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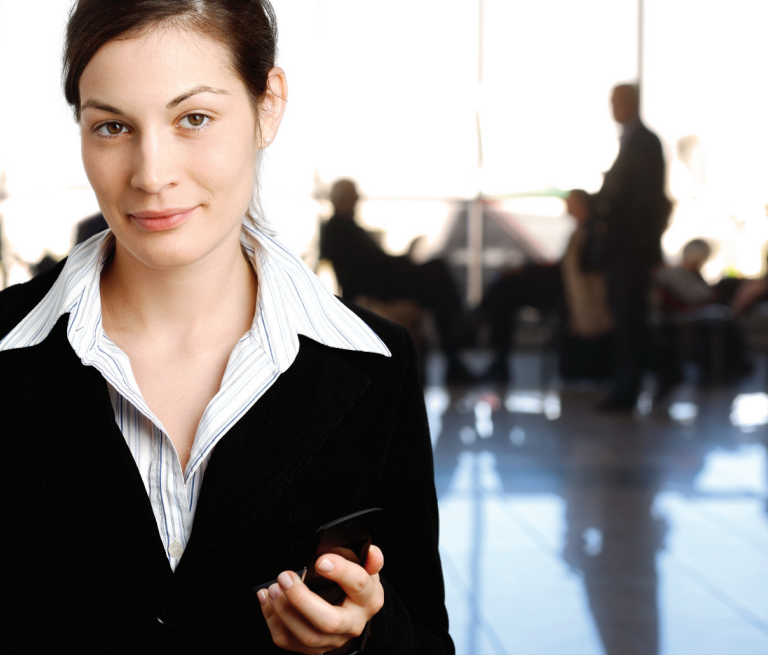
PROPOSED PREGNANT WORKERS FAIRNESS ACT MAY REQUIRE EMPLOYERS TO PROVIDE REASONABLE ACCOMMODATIONS TO PREGNANT EMPLOYEES

The Pregnancy Discrimination Act, enacted by Congress in 1978, currently prohibits employers from discriminating against employees for being pregnant. Most employers, however, are not required to make accommodations for an employee's pregnancy. This includes employers in Pennsylvania and New Jersey.[1]

This may be about to change.

On September 19, 2012, Senator Bob Casey (D-PA) introduced the Pregnant Workers Fairness Act (S. 3565) to the Senate floor. The proposed bill is modeled after provisions in the Americans with Disabilities Act (ADA) and would require employers to make reasonable accommodations for pregnant employees and job applicants. Employers would also have to make reasonable accommodations for those individuals with limitations related to childbirth. Moreover, the Pregnant Workers Fairness Act would institute anti-discrimination and retaliation protections for workers who request a reasonable accommodation related to their pregnancy, childbirth, or associated medical conditions. The bill would prevent employers from requiring that a pregnant employee take leave if she could perform her job with a reasonable accommodation. The bill would also make it unlawful for an employer to require an applicant or employee affected by pregnancy or childbirth to accept a particular accommodation.

The Pregnancy Workers Fairness Act would direct the Equal Employment Opportunity Commission (EEOC) to issue regulations implementing the law within two years of the bill's enactment. An employee alleging that her employer violated the Act would be able to recover the same damages available to a plaintiff in a Title VII lawsuit: back pay, front pay, or



PROPOSED PREGNANT WORKERS FAIRNESS ACT MAY REQUIRE EMPLOYERS TO PROVIDE REASONABLE ACCOMMODATIONS TO PREGNANT EMPLOYEES - *continued from page 1*

reinstatement; compensatory and punitive damages subject to a combined cap; and attorney's fees.

In a press release, Sen. Casey said: "Pregnant workers face discrimination in the workplace every day, which is an inexcusable detriment to women and working families in Pennsylvania and across the country." He further stated, "My bill will finally extend fairness to pregnant women so that they can continue to contribute to a productive economy while progressing through pregnancy in good health."

