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PELRAS UPDATE

Public Employer Labor Relations Advisory Service

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INSIDE THIS ISSUE:

ACA Affordability Limits Increased for 2019	2
Pennsylvania Supreme Court Rules that Workers' Compensation Act Creates Presumption of Coverage for Cancer in Firefighters	2

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What "Also Means" Means — the U.S. Supreme Court Rules the ADEA Applies to Local Governments Regardless of Number of Employees

by Paul N. Lalley, Esq.

Managers from municipalities with a small number of employees are probably aware from prior PELRAS presentations that some federal statutes may not fully apply to them. For example, Title VII of the Civil Rights Act of 1964 applies only to local governments that employ at least 15 people, and although the Family and Medical Leave Act's notice requirements apply to all local governments, actual FMLA leave rights only apply when a municipality has at least 50 employees. But what about the Age Discrimination in Employment Act of 1967, which applies to private employers that have at least 20 employees?

In a decision issued on November 6, 2018, *Mount Lemmon Fire Dist. v. Guido* (No. 17-587), the United States Supreme Court ruled that the ADEA applies to local governments regardless of the number of employees. The plaintiffs in *Mount Lemmon Fire* were two firefighters who were over the age of 40 and were laid off due to budgetary issues. The question presented to the Supreme Court was straightforward: does a local governmental entity need to have at least 20 employees to be subject to the ADEA? The ADEA defines "employer" to mean a "person engaged in an industry affecting commerce who has twenty or more employees.... The term also means (1) any agent of such person, and (2) a State or political subdivision of a State...."

The Court looked to legislative history of the ADEA. When Title VII, the ADEA, and the Fair Labor Standards Act were originally enacted, none applied to local governments. Congress changed that with later amendments, first by amending Title VII in 1972, and then by amending the ADEA and the FLSA in 1974, so that those laws applied to local governments. But the language used in these amendments was different. When Congress amended Title VII, it amended the definition of "persons" subject to the law to include state and local governments,

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but by doing so, it simply incorporated the 15-employee threshold that applies to private employers.

By comparison, the 1974 FLSA amendments made all state and local governments subject to the FLSA, regardless of the number of employees. In interpreting the ADEA, the Court concluded that Congress' intention in amending the definition of "employer" was to follow the model of the FLSA, rather than Title VII. The Court focused on the use of the phrase "also means" in the ADEA's amended definition of "employer" as creating a separate category of "employer," not simply adding a subcategory where the 20-employee threshold applies. The Court noted that its ruling that the ADEA applies to local governments regardless of the number of employees was consistent with how the EEOC had interpreted the ADEA for 30 years. In doing so, however, the Court overruled a number of federal circuit courts of appeals that had interpreted the ADEA as applying to local governments only if they had at least 20 employees.

It is, of course, always recommended that you consult with your labor and employment attorneys when you have a question about whether a particular federal or state law applies to your municipality, so that you may get the most up-to-date guidance.

ACA Affordability Limits Increased for 2019

by David E. Mitchell, Esq.

As the days grow colder and darker, many employers focus on changes in Affordable Care Act ("ACA") enforcement that will take effect in the New Year. In some welcome news for employers, the IRS has announced that the affordability limit, which measures the percentage of an employee's household income that the employee can be required to contribute towards healthcare before coverage is deemed to be unaffordable, has increased from 9.56% in 2018 to 9.86% for 2019.

The ACA itself defines unaffordable coverage as that which involves an employee contribution that exceeds 9.5% of an employee's household income. Related regulations permit adjustments in that amount and allow employers to measure affordability by using rate of pay, W-2 income or the federal poverty level instead of household income.

In 2018, Large Employers are subject to a $3,480 penalty for each employee who is offered unaffordable coverage and instead obtains coverage through an ACA Marketplace or Exchange and receives a tax credit or subsidy for that coverage.

