

EMPLOYERS MUST ESTABLISH DOMESTIC VIOLENCE PROTOCOL

Recently enacted Commonwealth Law No. 217 of September 29, 2006, requires all public and private sector employers to establish a formal *protocol* to handle domestic violence situations, pursuant to guidelines to be developed and monitored by the Office of the Solicitor for Women. The *protocol* must contain a policy statement, reference to the applicable laws, personnel duties and procedures to be followed in cases of domestic violence suffered by employees or occurring at the workplace.

This continues a trend increasing employer involvement in domestic violence situations at the workplace. Previously, Commonwealth Law No. 538 of September 30, 2004, had *authorized* (without requiring) employers to seek a protective order under the Domestic Abuse Prevention and Intervention Act (Law No. 54), for the protection of *employees* and *visitors* of the workplace, when an employee is or has been a victim of domestic violence or other criminal acts, and the acts of violence have occurred in the workplace or there is a reasonable basis to believe that such conduct may occur at the workplace.

Law No. 217 represents a change in the approach and now creates an affirmative obligation. Therefore, employers must promptly develop the required policy and procedures to ensure compliance with this new mandate.

CHRISTMAS BONUS REMINDER

The first of the three scheduled increases in the mandatory Christmas bonus kicks in this December.

Commonwealth Law No. 124 of September 29, 2005, amended the Christmas Bonus law, providing for staggered increases over a three (3) year period. The amount of the increase varies based on whether the employer has more than 15 employees.

Previously, the required bonus was 2% of the wages earned by the employee, up to a maximum of ten thousand dollars (\$10,000.00). Therefore, the maximum required bonus was two hundred dollars (\$200.00).

The maximum yearly salary to be used in the calculations remains at \$10,000. Accordingly, the mandatory bonus will increase as follows:

Year	15 or less employees	16 or more employees
2006	2.5% (\$250)	3% (\$300)
2007	2.75% (\$275)	4.5% (\$450)
2008	3% (\$300)	6% (\$600)

All other aspects related to: (1) the threshold amount of hours that needs to be worked in order to accrue the benefit (700 hours); (2) all calculations being based on the twelve (12) month bonus year period comprised from the first of October of the prior year until September 30 of the subsequent year; (3) how to make payments to prior employees; (4) penalties for non payment, and; (5) the documents that must be filed not later than **November 30** in order to be *excused* from payment of all or part of the bonus, remain unaltered.

The bonus must be paid between December 1 and 15. If you contemplate filing a notice to be excused from the payment of the full bonus, feel free to contact us for details on the requirements.

LEGISLATIVE WATCH

The following highlights several bills presently pending before the Puerto Rico Legislature, which may impact operations in Puerto Rico. Should you wish to monitor these or other bills more closely, or wish to communicate your point of view on these matters, feel free to contact us. O'Neill & Borges maintains an experienced "Government Affairs" practice group that handles such requests.

Clients To Pay Trucker's Worker's Comp. Senate Bill 753 (Parga Figueroa-PNP) was passed in the Senate and is presently under consideration by the House. The bill intends to *repeal* recent legislation that permits self-employed truckers to obtain worker's accident compensation insurance coverage for themselves (Law No. 263 of September 8, 2004.)

The bill is intended to require the *client* to include the truckers in its policy and pay for the coverage. The bill is premised on the assumption that prior to Law No. 263, clients using self-employed truckers were required to insure them; and that the recent amendment had improperly transferred the insurance cost to the truckers. In fact, in January 2002, the Corporation of the State Insurance Fund ("CSIF") had issued a policy statement of questionable validity, holding that such independent truckers must be included in the client's worker's accident compensation policy. Senate Bill 753 assumes that the CSIF's 2002 policy statement is valid. Therefore, repealing Law No. 263 reestablishes the prior "state of the law."

