

DISCRIMINATION LAW NOW PROTECTS DOMESTIC AND SEX VIOLENCE VICTIMS

Employers in Puerto Rico need to adjust their employment policies to address the *inclusion* of “domestic violence victims” and persons subject to “sexual aggression” or “stalking” within the group of protected individuals under local workplace antidiscrimination law.

Law No. 271 of December 17, 2006, amended Puerto Rico’s General Antidiscrimination Act, Law No. 100 of June 30, 1959, to prohibit discrimination against individuals *actually* suffering from “domestic violence,” “sexual aggression” or “stalking”, as well as to those *perceived* as being subject to such a situation.

Moreover, Law No. 271 goes beyond simply *prohibiting* employers from discriminating against such individuals. The amendment imposes upon employers the *affirmative obligation* to make work adjustments and “reasonable accommodations” in the workplace to protect all employees from current or potential aggressors, once the employer becomes aware of a potentially dangerous situation. Failure to provide such workplace adjustments or reasonable accommodations will give rise to a *presumption* of discrimination.

Law No. 271 continues a recent trend to increase statutorily required employer involvement in domestic violence and sexual aggression situations. Previously, Law No. 538 of September 30, 2004, had *authorized* 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/has been a victim of domestic violence or other criminal acts, and the acts occurred in the workplace or a reasonable basis exists to believe that such conduct may occur.

More recently, Law No. 217 of September 29, 2006, imposed upon all employers the affirmative

duty to establish a *protocol* to handle domestic violence situations in the workplace, pursuant to guidelines to be developed by the Office of the Solicitor for Women. The protocol must contain a policy statement, reference to the applicable laws, designation and training of personnel responsible to administer the protocol and procedures.

In view of these recent developments, employers need to develop the required policy and procedures, and train their supervisors accordingly. O’Neill & Borges is available to assist in developing these policies.

ELECTRONICALLY STORED DATA AND MESSAGES OPEN TO DISCOVERY

Law No. 297 of December 26, 2006, amended the rules of civil procedure in the local courts to authorize a litigant to require that the opposing party produce and present for inspection pertinent electronically stored information. Since December 1, 2006 similar, albeit more detailed rules regarding electronic discovery, entered into effect for the federal courts.

For instance, under these new rules, plaintiffs in employment discrimination claims can require access for inspection to company servers, hard disks, and portable computers, among other devices. Requests for inspection and production may include emails, electronic documents, metadata, or any other electronically stored information relevant to the claim. In addition, serious penalties or adverse factual inferences can be assessed against an employer who fails to preserve the pertinent electronic data once it learns of an actual or anticipated litigation, receives a notice from an adverse party in litigation, or fails to comply with statutory or regulatory record-keeping requirements.

Electronic documents can be used as evidence during trials. For instance, email communications may help to prove discriminatory “intent”, as well as provide facts pertinent to a lawsuit.

Email attachments that are downloaded to temporary files can remain on a computer's hard drive for a long time. Similarly, voicemail can also play an important role in court. The same can be said about portable devices like BlackBerries and personal digital assistants (PDAs). Such tools can store electronic evidence, including faxes, emails, voicemails, and text messages.

In view of these developments, employers should revise their policies and procedures on use of emails and voice messaging, destruction and preservation of emails or electronic data, etc.

Employers should also take steps to avoid losing important electronically stored information. An initial measure to address this objective is to develop electronic preservation policies that provide consistent processes for deleting old emails and instant messages. The policy should include the designation of a person responsible for ensuring compliance with “litigation hold” instructions, and for notification when discovery requests for electronic documents are made. O’Neill & Borges is available to assist in developing these policies.

CYBER-SEXUAL HARASSMENT BANNED

The local legislature deemed it necessary to amend Puerto Rico’s sexual harassment law to *expressly* prohibit the use of technology (including but not limited to the use of cyber space and other electronic media) to engage in workplace sexual harassment. Law No. 252 of November 30, 2006.

