**RASHRM**

**EMPLOYMENT LAW UPDATE**

**AUGUST 2014**

**NEW LEGISLATION**

Employee Background Checks (HB5701; Public Act 98-0774)

This new statute was signed by Governor Quinn on July 21, 2014 and becomes effective January 1, 2015. Under this Act, employers and employment agencies cannot inquire or require disclosure of criminal records or criminal histories of an applicant until the applicant has been selected for an interview or a conditional offer of employment. Employer is defined as any person or private entity that has 15 or more employees in the current or preceding calendar year.

* There are particular employer exceptions:
* Employers that are required to exclude applicants with certain criminal convictions due to federal or state law are excluded from this Act.
* Employers that require a standard fidelity bond or an equivalent bond may ask an applicant if he or she has specific criminal offenses that would disqualify him or her from obtaining such a bond.
* Employers that employ individuals licensed under the Emergency Medical Services Act are exempt.
* An employer can notify applicants in writing of the specific offenses that will disqualify an applicant from employment in a particular position due to federal or state law or the employer’s policy.
* The Act gives authority to the Illinois Department of Labor to investigate any alleged violations of this Act by an employer or employment agency. If IDOL finds that a violation has occurred, the Director of Labor may impose civil penalties:
* First violation: written warning and the employer has 30 days to remedy the violation.
* Second violation (or first violation is not remedied in 30 days of notice): civil penalty of up to $500.
* Third violation (or first violation is not remedied in 60 days of notice): an additional civil penalty of up to $1,500.
* Subsequent violations (or first violation is not remedied in 90 days of notice): an additional civil penalty of up to $1,500 for every 30 days that pass without compliance.
* Allows IDOL to adopt rules necessary to administer this Act and establish an administrative procedure to resolve claims and issue final and binding decisions subject to the Administrative Review Law.

**HEALTH INSURANCE - FREEDOM OF RELIGION**

U.S. Supreme Court

*Burwell v. Hobby Lobby Stores, Inc***.,**573 U.S. \_\_\_ (June 30, 2014)

**Facts:** The Patient Protection and Affordable Care Act requires certain employers’ group health plans to furnish “preventive care and screenings” for women without “any cost sharing requirements.” Regulations promulgated by the Dept. of Health and Human Services (HHS) defined preventive care to include 20 contraceptive methods approved by the FDA. HHS’ regulations also exempt churches and other religious non-profit organizations. Hobby Lobby and two other for-profit corporations (Contestoga and Mardel) claimed that these regulations violated their right to freedom of religion by requiring them to offer insurance benefits to facilitate access to contraceptive drugs or devices. Pursuant to their Christian beliefs, it was contended that life begins at conception and should not be interfered with thereafter.

**Summary:** The Supreme Court held that the HHS regulations imposing the contraceptive mandate violates a closely held corporation’s rights under the Religious Freedom Restoration Act of 1993. This Act prohibits the government from substantially burdening a person’s exercise of religion, even if the burden results from a rule of general application, unless the government demonstrates a compelling governmental interest and it is the least restrictive means of furthering that compelling interest.

 Initially, the Supreme Court found that corporations are “persons” under the law and the purpose of extending rights to corporations is to protect the rights (including religious beliefs) of persons associated with the corporation, including shareholders, officers and employees. Next, the Supreme Court agreed with the corporations that the HHS regulations mandating contraceptive coverage substantially burdens the exercise of religion as it would require the corporations to engage in conduct that seriously violates their sincere religious belief that life begins at conception. If they refuse to provide contraceptive coverage, the corporations faced severe economic consequences in penalties and fines (ranging between $800,000 to $475 million per year).

 Although the Supreme Court agreed that guaranteeing cost-free access to health care (including the challenged contraceptive methods) is a compelling governmental interest, the government failed to demonstrate that the contraceptive mandate is the least restrictive means of furthering that interest. By way of example, the Court noted that the HHS regulations could require the government to assume the cost of contraceptives to women unable to obtain the coverage or could extend the exemption to churches and religious non-profit organizations to other employers with religious objections to the contraceptive mandate.

