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PELRAS UPDATE

Public Employer Labor Relations Advisory Service

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Domestic Violence Reform: New Amendments to The Protection From Abuse Act

by Ian Everhart, Esq.

Recent amendments to the Protection From Abuse ("PFA") Act, and the Pennsylvania Uniform Firearms Act, will soon take effect, imposing stricter requirements on gun owners subject to court ordered PFAs and assigning new responsibilities to law enforcement agencies. Many provisions of Act 79 of 2018 will have taken effect on April 10, 2019 (180 days after the law was signed by Governor Tom Wolf). For purposes of employment, individuals who are required to carry firearms as a requirement of their job and who are subject to prohibitions of the revised PFA Act may be barred from continuing to work during the terms of a final PFA.

Under the previous version of the PFA Act, courts had discretion whether to require the surrender of firearms by a defendant in a PFA proceeding (the accused abuser). The amended law leaves that discretion in place for temporary orders and consent agreements, but it is now **mandatory** that the courts require the surrender of firearms in every final PFA order held after a hearing. Perhaps even more importantly, PFA defendants may no longer relinquish firearms to family members or friends. Rather, under Act 79, firearms may only be surrendered to: (1) the county sheriff; (2) a law enforcement agency (such as a municipal police department or the state police); (3) a federally-licensed firearms dealer or commercial armory; or (4) the defendant's attorney. 18 Pa.C.S. § 6105.2. The new law also requires that firearms be relinquished within 24 hours of the order being issued, whereas the law previously allowed for a sixty (60) day surrender period. 18 Pa.C.S. § 6105.2.

Another provision of Act 79 requires law enforcement to accompany the plaintiff to his or her residence to retrieve personal belongings, or while serving the petition or order on the defendant, when the plaintiff has reason to believe that his or her safety is at risk. 23 Pa.C.S. § 6106.

Local law enforcement agencies should be aware of the changes brought by Act 79, and should be

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prepared to assume the new duties imposed by the statute. How much the amended law will affect a local police department will depend on the volume of PFA orders issued, but each agency should consider the best way to manage these new requirements. In addition to storage of weapons, law enforcement must have a process for intake (and issuing receipts, required in 18 Pa.C.S. § 6105.2(b)(2)) and eventual retrieval of surrendered firearms (with the "weapon return form" required in 18 Pa.C.S. § 6108.1(a) upon dismissal or expiration of the PFA order). In order to facilitate the Act 79 amendments, the Pennsylvania State Police and the Pennsylvania Coalition Against Domestic Violence have developed a process within the PFA Database to assist with recording, monitoring and tracking firearms relinquishments. Agencies should also prepare to communicate with the court(s) issuing the PFA order.

Police departments are not permitted to assess fees against defendants associated with the return of weapons — i.e., storage fees are not permitted, although costs associated with a defendant's request that a firearm be transferred from a police department to a licensed dealer may be assessed. 18 Pa.C.S. § 6105.2(c)(2) and 23 Pa.C.S. § 6108.1(a).

Act 79 also includes a provision regarding sealing of older PFA records. The new law permits a PFA defendant who has signed a consent agreement to petition the court to seal the record of that agreement ten years after the expiration of the PFA consent agreement, so long as that was the first and only PFA that was filed against him or her, and the person has not been convicted of any other offenses. 23 Pa.C.S. § 6108.7.

Employers should have a policy requiring employees to disclose the existence of a temporary or permanent PFA if the PFA bars the employee from possessing a firearm and the employee's job requires the use of a firearm. Once a public employer becomes aware of the employee's PFA, consideration must be given as to whether the employee can perform the duties of his/her job and whether the employer is obligated to assign the employee to an alternate position during the PFA period. Contractual (collective bargaining agreement provision) and practical considerations must be vetted to ensure that the public employer is not violating the terms of the court order. Employers should carefully consider their approach in dealing with this employment scenario utilizing labor counsel.

Don't Delay in Designating Leave Under the FMLA, Even When It's Not Requested

by Julie A. Aquino, Esq.

