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

Employment Law Bulletin

To Our Clients And Friends:

Congress controlled by the Democratic party – what does this mean for employers? During the next two years, probably a stalemate. **The Democratic party owes a great debt to organized labor for their efforts to get out the vote on election day. In the "to the victors go the spoils" world of politics, labor expects their allies in Congress to seek enactment of the Employee Free Choice Act. This legislation would require employers to recognize a union as the employee's bargain representative based upon verification of authorization cards. If a majority of employees sign cards, there will not be a secret ballot election. If 30% to 50% of the employees sign cards, the union could proceed to an election.** The Employee Free Choice Act also provides a process within the first year of union certification whereby a labor agreement will occur. if the parties do not reach an agreement, the contract terms would be established through binding arbitration.

Additional legislative initiatives include increasing the minimum wage, requiring employers to provide a minimum number of paid sick days per year and amending Title VII to prohibit discrimination based upon sexual orientation. Except for an increase to the minimum wage, we expect the President to veto these other legislative initiatives should they pass through the Senate and House.

Organized labor's strategy is a two step process. First, to gain control of Congress, which they accomplished. Second, in 2008 to retain control of Congress and elect a Democrat as President who supports their legislative agenda.

"GROUP HEALTH PLAN" UNDER FMLA MAY INCLUDE DENTAL COVERAGE

In a November 15, 2006 opinion letter from the United States Department of Labor, Wage and Hour Division, DOL concluded that an employer's group dental plan was part of the employer's "group health plan" for FMLA purposes. According to DOL, "the FMLA and its regulations require employers to maintain any "group health plan" coverage "on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave…The department interprets this to mean that all "group health plans" provided by FMLA-covered employers to FMLA-eligible employee must be maintained during FMLA-qualifying leave." (Wage and Hour Opinion Letter, FMLA 2006-6-A).

The Opinion Letter was requested by a school district and the union representing its employees. The district pays 100% of an employee's dental coverage up to a fixed amount on a monthly basis for 12 months. **In concluding that the dental plan was a "group health plan" for FMLA purposes, DOL reviewed the factors excluding a plan from FMLA coverage and why they did not apply in this case:**

- The employer does not contribute to the plan.
- Whether the employee participates is completely voluntary.
- The employer advertises the plan and collects premiums through payroll deductions.
- The employer does not receive payments other than administrative costs.
- The cost to the employee does not increase when the employment relationship ends (such as the additional amount charged under COBRA).

In this case, the employer's dental plan was self insured and according to DOL, "in the Summary Plan Description the District describes the plan as a group benefit plan. Because the plan description…does not qualify for the exemption…the District as the employer must conform to the regulations governing group benefit plans." Therefore, DOL stated that "the District is required to maintain coverage under its group dental care plan for employees on FMLA leave as though the employees were continuously employed during the period of FMLA leave."

This Opinion Letter does not mean that all employer provided dental plans qualify as group health plans for FMLA purposes. Rather, employers should evaluate whether their dental plan meets the exception requirements to be excluded from a group health plan under the FMLA.

RETALIATION AGAINST A JOB APPLICANT

"Retaliation" is the most rapidly expanding employment claim, most often arising upon termination. However, the case of *Velez v. Janssen Ortho LLC* (1st Cir. November 3, 2006) is an example of how an applicant may pursue a failure to hire retaliation claim.

The case arose after a former employee for Janssen was terminated when the plant where she worked closed. Prior to her termination, she had filed an internal complaint of sexual harassment. After the plant closed, she sent letters and resumes to other company locations, stating that she wanted to be considered for "any position available." The company refused to rehire her, based upon her previous termination and severance pay and because she did not fit into the company's "business needs." She then sued, alleging that she was retaliated against because she had previously complained of sexual harassment.

To sustain her retaliation claim, she had to show: she was engaged in protected activity

(such as the prior harassment claim), she had an adverse employment action (refusal to hire) and there was a connection between the two. The court stated that Velez was not actually a proper applicant and, therefore, she did not suffer an adverse employment action. **The court ruled that her submission of two cover letters and resumes expressing an interest in a job did not qualify her as an "applicant." According to the court, in "retaliatory failure-to-hire claims…plaintiffs making such claims must show that they applied for, and had the technical qualifications for, the [particular] position sought."** In this case, Velez neither applied for a specific position nor identified specific qualifications for any position.

