

May 16, 2013

Legislation Roundup: Maryland General Assembly Mandates that Employers Provide “Light Duty” to Pregnant Disabled Women, Leave for Military Family Members, and Creates a New Wage Law

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In May 2013, Governor Martin O’Malley signed three noteworthy statutes that will affect virtually every Maryland employer. Effective October 1, 2013, Maryland employers with 15 or more employees must provide their pregnant employees with certain reasonable accommodations beyond the requirements of the Americans with Disabilities Act (“ADA”) and the Pregnancy Discrimination Act (“PDA”). The “Reasonable Accommodations for Disabilities Due to Pregnancy Act” (SB 784/HB 804) mandates that employers provide pregnant employees who are temporarily disabled with light duty assignments or transfers to less strenuous jobs, among other accommodations. Typically, these accommodations remove essential functions from a position, rather than allowing the employee to perform the essential functions. The law also requires that employers post a notice “in a conspicuous location” and devote a section in employee handbooks that explains a pregnant employee’s right to a reasonable accommodation under the new law.

Under the “Leave – Deployment of Family Members in the Armed Services Act” (SB 12), Maryland employers must provide their employees who have worked at least 1,250 hours during the previous 12 months with the opportunity to take unpaid leave, if they so choose, to spend time with their spouse, parent, stepparent, child, stepchild, or sibling on the day he or she leaves for, or returns from, active duty outside the United States.

Also, the Maryland General Assembly created a new law entitled “Lien for Unpaid Wages Act” (SB 758/HB 1130), which creates an expedited mechanism for employees to pursue certain wage claims. Effective October 1, 2013, this law provides that an employee can establish a lien for alleged unpaid wages, serve a notice of the lien on the employer, and place the affirmative burden on the employer to file within 30 days a “complaint” in circuit court setting forth its defenses. According to the law, the court must schedule an evidentiary hearing within 45 days.

The Reasonable Accommodations for Disabilities Due to Pregnancy Act

The impetus to amend the Maryland Fair Employment Practices Act (“FEPA”)¹ to include additional accommodations for pregnant employees was a recent decision issued by the United States Court

¹ Md. Code Ann., Art. 20 *et seq.*

of Appeals for the Fourth Circuit. In *Young v. UPS*,² the Fourth Circuit held that employers are not required under the ADA or PDA to provide pregnant employees with light duty assignments so long as the employer puts them on an equal footing with non-pregnant employees.

In this case, the plaintiff worked for UPS as a part-time driver. Although all drivers were required to be able to lift items weighing up to 70 pounds, plaintiff's duties generally included carrying lighter letters and packages. After plaintiff became pregnant, she asked for a brief leave of absence. Shortly thereafter, plaintiff submitted a doctor's note with a recommendation that she not lift more than 20 pounds, and she asked for an accommodation to work light duty. UPS refused these requests and would not allow her to return to work because lifting more than 20 pounds was an essential function of plaintiff's job.

Notably, UPS, as do many employers, accommodated on-the-job injuries with light duty assignments. However, UPS did not offer light duty assignments to any employee, male or female, who had a medical condition unrelated to a work injury. Plaintiff argued that the PDA requires employers, like UPS, to provide pregnant employees light duty work if it provides similar work to other employees in other circumstances. Both the U.S. District Court of Maryland and the Fourth Circuit held UPS's policy was lawful under the ADA and PDA because it was "gender-neutral" and employers are not required to provide light duty assignments to disabled employees under the ADA.

As a result of *Young v. UPS*, Maryland's General Assembly amended Maryland's FEPA to require an employer to provide certain reasonable accommodations to pregnant employees who provide notice to their employers of a temporary disability, even if the accommodation removes essential functions of the position. The statute offers no explanation for when a pregnant employee would be deemed "temporarily disabled" under the law, although this determination presumably hinges on medical documentation.

In particular, the law requires an employer to consider the following accommodations for a pregnant employee:

- Changing the employee's job duties;
- Changing the employee's work hours;
- Relocating the employee's work area;
- Providing mechanical or electrical aids;
- Transferring the employee to a less strenuous or less hazardous position; or
- Providing leave.

If an employee requests a transfer to a less strenuous or less hazardous position as a reasonable accommodation, the employer must honor the request if: (1) the employer has a policy, practice, or a collective bargaining agreement requiring or authorizing the transfer of other temporarily disabled employees (such as a policy authorizing special accommodations for employees who suffer on-the-job injuries); or (2) the employee's health care provider advises the transfer and the employer can transfer the employee without (a) creating an additional position; (b) discharging the employee; (c) transferring any employee with more seniority than the employee requesting the accommodation; or (d) promoting any employee who is not qualified to perform the job.

