Greater Protections for Delaware Employees = Additional Training and Awareness for Management

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Delaware's 148th General Assembly recently enacted legislation that expands the landscape of protections afforded to employees and applicants for employment under Delaware law. Prior to the new legislation, Delaware law, similar to federal law, provided protections for applicants and employees based on the protected classes of race, color, age, religion, sex, and disability. As one of the more progressive states, Delaware law also provided protection for employees and applicants based upon their genetic information, gender identity, sexual orientation, volunteer fire fighter status, and their status as victims of stalking, domestic violence, or sexual assault. The new legislation provides even further protection and includes additional classes of protection, including protection related to an employee's or applicant's reproductive health decisions and family caregiving responsibilities. In addition to enacting this expanded coverage, the General Assembly passed laws on wage disclosure and clarified that workers' compensation is an exclusive remedy for on-the-job injuries with limited specific exceptions, among other employment-related legislation. The following summary of the new employment laws in Delaware will help management in any Delaware business be prepared to comply. Compliance typically begins first with training all management employees.

Employee Protection from Discrimination for Reproductive Health Decisions

Many individuals in the United States are receiving fertility treatments and medications to start a family and are starting families at a relatively older age. Further, many Americans have strong views on fertility aids, birth control, and abortion. The Delaware legislature recognized these dynamics and their impact on the workplace and, accordingly, enacted a law to protect individuals in the workplace regarding their personal reproductive health decisions. The lead sponsor of the bill, Debra Heffernan, stated:

> We've heard the stories over and over — employees feel pressured by their bosses to disclose the deeply personal decisions they have made or intend to make related to raising a family. We believe that an employee's plans for his or her family should have no bearing on business decisions made by their employer.

House Bill No. 316, also known as "Not My Boss' Business" which takes effect on December 30, 2016, prohibits employment discrimination based upon an employee's "reproductive health decisions." Under this new law, employers cannot refuse to hire or discriminate against an applicant or discriminate against

or discharge an employee because of any of the employee's or applicant's "reproductive health decisions." A "reproductive health decision" is defined under the statute as a decision related to the use or intended use of a particular drug, device, or medical service related to fertility control, or the planned or intended initiation or termination of a pregnancy. Notably, this new law does not address personal opinions regarding reproductive health held by applicants or employees; rather, the focus is on protecting individuals from discrimination based upon their personal reproduction decisions. This state law does not create any accommodation obligations for employers, but individuals may qualify for accommodations and/or leave under federal law. Also of note, the legislature made clear that this new law does not create any new obligations or change any existing obligations related to insurance coverage of reproductive health care.

As a side note, House Bill 316 is an amendment to the Delaware Discrimination in Employment Act ("DDEA") (state law equivalent to Title VII), which sets forth all of the protected classes against discrimination and retaliation in employment for Delaware employers with four or more employees. The DDEA provides for an exemption for religious organizations for discrimination relating to gender identity and sexual orientation. However, the new amendment does not provide a similar exemption for religious organizations for reproductive health decisions. Thus, all Delaware employers with four or more employees must comply with this new law.

Employee Protection from Discrimination for Family Caregiving Responsibilities

Another expansion of protection for employees and applicants is House Bill No. 317, which takes effect December 30, 2016. It protects employees and applicants for employment from discrimination based upon their responsibilities as family caregivers. "So often, the role of primary caregiver for an aging parent or a child with special needs is filled by a daughter or mother who also has a full-time job," said Rep. Kim Williams, D-Newport, sponsor of House Bill No. 317. "No one should have to choose between earning a living and making sure that a loved one is cared for properly. Employers should judge people on how well they perform their jobs, not the responsibilities they may have at home."

The new law provides that employers cannot discriminate against employees because of their caregiving responsibilities. More specifically, pursuant to House Bill No. 317, an employer cannot refuse to hire, discharge, or otherwise discriminate against an employee because of the employee's family responsibilities. Additionally, an employer cannot segregate or deprive anyone of employment opportunities or otherwise adversely affect an individual's status as an employee because of the person's family responsibilities. Under the new law, "family responsibilities" means the obligation of an employee to care for any family member who would qualify as covered under the Family Medical Leave Act ("FMLA"). Generally, covered family members are the employee's spouse, son, daughter, or parent. Each of these terms is further defined in the FMLA regulations. This new law applies regardless of whether the employee is FMLA eligible.

It is important to note that this law does not create an accommodation obligation for employers related to caregiving responsibilities. Employees, therefore, must still fulfill the essential functions of the job and follow all other employment requirements, such as attendance standards. Employers may still discipline for attendance and other work-related violations that are outside of FMLA, the Americans with Disabilities Act, and other leave protections, provided they do so in a fair, consistent, and non-discriminatory fashion. Nevertheless, this law prohibits the employer from making job-related decisions, for example, based on the fact that an employee has multiple young children, a disabled child, or a sick parent.

Employers Cannot Prohibit Employees from Commiserating About Wages

Although employers often in the past have had practices or policies prohibiting employees from disclosing or discussing their wages, in Delaware, such practices are no longer permitted. In Delaware, employees are now free to discuss their compensation, even bonuses, with other employees or third parties. The intent of this new law is to allow employees to discuss compensation with other employees to ensure they are being paid fairly. Now, for example, women employees, by asking a male colleague the amount of his compensation or hearing another employee mention his bonus amount, more easily can ascertain the wages and bonuses of their male counterparts to determine whether they are receiving equal pay for equal work. "Wage secrecy is one of the big barriers that keeps women from earning as much as their male colleagues for the same work. Though it can be considered taboo to talk about fellow workers' pay, some companies actually prohibit it outright," said House Bill No. 314 sponsor Rep. Helene Keeley, D-Wilmington South. "We want all employees, not just women, to be able to talk openly about wage fairness in the workplace."

