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LABOR & EMPLOYMENT LAW WATCH

TABLE OF CONTENTS

EMPLOYMENT LAW UPDATE

Governor Rendell Signs the Clean Indoor Air Act into Law.....1

Recently Enacted Legislation Will Ban Discrimination Based on “Genetic Information”2

Third Circuit Holds That Pregnancy Discrimination Act Protects Women Who Undergo Abortions.....3

Pennsylvania Courts Consider Definition of EEOC “Charge”4

Does the “Follow the Spouse Rule” in Unemployment Compensation Law Apply to Same-Sex Partners?.....5

WORKERS’ COMPENSATION LAW UPDATE

Workers’ Compensation Update: Effective Use of the IRE.....6

“workplace” is further defined as an indoor area serving as a place of employment, occupation, business, trade, craft, professional or volunteer activity. Unfortunately, the Act does not define the term “enclosed area,” which leaves some ambiguity that may be clarified through implementing regulations at a later date.

The Act sets forth a number of exceptions to the smoking ban, such as private homes and vehicles (unless being used for child-care services), private clubs, certain sections of casinos, tobacco shops and workplaces of any manufacturer, importer or wholesaler of tobacco products. In addition, smoking is permitted in a “drinking establishment,” defined to include an establishment that: (i) operates pursuant to a restaurant license under the Liquor Code; (ii) has total annual sales of food sold for on-premises consumption of less than or equal to 20% of the combined gross sales of the establishment; and (iii) does not permit individuals under eighteen (18) years of age. To obtain a drinking establishment exception, an establishment must send a letter to the Pennsylvania Department of Health with verifiable supporting documentation.

The Act also requires that workplaces and restaurants prominently post “Smoking Permitted” or “No Smoking” signs. The Act does not provide further instruction as to the number or size of such signs; however, it does require “Smoking Permitted” signs to be posted at every entrance to a public place where smoking is permitted.

Violations of the Act include failing to post the required signage, permitting smoking in a public place, or smoking in a public place. A complaint alleging a violation of the Act may be made to local law enforcement or to the Pennsylvania Department of Health. A complaint made to the Department may be in writing, by phone or by electronic submission on the Department’s website.

Penalties for violating the Act include administrative fines and criminal penalties (a summary offense). The fines are as follows: (i)

EMPLOYMENT LAW UPDATE:

Governor Rendell Signs the Clean Indoor Air Act into Law

By W. Ryan Neumyer, Esquire

On June 13, 2008, Governor Rendell signed into law the Clean Indoor Air Act (the “Act”). The Act takes effect on September 11, 2008.

The Act prohibits smoking in “public places,” defined as enclosed areas that serve as a workplace, commercial establishment or an area where the public is invited or permitted. A



\$250 for the first offense; (ii) \$500 for the second offense if committed within one (1) year of the first offense; and (iii) \$1,000 for the third offense if committed within one (1) year of the second offense. Retaliation against anyone who files a complaint under the Act is prohibited. The Act also provides the following affirmative defenses: (i) the owner, operator or manager asserts in a sworn affidavit that a good faith effort was made to prohibit smoking; or (ii) when the violation occurred, the actual control of the public place was not exercised by the owner, operator or manager but by a lessee.

Recently Enacted Legislation Will Ban Discrimination Based on “Genetic Information”

By Amy G. Macinanti, Esquire

A new “protected class” is now recognized under federal law. The Genetic Information Nondiscrimination Act (“GINA”) was signed into law on May 21, 2008. It becomes effective on November 18, 2009, 18 months from its date of enactment. GINA is a comprehensive nondiscrimination law prohibiting discrimination on the basis of “genetic information.” It is targeted primarily at healthcare providers but there also is a section of the Act which prohibits discrimination in employment on the basis of genetic information. See, Section 2000ff.

In drafting GINA, Congress borrowed much of its language from Title VII of the Civil Rights Act, as well as some of the language, mechanisms and procedures from the Americans with Disabilities Act and HIPAA. Section 2000ff-1 provides that:

It shall be an unlawful employment practice for an employer –

(1) to fail or refuse to hire or to discharge, any employee, or otherwise to discriminate

against any employee with respect to the compensation, terms, conditions, or privileges of employment of the employee, because of genetic information with respect to the employee; or

(2) to limit, segregate, or classify the employees of the employer in any way that would deprive or tend to deprive any employee of employment opportunities or otherwise adversely affect the status of the employee as an employee, because of genetic information with respect to the employee; or

(3) to request, require, or purchase genetic information with respect to an employee or a family member of the employee. 42 U.S.C. 2000ff-1(a)-(b).