A House version of this bill (H.R. 5647) was introduced by Rep. Jerrold Nadler (D-NY) on May 8, 2012, but has not advanced out of committee.

ADVICE:

If this bill progresses, employers should be ready to accommodate pregnant employees, such as modifying lifting requirements, reassigning non-essential tasks, increasing bathroom breaks, etc. It is likely that employers will be required to engage in an interactive process with pregnant employees, similar to the interactive process in which employers are required to engage with employees who have disabilities. We will keep you apprised of any developments with regard to this Act.

[1]A small number of states, including California, has enacted pregnancy-related disability laws, providing pregnant employees with enhanced protection.

FLSA'S "FLUCTUATING WORKWEEK METHOD" OF OVERTIME COMPENSATION HELD TO VIOLATE PENNSYLVANIA LAW

Pennsylvania employers beware: Even if your wage and hour practices are compliant with the Fair Labor Standards Act (FLSA), they may still be in violation of the Pennsylvania Minimum Wage Act (PMWA). Both laws contain overtime and minimum wage requirements with which Pennsylvania employers must comply, and although they are similar, they are not identical.

On August 27, 2012, the United States District Court for the Western District of Pennsylvania held in **Foster v. Kraft Foods Global, Inc.,** Civil Action No. 09-453, that payment of overtime under the "Fluctuating Workweek Method" is impermissible under the PMWA. Under this method, employees receive a guaranteed fixed weekly salary, regardless of the number of hours worked. Then, as compensation for overtime (hours worked over 40 in a work week), the employee receives an additional one-half of the employee's regular rate, as opposed to the traditional "time and a half" model. This method, which is expressly allowed under the FLSA, allows employers to pay non-exempt employees a fixed salary and minimize overtime costs.

The Court in **Foster** held that the PMWA does not allow payment of only an additional one-half of the regular rate for overtime hours, as is permitted by the FLSA's Fluctuating Workweek Method. Rather, the PMWA requires that employees, even if paid under a Fluctuating Workweek Method, receive one and one-half times their regular rate for hours worked over 40 in a work week. This renders the Fluctuating Workweek Method no longer advantageous to Pennsylvania employers.

ADVICE:

In light of the **Foster** decision, Pennsylvania employers should review their pay practices to ensure compliance with not only the FLSA, but also the PMWA. And, if you are a Pennsylvania employer who currently compensates employees using the Fluctuating Workweek Method, you should revise your current pay practice to ensure that employees are receiving no less than one and one-half times their regular rate for all hours worked over 40 in each workweek.

PHONE CALL THAT AN EMPLOYEE IS CURRENTLY IN THE EMERGENCY ROOM WITH MOTHER MAY CONSTITUTE "NOTICE" UNDER THE FAMILY AND MEDICAL LEAVE ACT OF 1993

In Lichtenstein v. Univ. of Pittsburgh Med. Ctr., 691 F.3d 294 (3d Cir. 2012), the United States Court of Appeals for the Third Circuit denied an employer's motion for summary judgment, holding that an employee's telephone call that she was unable to go into work because she was in the emergency room raised a genuine issue of material fact as to whether the employer was on notice that the employee could require leave under the Family and Medical Leave Act of 1993 (FMLA).

The plaintiff, Jamie Lichtenstein, alleged that her employer, University of Pittsburgh Medical Center (UPMC), terminated her employment in violation of the FMLA. Ms. Lichtenstein was employed as a psychiatric technician and had attendance problems during her tenure with UPMC. In the three months leading up to her termination, she was absent twice, tardy six times, and switched shifts constantly. One day, Ms. Lichtenstein called her supervisor prior to a scheduled shift and stated that she was currently in the emergency room with her mother, who had been brought into the hospital via ambulance, and was unable to work that day. Ms. Lichtenstein's supervisor noted in the attendance log, "sick mom." Four days later, UPMC terminated Ms. Lichtenstein's employment. Ms. Lichtenstein brought suit, alleging that she had been terminated in violation of the FMLA. UPMC maintained that it had terminated Ms. Lichtenstein's employment based on her history of attendance problems.

