Third Quarter, 1996

LABOR UPDATE

Recent Developments in Labor and Employment Law

NEW ILLINOIS JOB REFERENCE LAW GIVES EMPLOYERS FLEXIBILITY - - BUT LEAVES MUCH UNANSWERED

Illinois employers have rightly complained for years that they have been forced to take a "name, rank and serial number" approach to job references, due to fears that a former employee might sue them for defamation. Compounding matters, recent cases have arisen where employers have been sued under a "negligent reference" theory when the companies failed to disclose that a former employee committed violent acts in the course of his or her employment.

Trapped between saying too little or too much, Illinois employers greeted with open arms the passage of the Employment Record Disclosure Act, P.A. 89-470, signed into law on June 13, 1996. The law provides that any employer who, upon request of a prospective employer or a current or former employee, gives "truthful written or verbal information, or information that it believes in good faith is truthful, about a current or former employee's job performance, is presumed to be acting in good faith and is immune from civil liability for the disclosure and the consequences of the disclosure." This law not only protects the employer, but also any "authorized employee or agent acting on behalf of an employer," when giving a job reference.

The Act gives rise to a rebuttable presumption that the employer, or its authorized agent, has made a reference in good faith. However, this presumption may be rebutted if it is established by a preponderance of the evidence that the information disclosed "was knowingly false or in violation of a civil right of the employee or former employee."

While the language of the new law appears to grant employers broad immunity, many critical questions remain. For instance, the Act does not define "job performance," to which the reference may solely relate. Job performance clearly does not mean the personal aspects of the employee such as his or her political preference, sexual orientation or the like. On the other hand, job performance would undoubtedly allow an employer to comment on the attendance, knowledge and skills of the

employee. Borderline questions remain, however. At this point, it is unclear whether the Act would extend to comments on employee characteristics which may be both personal and performance related, such as appearance and cleanliness.

An employer's immunity is lost when information is disclosed that is "knowingly false." This standard appears to give an employer great flexibility in giving references. However, the courts may give a broader reading to this phrase and allow civil liability where an employer acts with "reckless disregard" when giving a reference.

Additionally, the good faith presumption may be overcome by showing that the employer disclosed information in violation of the employee's civil rights. The Act does not define "civil right," but this presumably refers to those protected rights set forth in the various state discrimination statutes. Thus, for example, if an employee could establish that an employer disclosed information about his or her disability, marital status or religion, then the employer's immunity could be lost.

While the Employment Record Disclosure Act provides employers with much needed flexibility in giving references, caution and prudence must still be used. Some practical tips include: (1) Do not respond to a reference inquiry without a request, preferably in writing, from a prospective employer or a current or former employee; (2) When possible, obtain a written release/consent from the employee for the reference; (3) Limit your comments to strictly the employee's job performance; (4) Keep records of all references given; and (5) Seek legal advice when in doubt.

* * * * * *

STATE SUPREME COURT SPEAKS: "NO-SPOUSE" RULES ARE LEGAL

Overruling precedent established by the Illinois Human Rights Commission and an Illinois Appellate Court, the Illinois Supreme Court recently held that policies which prohibit spouses from working together do not violate the Illinois Human Rights Act ("the Act"). The Court ruled that such policies do not run afoul of the Act's ban on marital status discrimination.

More than ten years ago, the Illinois Human Rights Commission broadly interpreted this ban to extend beyond discrimination based on "the legal status of being married, single, separated, divorced, or widowed" (as the term "marital status" is defined in the Act) and to <u>also</u> encompass discrimination based on the identity of one's spouse. As reported in a previous edition of the *Labor Update*, the Commission's interpretation was judicially endorsed by one Illinois appellate court, which invalidated a school district policy precluding one spouse from supervising another.

Despite this precedent, the Supreme Court refused to extend the Act that far. Faced with

claims brought by a pair of state troopers forced to work separate patrols only after they were married, the Court declared that the human rights law does not prohibit no-spouse rules in the workplace. It reasoned that if the legislature had intended "marital status" to encompass a particular individual's relationship to another employee, it would have specifically provided so. Since the legislature did not, the Court refused to broaden "the plain language of the statute."