Minimum Wage Alert. House Bill 1714 (PPD, PNP, PIP) would establish a local minimum wage of \$5.40, effective immediately; with subsequent automatic yearly minimum wage increases of 20 cents per hour through the year 2020; when automatic minimum wage will increase each year by 25 cents per hour, unless the federal minimum wage is higher. The bill is sponsored by representatives of *all* parties. Consideration of the bill, however, remained dormant after November 2005.

Since the 1995 Labor Reform laws, the official public policy has been to automatically apply the federal minimum wage. According to this public policy statement, the local government should not support local minimum wages that are *lower* nor *higher* than the uniform federal minimum mandate.

Recently, a heated public debate has developed between the Puerto Rico Secretary of Labor and Human Resources (who favors local legislation increasing the minimum wage) and the SHRM local chapter (as well as other business/management groups). In view of this

renewed debate, we believe employers with operations in Puerto Rico must remain active in *effectively* communicating their positions regarding local initiatives on this issue and how the contemplated increases will affect your business. This must be done at both the appropriate legislative and executive level.

The result of next month's congressional elections may determine whether an increase in the federal minimum wage can be expected. Democrats have promised to increase the federal minimum wage if they obtain control of Congress on November 7. In the absence of a nation-wide federal increase, Puerto Rico government officials can be expected to respond to the influence of those interest groups who participate in the debate. While the formal public policy may remain on the books, the political realities may drive local legislation in a different direction.

Paternity Leave. House Bill 2979 (Fernández Rodríguez-PNP) was recently introduced, to grant a four (4) week paid *paternity* leave in the private sector. The leave would also apply to adoptions, under requirements similar to what is presently provided for under the local Maternity Leave Act.

Tips and Service Charges. Bipartisan House Bills 1303, 1304, 1305, 1306, 1307, 1308 and 1309 (Méndez Núñez, Jiménez Cruz-PNP; S. Rodríguez, Ferrer Ríos-PPD), were recently passed by the House and await consideration by the Senate. These bills intend to *exclude* customer "tips" or employer imposed "services charges" from the calculations or payments under Puerto Rico's wrongful discharge indemnity, non-occupational disability (SINOT), unemployment, worker's accident compensation premiums, vacation and sick leave, maternity leave payments, and overtime rates. These bills would significantly benefit the tourism, hotel and restaurant industries. Similar bills had been filed in the Senate, but were shelved due to negative reports.

Discrimination Criminal Sanctions. House Bill 2185 (Fernández Rodríguez-PNP; Ferrer Ríos-PPD), was passed in the House and awaits consideration in the Senate. The bill would *increase* the criminal sanctions to be imposed on

an employer and its representatives in the cases of employment discrimination, from a present maximum of \$500 to a new maximum of \$5,000. The 90 day maximum incarceration period remains the same, although the minimum 30 day jail period would be eliminated.

Payroll Incentives To Hire Ex-Convicts. House Bill 2093 and Senate Bill 996 (All-PNP) have passed in their respective bodies. Both amend the Unemployment Fund law to authorize the use of financial resources of the “Fund to Promote Employment Opportunities,” to provide incentives (which can include payroll subsidies) for employers to hire and train *ex-convicts*. This fund is nourished by employer unemployment contributions. During recent years, the resources of the Fund have been siphoned to promote the hiring and training of older workers; persons between 16 and 24 years of age; and persons who are seeking employment for the first time.

COURT DECISIONS

Work From Remote Site Not Reasonable Accommodation Under The ADA

In *Mulloy v. Acushnet Co.*, 460 F.3d 141 (1st Cir. 2006), the First Circuit concluded that the requested transfer of a supervisor in a golf ball plant, who blamed his intermittent respiratory problems on a chemical used in the manufacturing process, to work from a remote site, was not a reasonable accommodation under the ADA. The Court held that such a transfer would not permit the employee to fulfill his essential troubleshooting functions.