The Court found that by notifying the employer that her mother was in the emergency room, Ms. Lichtenstein did not provide enough information for her employer to conclude that she needed leave under the FMLA. Nevertheless, the Court also held that the employee had given the employer enough information to conclude that the FMLA may be in play. As a result, the employer had an obligation to conduct a further inquiry to determine whether FMLA leave was necessary. Because it did not, and because it shortly thereafter terminated Ms. Lichtenstein's employment, it raised an inference that the employer took the action so as to interfere with her rights under the FMLA, and summary judgment was precluded.

ADVICE:

This case joins the many recent cases that seem to increasingly put the onus on employers to ask the questions necessary to determine whether the FMLA is applicable. Employees are not required to specifically state "FMLA" as a reason for their absence, which makes it difficult for employers to know whether the FMLA is in play. Nevertheless, the FMLA puts the responsibility on employers to inquire further if there is any ambiguity in a leave request and determine whether the FMLA applies. Always ask questions and inform employees of their right to take leave under the FMLA, if applicable.

NEW JERSEY EMPLOYERS BEWARE: ASKING YOUR EMPLOYEES TO PROVIDE THEIR SOCIAL NETWORKING INFORMATION COULD RESULT IN LIABILITY

On September 20, 2012, the N.J. Senate Labor Committee passed the "Facebook bill," which would prohibit employers from requiring their employees to disclose their social networking usernames and passwords. Aimed at protecting employees' rights to free speech and association, the bill would make an employer civilly liable if it demanded that an individual connect with or "friend" someone within the company, such as his or her supervisor or an HR representative, or if it asked for an employee's social media identity and/or password.

A first violation could result in a penalty of up to $1,000, with $2,500 for each subsequent violation. Additionally, an aggrieved employee could file suit against the employer within one year of the alleged violation. If an employer is shown to be in violation of the Act, the employee could recover injunctive relief and damages, including lost wages, benefits, compensatory damages, attorneys' fees, and costs.

Maryland and Illinois have placed similar prohibitions on employers, and at least 10 other state legislatures have similar bills pending. The legislation was introduced following articles in *The Baltimore Sun* and later reports from the Associated Press that private and public employers were requiring their employees to disclose their IDs and passwords for social media sites.

ADVICE:

Regardless of whether the new New Jersey legislation is signed, it is in the best interest of employers everywhere to cease asking employees and applicants for social media IDs and passwords, and not to require them to establish connections with personnel via their personal social media accounts. Instead, an employer's best practice is to have a comprehensive social media policy that does not require divulgence of such information.

NLRB RULES THAT EMPLOYER'S BLANKET CONFIDENTIALITY POLICY DURING HR INVESTIGATIONS VIOLATES THE NLRA

In Banner Health System d/b/a Banner Estrella Medical Center, 358 NLRB No. 93 (2012), decided July 30, 2012, the National Labor Relations Board (NLRB), in a 2-1 decision, held that a blanket policy requiring employee confidentiality during the course of a human resources investigation violates an employee's right to engage in concerted activity under Section 7 of the National Labor Relations Act (NLRA).

The NLRB administrative law judge who originally heard the case stated in his decision:

> *"During the hearing, General Counsel amended the complaint to allege that Respondent's confidentiality agreement and interview of complainant form violates Section 8(a)(1) of the Act. The interview of complainant form is not given to employees. During interviews of employees making a complaint, [employer representative] Odell asks employees not to discuss the matter with their coworkers while the investigation is ongoing. I find that suggestion is for the purpose of protecting the integrity of the investigation. It is analogous to the sequestration rule so that employees give their own version of the facts and not what they heard another state. I find that Respondent has a legitimate business reason for making this suggestion. Accordingly, I find no violation."*

The NLRB Board majority reversed the ALJ and nevertheless found a violation, essentially stating that an employer cannot have a policy that stops employees from engaging in discussion about problems in the workplace. This muddies the water for employers, who now must balance their obligation to maintain confidentiality to the extent possible with the employees' rights under the NLRA to engage in concerted activity.