Despite this ruling, employers considering adopting or reinstating any form of anti-nepotism policy should proceed cautiously. Although such policies may no longer give rise to claims of marital status discrimination, they can still foster claims of sex discrimination if enforced unequally (e.g., if one gender of spouse suffers adverse treatment more often than its counterpart in the application of a no spouse rule). Accordingly, employers should have sound reasons for implementing such policies and administer them consistently. *Boaden v. Department of Law Enforcement*, 171 Ill.2d 230 (1996).

* * * * * *

IMPACT OF LEAVE LAW ANALYZED

The Family and Medical Leave Act of 1993 ("FMLA"), which applies to employers with fifty or more employees, allows eligible workers to take up to twelve weeks of unpaid, job-protected leave to care for a newborn, for the adoption or foster care of a child, to care for a seriously ill spouse, son, daughter or parent, or because of the employee's own serious health condition. Recently, the bipartisan "Commission on Family and Medical Leave" reported the following items to Congress regarding the impact of the FMLA:

- Between January 1994 and July 1995, less than 4 percent of eligible workers took family or medical leave;

- 60 percent of workers taking leave did so for their own serious health conditions. About 13 percent took leave to care for a newborn or newly adopted child, and 8 percent took off to care for a sick child. Roughly 15 percent took leave to care for a parent, spouse, or other close family member, and 4 percent left for maternity disability;

- The average length of leave was 10 days, and 90 percent of all leave was completed within the Act's 12-week limitation;

- Approximately 11.5 percent of workers taking leave did so on an intermittent basis. Employers cited the administrative burdens associated with such leaves as the most difficult problem arising from the Act.

- Men took parental leave in amounts comparable to women, although more men took leave to care for an ill spouse.

BITS AND PIECES

A recent survey reported that the average jury award in an employment discrimination case

was $184,000 in 1995. This average was undoubtedly inflated by a series of well-publicized multi-million dollar awards, as median awards have fallen in recent years. Statistics obtained from a federal court database show that the median jury award was $371,284 in 1990, compared to $102,000 in 1994. Discrimination plaintiffs won 46.7% of jury trials in 1990; 43.3% in 1994. Additionally, recent statistics reviewing complainants' victories at the Illinois Human Rights Commission provide further evidence of the trend away from alleged discriminatees prevailing at hearing. In 1981, 78% of complainants were victorious before the Commission. Amazingly, however, only 12% of complainants were victorious before the Commission in 1995!

* * * * *

On May 17, 1996, the Illinois eavesdropping statute was amended setting forth detailed guidelines for when an employer may "listen in" on employee telephone calls. These guidelines include: (1) Monitoring devices may only be used by companies engaged in marketing or opinion research or telephone solicitation; (2) The monitoring must be used solely for the purpose of service quality control, education or training purposes; (3) Notice must be provided and consent obtained from employees; (4) Access to a personal-only telephone line must be provided; and (5) If it is discovered that a monitored call does not relate to a marketing, opinion research, or solicitation, then the monitoring must cease immediately.

* * * * *

Local economists predict that base pay raises for non-union Chicago-area workers will range between 3.7% and 4.1% in 1997, while union workers' pay raises will be about 3.0%. These figures essentially track the current rate of inflation, and are slightly higher than this year's anticipated 3.4% to 3.8% pay raise for non-union workers and 2.9% pay raise for union workers. Surveys report that 5% of local Chicago companies plan to give no pay raises in 1997.

* * * * *

QUOTABLE

In America, anyone can become President. That's one of the risks you take.

Adlai Stevenson

Since 1984, the LABOR UPDATE has been provided as a service to clients, fellow attorneys and other friends of the Law Offices of Donald F. Peters Jr. Written entirely by this office, it is intended to provide useful information as to the matters covered, but should not be viewed as an exhaustive treatment of the subjects addressed nor as covering all significant developments in labor and employment law. The LABOR UPDATE is not intended to be a substitute for legal advice.

The LABOR UPDATE may be quoted or reproduced if credit is given to the source.