**DISCRIMINATION**

Federal Circuit Courts

*Matthews v. Waukesha County*, No. 13-1839 (7th Cir. July 22, 2014)

**Facts:** The plaintiff filed a race discrimination claim against Waukesha County under Title VII when the County did not hire her for an open position. She claimed that the hiring process itself was discriminatory on the basis of race because, pursuant to that process, she wasn’t even considered for the position. The district court granted the County’s motion for summary judgment and the plaintiff appealed.

 The plaintiff submitted her application for the position and, upon initial screening by a representative in the County’s resource department, it was determined that the plaintiff did not meet the minimal requirements qualifications for the position. The plaintiff then contacted the representative to discuss her qualifications, and the plaintiff’s application was submitted to the next step of the process after the representative cleared it with her supervisor. The applications that made it through the initial screening process were separated into four groups, with the Group 1 applications demonstrating the most qualifications and the Group 4 applications demonstrating the least qualifications. Based on the experience listed on plaintiff’s application, she was placed in Group 4.

 An applicant from Group 1 – a white female – was chosen for the first position opening, and someone from Group 2 – an African-American female – was chosen for the second position opening that came at a later date. Although a couple of those in Group 3 were offered courtesy interviews, no one from that group was chosen, and no one from Group 4 was interviewed for either opening.

**Summary:** The Seventh Circuit affirmed the district court’s grant of summary judgment to the County because the plaintiff’s claims had no basis in fact. The plaintiff’s claims of race discrimination under both the direct and indirect methods failed because, even assuming the plaintiff stated a prima facie case of discrimination, the plaintiff’s indirect method argument failed because the County articulated a legitimate, nondiscriminatory basis for its hiring decision and the basis was not pretextual. Her direct method argument also failed because there was no evidence of intentional racial discrimination.

**FAIR LABOR STANDARDS ACT - RETALIATION**

Federal Circuit Courts

*Avila v. Los Angeles Police Department*, No. 12-55931 (9th Cir. July 10, 2014)

**Facts:** The plaintiff was a former city police officer who challenged his termination that was recommended by the department’s disciplinary board. The police department claimed that, pursuant to the Board’s recommendation, the officer was terminated for insubordination by not submitting overtime requests for working through lunch hours. The officer claimed that he was terminated in retaliation for testifying under subpoena in a Fair Labor Standards Act (FLSA) suit brought by a fellow officer who sought overtime pay for working through his lunch hours.

**Summary:** The plaintiff sued the city and its police department, asserting claims under the anti-retaliation provision of the FLSA, Section 1983 of the Civil Rights Act, and state law. The district court granted the city’s motion for judgment as a matter of law on the state law claims. The district court, however, refused the jury instructions and special verdict questions offered by the city on the plaintiff’s retaliation claims. Instead, the district court gave the jury instruction asking whether his protected activity of testifying in previous FLSA suit brought by a fellow office was a motivating reason for his adverse employment action.

 The jury found in the plaintiff’s favor on this FLSA claim, but against him on the Section 1983 claim, and awarded damages. The district court entered judgment on the jury verdict and awarded plaintiff attorney fees. The city appealed and the Ninth Circuit affirmed.

 On appeal, the city argued that the disciplinary board’s recommendation of termination precluded plaintiff’s FLSA retaliation claim. The Ninth Circuit determined, however, that there was no issue preclusion because neither the board’s decision nor the termination order addressed the issue of retaliation.

 The city then argued that the district court committed clear error when it refused to offer its proposed jury instructions and special verdict questions. The Ninth Circuit determined, however, that the district court did not err with regards to the jury instructions because the district court was within its discretion in refusing to give the city’s proposed instructions that were not supported by the evidence. Furthermore, the evidence supported the finding that the plaintiff was fired because he testified in court against his employer.