The Act also affirmatively requires employers to treat and maintain any genetic information related to an employee as a “confidential medical record” of the employee and to maintain this information in accordance with the mandates of section 112(d)(3)(B) of the Americans with Disabilities Act.

So what exactly is “genetic information?”

“Genetic information” is defined to include the results of a genetic test administered to the employee or the employee’s family member(s). It also includes the employer’s knowledge that the individual underwent such testing or sought genetic counseling. The definition of genetic information reaches beyond the individual employee or applicant. It includes “manifestations of a disease or disorder in family members of such employee.” In other words, if an employee’s mother is exhibiting outward signs of Parkinson’s disease, that information would be considered genetic information regarding the employee if it is known to the employer.

Congress has directed the EEOC to publish regulations for GINA by May of 2009. We will



publish a follow-up article once the regulations are issued.

Third Circuit Holds That Pregnancy Discrimination Act Protects Women Who Undergo Abortions

By Eric N. Athey, Esquire

The Pregnancy Discrimination Act (“PDA”) requires that women who are affected by pregnancy and related conditions must be treated the same by employers as other applicants and employees on the basis of their ability or inability to work. In Doe v. C.A.R.S. Protection Plus, Inc., the U.S. Court of Appeals for the Third Circuit considered whether this protection equally applies to women who have recently undergone an abortion.

Mrs. Doe missed several days of work once it was determined that there were problems with her pregnancy. Her husband notified her employer on each day she was absent and each absence was approved. Upon the advice of her physician, she then terminated her pregnancy because her baby was determined to have severe deformities. Her husband requested that she be permitted to take a week of vacation to allow for the funeral and recovery. Again, the employer allegedly approved this request. However, co-workers noticed that the employer packed up Doe’s belongings during her week off. When Doe inquired with her employer about her work status, she was told she had been discharged. She sued her employer under the PDA.

Although Mrs. Doe was not pregnant at the time of her termination, the Third Circuit observed that the PDA prohibits discrimination on the basis of pregnancy and “other related medical conditions.” The Court observed that the legislative history of the PDA suggests that Congress used this terminology to ensure the protections of the Act extended to “women who choose to terminate

their pregnancies.” Moreover, the EEOC and at least one other federal appeals court had already adopted this interpretation of the Act. For these reasons, the Court found that Mrs. Doe was protected by the PDA, even though she was not pregnant at the time of her termination.

Once it found that Mrs. Doe was protected by the Act, the Court had no trouble concluding that Doe could establish a prima facie case of discrimination. To do so, the Court found that Mrs. Doe needed to show that: (i) she was (or had been) pregnant and that her employer knew of her condition; (ii) she was qualified for her job; (iii) she suffered an adverse employment action; and (iv) there is some nexus between her pregnancy and the adverse action. The Court noted that Mrs. Doe clearly satisfied the first three elements of a prima facie case. It then turned to the question of whether there was some “nexus”, or link, between her abortion and her termination.

Significantly, the Court focused on what it characterized as the employer’s “less than compassionate leave policies” in determining that Mrs. Doe may have been treated differently than other employees due to her abortion. The employer’s vice-president, Fred Kohl, testified that C.A.R.S. offered no sick leave or personal leave to employees, but that employees may use vacation or unpaid time off if needed due to illness. According to Kohl, employees “needed to call off every day” and obtain approval from him before an absence would be approved. Nevertheless, Kohl’s secretary testified that, for every employee, “C.A.R.S. had a separate set of rules.” The Court noted several examples of employees who missed work due to non-pregnancy related conditions without being held to the same standard for calling off that was applied to Mrs. Doe. In light of this apparent disparate treatment, the Court concluded that Mrs. Doe had established a prima facie case and the case was remanded to the lower court for trial.



The Doe decision contains two important lessons: (1) the PDA's protections are not limited to pregnant women, but also protect women affected by pregnancy-related conditions, such as having undergone an abortion; and (2) consistent enforcement of leave policies is essential for purposes of defending claims under the PDA.

Pennsylvania Courts Consider Definition of EEOC "Charge"

By Denise E. Elliott, Esquire

A common defense to discrimination claims is that the employee's charge of discrimination was not filed with the EEOC in a timely manner. When an employer raises this defense, there is often a dispute as to whether various employee communications with the EEOC constituted the filing of a "charge." Two Pennsylvania Courts have recently discussed and applied the 2008 U.S. Supreme Court Decision in Federal Express Corp. v. Holowecki regarding what constitutes a charge for purposes of EEOC filings. The Holowecki standard is that a charge is any filing which can reasonably be construed as a request for the federal or state agency to review a matter and take remedial action to protect an employee's rights, or otherwise settle an employee/employer dispute. Both recent Pennsylvania cases found that the documents filed by the employee met the Holowecki standard and thus constituted a charge.