The Court reiterated that in most instances, personal contact, interaction with personnel and/or equipment, troubleshooting, training and supporting other personnel, teamwork, and coordination are essential functions that disqualify working from a remote site or the employee’s home as a reasonable accommodation under the ADA. Because plaintiff in this case was unable to perform these tasks from a site outside of the golf ball plant, the Court found that this employee was not a “qualified individual with a disability” under the ADA.

The Court also concluded that the requested accommodation created an undue burden for the employer. The employee, an electrical engineering supervisor, requested that he be allowed to perform his troubleshooting functions through the use of a webcam. The request was deemed an undue burden because the accommodation required the hiring of a webcam operator, a position that did not exist at the golf ball plant.

In both opinions, the District Court and Circuit Court relied heavily on the employer-prepared supervisor’s job description to determine which functions were the engineering supervisor’s essential functions. The Court considered that the following functions implied some level of interaction with the employees and the machinery: teamwork, troubleshooting, evaluating, and provide training and support. The Court also stressed that it was unnecessary for job descriptions to state that physical presence at the worksite is necessary.

Delays In Accommodation Under The ADA May Constitute Retaliation.

After discussing the Supreme Court’s recent decision in *Burlington Northern v. White*, the First Circuit concluded that a delay in providing an accommodation needed to meet a disability may cause a “significant injury or harm” that would entitle an employee to a retaliation action. *Cardona-Rivera v. Commonwealth of Puerto Rico, et al.*, 2006 U.S.App.Lexis 23257 (1st Cir. 2006).

In *Burlington Northern*, the Supreme Court held that an employee could maintain a retaliation action if the employer’s actions towards an employee that complains or supports a discrimination claim would sufficiently dissuade reasonable employees from presenting discrimination charges, even when said actions did not constitute an adverse employment action. See our July 2006 newsletter for additional analysis of the case.

Carmona-Rivera involved a schoolteacher with a disability who complained, not that her disability had not been accommodated, but that the accommodation had taken too long. In the absence

of evidence of retaliatory intent, her argument that the delay itself was retaliation fell on deaf ears. In the case at hand, the Court found the delay to be the type of action "inherent in the workings of an educational bureaucracy."

Citing *Burlington Northern*, however, the Court also noted that the alleged retaliatory action must be material, producing a significant, not trivial, harm. Trivial actions such as "petty slights, minor annoyances, and simple lack of good manners will not [normally] create such deterrence."

NLRB DECISIONS

NLRB Issues Long-Awaited Supervisor Test

The National Labor Relations Board ("NLRB" or "the Board") recently issued three decisions explaining some of the most debated requirements for determining whether an individual is an *excluded* "supervisor" under the Labor Management Relations Act ("the Act").

The Act defines the term "supervisor" as: "any individual having authority in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment".

Individuals are considered supervisors under the Act if they comply with the following requirements:

- * Have authority to engage or effectively recommend in one (1) of the twelve (12) statutory supervisory responsibilities. To wit: hire, transfer, suspend, lay off, recall, promote, discharge, *assign*, reward, discipline other employees, *responsibly to direct* them, or to adjust their grievances.
- * The exercise of such authority is not of a merely routine or clerical nature, but requires the use of *independent judgment*".
- * Their authority is held in the interest of their employer.

In *Oakwood Healthcare*, 348 NLRB 37 (2006), the Board explained the terms "*assign*", "*responsibly to direct*", and "*independent judgment*."

The Board indicated that the required authority to "assign" refers to the act of designating an employee to a place (location or department), appointing an individual to a time (shift or overtime) or giving significant overall duties/tasks to an employee (as opposed to *ad hoc* instructions to perform a discrete task).

The "responsibly to direct" authority means that the person has employees under him/her and (1) decides what job shall be undertaken next or which employee shall do it, (2) is accountable for the work performed with authority to take corrective action, and (3) faces the prospect of adverse consequences for such supervision.

