K&LNG Alert

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Pennsylvania Employment Law

New Pennsylvania Legislation Assists Employers

On June 15, 2005, two pieces of legislation favorable to employers in the Commonwealth of Pennsylvania were signed into law. Each piece addresses different problems confronted by Pennsylvania employers.

Immunity From Job Reference Liability

An employer interviews a job applicant but wants to obtain information about the applicant from a previous employer. The previous employer would like to provide information but refuses because the former employee may sue if unflattering information is provided. This situation is beneficial to no one except a poorly performing employee.

The Employer Immunity From Liability For Disclosure of Information Regarding Former or Current Employees becomes effective on August 14, 2005. It provides protection from liability to an employer, and to anyone acting on the employer's behalf, who discloses in good faith certain information about a former or current employee. The information disclosed must:

- relate only to the employee's job performance; and
- have been requested by the employee or the prospective employer.

The employer is immune from civil liability unless lack of good faith is proven. The presumption of good faith can be rebutted only by clear and convincing evidence that the employer disclosed information that:

- the employer *knew* was false or in the exercise of due diligence *should have known* was false;
- the employer *knew* was materially misleading;
- was false and rendered with *reckless disregard* as to the truth or falsity of the information; or
- was prohibited from disclosure by any contract, civil, common law or statutory right of the current or former employee.

The legislation further provides that the immunity created by the legislation does not affect other immunities or defenses to which the employer may be entitled. For example, if an employer is sued for defamation because it gave adverse information about an employee to someone other than a prospective employer, the employer could defend on the grounds that the information was true even though the disclosure did not fall within the protection of the new legislation.

In enacting this legislation, Pennsylvania joins 36 other states with similar protection. While clearly a step forward for employers, the legislation does not protect the employer against disclosures which do not comply with the legislation. Thus, the information must be about the employee's performance—it cannot include, for example, medical information, or the fact that the employee filed a discrimination charge, or similar information unrelated directly to job performance. Even though the legislation makes successful litigation against the employer more difficult, it is not a guarantee that a lawsuit won't be filed. Finally, it is unclear whether the legislation would be applicable to disclosures made prior to the effective date.

The prudent employer will continue to insist upon a written authorization and release from an employee or former employee before disclosing information and

will continue to exercise great care in selecting what information is released.

Unemployment Compensation

The second piece of legislation made two significant changes to Pennsylvania's Unemployment Compensation law. The first change reversed a Pennsylvania appellate court's determination that a corporate employer could be represented only by an attorney during unemployment compensation hearings and appeals. The second prohibits "dumping" under the state's Unemployment Tax Act.

REPRESENTATION

As we reported in an earlier Client Alert (see "A Fundamental Change for Employers in Unemployment Compensation Hearings," February, 2005), the Pennsylvania Commonwealth Court ended a long-standing practice in unemployment compensation proceedings in which corporate employers were represented either by an employee or by a non-employee representative who was not an attorney but typically an employee of a tax service. *See Harkness v. Unemployment Compensation Board of Review*, No. 150 CD 2004 (Pa. Cmwlth. February 3, 2005). The Commonwealth Court ruled that "any non-attorney advisor, consultant, advocate, manager, administrator, facilitator, and every other non-lawyer, whether employed by the respondent-employer or by a third party, engages in the unauthorized practice of law when he or she represents an employer at an unemployment compensation hearing."

Following that ruling, the State Bureau of Unemployment Compensation required that, in the context of any proceedings before a referee or appeals from a referee's determination, a corporate entity must be represented by an attorney. Absent legal representation, a corporate entity was prohibited from appealing an adverse determination of the unemployment compensation office, from submitting any evidence (other than direct testimony of a witness) and from cross-examining a claimant (or other witness) during a hearing. As a result, employers were forced to choose between presenting a much less effective case without legal representation or paying the costs of legal representation.

In direct response to the *Harkness* decision, the Pennsylvania General Assembly amended Pennsylvania's unemployment compensation law by adding Section 214, which states:

> *Representation in proceedings. — Any party in any proceeding under this Act before the Department, a Referee or the Board may be represented by an attorney or other representative. S.B. 464, Section 3.*

This simple sentence codifies the status quo pre-*Harkness* and may be interpreted to go beyond what was the custom prior to *Harkness*. Prior to *Harkness* it was common for a non-attorney representative to represent an employer in connection with proceedings before the unemployment office or a referee. However, when an appeal was filed to the Board of Review, an attorney would often be engaged to prepare and file the brief. The language of S.B. 464 expressly permits a non-attorney to represent any party, including corporate employers, in *any* proceeding under the Unemployment Compensation Law, including appeals to the Board of Review.

During the deliberations of S.B. 464, the issue was hotly contested by at least two interested organizations: the Pennsylvania Chamber of Business that argued for its passage and the Pennsylvania Bar Association that contended the General Assembly was legislating the unauthorized practice of law. The President of the Pennsylvania Bar Association has expressed an intention to file a legal challenge to this legislation. Until and unless such a challenge is filed and prevails, however, an employer is not required to have legal counsel in connection with any unemployment compensation proceeding. As always, employers will likely choose to have legal representation in these proceedings when important precedents may be set, when a proceeding affects a large number of claimants (as in a strike/lockout situation), or when the claimant is also expected to file other charges or complaints regarding his or her termination.

SUTA

"Dumping" is one method that some employers have used to minimize (the State says avoid) taxes under the State Unemployment Tax Act ("SUTA"). Some employers have transferred their employee payroll to a different business entity that has a more favorable unemployment compensation experience rating; in

other words, they have "dumped" those employees. In 2004, the United States Congress passed the SUTA Dumping Prevention Act (P.L. 108-295) in an effort to preclude this practice. This Act amends the Social Security Act and requires, as a condition of state eligibility for grants for unemployment compensation administration, that states enact laws against SUTA dumping.

In response to this directive, in S.B. 464, the Pennsylvania General Assembly amended the definition of "employer" to provide that, where an employer transfers some or all of its employee payroll to an affiliated entity but those employees continue to do work for the transferring employer, the transferring employer is deemed to be the "employer" for purposes of unemployment compensation benefits. The law also provides that Pennsylvania Department of Labor and Industry must establish a procedure to monitor SUTA dumping and permits the Department to refuse to transfer an experience record and reserve account associated with the transferred employee payroll if it determines that dumping has occurred.

The Department has pursued SUTA dumping investigations for some time. The difficulty has been in the ability to effectively police dumping. It remains to be seen whether changes made pursuant to this federal legislation will have any practical effect on "dumpers."

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