In Holender v. Mutual Industries North, Inc., the U.S. Court of Appeals for the Third Circuit was required to determine when an employee's charge was filed for purposes of determining whether 60 days had passed since the filing, which is a statutory prerequisite for an employee to bring an Age Discrimination in Employment Act claim in federal court. The employee filed an EEOC Form 5, entitled "Charge of Discrimination," along with an affidavit that contained substantive information regarding the alleged discrimination. Subsequently, the EEOC sent the employee a

follow-up letter requesting that he complete various forms and questionnaires "before the EEOC [could] formally docket [the] matter as a charge." The employee never provided the additional information and simply filed an action in federal court.

In determining whether the employee's federal court filing complied with the ADEA time requirements, the Third Circuit ruled that the filing of EEOC Form 5 and the signed affidavit constituted the filing of a EEOC charge under the Holowecki standard. In reaching this conclusion, the Court noted the title of Form 5 (Charge of Discrimination), and the fact that the affidavit stated "I am therefore filing the instant charge on behalf of all persons similarly situated."

The U.S. District Court for the Middle District of Pennsylvania considered a similar issue in Grigsby v. Pratt & Whitney Amercon, Inc., et al. In Grigsby, the Court considered whether the employee's charge alleging a Title VII violation was timely filed. The employee in Grigsby, who was represented by counsel, sent a letter to the EEOC alleging race discrimination and stating that the employee wanted to file a charge. Attached to the letter was a 14-page statement of allegations along with various questionnaires in which the box "I want to file a charge," was checked. Approximately six weeks later, the EEOC sent a letter to the employee's attorney requesting that a Form 5 Charge of Discrimination be completed. The Form 5 was completed and stamped by the EEOC in Philadelphia two months after the employee's initial submission was received.

The Court determined that the employee's initial letter and accompanying documents constituted a charge because the documents were in writing, the statements were verified under penalty of perjury, the parties charged with discrimination were identified and the documents clearly stated that the employee wanted a charge to be filed. The fact that the employee later filed a Form 5 was of



no consequence. The Court also noted that the standard to be applied for determining whether a written submission constituted a charge did not change because the employee was represented by counsel. Citing the Holowecki decision, the Grigsby Court recognized that the Supreme Court specifically avoided creating a rule that would encourage individuals to avoid filing errors by increasing their costs and hiring counsel.

In light of these recent decisions, Pennsylvania Courts are likely to apply a lenient standard when determining what constitutes a charge in actions brought before the EEOC. As long as the document is in writing, indicates the employee's desire to file a charge, no matter how informally, and contains enough information to identify the parties, the document will likely be considered a charge.

Does the “Follow the Spouse Rule” in Unemployment Compensation Law Apply to Same-Sex Partners?

By Eric N. Athey, Esquire

As a general rule, an employee who resigns from her job is not entitled to unemployment compensation unless she had a “necessitous and compelling cause” to do so. One example of necessitous and compelling cause has come to be known as the “follow the spouse rule.” Pennsylvania courts have allowed employees to collect unemployment compensation in cases where an employee resigns because: (1) his or her spouse elected to move for reasons beyond his or her control, and the decision to move was reasonable and made in good faith, and (2) the couple would face an economic hardship in maintaining two residences or the move has resulted in an insurmountable commuting problem. Perhaps the most common application of the follow the spouse rule is where an employee's spouse is involuntarily transferred to a

distant work location and the employee resigns his or her employment to move there.

In the recent case of Procito v. UCBR, the Commonwealth Court considered, for the first time, whether the “follow the spouse rule” applies to same-sex partners. Ms. Procito worked as a financial manager in Pennsylvania and resigned her position to follow her domestic partner to Florida. Her domestic partner had moved to Florida to be with her son, who had a learning disability, and to seek a less stressful environment.

Ms. Procito's claim for unemployment benefits was denied by a UC Referee on the basis that the follow the spouse rule only applies to individuals who are legally married and that she had not proven that her resignation was due to a necessitous and compelling cause. The Unemployment Compensation Board of Review upheld this decision.

On appeal to the Commonwealth Court, Ms. Procito argued that the categorical denial of benefits to same-sex partners in follow the spouse cases violated the Pennsylvania Constitution and that the case should be remanded to the referee for further development of the facts.

In its decision issued on March 17, 2008, the Commonwealth Court avoided the broad Constitutional challenge raised by Ms. Procito and upheld the Board's denial of benefits since “Procito simply failed to meet her burden to prove that she terminated her job for a necessitous and compelling cause.” Although Procito's partner quit her job and moved to Florida due to ongoing stress, the Court found that this was ultimately a choice of “personal preference” – not a situation beyond her control. If Ms. Procito had shown that her partner's relocation was beyond her control, the case *may* have been decided differently.