ADVICE:

Note that the NLRB has stated its position that it believes **blanket** confidentiality provisions to be unlawful, but it has not stated that all confidentiality policies would necessarily violate the NLRA. Additionally, it is still unknown as to how a court of law would rule on this issue. Employers still have a duty to maintain confidentiality and may do so on a case-by-case basis. Review your company's current policy. If you have a blanket policy, revise it to articulate the factors to be considered when determining whether confidentiality is appropriate in an investigation.

EEOC FOCUSES ON EDUCATING YOUNGER WORKERS ABOUT THEIR RIGHTS

Employers that hire students, teenagers, and other younger workers should be aware that on September 19, 2012, the U.S. Equal Employment Opportunity Commission (EEOC) released a video and accompanying classroom guides to educate working-age students about sexual harassment and other forms of employment discrimination. These tools are free to the public and available for download on the EEOC's website (at youth.eeoc.gov under "Free Downloads"), and are meant to train younger workers about employee rights and responsibilities and discrimination and harassment in the workplace.

The video and the classroom guides provide a series of vignettes in typical workplace settings for teens (a retail store and a fast food restaurant) to help them identify and understand some of the issues they may face, as well as provide them with information regarding what to do if they feel their rights in the workplace are being violated.

ADVICE:

The EEOC's initiative is an important reminder to employers that all employees need to be trained with regard to the employer's policies and procedures. Be careful to make sure younger employees who hold after-school positions and/or part-time positions are given employee handbooks and made aware of complaint channels available to them.

N.J. SUPREME COURT TO DECIDE WHETHER JURY'S AWARD OF $500,000 IN PUNITIVE DAMAGES IN SEXUAL HARASSMENT CASE CAN STAND

On October 22, 2012, the New Jersey Supreme Court heard arguments on whether a $650,000 verdict, $500,000 of which was punitive damages, could stand. In 2010, a Mercer County jury found in favor of plaintiff Doreen Longo, a former salesperson for a wholesaler of adult sexual products. Ms. Longo had filed a complaint against her former employer under New Jersey's Conscientious Employee Protection Act (CEPA). Ms. Longo claimed that her termination was in retaliation for her complaints about a fellow salesman whose conduct created a hostile work environment and constituted sexual harassment and intimidation. The defense argued that Ms. Longo had never complained about her co-worker until they had a dispute, which showed that she was comfortable with the environment and could not claim harassment. The jury sided with Ms. Longo and awarded her $120,000 in back wages, $30,000 for emotional distress, and $500,000 in punitive damages.

On August 15, 2011, the Superior Court of New Jersey, Appellate Division, upheld the verdict on appeal. One judge, however, dissented, concluding that the award for punitive damages could not stand based on the trial court's failure to give an instruction to the jury that a necessary precondition to an award of punitive damages was a finding that upper management had either actively participated in or been willfully indifferent to the violation of the plaintiff's rights. This was the issue argued by the parties before the New Jersey Supreme Court on October 22, 2012.

ADVICE:

Be sure to read upcoming issues of our employment law newsletter, where we will report on the New Jersey Supreme Court's ruling once it has been made.

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Joseph Goldberg
Chair of the Employment Practices Liability Group

215-825-7225
jgoldberg@wglaw.com

Tracy A. Walsh
Co-Chair of the Employment Practices Liability Group

215-825-7224
twalsh@wglaw.com

Wendi D. Barish
Partner in the Employment Practices Liability Group and Editor of the ***Employment Practices Update***

215-972-7914
wbarish@wglaw.com

Brett A. Zahorchak
Associate in the Employment Practices Liability Group and Editor of the ***Employment Practices Update***

267-519-4976
bzahorchak@wglaw.com