Specifically, House Bill No. 314 makes it unlawful for an employer to prevent an employee from discussing his or her wages or the wages of another employee. Under this new law, employers cannot require that an employee refrain from inquiring about, discussing, or disclosing his or her wages or the wages of another employee. In addition, the new law makes clear that it is unlawful to require an employee to sign a waiver or other document that would deny the employee the right to disclose his or her wages, and prohibits an employer from discharging, formally disciplining, or otherwise discriminating against an employee for discussing his or her wages or the wages of another employee. Notably, the new law does not require employers to disclose wages of employees nor employees to disclose his or her wages. Thus, an employee lawfully may choose not to tell others his or her compensation, even if asked. Moreover, this law does not prevent an employer from requiring employees in certain positions, such as a manager, to treat other employees' compensation and personnel data in a confidential manner; however, this manager would be free to disclose his or her own salary or ask another manager about that other manager's compensation. This new law took effect when signed by Governor Markell on June 30, 2016.

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Delaware Division of Unemployment Has the Means and Method for Collecting Unpaid Overpayments and Tax Assessments

House Bill No. 160 clarifies that the Delaware Division of Unemployment Insurance is authorized to collect unpaid claimant overpayments of unemployment benefits and unpaid employer unemployment tax assessments by intercepting state and federal tax refunds due to the claimant or employer. This is already authorized by the Delaware Code for state tax refunds, and is both authorized and required as a condition of receiving federal unemployment compensation funds. This new law took effect when signed by Governor Markell on June 28, 2016.

Delaware Workers' Compensation Statute Remains the Exclusive Remedy for Work Injuries with Minor Exceptions

Although not yet signed by the Governor, should this bill become law, House Bill No. 308 would clarify that even though an employee is bound by Delaware's workers' compensation law with regard to compensation for personal injury or death arising in the course of employment, regardless of the question of negligence, the injured employee can still obtain or retain uninsured and underinsured motorist benefits and personal injury protections.

House Bill No. 308 clarifies the issue raised in Simpson v. State, 2016 WL 425010 (Del. Super. Jan. 28, 2016), in which the plaintiff employee sought underinsured motorist benefits from her employer, the State of Delaware, and her personal insurance carrier for injuries sustained in the course of employment. Simpson was injured in an accident with an underinsured motorist while driving a car owned by the state. Simpson received workers' compensation benefits for her injuries, but she wished to collect benefits from her own personal insurance against underinsured motorists and from the state, which self-insured its employees against underinsured motorists. Simpson's insurance carrier informed her that she was prevented from accessing such benefits until she had exhausted the state's coverage as the primary policy on the vehicle involved in the accident. The state claimed Simpson was not eligible for these benefits because she had already collected workers' compensation benefits as her exclusive remedy.

The Delaware Code already allows employees to collect both workers' compensation and their own insurance policy benefits. However, in this case, the workers' compensation insurer and the underinsured motorist insurer were the same entity, the State of Delaware. The court believed that if an individual could get both types of benefits, he or she would be compensated twice for the same injury. The court then suggested that the legislature introduce clarifying language if it wanted to support the position that the phrase "exclusion of all rights and remedies" did not apply to other insurance provided by the employer. Otherwise, the state in the Simpson case was not required to pay the plaintiff anything beyond the workers' compensation benefits she had already received. As a result of this decision, the General Assembly acted to ensure that employees, including state employees, had the protection of workers' compensation benefits as well as motorist and personal insurance benefits, if applicable.

This new law will take effect if and when signed by the Governor.

Statute of Limitations for Discrimination Claims Increases from 120 Days to 300 Days

The Delaware Department of Labor's Office of Anti-Discrimination (the "DDOL") has the exclusive jurisdiction to investigate employees' state law claims of discrimination or retaliation made against their employer. Current Delaware law provides that for charges based solely on Delaware state law, employees must file their charge of discrimination with the DDOL within 120 days of the alleged unlawful employment action committed by their employer, setting forth a concise statement of facts, in writing, verified and signed by the employee or applicant for employment. Under Senate Bill No. 214, employees and applicants would have 300 days to file such charges against employers. The legislature's intent was to make Delaware's statute of limitations consistent with the statute of limitations under federal discrimination law. Senate Bill No. 214 has not yet been signed by the Governor, but if signed by the Governor will take effect when signed.

As a practical matter, Senate Bill No. 214 is not likely to materially increase the number of claims against employers filed by employees and applicants with the DDOL. Employees and applicants already have the ability to file a charge of discrimination with the DDOL within 300 days, as long as they are simultaneously filing their charge with the EEOC under federal anti-discrimination law, which is accomplished by simply checking a box on the charge form. In reality, most employees automatically file charges with both the EEOC and the DDOL, and as a result, most employees already have 300 days to bring their claim against their employer. The employees who will benefit from this change in the law are those who work for employers with fewer than 15 employees, as they are not protected by federal anti-discrimination laws and only have 120 days to file a charge of discrimination.

What Do Employers Need to Do?

Employers should ensure that they are, or will be, in compliance with these new laws and potential new laws as of their effective dates. One critical step is to educate and train management about these new laws. Management must be aware of these issues, particularly related to the increase in protected classes under anti-discrimination protections, and know to seek human resources and legal guidance before implementing any employment decisions that could put the

company at risk. These new laws also may require revisions to existing employment policies, such as Equal Employment Opportunity anti-discrimination, and confidentiality policies.

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