



DELAWARE

EMPLOYMENT LAW LETTER

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LEGISLATION

Dover is busy again: proposed domestic violence amendment

by Lauren E.M. Russell

The Delaware General Assembly is gearing up for another session of active employment legislation. As we have seen in the past, its efforts at protecting employee rights frequently have unintended consequences. The same is true of the General Assembly's most recent legislation. House Bill (HB) 4 proposes to amend the Delaware Discrimination in Employment Act (DDEA) to add protection for victims of domestic violence. While well-intended, the bill creates several pitfalls for employers.

The bill

HB 4 amends two sections of the DDEA. First, it adds three new definitions for "domestic violence," "sexual offense," and "stalking." The definitions are taken from the Criminal Code, and such claims by an employee must be verified by an official document or "a reliable third-party professional." The professional may be a police officer, healthcare provider, or a victims' advocate. The onus is on the

employee to provide the relevant verification documents.

The requirement for documentation provides some coverage to employers. Employees can't simply assert that they are the victims of domestic violence and obtain protection from termination. However, it leaves many questions open. First, how long is an employee protected? If an individual discloses that she or he was the victim of domestic violence 10 years ago and does so on the day before termination, does that give rise to an inference of retaliation? If the bill is passed in its current form, there is no guidance on this question.

The second change to the DDEA is the addition of unlawful employment practices. More specifically, HB 4 prohibits employers from making employment decisions "because the individual was the victim of domestic violence, a sexual offense, or stalking." In addition, the bill imposes a duty to reasonably accommodate domestic violence victims. The only example of a reasonable accommodation provided is the ability "to use accrued leave originally designated for a different purpose to address the domestic abuse, sexual offense, or stalking."

The Ike-and-Tina scenario

HB 4 creates several issues for employers. One of the most worrisome is the "he said, she said" domestic violence scenario that arises when two parties to a domestic violence incident are employed by the same company. In such a case, employers in the past have made their own credibility determination and elected to terminate one of the employees or, in some extreme cases, both employees. If HB 4 becomes law, that course of action could expose the employer to liability for discrimination against both parties to the dispute.

Similarly, if the employer elected to separate the parties by moving one to a different shift or a different location or placing one individual on leave pending resolution of the dispute, the employer could be accused of taking an adverse employment action against the affected employee. Keep in mind that the DDEA applies to any Delaware employer

with four or more employees. To maintain a safe and productive workforce, a small employer could find itself faced with placing one employee on paid leave until criminal charges are resolved, which could take months or longer.

Workplace violence concerns

In a similar vein, employers could find their hands tied when an employee's spouse makes threats against the workplace. Imagine a scenario in which a spouse is the victim of domestic violence and her husband makes credible threats of violence against the employer or its employees. Under such a circumstance, the employer's only resort is to make a complaint to the police. Any action to remove the employee from the workplace could be considered an adverse employment action. Alternatively, the employer could again be faced with the duty to place the employee on paid leave for an indefinite period of time until the situation is resolved through the criminal justice system.

Bottom line

As of the publication of this article, the bill has not yet been passed by either house of the General Assembly. However, like the recent protection for pregnant workers passed in 2014, the subjects of HB 4 are highly sympathetic, and there is every reason to believe this bill will move forward and become law.

There is no question that the General Assembly was well-intentioned in the preparation of HB 4. Victims of domestic violence deserve protection from financial manipulation by an abusive partner. However, extending that protection by imposing liability on employers is a complicated issue. In addition to supporting employees who are the victims of domestic violence, employers have a duty to protect the workplace from disruption. HB 4 has the unfortunate side effect of tying employers' hands when they feel that an employee's legal troubles also affect the safe and efficient operation of the company's business.

Employers with concerns about the business impact of HB 4 are encouraged to speak with their

representatives and share the practical implications of this proposed law.

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