BREASTFEEDING BREAK INCREASED

Law No. 239 of November 6, 2006 amends Puerto Rico’s “Breastfeeding and Milk Extraction” law to increase the paid break from 30 minutes to one (1) hour.

The “Breastfeeding and Milk Extraction” statute (Law No. 427 of December 16, 2000) provides that

all employers are required to allow a breastfeeding mother to breastfeed her infant, if the employer has a child-care center on premises. If the employer does not have such a facility, it must provide adequate facilities to express (extract) milk for such purposes. Only full time employees are entitled to this break, and the entitlement extends for 12 months from the time the employee returns to work after her maternity leave.

Previously, the 30-minute break could be divided into two breaks of 15 minutes each. Having concluded that such period was too short, the legislature has now extended the break to one hour, which can be distributed in two periods of 30 minutes each, or three periods of 20 minutes each.

Interestingly, Law No. 239 *exempts* from the increase in the break period those employers that fall under the “small business size” standards established by the U.S. Small Business Administration (SBA).

There is an SBA small business size standard for every private sector industry in the U.S. Economy. The size standards (usually stated in number of employees or average annual receipts) represent the largest size that a business (including its subsidiaries and affiliates) may be to remain classified as a small business for SBA’s programs and for Federal contracting programs. The SBA has several general size standards.

For example, *general* threshold limits to qualify as a small business is 500 employees for manufacturing; 100 employees for wholesale trade; and \$6.5 million for retail trade. Some industries have *higher* employment levels or volume of business standards than the general one for the industry group.

Employers not inclined to grant the increased break, will need to determine whether they meet the SBA small business standards.

Finally, although Law No. 239 increased the duration of the break that must be granted by most employers, it left unaltered the previously granted tax credit for private sector employers, equal to a month of the employee’s salary.

WORK AT HOME NOW COVERED BY LOCAL WORKER'S COMP

The feasibility of working from an employee's home or telecommuting has received a boost by virtue of Commonwealth Law No. 284 of December 22, 2006. This new law amends the Workers' Accident Compensation Act to *clarify* that work performed at such locations can be covered under the statute.

Prior to this amendment, a controversy arose as to whether such work could be insured, since Article 2 of the Act appeared to exclude from coverage persons who "work in their homes."

Law No. 284 clarifies that such work can be insured. The issue remains, however, as to which "risk classification" should be assigned to such work. The cost of the insurance varies depending on the risk classification assigned to the work. Failure to insure the employee under the proper risk classification is equivalent to a failure to insure. Classification errors may result in the employer being held "uninsured" for the accident; therefore, employer immunity would not be available. Hopefully, the Corporation of the State Insurance Fund will soon issue formal guidance on this issue. In the meantime, should you need assistance in evaluating this matter further, you may contact O'Neill & Borges.

NEW RESTRICTIONS ON THE USE OF SOCIAL SECURITY NUMBERS

Commonwealth Law No. 207 of September 27, 2006 prohibits the use of a person's SSN for identification purposes (employee's ID) or in any document of general circulation by employers in the public sector or in the private sector, if they are also government contractors.

Employers covered by this statute must edit public documents that contain a person's SSN, to make it partially illegible, without altering the content of the document. Article 2 of the Act imposes monetary sanctions for employers that violate these provisions.

The Act provides that within 6 months the Department of Labor and Human Resources should issue a regulation to implement the penalties under Article 2 *and* any other matter related to the law. The protections set forth in the Act can be waived, but the waiver cannot be imposed as a condition of employment.

EMPLOYMENT OF EX-CONVICTS

Law No. 285 of December 26, 2006 amended 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.

The unemployment fund is nourished exclusively by employer contributions.

FEDERAL MINIMUM WAGE ALERT

On January 10, 2007, the US House of Representative passed HR Bill No. 2, also referred as the "Fair Minimum Wage Act of 2007." 82 Republicans joined 233 Democrats to pass the bill in the House, by a vote of 315 to 116. The bill is pending before the US Senate, and should be considered in the very near future.