The law does not change an employee's obligation to engage in the interactive process. Moreover, the law states that an employee must provide an employer with a health care provider's certification that includes the date the reasonable accommodation became medically advisable, the probable duration of the accommodation, and an explanatory statement as to the medical advisability of the accommodation.

Significantly, the amendment to Maryland's FEPA also states that an employer must post in a conspicuous location—and include in any employee handbook—information concerning an employee's rights to a reasonable accommodation under the new law.

Leave – Deployment of Family Members in the Armed Services Act

As noted above, under the Leave – Deployment of Family Members in the Armed Services Act, employees who have worked for an employer for one year and at least 1,250 hours during the previous 12 months have the opportunity to take unpaid leave, if they so choose, to spend time with their immediate family member (*i.e.*, spouse, parent, stepparent, child, stepchild, or sibling) on the day he or she leaves for, or returns from, active duty outside the United States. In other words, an employer may not require an employee to use sick, vacation, or other "paid time off" leave when taking leave under this new law.

² 707 F.3d 437 (4th Cir. Jan. 9, 2013).

The Act defines “Employer” as a person or entity that (1) employs 50 or more individuals; and (2) is engaged in a business, industry, profession, trade, or other enterprise in the state. Because “Employer” is not defined as employing 50 or more individuals *in the state*, this law seems to apply to even one employee who is employed in Maryland, and who otherwise meets the one year and 1,250 hour requirement. Judicial and regulatory interpretation in this regard will be important.

An employer, however, may require an employee requesting leave to submit “proof to the employer verifying that the leave is being taken” for this purpose. Notably, this law does not require an employee to provide advance notice of the leave.

Lien for Unpaid Wages Act

The Lien for Unpaid Wages Act, modeled after the Maryland Contract Lien Act, provides a mechanism for an employee to file a lien for unpaid wages on an employer’s real or personal property *before* a lawsuit is filed in court. In addition, the law creates an expedited process by which a court must determine whether to issue an order establishing a lien for unpaid wages within 45 days after the date on which the complaint is filed. Given this timetable, it is unclear whether the parties would exchange written discovery before the evidentiary hearing and whether the parties would brief the legal issues after the hearing.

Under the new wage law, an employer must file a complaint setting forth its defenses in the circuit court for the county where the real or personal property is located within 30 days of service of the notice of lien. The complaint must include an affidavit containing a statement of facts that support any defenses raised. The complaint should also request an evidentiary hearing. The employee, however, still must prove his or her case based on a preponderance of the evidence. If the employee succeeds, the employee is entitled to court costs and reasonable attorney’s fees. In addition, if the employer fails to file the complaint within 30 days after notice is served, the lien for unpaid wages is formally established. Because the statute does not offer an employer any additional defenses after the lien is imposed, meeting the 30-day filing deadline is crucial.

Although the term “wages” is not defined, the law expressly excludes “commissions.” Presumably, a wage under this law will include all other compensation due to an employee for employment, as defined by the Maryland Wage Payment and Collection Law.³ Such compensation includes a bonus, fringe benefit, overtime, or any other remuneration promised for service. Commissions were likely excluded from the law because whether an employee has actually “earned” the commission under an agreement or the employer’s commission policy is a fact-intensive analysis. Because alleged “off the clock” work and misclassification also involve complicated legal issues and a similar factual analysis, it is a mystery how a court will be able to resolve these issues in such an expedited fashion.

The Maryland Department of Labor, Licensing, and Regulation will soon adopt regulations to establish the content of the Notice, Complaint, and Wage Lien Statement.

What this Means for Maryland Employers

Employers in Maryland should educate themselves, or speak with their employment counsel, regarding the amendment to the Maryland Fair Employment Practices Act which mandates that employers provide “light duty” assignments, among other new potential accommodations, to pregnant employees who are temporarily disabled. Moreover, employers should consult with their employment counsel concerning the new “posting” and “handbook” requirements by which employees are informed of these new requirements and to what extent an employer should modify its leave policies to ensure adherence to the Leave – Deployment of Family Members in the Armed Services Act.

Employers in Maryland should also review the Lien for Unpaid Wages Act and monitor the Department of Labor, Licensing, and Regulation’s website for developments on supporting regulations. If an employer is served with Notice of a Lien for unpaid wages, it should immediately contact employment counsel because of the short timeframe to respond and to prepare for a hearing.

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3 Md. Code Ann., Labor & Employment, §3-501, *et. seq.*