Although the health care contributions for most full-time employees will not come close to the 9.86% limit, contributions of some "part-time" employees who are deemed to be full-time under the ACA because they work 30 or more hours per week could approach or exceed that limit. The upward adjustment in the affordability limit gives employers more room and makes it less likely that they will be penalized for offering coverage that is not affordable. Stay tuned for future issues of the PELRAS Update newsletter for further Affordable Care Act developments.

Pennsylvania Supreme Court Rules that Workers' Compensation Act Creates Presumption of Coverage for Cancer in Firefighters

by Shon K. Worner, Esq.

On October 17, 2018 the Pennsylvania Supreme Court in *City of Philadelphia Fire Department v. Workers' Compensation Appeal Board (Sladek)* determined that a firefighter who develops cancer

must only demonstrate that it is *possible* that a known carcinogen caused the type of cancer with which the firefighter is afflicted in order to create a presumption of coverage under the Workers' Compensation Act (hereafter "the Act"). *See City of Phila. Fire Dept. vs. W.C.A.B. (Sladek),* No. 13 EAP 2017, 2018 WL 5046516 (Pa. October 17, 2018).

In this case, the City of Philadelphia had hired Sladek as a firefighter in 1994. Prior to his service, Sladek had not been treated for cancer and had passed a physical examination confirming that he was cancer-free and in good health. In 2007, however, he was diagnosed with malignant melanoma and underwent treatment to remove a cancerous lesion. Sladek filed a claim for workers' compensation benefits in 2012, alleging that he had developed melanoma from "direct exposure to Group 1 carcinogens while working as a firefighter." The City denied that Sladek was entitled to compensation and a hearing was held before a workers' compensation judge. While Sladek introduced two expert reports, one of which concluded that firefighters are exposed to Group 1 carcinogens in the course of their work, neither report was able to causally link any particular Group 1 carcinogens to malignant melanoma, which was the type of cancer from which he had suffered. Rather, Sladek's second expert opinion merely concluded that Sladek has been exposed to carcinogens while working as a firefighter and that such exposure was a significant contributing factor to his diagnosis. The City offered an expert opinion which attacked the methodology provided by Sladek's expert, indicating that it was neither appropriate nor accepted methodology to determine, in the manner that he had, that a link existed between Sladek's exposure to carcinogens and his malignant melanoma diagnosis.

The Commonwealth Court, *en banc*, overturned the Workers' Compensation Appeal Board decision in Sladek's favor and found that Sladek failed to meet his initial burden to show that his malignant melanoma is a type of cancer *caused* by the Group 1 carcinogens to which he was exposed as a firefighter. The Pennsylvania Supreme Court, however, overturned the Commonwealth Court. In so ruling, the Supreme Court interpreted 2011 amendments to the Act which specifically address firefighters claiming benefits for cancer alleged to have been caused as a result of performing their duties. Finding that the amendments to the Act embody a legislative acknowledgement that firefighting is a dangerous occupation that routinely exposes firefighters to known carcinogens, the Supreme Court determined that the Act does not require a firefighter to prove that a known carcinogen *actually* caused their cancer. In keeping with this finding, the Supreme Court acknowledged that the burden imposed on a firefighter for Workers' Compensation benefits due to a cancer diagnosis under the amended Act is "not a heavy burden." *City of Phila. Fire Dept*. at *8.

This case presents a "win" for firefighters who develop a cancer diagnosis and their dependents. The effect of this decision will result in more firefighters being covered under the Act when diagnosed with cancer. Accordingly, municipalities should be prepared for an increase in Workers' Compensation insurance rates as a result of this decision.

Employers should also be aware that this ruling does not mean that there is no recourse when faced with a Workers' Compensation claim by a firefighter based on a cancer diagnosis. Once a firefighter has established the relationship between their cancer diagnosis and known carcinogens, the burden then shifts to the employer to produce a medical opinion which shows that the firefighter's cancer was not caused by firefighting. The Court has made it clear that an employer may not rebut the presumption with generalized evidence; rather, an employer must provide a medical opinion which supports the position that there is a specific cause for the firefighter's cancer that is not related to his/her occupation as a firefighter.