This bill would amend the Fair Labor Standards Act of 1938, to increase the federal minimum wage by \$2.10 an hour over 26 months – representing the largest increase in the history of the minimum wage. The increases would be as follows: (1) \$5.85 an hour, beginning on the 60th day after enactment of this Act; (2) \$6.55 an hour, beginning 12 months after that 60th day; and (3) \$7.25 an hour, beginning 24 months after that 60th day.

At the Senate level there are various efforts to attach to the bill a substantial federal tax-incentive and regulatory relief package for small businesses to ease the impact of increased payroll costs. These amendments, even if obtained, apparently will not benefit employers in Puerto Rico who are not subject to federal taxation. To date there is no local initiative to grant local tax incentives, payroll subsidies or other financial assistance to employers in Puerto Rico who will be impacted by the minimum wage increase.

Since the increase in the federal minimum wage seems to be fast tracked, in our opinion the various initiatives at the local legislative level will probably continue dormant. (*See*, House Bill 1714, which would establish a local minimum wage of \$5.40, effective immediately; and 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.)

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 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.

Victims of Domestic violence may have a right to receive unemployment benefits

House Bill 2134 proposes to amend the Employment Security Act, which provides unemployment benefits, to authorize benefits from the General Unemployment Fund to victims of domestic violence who abandon their employment to ensure their safety and/or emotional integrity or the safety and/or emotional integrity of their children. The proposed language states that these benefits would not be charged to the employer's account.

Clients To Pay Trucker's Worker's Comp

Senate Bill 753 intends to require the *client* who uses independent truckers to include the truckers in the client's "worker's accident compensation insurance" policy and pay for the trucker's coverage. The bill was passed in the Senate, received a positive report (without amendments) from the House Labor Affairs Committee and was referred to the House Rules and Calendar Committee.

Therefore, absent prompt lobbying by the business community, the bill's passage is probable.

COURT DECISIONS

Overtime and Vacation Leave

The Puerto Rico Supreme Court recently issued a decision that may impact compensation practices for non-exempt employees related to (1) whether time worked on the seventh consecutive day that also coincides with weekly overtime needs to be paid at a rate *greater* than double time; (2) the impact of shift differentials on overtime pay rates; (3) whether small periods of time worked during the established meal periods can be discarded from payment under the *de minimis* rule applicable to regular and overtime hours; (4) under what circumstances can an employee be permitted to not exhaust all accrued vacation leave in a consecutive day manner; and (5) the consequences of not obtaining the employee's consent to fraction the use of accrued vacation leave. *Jiménez Marrero v. General Instruments, Inc.*, (PR Sup. Ct. Opinion January 19, 2007).

After an extensive examination of the historical development of the regulation of overtime and vacation leave for non-exempt (hourly) employees under Puerto Rico law and the "mandatory decrees," the Court *held*:

1. Time worked on the seventh consecutive day that also coincides with weekly overtime need only be paid at a *double*, not at a triple rate of pay.
2. If an employer's policies simply provide for a deferential (premium rate) for certain shifts, *the time worked during the hours of that shift* by an employee whose *regular* shift is not subject to the deferential, must include the premium in determining the regular rate of pay for overtime purposes.
3. The *de minimis* rule that permits employers to discard insubstantial or insignificant periods of time work for regular and overtime purposes *is not* applicable to the time worked during the

established meal period, at least when the time can be determined with certainty and precision.

4. In order to be excused from having to require that the employee exhaust all accrued vacation leave in a consecutive day fashion, the employer must be able to prove that (a) that there was an agreement between the employer and the employee to divide/fraction de vacation leave and (b) the employee enjoys at least 5 consecutive working days as vacation leave during the year.
5. Failure to comply with the two requirements for the fractioning of the vacation leave, however, does not invalidate the vacation leave granted, nor does it entitle the employee to the concession of such vacation days again in a consecutive fashion. The only remedies available against the employer are of a criminal nature (which includes incarceration and/or a fine) or the Puerto Rico Secretary of Labor and Human Resources can seek an injunction in the court to ensure future compliance.

