Labor & Employment Newsletter

February, 2007

MASSACHUSETTS CHILD LABOR LAWS AMENDED

On his final day in office, former Massachusetts Governor Mitt Romney signed a bill making significant changes to the Massachusetts Child Labor Laws. The new law, which became effective on January 3, 2007, affects minors' working hours, requires additional adult supervision, sets forth revised permitting procedures, and imposes a new set of civil penalties.

The revised law allows 16 and 17 year-old minors to work until 11:30 p.m. on nights not preceding a school day, where they were previously prohibited from working later than 10:00 p.m. This rule applies to all business establishments, except for restaurants and race tracks, where minors are still permitted to work until 12:00 midnight on nights not preceding a school day. Additionally, the law now allows establishments that stop serving customers at 10:00 p.m. to employ minors until 10:15 p.m. With limited exceptions, the revised law also prohibits the employment of any child after 8:00 p.m., unless the child is under the "direct and immediate supervision of an adult acting in a supervisory capacity" and who is on-site or reasonably accessible. Finally, the law prohibits the employment of a minor in any job requiring the use or possession of a firearm.

The legislation also has changed the application and permit process for working minors. Previously, the law required work permits only for 14 and 15 year-olds, and educational certificates for 16 and 17 year-olds. Now, all children under 18 must apply for and obtain a work permit before starting a new job. (In addition, a Physician's Certificate of Health is required for 14 and 15 year-olds).

Finally, the revised child labor law establishes a new set of civil penalties, to be enforced by the Massachusetts Attorney General's Office. The Attorney General now has the authority to issue written warnings or civil citations accompanied by the following fines: (a) up to $250 for the first violation; (b) up to $500 for the second violation; and (c) up to $2,500 for the third and each subsequent violation. These fines may be issued for *each separate instance* in which a minor is required to work in violation of the law's provisions. Further, in determining the number of previous violations when assessing the penalty, the Attorney General will look at the establishment's practices over the prior 3 years.

The text of the new law is available at: www.mass.gov/legis/laws/seslaw06/s2060426.htm. The work permit application can be downloaded at: www.mass.gov/dos/youth/youth_application.pdf.

MASSACHUSETTS MINIMUM WAGE INCREASED

Effective January 1, 2007, the Massachusetts minimum wage was increased from $6.75 to $7.50 per hour. Additionally, a second raise to $8.00 per hour is scheduled to become effective January 1, 2008. With regard to tipped employees, employers may pay tipped workers at the rate of $2.63 per hour, if the tips they receive regularly total at least $20 per month and their average hourly tips, when added to the $2.63 rate, equal or exceed the minimum wage. The Massachusetts Wage & Hour Laws Poster has been updated and is available at the Office of the Attorney General's website: www.ago.state.ma.us/filelibrary/Employment_MinWage2007.pdf.

EEO-1 FORM REVISED

The EEOC has made several changes to the EEO-1 form and the information-gathering requirements which become effective this year. First, the race and ethnicity categories for which information must be collected have been revised as follows: (1) Asian or Pacific Islander has been divided into two categories – Asian and Native Hawaiian or Other Pacific Islander; (2) Black has been renamed Black or African-American; (3) Hispanic has been renamed Hispanic or Latino; and (4) the addition of a new category titled "Two or More Races." The revisions also encourage companies to ask employees to self-identify, and to rely on visual identification methods only when the employee refuses to do so. The EEOC also has made changes the EEO-1 job categories. The Officials and Managers category has been split into two subcategories: Executive/Senior Level Officials and Managers (who plan and direct policy, set strategy and provide overall direction); and First/Mid-Level Officials and Managers (who direct implementation or operations within parameters set by the

Executive/Senior Level Officials and oversee day-to-day operations). The revised EEO-1 form also will move business and financial occupations from the Officials and Managers category to the Professionals category. Employers must begin to use the revised EEO-1 form for the reporting period beginning September 30, 2007.

WORKER ELIGIBLE FOR FMLA LEAVE DESPITE 5-YEAR BREAK IN EMPLOYMENT

In a case of first impression, the First Circuit Court of Appeals has ruled that an employee, who had just returned to employment with a car dealership after a 5-year break in employment, was eligible for benefits under the Family and Medical Leave Act. The case, *Rucker v. Lee Holding Co.*, involved a salesman who had worked for a car dealership for 5 years, left, and then returned to the company 5 years later. The salesman began a medical leave of absence 7 months into the second period of employment and was discharged 2 months later.

The Court of Appeals found that the employee was eligible for FMLA leave, even though he had only been with the company for 7 months since his return. The Court determined that the employee's prior period of employment could be included in determining whether he had been employed by the company for at least 12 months, as required by the FMLA. Noting that the statute does not specifically address the break-in-service issue, the Court turned to a Department of Labor regulation which states that the 12 months an employee must have been employed to qualify for FMLA benefits need not be consecutive. The regulation, however, is ambiguous as to whether some sort of continued relationship is required during the break (such as an unpaid leave of absence). The Court adopted the DOL's reasoning set forth in its *amicus* brief, which argued that non-consecutive periods of employment count, even if the employee did not maintain any continuing relationship with the employer during the break in service. The Court concluded that earlier periods of employment may be counted towards the 12 month requirement even in the case of the "complete separation of an employee from his or her employer for a period of years."

It is unclear, however, whether all periods of prior employment now count towards the 12-month requirement. The DOL stated that a break in service longer than 5 years would be at the "outer bounds" of what the DOL would deem reasonable. However, the Court refused to adopt any such rule. Until the DOL issues further guidance on this issue, employers should assume that all prior periods of employment count towards the 12-month requirement. Further, companies should ask all applicants about previous periods of employment with the company on their employment applications or during the interview process.

