DiMonte & Lizak, LLC

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New Illinois Whistleblower Act Creates Additional Liability

By: Margherita M. Albarello, Esq.

Effective January 1, 2004, the new Illinois "Whistleblower Act" (Public Act 93-0591) will further protect the "whistleblower" who informs government or law enforcement of actual or suspected unlawful activities by his private sector employer. The Act imposes three new restrictions on employers and makes it easier for a broad range of employees to claim actionable "retaliation."

The Act restricts employers from: (1) adopting policies which prevent an employee from disclosing information to a government or law enforcement agency if the employee has reasonable cause to believe that the information discloses a violation of a state or federal law, rule, or regulation; (2) retaliating against employees for these disclosures; and (3) retaliating against employees who refuse to participate in activities that would result in a violation of state or federal law, rule, or regulation.

The Whistleblower Act's retaliation provisions are tremendously significant for Illinois private sector employers. For years, Illinois common law has recognized an employee's claim for retaliation where the employee complained internally or externally about the employer's alleged illegal or wrongful activity. However, Illinois courts narrowly limit these common law retaliation actions to situations where the employee is fired (as opposed to being demoted or some other adverse action short of termination) and where the employer's wrongful conduct violates a clearly mandated Illinois public policy.

In contrast, the Whistleblower Act broadens actionable retaliation to include all types of employer retaliation in response to covered employee whistleblower activities, including, for example, harassment, demotion, or reassignment. In this regard, the Whistleblower Act is similar to laws prohibiting discrimination based upon sex, disability, race, and the like, where any manner of adverse employment action can form the basis for an action for discrimination.

The Whistleblower Act broadly defines an "employer" as any "individual, sole proprietorship, partnership, firm, corporation, association, any other entity that has one or more employees in [Illinois]." The definition of "employee" is similarly broad, and is defined as "any individual who is employed on a full-time, part-time, or contractual basis by an employer." Therefore, the Act apparently protects independent contractors as well as traditional employees.

The Act does not expressly forbid retaliation where the employee makes only an internal complaint but does not report the information at issue to the government or law enforcement. Further, the employee is protected from retaliation for disclosing information to the government or law enforcement only if he had reasonable cause for believing the information disclosed reveals unlawful conduct. Thus, not every disclosure is protected; the employee must show that he had some reasonable basis for making the external complaint.

The employee is protected from retaliation for refusing to participate in an activity only where the activity would result in a violation of the law. Thus, the Act places a greater risk on an employee for refusing to perform an assignment than for making an external complaint. For example, an employee who refuses to perform an assigned duty, is terminated or suspended for insubordination, but is unable to show that the activity would result in a violation of the law, is not protected by the anti-retaliation provisions of the Act.

A violation of the Act is a criminal misdemeanor. A prevailing plaintiff in a civil action is entitled to reinstatement, back pay with interest, actual damages, attorney's fees, expert fees, and litigation costs. The Act does not provide for punitive damages.

Illinois Equal Pay Act Now a Law

By: Christopher Lega, Esq.

Governor Blagojevich recently signed into law the Equal Pay Act of 2003 ("Act"). The Act, which takes effect January 1, 2004, will affect all Illinois employers with four or more employees. Similar to its federal counterpart, the Act prohibits any discrimination on the basis of sex when determining the wages to be paid to employees who are essentially performing the same job. In other words, a male and female employee performing a job that is the same or substantially similar, requiring equal skill, effort and responsibility, must be paid at the same rate. The Act does allow for exceptions to this requirement where an employer has a seniority or merit based system in place, or a similar system that determines salary based on factors such as quantity or productivity.

An employer who violates the Act may

Grandparents' Visitation Rights
By: Chester A. Lizak, Esq.

About 30 years ago I vowed that I would not handle any more divorce cases. I was representing a husband who was contesting his wife's request for a divorce. Prior to trial, I had spoken to his mother who confirmed all the good things that her son said she would testify to. However, when she became a witness at trial, her testimony was 180 degrees different from what she told me when I was preparing her as a witness. She more or less concluded her testimony with, "My son is a drunk and a bum. He stays out all night."

After the trial, I asked her to explain why the turnabout in her testimony. She told me that when I was preparing her as a witness she did not want to contradict her son in his presence. However, when she got on the stand, she knew that she had to tell the truth. "I knew that my daughter-in-law was going to get the children, and I didn't want to jeopardize my visitation rights with my grandchildren." I agreed with her although I wished that she would have told me this prior to the trial.

Grandmother had correctly analyzed the situation.

Over the last 15 years, the Illinois legislature has passed and amended a statute guaranteeing grandparents' visitation rights under certain circumstances when it is in the best interests and welfare of the child. The statute gave them the right to petition the court for reasonable visitation privileges under circumstances where one of the parents was deceased, or the parents were not cohabiting, or other similar circumstances. However, the Illinois Supreme Court has held that the grandparent visitation statute is unconstitutional. The statute violates a fundamental right protected under the due process clause of the Fourteenth Amendment i.e. the right of parents to make decisions concerning the care, custody, and control of their children without unwarranted state intrusion.

Obviously, the grandmother in the 30-year old case instinctively knew that it is important to maintain a good relationship with the spouse of your

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be subject to a civil lawsuit by the employee. The prevailing employee may be entitled to monetary damages equal to the amount of any underpayment, interest, and reasonable attorney's fees. In addition, an employer is also subject to a fine from the Illinois Department of Labor of up to $2,500.00 for each violation and for each employee affected.