 Finally, the city contended that the district court abused its discretion in awarding the attorney fees and liquidated damages. The Ninth Circuit determined, however, that the district court did not abuse its discretion because the attorney fees were reasonable and the damages were compensatory, not punitive.

**WORKERS COMPENSATION**

Illinois Appellate Courts

*Brias v. Illinois Workers’ Compensation Commission*, 2014 IL App (3d) 120820 WC (3rd Dist. May 8, 2014.

**Facts:** Claimant was a child support coordinator that worked in the Kankakee County Courthouse. On the date of her injury, she had attended a work-related meeting outside the courthouse. Since the employee entrance was locked at the time she returned from the meeting, she entered the courthouse via the front public sidewalk. A few steps before the front stairs to the building, she tripped and fell when her high-heel lodged in a crack in the sidewalk. The fall resulted in a fracture of her wrist requiring extensive medical treatment. The arbitrator determined that the injury did not arise out of and in the course of her employment. Her injury occurred when she was walking along a public pathway into a public building. In doing so, she was not subjected to a risk to which the general public was not exposed to or that was peculiar to her work. The Commission and Circuit Court affirmed the arbitrator’s decision.

**Summary:** An injury arises out of one’s employment if it originates from a risk connected with, or incidental to, the employment, so as to create a casual connection between the employment and the accidental injury. Whether a claimant’s injury arose out of or is in the course of her employment is a question of fact for the commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. However, when the facts are undisputed and susceptible to only one single inference, the question is one of law and is subject to de novo review.

 The Appellate Court found the facts of this case to be undisputed and reversed. “In the course of” employment refers to the time, place and circumstances under which an employee is injured. There was no question that the claimant was returning from a work-related meeting. Clearly, the injury was sustained in the course of her employment. Moreover, the injury arose out of her employment. There was no dispute that the fall resulted from a special hazard – the cracked and uneven sidewalk. The claimant’s presence on the sidewalk was occasioned by the demands of her employment. As such, the injury was compensable.

 *Carter v. Illinois Workers’ Compensation Commission*, 14 IL App (5th) 130151WC (5th Dist. June 9, 2014)

**Facts:** Claimant was a former coal mine worker. He filed a claim for workers compensation attributable to coal worker’s pneumoconiosis with a last exposure date of September 2004. The medical evidence revealed a diagnosis of COPD caused in part by exposure to coal dust, but there was no diagnosis of coal worker’s pneumoconiosis. The arbitrator found the claim to be time-barred as it was not filed within the three year statute of limitations applicable to occupational diseases other than coal worker’s pneumoconiosis which had a five year statute of limitations. On appeal, the claimant alleged that the differing statute of limitations violated the Equal Protection Clause of the Illinois Constitution.

**Summary:** The coal mine closed in September 2004 and claimant worked there until it closed. Although he had made complaints of breathing problems before his last day, he did not file a workers compensation claim until September 3, 2008. Since the medical evidence supported a diagnosis of COPD and not pneumoconiosis, the Appellate Court found that the appropriate statute of limitations was the three year limitation. The five year statute of limitations for pneumoconiosis did not include reference to COPD and was found to be inapplicable. The equal protection argument had not been made before the Commission and, as such, the Appellate Court considered the argument to be waived. However, the Appellate Court noted that this argument would also fail because the legislature is permitted to enact legislation that draws distinctions between different categories of people, for example, those with COPD versus those with pneumoconiosis. The equal protection clause prohibits different treatment to persons that are “similarly situated.”

*Folta v. Ferro Engineering*, 2014 IL App (1st) 123219 (1st Dist. June 27, 2014).