The Board adopted an interpretation of the term "independent judgment" that applies irrespective of any of the supervisory functions implicated, and notwithstanding that the judgment is exercised using professional or technical expertise. First, the judgment exercised must not be effectively controlled by another authority. Second, the degree of discretion exercised must rise above the "routine or clerical."

Finally, the NLRB addressed the issue of employees scheduled as minimal part-time, or rotating supervisors. The Board noted that it had found supervisory status where employees spend a "regular" and "substantial" portion of their work time in a supervisory role (at least 10%-15% of their total work time).

In applying the new standards to a hospital unit, the Board majority in *Oakwood Healthcare*, concluded that charge (or lead) registered nurses were supervisors, and *could not* be represented by the union, because they used independent judgment when they "assigned" other nurses to particular patients, based upon their assessments of the needs of the patients and the skills of the individual nurses. On the other hand, emergency room charge nurses were not supervisors because they did not make similar assessments. Instead, they simply assigned staff to geographic areas of the emergency room.

It is important to note that the NLRB held that none of the charge nurses “responsibly directed” others because they were not held accountable for the outcomes of the assigned jobs. The evidence in the case showed that the charge nurses were accountable for their *own* performance or lack thereof, not the performance of *others*.

The NLRB also held that registered nurses who did not “regularly” perform charge nurse duties on a predictable schedule or pattern were not supervisors and could engage in union activities.

In the other two decisions, the Board found that the challenged positions were not supervisors under the Act.

In *Golden Crest Healthcare Center*, 348 NLRB 39 (2006), the Board held that the Golden Crest’s charge nurses at a nursing home did not exercise supervisory authority under the Act because they lacked the authority to “assign” other employees under the Act. The Board emphasized that Golden Crest failed to establish that the charge nurses possessed the authority to require other employees to stay past the end of their shifts, to come in from off-duty status, or to shift section assignments. The Board also found they lacked the authority to “responsibly direct” other employees, insofar as Golden Crest failed to establish that the charge nurses were actually held accountable for the job performance of the other employees

In *Croft Metals, Inc.*, 348 NLRB 38 (2006), the Board applied the definitions of “assign” and “responsibly to direct” to find that certain *lead persons* at a manufacturing facility did not exercise supervisory authority.

The Board determined the lead persons in question did not possess the authority to “assign.” However, the Board did determine that they responsibly directed their line or crew members, were required to manage their assigned teams, correct improper performance, shift employees, and decided the order in which work was to be performed in order to achieve production goals. The Board further found that the lead persons were held accountable for the performance of their crew or line members.

Nonetheless, the Board found that Croft Metals failed to meet its burden to establish that the lead persons *exercised independent* judgment in directing their crew or line members. The Board found that the lead persons’ exercise of judgment was either fundamentally controlled by pre-established guidelines, such as delivery schedules, or was simply a routine.

Comments:

While these new decisions detail the requirements for supervisory status, the application of the standard will diverge based on the set of facts. In the Hospital units, it is likely that charge or lead nurses will be considered supervisors dependent on the nature of the assignments they make. In other industries, the new standard will derail more cases trying to define whether the new definitions expand or restrict the answer of who should be deemed a supervisor under the law.

Note: Because of the general nature of this Labor Newsletter, nothing herein should be considered as legal advice or a legal opinion. For further information, contact:

LABOR AND EMPLOYMENT LAW DEPARTMENT

Jorge L. Capó-Matos
Luis A. Núñez-Salgado
Pedro A. Delgado-Hernández
Yldefonso López-Morales
José F. Benítez-Mier
Carlos E. George

Eileen García-Wirshing
Debbie E. Rivera-Rivera
María E. Santori-Aymat
Ana M. Santiago-Ramírez
Enrique González-Quñones*

O’NEILL & BORGES
American International Plaza, Suite 800
#250 Muñoz Rivera Ave.
San Juan, P.R. 00918-1813
Tel. 787-764-8181 / Fax. 787-753-8944

* *Pending Bar admission*