Finally, the Act imposes a few administrative requirements. It requires that all affected employers must make and retain records that document an employee's salary information. These records must be kept for three years. In addition, the employer must post notices in the workplace which summarize the requirements of the Act. Copies of these notices may be obtained at no charge by contacting the Illinois Department of Labor.

If you should have any questions regarding the contents of these articles or any other employment related matters, please contact: Margherita M. Albarello at malbarello@dimonteandlizak.com or Christopher Lega at clega@dimonteandlizak.com. You may also call 847-698-9600.

Rights of Employees Serving in the Armed Forces

By: Christopher Lega, Esq.

Many Illinois employees who were called to serve in the war on terror are now returning to civilian life. Other employees are currently members of military reservists programs or the Illinois National Guard and are subject to a future call-up. In either case, all Illinois employers should be aware of their obligations to those employees called to serve our country or who may be called in the future.

Both federal and state law impose obligations on Illinois employers to provide a leave of absence to any employee required to satisfy a military obligation. Unlike many other employment-related laws, there is no minimum number of employees a business must have to be affected by both laws.

The Uniformed Services Employment and Reemployment Rights Act ("USERRA") is a federal law passed in 1994 in order to encourage "non-career service in the uniformed services," without the resulting risk of losing employment or discrimination. Generally speaking, USERRA imposes an affirmative duty on employers to provide leave to employees called to active duty, and reinstatement to employment upon their release. The provisions of USERRA cover most uniformed services including the Army, Navy, Air Force, Marines, Coast Guard, Army National Guard, and Air National Guard, whether engaged in active duty training, inactive duty training or full time National Guard duty. Regardless of the branch of service, all employees must receive an honorable discharge from service to avail themselves of these benefits.

USERRA does not require an employer to compensate an employee for absences due to any of the above military services. However, any benefits that an employee would otherwise be entitled to during an ordinary leave of absence, such as continued health in-

surance (if the employee contributes), or pension benefits, must be provided to the employee on military leave as well.

The most significant provision under USERRA is the employee's right to reinstatement upon completion of military service. Generally speaking, an employee must notify his employer of his intent to return to work following service. The timing of this notice varies depending on the amount of time served. Assuming an employee has satisfied all notice requirements, he must be reinstated to a position he would have attained if continuously employed, so long as he is qualified for the job or becomes qualified after reasonable efforts.

Failure to comply with the provisions of USERRA can result in a lawsuit brought by the federal government or by an employee. A prevailing plaintiff is entitled to compensation for lost wages and benefits, as well as attorneys fees and reinstatement. In the case of willful violations, the employer may also be subject to additional damages. The statute also provides a prevailing employee with attorney's fees, expert witness fees and other litigation expenses.

Illinois employers are also subject to the Service Men's Employment Tenure Act of 1993 ("SMETA"). SMETA provides certain benefits more generous to employees than USERRA. One benefit is particularly important because it is an exception to the Illinois employment-at-will rule which allows an Illinois employer to discharge an employee for any reason, so long as the employee is not fired because of illegal discrimination or in violation of public policy. SMETA protects an employee from discharge without cause for up to one year after return from military leave.

All employers should be aware of the rights of those returning to work after serving our country. A basic understanding of these laws and establishing a written military leave policy will ensure an easier transition for those

Condo and Townhome Associations – Duties of Developers and Directors

By: Eugene A. DiMonte, Esq.

The appellate court of Illinois decided three cases recently which expand the liability of the developers and directors of condominium and townhome associations to the association. It is likely that future appellate decisions will expand the liability of developers and directors of other types of property owner associations.

Illinois statutes require condominium developers to make contributions to reserve accounts for unsold units as required of other unit owners. There is no similar statute regarding townhome developers.

In 1995, an Illinois appellate court held that the developer owed a fiduciary duty to the condominium association not to do or not do anything that would interfere with the ability of the association to operate. This included a duty to provide proper reserves to replace the common elements, even though the condominium statute at the time did not require this.

In a 1999 case against a developer of a townhome development, the same issue was raised—the failure of the developer to provide and fund reserve accounts. The court relied upon the previous decision regarding condominium associations and ruled that the townhome developer owed a fiduciary duty to the association to fund reserve accounts. However, because the recorded declaration of covenants expressly provided a limitation on the developer's obligations to fund reserve accounts, the court ruled that this duty could be modified. The court held that a developer of a townhome association can limit its obligation to fund reserve accounts if it gives prospective purchasers notice of such limitation. The prospective purchasers can elect not to buy a unit with such limitations. The court also indicated that the limitation must be reasonable.

In another 1999 case involving the same issue in a condominium situation, the court ruled that not only could the developer be liable but that the individual board members could also be held personally liable for failure to require appropriate reserve accounts.

These decisions do not hold that developers and directors are automatically liable. They only require that those persons act fairly, equitably and reasonably under the circumstances.

Developers, in their recorded declarations and in the contracts they provide to purchasers, should include provisions defining their obligation to fund reserve accounts. They should also include (or the associations should include) provisions for the association to indemnify innocent members of the board of directors. Consideration should also be given to providing directors and officers with liability insurance.

Prospective owners, when purchasing a condominium, townhome or other property governed by an association, should inquire into the status of reserves and whether reserves will be required in the future. This should be investigated prior to entering into a contract to purchase the property.

Purchasers frequently investigate the condition of the property they plan to purchase but give no consideration to the condition of the common property owned by the association or all the owners.

Margherita Albarello on CNN Financial

CNN Financial recently interviewed Margherita Albarello for their special report on bullying. To see CNN coverage on this topic go to http://www.cnn.com/2003/EDUCATION/12/09/bullying.ap/index.html.

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