The court referred to denial of promotion claims as a model to analyze a failure to hire claim. In failure to promote claims, the court noted that "plaintiffs asserting discriminatory retaliation must show that they applied for a specific vacant position for which they were qualified, and that they did not get the job." There are important "lessons learned" for employers from this case:

- Applicants should be required to identify a specific position for which they want to be considered.
- Be careful regarding hiring decisions regarding former employees:
  - If they engaged in protected activity during their prior employment with your organization, failure to hire them may be a basis for a retaliation claim, unless the reason for not hiring them is consistent with why you would not hire other former employees or applicants.
  - If your organization has a form it completes upon termination of employment with a question "eligible for rehire?", be sure that question is answered without regard whether the employee engaged in protected activity during the course of employment.

EEO TIPS: DON'T TURN A DEAF EAR TO HEARING IMPAIRMENTS UNDER THE ADA

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.

The term "hearing impairment" or "hearing difficulty" can refer to a broad spectrum of hearing limitations. At one extreme, a person who is "deaf" refers to an individual whose hearing impairment will not allow him or her to rely on their hearing to understand or process speech or language. Persons with moderate hearing difficulties are sometimes referred to as being merely "hard of hearing." These persons can use their limited hearing to assist in communicating with others. Deaf persons and those who are "hard of hearing" frequently meet the definition of being an individual with a disability within the meaning of the Americans with Disabilities Act (ADA). Accordingly, employers may need both medical and legal advice to make the proper determination as to how an individual applicant or employee with a hearing impairment should be treated. Employers have a number of lawful options to help them make such determinations.

The first question that needs to be answered is whether the individual with a hearing impairment has a disability within the meaning of the ADA. **Incidentally, just as with all other disabilities the individual is under no obligation to disclose his or her hearing impairment, unless he or she is seeking an accommodation.**

EEO TIP: Although an employer may not make any pre-offer inquiries concerning an applicant's hearing impairment or medical history, it is lawful to ask pre-offer of all applicants whether any accommodation will be needed to complete the application process. For example, according to the EEOC, the question could be in the form of a statement or direction that any

applicant who might need a reasonable accommodation to complete the application process should contact the Human Resources Department at a given number to make arrangements for the accommodation. The question or statement could be on the application form, job announcement or company website to avoid any direct inquiries of applicants. On the basis of the information received an applicant may be asked specifically about the kind of accommodation being requested. Employers are not required to provide just any accommodation requested, but only one which will allow the individual to complete the application process.

What specific types of hearing impairments are disabilities under the ADA? Analytically, hearing impairments are no different than any other types of disabilities under the ADA. The key determination is whether: (1) the hearing impairment substantially limits a major life activity; or (2) whether the hearing impairment substantially limited a major life activity in the past (a record of disability); or (3) whether the individual is treated by the employer as though the hearing impairment was substantially limiting of a major life activity.

Since hearing impairments, as stated above, run the gamut of disability from merely "hard of hearing" to "total deafness," a determination of whether it is covered under the ADA can only be made on a case-by-case basis. This basic principle under the ADA was recently reinforced by the 9th Circuit Court of Appeals in the case of *Bates v. United Parcel Service*. There the court held that "each person with a hearing impairment should be given the same opportunity as applicants or employees without hearing impairments to show that they can perform the duties of the position safely and effectively."

As with other disabilities, after making a conditional job offer, an employer may make certain inquiries which should help to determine whether the hearing impairment is a disability under the ADA as follows:

1. **Does the applicant or employee use any "mitigating devices" or measures to improve or completely offset his or her hearing impairments?** Mitigating devices include such items as hearing aids, cochlear implants or other hearing measures. The U.S. Supreme Court made it clear in the cases of *Sutton v. United Airlines* and *Murphy v. United Parcel Service, Inc.* (U. S. Sup. Ct., 1999) that in determining whether a person has a disability under the ADA, employers may take into consideration whether the individual in question is still substantially limited in a major life activity when using the mitigating measure in question. **Thus, if the person in fact has no substantial limitation in a major life activity when using the mitigating device or measure, then he or she does not satisfy the first requirement in the ADA's definition of a covered disability, namely "substantial limitation of a major life activity."** Simply stated in other words, if the hearing impairment of an applicant or employee is corrected to a normal range of hearing by the use of a hearing aid or a cochlear implant, then the individual in question is not substantially limited in major life activity, and thus, would not be covered by at least the first of the three possible definitions of a disability under the ADA. **If the hearing aid, cochlear implant or other device does not fully correct the hearing of an applicant or employee to a normal range, then that individual might still qualify as being substantially limited in a major life activity.**

2. **Does the applicant or employee depend upon "compensating measures" such as sign language, lip reading, TDY or TTY to communicate in person or by telephone in a work environment?** Compensating measures such as these do not actually improve an individual's hearing, they merely allow the individual to function to a certain degree notwithstanding the impairment. If the applicant or employee falls into this category, his or her hearing impairment very likely would be a substantial limitation on a major life activity, and the individual would have a disability within the meaning of the ADA.

EEO TIP: Regardless of whether an applicant or employee with a hearing impairment uses mitigating devices or compensating measures, the key to determining his or her disability under the ADA is whether the individual in question is still substantially limited in a major life activity after taking into consideration the mitigating device or compensating measure. If the mitigating device improves the individual's hearing to a normal range for general purposes, the individual would not be substantially limited in a major life activity under the ADA. If the mitigating device only partially improves an individual's hearing, he or she may qualify as being substantially limited in a major life activity depending on the essential job duties and the job environment. Individuals who can only use compensating measures which do not improve their hearing almost always are considered to be substantially limited in a major life activity.

A Word About Reasonable Accommodations. Under the ADA an employer is obligated to provide some reasonable accommodation to a qualified individual with a disability unless to do so would impose undue hardship. However, in the context of hearing impairments employers do not have to:

- **Provide as a reasonable accommodation personal use items such as hearing aids or devices which are needed and used by the employee both on and off the job**. However, any special hearing aids, assistance measures or devices which are exclusively for use on the job would be a proper accommodation unless it imposed an undue hardship on the employer. For example, the provision of a sign language assistant for a deaf employee may or may not impose an undue hardship on the employer.
- **Lower production standards or alter the essential functions of the job to accommodate an employee with a hearing impairment**. However, an employer may be requested to make some minor modifications or restructuring of the job to permit a person with a hearing impairment to meet the production standards. For example, the installation of a TTY telephone system which would allow the employee to perform an essential function such as communication with the public through a relay operator may be the kind of job modification that would be reasonable.
- **Accept a more costly accommodation requested by the employee over a less expensive accommodation that would be effective in removing the workplace barrier which is impeding the performance of an employee with a hearing impairment**. There should however, be some interactive discussion between the employee and the employer as to the most reasonable accommodation.

For assistance and/or more details on how to handle applicants or employees with hearing impairments please call this office at (205)323-9267, as indicated above.

OSHA TIPS: FOCUS ON AMPUTATIONS

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.

Effective October 27, 2006 OSHA has a new directive for addressing workplace amputation hazards. The initial concentration of the agency had been upon mechanical power presses. This was expanded in 2002 to include all types of power presses, including press brakes, saws, shears, slicers, and slitters in a national emphasis program.

Some of the significant changes found in the new directive are as follows:

- **The revised directive focuses on identifying industries and establishments associated with amputations rather than equipment associated with amputations.**
- Appendix D of the revised directive lists some of the typical machinery and equipment associated with amputations. (Examples: conveyors, presses, saws, extruding machinery and packing, wrapping, bundling machinery)
- The directive incorporates a comparison chart for the Standard Industrial Classification (SIC) codes and the North American Industry Classification System (NAICS) codes.
- The revised targeting methodology is based on a combination of more current data from the Bureau of Labor Statistics and OSHA's integrated management information system (IMIS).
- The revised targeting methodology also includes two additional OSHA standards that are generally recognized as being related to amputation hazards-1910.147, The Control of Hazardous Energy (Lockout/Tagout) and 1910.219, Mechanical Power Transmission Apparatus.