To date, Pennsylvania courts have limited application of the follow the spouse rule to legally



married couples. For example, the Commonwealth Court has previously refused to apply the rule to “significant others” or couples who plan to but have not yet married. The Procito case is interesting because it leaves open the possibility that the rule *may* apply to same-sex partners. However, the Court deliberately sidestepped this issue and resolution of this question will need to wait until it is again presented to the court or until the legislature addresses it. Stay tuned!

WORKERS’ COMPENSATION UPDATE:

Workers’ Compensation Update: Effective Use of the IRE

By Paul D. Clouser, Esquire

One of the cost-saving measures incorporated into the Act 57 Amendments to the Pennsylvania Workers’ Compensation Act was the concept of impairment rating evaluations or “IREs.” The measure was designed to make the workers’ compensation system more economical by utilizing an objective standard to bring finality to the payment of wage loss benefits and to encourage settlement of litigated claims. A number of states, including Maryland, convert claims from “temporary” to “permanent” status once an employee reaches maximum medical improvement, regardless of whether he had returned to work. At that point, American Medical Association guidelines are used to calculate the applicable percentage impairment. The resultant “impairment rating” is then applied to a permanent disability schedule to determine the number of weeks of future payments and the total recovery. For instance, if an employee earning \$300 per week sustained a wrist injury, but has returned to work at no loss of earnings and has reached maximum medical improvement with

a 10% impairment of the hand under AMA guidelines, the claim is converted to permanent partial status, at a reduced partial disability benefit of \$100 per week (i.e., 1/3 of the AWW) for 25 weeks (i.e., 10% x 250 weeks). The employee’s recovery is therefore capped at \$2,500 going forward.

In contrast to Maryland’s approach, Pennsylvania retained its “wage loss” approach to benefits, while incorporating “hybrid” features that should, at least theoretically, limit future recoveries upon receipt of 104 weeks of temporary total disability (“TTD”) benefits. Section 306(a.2)(2) of the Act allows an employer to seek an impairment rating evaluation (“IRE”) of an injured worker, through a bureau appointed physician, to determine the proper impairment utilizing AMA guidelines. So long as the evaluation is formally requested on a proper bureau form within 60 days of the 104 week TTD date, the employer may then “convert” the claim to temporary partial disability (“TPD”) status, with a corresponding 500-week limitation on future indemnity payments. However, this conversion may only apply if the impairment rating is less than 50% of the “whole person,” under the AMA guidelines. Unfortunately, the time limits for seeking conversion are strictly construed and enforced by the Courts, as discussed below. In addition, unlike Maryland law, Act 57 permits neither a reduction in the benefit rate nor a reduction in the length of time benefit payments must be made, when a conversion takes place. The employer gains relief from the ongoing payment of wage loss benefits, but only to the extent it can prove that its employee has an actual earning capacity.

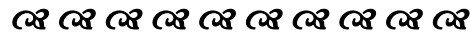
A recent Commonwealth Court case has limited the usefulness of an IRE in cases where the evaluation is sought outside the applicable 60-day “window.” In Diehl v. WCAB (Cmwlth. Court, April 28, 2008), the Commonwealth Court ruled that an employer seeking “conversion” following a late IRE request (i.e., a request made more than



60 days after the 104 week TTD anniversary), must establish an earning capacity on the part of the employee through traditional job referrals, actual employment, or a labor market survey. In short, if the employer misses the allowable 60-day window for a self-executing conversion to TPD status, it must then incur the additional cost and uncertainty of a litigated earning capacity proceeding to gain a conversion.

We believe the Diehl case to be wrongly decided and inconsistent with the rationale behind the IRE provisions and the Supreme Court's decision in Gardner v. WCAB, (Pa. Sup. Ct. 2005). Happily, on June 24, 2008, the Commonwealth Court granted the employer's petition for reargument on this important issue

and also vacated its prior Order and decision. Hopefully, within the next month or so, a decision will be issued overruling the prior decision in April. Nevertheless, pending legislative action or further clarification from the Supreme Court, it is critically important that employers and third party administrators carefully track the 104-week TTD payments and take full advantage of the "automatic conversion" within the 60-day window by filing a timely request for an IRE. We will keep you advised as to further developments and naturally, if you have questions or concerns regarding use of IREs, please contact Paul Clouser or Denise Elliott in our office.



If you have any questions regarding any labor or employment law matter, including the issues discussed in this newsletter, please do not hesitate to contact us at (717) 392-1100, or e-mail us at the following addresses:

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