**Facts:** The plaintiff was allegedly exposed to asbestos while working at a plant owned by the defendant from 1966 to 1970. Forty-one years after leaving his employment, Plaintiff was diagnosed with peritoneal mesothelioma. By this time, the 25 year statute of repose under the Illinois Worker’s Compensation Act and the three year statute of repose under the Worker’s Occupational Diseases Act had long expired. Plaintiff brought a claim against his employer and 14 other companies that had supplied products or equipment to his employer containing asbestos. The trial court granted the employer’s Motion to Dismiss based upon the exclusive remedy provisions of the Acts.

**Summary:** On appeal, plaintiff argued that the lapse of the applicable statutes of repose made his claims “not compensable” under those Acts. As such, the plaintiff argued that the “exclusive remedy” provision did not apply. Plaintiff further argued that if the exclusive remedy provisions served to bar his claims against his employer, it would violate his equal protection and due process rights under the Illinois Constitution. The Appellate Court noted that this was a case of first impression in that no previous case had ruled on whether a time-barred workers’ compensation claim should be considered “not compensable under the Act.” Plaintiff argued that the injury he suffered was time-barred under the statute of repose through no fault of his own. His complaint alleged that the employer had hid or concealed information from the plaintiff and had been aware of the health risks posed by asbestos dust. The Appellate Court held that if plaintiff’s injuries were of a nature that they could not recover under the Act, the exclusive remedy would not preclude a common-law suit against the employer. Because of the nature of the asbestos-related disease, the diagnosis did not become known until after the statutes of repose had lapsed. Through no fault of the plaintiff’s, his injuries had become noncompensable under the Acts.

*Young v. Illinois Workers’ Compensation Commission*, 2014 IL App (4th) 130392WC (4th Dist. July 7,2014)

**Facts:** Plaintiff was employed as a parts inspector. He claimed to have injured his shoulder in the course of his employment when he reached into a box for a part and, in that process, felt his shoulder snap or pop. He finished the tasks assigned that day, but later noted increased pain in his shoulder and, about six days later, sought medical treatment from the company doctor. He was eventually diagnosed with a tear of the rotator cuff. The arbitrator denied benefits under the Act on the basis that reaching for an item, without more, did not constitute an increased risk of injury peculiar to his employment. The Commission affirmed the arbitrator’s decision noting that the mere act of reaching down for an item did not increase the risk of injury beyond that which the plaintiff would experience as a normal activity of daily living.

**Summary:** Whether a claimant’s injury arose out of or in the course of his employment is typically a question of fact to be resolved by the Commission. The Commission’s findings will not be reversed unless it is against the manifest weight of the evidence. However, if the facts are undisputed and susceptible to but a single inference, the question is one of law and is subject to a de novo review. Here, the Appellate Court found the facts to be subject to more than a single inference. In particular, the question was whether the claimant’s act of “reaching” was one to which the general public was equally exposed to or whether claimant was exposed to an increased risk by reaching beyond normal limits by virtue of his employment. Given the multiple inferences from the facts, the Commission’s determination could only be overturned if it was deemed to be against the manifest weight of the evidence.

There was no dispute that the claimant was injured “in the course of employment.” The issue here was whether the injury “arose out of” his employment. In analyzing this issue, the court looks at whether the risk is incidental to the employment or is connected with what an employee has to do in fulfilling his duties. The Appellate Court found that the claimant’s injury arose out of an employment-related risk and, as such, was compensable. The record showed that the claimant was injured while performing his job duties – inspecting parts. The parts he was inspecting were contained in a box and his employment required him to reach into the box to retrieve the part. He was performing an act the employer might reasonably have expected him to perform incident to his assigned duties. As such, no “neutral-risk” analysis was necessary and there was no need to determine whether the claimant was exposed to a risk to a greater degree than the general public.

Submitted by:

Clayton L. Lindsey

VP of Gov’t Affairs-RASHRM

Attorney at Law

WilliamsMcCarthyLLP

clindsey@wilmac.com

G:\Wpdocs\_bev\CLL\R\RSHRM\july2014.docx