OSHA may begin targeting inspections under the new directive after 60 days from the effective date. The inspections will be directed to general industry sites with more than 10 employees. Inspection sites will be determined as follows. Using a Dun & Bradstreet employer list supplied by the National Office, local OSHA offices will prepare master lists of the identified SIC codes. They will add local establishments known to have had amputation injuries or fatalities related to machinery within five years of the effective date of this directive. A random number table will then be applied to the list to determine the order of site inspections.

An employer would be well advised to ensure that all machinery and equipment known to cause amputations is properly safeguarded. Amputations are among the most costly worker claims by nature of injury and have one of the highest numbers of median days away from work.

Avoiding OSHA penalties as seen in the following incidents should be another incentive. An OSHA press release in one case carried the headline, "Amputation Of Worker's Fingers Leads to OSHA Fine of $295,000." This case involved the failure to safeguard a mechanical power press and cost the employee three fingers.

Another case led to a proposed penalty by OSHA in the amount of $540,000. This investigation was triggered by a complaint that an employee had suffered an amputation injury to his arm while operating a machine. Notable in this case was that, following a serious injury, another employee was allowed to operate the same equipment without any attempt to correct the unsafe condition.

The above directive, CPL 03-00-003, can be accessed on OSHA's website at osha.gov. It includes a 43-slide power point presentation.

WAGE AND HOUR TIPS: WHEN IS TRAVEL TIME CONSIDERED WORK

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.

One of the most difficult areas of the Fair Labor Standards Act is determining whether travel time is considered work time that must be paid for. The following provides an outline of the enforcement principles used by the Wage and Hour Division to administer the Act and its related regulations.

The principles, which apply in determining whether time spent in travel is compensable time, depend upon the kind of travel involved.

Home To Work Travel: An employee who travels from home before the regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel, which is not work time.

Home to Work on a Special One Day Assignment in Another City: An employee who regularly works at a fixed location in one city is given a special one day assignment in another city and returns home the same day. The time spent in traveling to and returning from the other city is work time, except that the employer may deduct/not count that time the employee would normally spend commuting to the regular work site.

Travel That is All in the Day's Work: Time spent by an employee in travel as part of his/her principal activity, such as travel from job site to job site during the workday, is work time and must be counted as hours worked.

Travel Away from Home Community: Travel that keeps an employee away from home overnight is travel away from home. Travel away from home is clearly work time when it cuts across the employee's workday. The time is not only hours worked on regular working days during normal working hours but also during corresponding hours on nonworking days. As an enforcement policy the Division will not consider as work time that time spent in travel away from home outside of regular working hours as a passenger on an airplane, train, boat, bus, or automobile.

Driving Time – Time spent driving a vehicle (either owned by the employee or the driver) at the direction of the employer transporting supplies, tools, equipment or other employees is generally considered hours worked and must be paid for. Many employers use their "exempt" foremen to perform the driving and thus do not have to pay for this time. If employers are using nonexempt employees to perform the driving they may establish a different rate for driving from the employee's normal rate of pay. For example if you have an equipment operator who normally is paid $15.00 per hour you could establish a driving rate of $8.00 per hour and thus reduce the cost for the driving time. However, if you do so you will need to remember that both driving time and other time must be counted when determining overtime hours and overtime will need to be computed on the weighted average rate.

Riding Time - Time spent by an employee in travel as part of his principal activity, such as travel from job site to job site during the workday, must be counted as hours worked. Where an employee is required to report at a meeting place to receive instructions or to perform other work there, or to pick up and to carry tools, the travel from the designated place to the work place is part of the day's work, and must be counted as hours worked regardless of contract, custom, or practice. If an employee normally finishes his work on the premises at 5 p.m. and is sent to another job which he finishes at 8 p.m. and is required to return to his employer's premises arriving at 9 p.m., all of the time is working time. However, if the employee goes home instead of returning to his employer's premises, the travel after 8 p.m. is home-to-work travel and is not hours worked.

