be non-recordable since the prescription was only a preventive measure. The answer given was that it should be recorded as required for **all** prescription medications.

In an earlier interpretation letter, OSHA also points out that a case is recordable once a health care professional issues a prescription, even if it is not subsequently filled or the medication is not taken.

OSHA addresses the recordkeeping issue of conflicting opinions from two physicians in a reply to a questioner dated May 12, 2006. In this case an employee received multiple stings while clearing overgrowth. He was treated with injections of Benadryl and Kenalog which made the case recordable. Subsequently, a second physician gave the opinion that "many providers would have offered oral diphenhydramine

(Benadryl) and topical triamcinalone (Kenalog)," which would have been first aid treatment and therefore not recordable. In the response it is noted that OSHA's recordkeeping provisions sometimes allow the employer to choose the most authoritative of conflicting medical opinions. However, once medical treatment is administered a case is then recordable and not to be changed due to a second opinion.

OSHA recordkeeping rules include some exceptions to work relatedness. An interpretation letter dated March 10, 2005 addresses the exception for injuries in the work environment resulting from an employee's personal activity. It describes a situation where an employee required sutures for a hand laceration received while she was knitting a sweater for her daughter while on her lunch break. This injury was said to be recordable since it occurred during her normal work hours. An exception to work relatedness does not apply to breaks in the normal work schedule.

A comprehensive treatment of OSHA's recordkeeping rule, complete with interpretation letters on the topic, can be found on the agency website at www.osha.gov.

DID YOU KNOW…

…that the EEOC reported a drop in the total amount of benefits charging parties and plaintiffs received at the Commission or through Commission initiated litigation? During the past nine months, $198.4 million in total benefits was obtained by the Commission for charging parties and plaintiffs where the EEOC initiated the litigation. Of that total amount, only $34.4 million occurred through litigation. One year ago, the EEOC obtained a total of $251.4 million, over $80 million of which was from EEOC initiated litigation. The EEOC also resolved 52,300 charges during the last nine months, compared to 54,000 a year earlier. Of the 52,300 charges that were resolved, 6,000 occurred through the Commission's mediation process.

…that a manager who warned his employer that it may be violating the Fair Labor Standards Act was not protected from retaliation under that law? The manager told his employer that its "comp time" policy instead of overtime violated the FLSA (he was right). In a discussion with another employee, the manager told that employee to call the U.S. Department of Labor concerning a possible violation of overtime requirements. The manager's boss told him that "I am not kidding. If they come in here it costs me tens of thousands of dollars, we will take you out behind the building and shoot you." The manager was terminated, but the court concluded that termination for speaking up about a possible overtime violation is not retaliatory under the Fair Labor Standards Act. According to the court, retaliation is prohibited when an employee "has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act." The court interpreted "proceeding" to involve notice to the United States Department of Labor, Wage and Hour Division, rather than internal discussions. *Stein v. Rousseau (E.D. WA, August 8, 2006).*

…that failure to comply with state drug testing law resulted in reinstatement and back pay? *McVey v. National Org. Serv., Inc.* (Iowa, August 11, 2006). Approximately half the states have enacted legislation regulating drug testing. Most state drug testing legislation includes details regarding what a valid policy under state law must include. Iowa requires employers to provide employees with written notification of the company's drug testing policy. Jeri McVey was subjected to random drug testing, and as luck would have it, she tested positive and was terminated. The employer was a government contractor and notified employees of its drug-free workplace policy, which McVey admits that she received. However, she did not receive a written notification of the employer's drug testing policy. Furthermore, the employer's policy did not provide for the specific disciplinary actions that could occur based upon test results. Accordingly, McVey was reinstated with back pay.

…that according to the Bureau of Labor Statistics, fatalities involving Hispanic workers for 2005 reached its highest number since 1992? There were a total of 5,702 workplace fatalities during 2005, according to the Bureau of Labor Statistics. The number of those that involved Hispanic or Latino employees was 917, which was 16% of all fatalities. Of the total number of fatalities, 1,499 involved employees who were at least 55 years old. Highway fatalities led the way with 1,428 fatalities, falls was the second most frequent reason, with 767 fatalities and those were struck by objects totaled 604 fatalities, the third highest category of fatalities.

…**that a jury in Northern California ordered the union UNITE HERE to pay $17.3 million to Sutter Health based upon a defamation claim?** *Sutter Health v. UNITE HERE*, (Cal. Super Ct., July 21, 2006). The union sent postcards to current and former patients and employees of child bearing age. UNITE HERE focused on Sutter's laundry contractor, Angelica, for organizing purposes. The postcards stated that Angelica "does not ensure that clean linens are free of blood, feces, and harmful pathogens. Protect your newborn. Choose your birthing center wisely."

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