In light of the *General Instruments*, if an employer wishes to limit the shift differential payment to only those employees who *regularly* work the premium shift, a clear announcement to that effect must be made. Otherwise, this decision requires that the differential be paid to and included in the regular rate of pay of even those employees regularly working on the non-premium shifts, but whose occasional overtime may result in the employee working some of the hours of the premium shift.

With regard to the splitting of vacation leave, the decision does not address what type of documentation or evidence is required in order to prove that both the employer and employee agreed to the non-consecutive day use of the vacation leave. This is an issue that each employer should examine further, in light of its particular operations.

ERISA: Failure to follow claims procedure regulations can lead to reversal of a benefits denial

On December 19, 2006, the First Circuit decided a case that highlights the importance of proper handling of employee disability benefits claims. *Bard v. Boston Shipping Assoc.*, ___ F.3d. ___, 2006 U.S. App. LEXIS 31137 presents an example of a case where the courts grant a meaningful remedy where ERISA plan administrators violated the statute's claims procedure requirements.

Bard involves the denial of disability benefits by a multi-employer trust fund. After various years of considering the claim, the trust fund denied it asserting that the employee had not presented proof that his disability began before his employment terminated.

The First Circuit decision focused on the Plan's several procedural missteps in handling the claim. Generally, the Court concluded that the Plan had mismanaged plaintiff's benefits claim by:

1. Misinterpreting its own precedent regarding the denial of benefits to employees after they have ceased work and what being an "Employee" or "Participant" entails;
2. Failing to provide proper notice of the initial denial of his claim and the specific rules that warranted the denial of his claim;
3. Not properly providing written or electronic notification of the denial;
4. Not having an intermediate appellate body to review the denial (the Plan violated the claims procedure requirements when it allowed the same individual to review the employee's appeal as had originally evaluated and denied his claim);
5. Failing to consult an appropriate medical expert when reviewing the employee's claim and unreasonably refusing to take into account updated medical records submitted by the employee's physicians; and
6. Failing to comply with the time limits outlined in the claim procedure regulations for making a decision on Bard's appeal and notifying him of that decision.

The First Circuit seems to have been specially bothered by the failure of the ERISA-required Summary Plan Description (SPD) to give clear notice to employees that they must be permanently and totally disabled before termination of their employment in order to be entitled to disability benefits.

The First Circuit stressed the referred procedural violations were not merely technical, but prejudiced the employee. For instance, the failure to notify claimant of the basis for the denial of his benefits claim precluded the employee from knowing the type of evidence he needed to submit to challenge the denial.

The ambiguity of the SPD language and the speckled procedural history of the claim, led the court to rule that claimant's interpretation of the ambiguous SPD language was reasonable and concluded that he was entitled to the pursued benefits.

FAILURE TO HIRE RETALIATION CLAIM

Normally, individuals suing for failure to hire should have applied for a specific position rather than generally applying for work. In a case of first impression, the First Circuit has recently held that applicants must submit an application for a specific vacant position as a pre-requisite to a retaliatory failure-to-hire case. In *Vélez v. Janssen Ortho, LLC*, 467 F.3d 802 (1st Cir. 2006), an employer fired an employee who had previously filed a sexual harassment lawsuit. A year after her termination, the former employee sent two letters to the employer asking to be rehired. Three years after her termination, she sent two more letters asking to be rehired in "any position available."

The employee sued her former employer alleging that she was not hired as the result of her previous sexual harassment complaint. The First Circuit disagreed.

In essence, the Court concluded plaintiff had not proven she had suffered an "adverse employment action," a pre-requisite to present a failure-to-hire retaliation claim. Mainly, the Court held that in

the absence of a specific job application, a failure to hire claim should not prosper.

Plaintiffs alleging failure to hire claims must be able to establish that they applied for: (a) a particular position, (b) which was vacant, and (c) for which the employee was qualified. In its ruling, the Court held that employers should not be exposed to Title VII claims when applicants present open-ended requests for employment. Doing so, would require employers to review an applicant's generally stated credentials whenever a position becomes available.

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:

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