The operative issue with regard to riding time is whether the employee is required to report to a meeting place and whether the employee performs any work (i.e. loading or fueling vehicles) prior to riding to the job site. If the employer tells the employees that they may come to the meeting place and ride in a company provided vehicle to the job site and the employee performs no work prior to arrival at the job site then such riding time is not hours worked. Conversely, if the employee is required to come to the company facility or performs any work while at the meeting place then the riding time becomes hours worked that must be paid

for. In my experience, when employees report to a company facility there is the temptation to ask one of the employees to assist with loading a vehicle, fueling the vehicle or some other activity which begins the employee's workday and thus makes the riding time compensable. Thus, employers should be very careful this the supervisors do not allow these employees to perform any work prior to riding to the job site. Further, they must ensure that the employee performs no work (i.e. unloading vehicles) when he returns to the facility at the end of his workday in order for the riding time to not be compensable.

If you have questions or need further information do not hesitate to contact me.

DID YOU KNOW…

…that a recent report suggested double digit health care cost increases for 2007? This is based upon a report that was issued on November 13 by PricewaterhouseCoopers. According to the report (http://pwc.com/2007ataltacostterends), without changing the plan or adopting cost containment approaches, the cost of the plan will increase by 11.9%; those costs for health maintenance organizations and consumer/directed health care plans will increase by a slightly lesser amount. The consumer/directed health care plans tend to have higher deductibles; the report states that only three million out of 243 million insured Americans belong to those plans. The report also provides employers with recommendations to limit health care cost increases, such as processes to eliminate duplicative testing and offering health wellness programs, such as weight loss and smoking cessation.

…that average first year wage increases for labor contracts negotiated in 2006 was 3.3%, compared to 3.1% for 2005? The median first year average for 2006 was 3%, the same as for 2005. The median means that half of the contracts had first year increases that were higher than 3% and the other half had first year increases that were lower than the 3%. Manufacturing increases were 2.8% for 2006, compared to 2.2% for 2005; non-manufacturing, other than construction, averaged 3.7% for 2006 compared to 3.3% for 2005. Adding lump sum payments into first year increases resulted in an average overall increase of 3.6% in all industries for 2006 compared to 3.5% for 2005. Manufacturing agreements including lump sum payments averaged 3.4% for 2006, compared to 3.6% for 2005.

…that an employee of the Teamsters Local 710 was sentenced to jail for stealing more than $500,000 from the union's health and welfare fund? *United States v. Pool* (M.D. Ill, November 15, 2006). The employee must pay restitution of $584,380 and spend 33 months in jail. The employee was a medical claims adjuster for the fund. She filed fictitious medical claims and then had the checks made payable to her. This occurred 165 times between August 1998 and May 2004.

…that IBM on November 22, 2006 agreed to pay $65 million for wage and hour violations regarding technical services and information technology employees? The case arose out of a class action filed nationally and also violations of wage and hour laws in 15 states. Approximately 32,000 current and former IBM systems employees and technicians are eligible for back pay. IBM treated them as exempt from minimum wage and overtime under the Fair Labor Standards Act. However, the employees claimed that they were responsible for installing and maintaining systems; this is manual work which usually nullifies the application of a wage and hour exemption. The employees also claimed that their job duties were performed within the boundaries of specific company guidelines and they did not exercise discretion or judgment to meet the exempt status.

…that The Source magazine and its owners owe a former employee $7.9 million for defamation? *Osorio v. Source Enterprises, Inc.* (S.D. NY, October 31, 2006) After the employee filed a written complaint with the company's

human resources director alleging sexual harassment and sex discrimination, the company's chief executive officer and it's chief brand executive ordered the employee to retract her statement. After she refused, she was terminated. Then, the company posted on its website a statement that the employee "tried to extort the company by filing a complaint."

LMV UPCOMING EVENTS

Jan 24, 2007
The Effective Supervisor
Hampton Inn (Montgomery, AL)
LMV Attorneys and Consultants
Over 5,000 business professionals have attended this conference in the past 10 years! For 2006, this popular, one day-program continues to emphasize the fundamentals of successful supervision (by exploring such topics "lawful leadership," performance evaluations, discipline, and discharge), and will include discussions of particular importance to Alabama's business community, including hiring and retention strategies.

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

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