FIRST CIRCUIT COURT OF APPEALS CLARIFIES BURDENS OF PROOF UNDER USERRA

In *Velazquez-Garcia v. Horizon Lines of Puerto Rico, Inc*., the First Circuit Court of Appeals determined that a terminated employee could proceed with a discrimination claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA) without showing that the employer's stated reason for his discharge was a pretext for discrimination. The former employee, who had enlisted as a Marine reservist after 3 years of employment with the company, alleged that his supervisors complained and pressured him about having to reschedule his shifts during his weekend and annual training sessions and that his coworkers and one supervisor frequently called him names such as "G.I. Joe" and "little lead soldier." The company discharged the employee after learning that he was operating a side-business cashing checks for other Horizon employees, which he had been doing for the prior 7 months. The termination also occurred shortly after the employer had recovered all of the salary that it was owed for those periods during which it paid the employee while he was performing (and receiving government compensation for) his military duties.

The District Court had awarded the employer summary judgment, stating that the employee failed to show that the employer's stated reason for his termination was a pretext for discrimination. The First Circuit Court of Appeals reversed, stressing that the District Court had applied the wrong standard. The Court of Appeals stated that the language of the statute and its legislative history requires a two-part analysis with respect to USERRA claims. The employee must first prove that the military service was *a motivating factor* in the employer's decision. The employer must then prove that the adverse employment action would have been taken regardless of the employee's military service in order to avoid liability.

This burden-shifting scheme is quite different from the three-part test normally applied in discrimination cases under Title VII of the Civil Rights Act, and other anti-discrimination statutes, which places the ultimate burden of proof on the employee to show that the employer's action was a pretext for discrimination. By contrast, under USERRA, the employer must prove that the stated reason was not a pretext and that it would have made the same decision regardless of the employee's military status. The *Velazquez-Garcia* Court concluded that the employee had

produced sufficient evidence that his military status was at least a motivating factor in his dismissal. Based on these facts, the Court determined that whether the discovery of the check-cashing business was a pretext for the employer's decision was a jury question.

This case sends the message to employers that obtaining summary judgment in USERRA cases will be significantly more difficult than in cases brought under other discrimination statutes. Any adverse decisions with regard to employees who are or have been members of the military should be made carefully and supported with adequate documentation.

EMPLOYEE CAN SUE FOR GENDER BIAS BASED ON MOTHERHOOD

A Massachusetts Superior Court judge has ruled, in another case of first impression, that a paralegal who claimed that she was repeatedly denied promotions because she was the mother of a young child could sue her employer for sex discrimination. The plaintiff, who had previously received positive evaluations and increased responsibilities, alleged that after becoming pregnant and giving birth to her daughter, she noticed a negative attitude towards her, received increased scrutiny and criticism of her performance, and was told that the birth of her child led company managers to conclude that she was no longer interested in a promotion.

The Court concluded that stereotypical remarks and attitudes about the "incompatibility of motherhood and employment" can constitute evidence of gender bias. The Court reasoned that such statements reflect a discriminatory animus towards women, based on antiquated ideas about a woman's role in society. Rejecting the employer's argument that the alleged acts were not discriminatory because parenthood is not a protected class, the Court stressed that discrimination is just as "corrosive" when it results in the advancement of a woman who is not a mother over one with children for that reason. The Court concluded that the plaintiff stated a *prima facie* case of gender bias based on the employer's stereotypical belief that she could not be both a hard worker and good mother.

In reaching its decision, the Court relied on federal cases from other jurisdictions and one Massachusetts Commission Against Discrimination ruling. It is questionable whether this decision will be upheld, if it is appealed. However, this case signals a need for employers to update their efforts to train supervisors on discrimination issues, particularly with regard to beliefs and stereotypes concerning employees' gender, which may include parental status.

E-MAILS PROTECTED BY ATTORNEY-CLIENT PRIVILEGE DUE TO EMPLOYER'S INADEQUATE POLICY

In *TransOcean Capital, Inc. v. Fortin*, a Massachusetts Superior Court judge determined that a series of e-mails exchanged between an employee and his attorney were protected by the attorney-client privilege, even though the employee sent them from his company computer and e-mail address. Although it was clear that the company owned the computer from which the e-mails were sent, the Court found that the employee did not have fair notice that the employer reserved the right to intercept and read his e-mails. In the absence of such notice, the employee would not have reasonably recognized that his personal e-mails were accessible to his employer.

The Court agreed with a prior case that held that if an employer distributes a policy that clearly warns that e-mails on the company's system may be read by the company, the employee could have no expectation of privacy with regard to e-mails sent to his attorney. However, in this case, the Court stressed that the company did not maintain or distribute a policy concerning review of e-mails on the company's network. (The Court determined that the employee handbook created by the firm to which the company outsourced its human resources functions was insufficient because the company never explicitly adopted the handbook or notified its employees of the handbook's existence). The Court concluded that the employee did not waive the attorney-client privilege by using his company e-mail address and computer to communicate with his lawyer.

Employers should review their computer usage and internet policies to ensure that they put employees on clear notice that any communications on company equipment or systems are not private and are subject to interception and review by the employer.

Manchel & Brennan, P.C., 199 Wells Ave, Suite 301, Newton, MA, 02459 Tel 617-796-8920 Fax 617-796-8921 www.manchelbrennan.com
©Manchel & Brennan, P.C., 2007. The information contained herein is for general informational purposes and is not offered as, and should not be construed as, legal advice with respect to any specific matter.