The Federal Department of Labor ("DOL") recently issued an Opinion Letter, FMLA 2019-1-A, concluding that employers **must** designate leave as FMLA leave once the employer knows that the leave is FMLA qualifying, rather than allow an employee to first use accrued paid time off. The DOL also concluded in the Opinion Letter that employers may not designate more than 12 weeks as FMLA leave (or 26 weeks of military caregiver leave). While we have typically urged clients to designate qualifying leave as FMLA leave even if the employee is not requesting FMLA leave and to not delay such designation, this is the first time the DOL has opined that employers **must** indeed make such designation, even if the employee would prefer to first use accrued paid time off and set aside the FMLA leave for later use.

The DOL's recent Opinion Letter was a response to an employer requesting clarification as to whether it is permissible for an employer to allow employees to exhaust some or all of available paid sick (or other) leave **prior** to designating leave as FMLA-qualifying, even when the leave is "clearly FMLA-qualifying." The DOL concluded that employers "may not delay the designation of FMLA-qualifying leave or designate more than 12 weeks of leave (or 26 weeks of military caregiver leave) as FMLA leave." Rather, "[o]nce an eligible employee communicates a need to

take leave for an FMLA-qualifying reason, neither the employee nor the employer may decline FMLA protection for that leave." The Opinion Letter also states, "[o]nce the employer has enough information to make this determination, the employer must, absent extenuating circumstances, provide notice of the designation within five business days. Accordingly, the employer may not delay designating leave as FMLA-qualifying, even if the employee would prefer that the employer delay the designation" (citation omitted).

What does the DOL Opinion Letter mean for employers? The DOL confirmed that employers may designate qualifying leave as FMLA leave even when the employee is not requesting FMLA leave, which is a question not addressed in the plain language of the FMLA statute or regulations. The Opinion Letter also tells employers that they **must** designate qualifying leave as FMLA leave, rather than allowing it to be saved for later use. It should be noted, however, that the DOL Opinion Letter is not binding authority and contradicts a 2014 decision in the Ninth Circuit, *Escriba v. Foster Poultry Farms, Inc*. (The Ninth Circuit decision is also not binding authority in Pennsylvania). Even though the DOL's Opinion Letter is not binding authority, it has always been advisable for employers to promptly designate qualifying leave as FMLA leave, even if the employee is not requesting FMLA leave and/or would prefer to delay the use of FMLA leave.

You may also be wondering whether the Opinion Letter impacts the rules pertaining to the use of paid time off concurrent with FMLA leave. The answer is no, but the analysis is nuanced. By statute and regulation, an employee may request that accrued paid time off be used concurrently with unpaid FMLA leave, and the employer can also require the same. 29 U.S.C. § 2612(d); 29 CFR § 825.207. If the employer does not require use of paid time off concurrent with FMLA leave, and the employee does not request the same, the employee may use accrued paid time off **after** the 12-weeks of FMLA is exhausted. Accordingly to the DOL's recent Opinion Letter, what employers cannot allow is for employees to **first** use their accrued paid time off, in order to save FMLA hours for later use. This is because the DOL interpreted the FMLA to not permit delay in designation of FMLA-qualifying leave. With respect to employer policies requiring concurrent use of paid leave with FMLA leave, employers must be aware that this is a mandatory subject of collective bargaining for union employees. Such policies are viewed as advantageous to employers because employees are often reluctant to exhaust their accrued paid time off, including vacation days, making their use of FMLA leave more judicious (especially in the case of intermittent absences).

Lastly, the DOL Opinion Letter also confirms that employers may not designate more than 12 weeks (or 26 weeks of military caregiver leave) as FMLA leave in the applicable 12-month period, and that providing "additional leave" outside of the FMLA does not expand the employee's 12 week (or 26 week) entitlement under the FMLA. Policies that purport to provide "additional FMLA leave" should be revised as FMLA leave is never expanded outside of the 12 week or 26 week entitlement. Additional unpaid leave for a medical condition, beyond the FMLA period, may be a reasonable accommodation under the Americans with Disabilities Act, but it is never an expansion of FMLA leave.

Still No Clear Answer for Employers on Medical Marijuana

by Hobart Webster, Esq.

The Medical Marijuana Act (the "Act") took effect on May 17, 2016, making Pennsylvania the twenty fourth state to legalize medical marijuana. 35 P.S. § 10231.101 *et. seq*. Although it's been almost two years since the law went into effect, employers in Pennsylvania still have more questions than answers. The Pennsylvania Department of Health (the "Department") is responsible for implementation and administration of the Act, but to date, the Department has only issued temporary regulations and none address employment issues. There have not been any Pennsylvania court

decisions that squarely address the Act's employment provisions.

While we await implementing regulations from the Department and guidance from Pennsylvania courts, the Act does provide some guidance for employers. First, it is clear that employers may continue to enforce prohibitions on positive marijuana tests for CDL drivers, as the Pennsylvania Medical Marijuana Act does not impact the applicability of the Federal Motor Carrier Safety Administration ("FMCSA") regulations for CDL drivers. Furthermore, the Medical Marijuana Act mandates that employers not allow employees to work at heights or in confined spaces while under the influence of medical marijuana, and allows employers to prohibit performance of job duties while under the influence of marijuana where a public health or safety risk is presented, including a life threatening risk. 35 P.S. § 10231.510. Therefore, for positions that present an inherent and constant safety risk, such as law enforcement positions, there seems to be little question that off duty medical marijuana use can be prohibited by the employer.

However, what about employees other than CDL drivers and police officers? Some provisions of the Medical Marijuana Act are straight forward – employers are expressly authorized to prohibit employees from possessing or using medical marijuana on employer property. But, significant provisions of the Act are less clear. For example, the Act prohibits employers from taking adverse employment action against an employee based solely on the employee's **status** as a user of medical marijuana. What does that mean?

The plain language of the Act states, "[n]o employer may discharge, threaten, refuse to hire or otherwise discriminate or retaliate against an employee regarding an employee's compensation, terms, conditions, location or privileges solely on the basis of such employee's status as an individual who is certified to use medical marijuana." 35 P.S. § 10231.2103(b)(1). The Act continues, "This act shall in no way limit an employer's ability to discipline an employee for being under the influence of medical marijuana in the workplace or for working while under the influence of medical marijuana when the employee's conduct falls below the standard of care normally accepted for that position."

What does it mean to take an employment action based **solely** on an employee's status as a user? What other factors need to be present before an employer can take action against an employee certified for medical marijuana use? Employers are largely left to guess, and ultimately, these questions will likely be answered by the courts. It **may** be the case that unless the employer can identify evidence that an employee is under the influence at work, or evidence of possession or use on company property, an employer is barred from taking an adverse employment action against an employee who tests positive for marijuana. The answer may also depend on whether a safety risk is inherently present in the particular employee's job duties, such as in the case of police officers and perhaps certain public works employees who may work at heights or in confined spaces (and of course CDL drivers which are governed by the FMCSA regulations). Further complicating matters is that testing for marijuana is far different than testing for alcohol because a urinalysis test for marijuana cannot determine approximate degree of impairment. And while a blood test can provide more specific information regarding degree of impairment than a urine test, blood testing is rarely conducted in the employment setting.

You may also be asking, what about the Federal Drug-Free Workplace Act? Doesn't that apply when a municipality receives certain federal funds? Employers are specifically empowered under the Medical Marijuana Act to comply with federal law, but does the Drug Free Workplace Act prohibit employees from lawfully using medical marijuana on their own time, away from the workplace? The answer to that question is unclear. The Drug-Free Workplace Act requires some federal contractors and all grantees to agree that they will provide drug-free workplaces as a precondition of receiving a contract or grant from a federal agency. But the focus of the Drug-Free Workplace Act is the workplace — it is unclear whether the Drug-Free Workplace Act prohibits employers from continuing to employ individuals who use medical marijuana consistent with state law, outside the workplace, and

on their own time. While this question has been litigated in at least two other jurisdictions with differing results, it has not been litigated in Pennsylvania. Compare*, Carlson v. Charter Commc'ns,* LLC, 742 F. App'x 344 (9th Cir. 2018) with *Noffsinger v. SSC Niantic Operating Co.,* LLC, 338 F. Supp. 3d 78, 81 (D. Conn. 2018) (D. Conn). Until Pennsylvania courts address this issue, employers are left with more questions than answers. These situations require a careful analysis of the specific facts and circumstances unique to each employer. It is essential to work through these issues with your labor counsel.