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Issues You Can Expect to See in Employment Law in 2016

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As 2015 draws to a close, here is a look at some of the emerging employment law issues on the horizon in 2016 affecting Philadelphians. Without further ado, here is the list.

WAGE THEFT

This column has written about wage theft in the past and it appears to be a problem that is not going away. According to the website for Community Legal Services of Philadelphia, wage theft is the practice of underpaying or failing to pay workers money that they are legally owed. Wage theft comes in many forms—some employers misclassify their workers and fail to pay them overtime, others pay at rates below the minimum or promised wage, and other employers simply fail to pay their workers for all of their hours. In Philadelphia alone it has been reported that in any given work week there are as many as 93,000 instances of wage theft, including overtime violations, shorting hours, and minimum wage violations. Victims of wage theft are estimated to lose 15 percent or more of their paychecks. Throughout the state, employees lose anywhere from \$19 million to \$32 million each week due to wage theft. (See June report titled "Shortchanged: How Wage Theft Harms Pennsylvania's Workers and Economy," prepared by the Sheller Center for Social Justice at Temple University's Beasley School of Law).

An anti-wage theft bill was introduced by City Councilman William Greenlee and unanimously approved by City Council on Nov. 12. Having been signed by Mayor Michael Nutter, the ordinance will become effective July 1, 2016. The new law will make it easier for victims of wage theft to file complaints with a newly created position within the Managing Director's Office called a "wage theft coordinator." The coordinator will have adjudicatory powers to hear disputes and victims will have a private right of action providing for penalties and counsel fees, if successful. The ordinance has some additional teeth, such as an anti-retaliation provision and penalties for employers who steal wages by revoking or suspending their business license.

I would not expect to see an immediate impact with this new ordinance but the long-range forecast could make a substantial dent in the alarmingly high amount of Philadelphians being victimized by

wage theft.

BAN THE BOX

One of the more controversial employment trends involves the "Ban the Box" legislation. Initially introduced in 2012, the Fair Criminal Records Screening Standards Ordinance was intended to make sure that employers make hiring and other employment decisions based on relevant work qualifications without improperly considering a person's criminal record. According to the Philadelphia Commission on Human Relations (PCHR), the agency charged with enforcing the ordinance, "Ban the Box" restricts when during the application an employer can inquire about someone's criminal history. Employers are prohibited from ever considering a closed case that did not result in a criminal conviction.

On Dec. 15, Nutter signed legislation that would beef up the protections afforded to "returning citizens," a term used to describe people with criminal backgrounds who are looking to re-enter the work force. The enhanced ordinance affects city agencies and private employers with at least one employee, preventing them from inquiring about criminal background and arrests on the job application itself.

While the employer may still perform a background check, it may now only do so after making a conditional offer of employment. In the event the background check reveals a criminal conviction within the last seven years (excluding periods of incarceration), the employer must consider the nature of the crime, the time that has elapsed since the offense and the duties of the job when determining whether to offer employment. Further protections include providing notice to rejected applicants, in writing, along with a copy of the criminal history report. Applicants would then have 10 business days following the rejection to provide evidence of an inaccuracy on the report or to provide an explanation.

The new law becomes effective March 15, 2016, but it is not without its detractors. The pessimists of the world view the legislation as a threat to economic growth and private-sector job creation, making it more expensive to do business in Philadelphia. But according to Rue Landau, executive director of the PCHR, "discrimination against people with criminal records still happens every day. This legislation will open doors to employment opportunities for thousands of Philadelphians who are trying to make better lives for themselves as they struggle to overcome poor choices in the past."

PAID SICK LEAVE

The city of Philadelphia enacted the "Promoting Healthy Families and Workplaces Ordinance" earlier this year. The law, which took effect May 13, requires all employers with at least 10 employees to provide paid sick leave and smaller employers to provide unpaid leave. On the employee's first day of employment, he or she will begin accruing a minimum of one hour of sick time for every 40 hours worked in Philadelphia, up to a maximum of 40 hours per calendar year. Employees are able to start using earned paid sick time 90 days after it has been accrued.

The ordinance provides even greater protection than its federal counterpart, the Family and

Medical Leave Act (FMLA). In addition to providing for paid leave, the sick leave ordinance broadly defines who can use the leave. Employees or those caring for a family member with a "mental or physical illness, injury or health condition; an employee's need for medical diagnosis, care, or treatment of a mental or physical illness, injury or health condition; an employee's need for preventive medical care" are entitled to protected leave. This is less onerous than the FMLA's requirement for a "serious health condition." Moreover, "family members" are defined much more broadly by including special recognition for "life partners" defined elsewhere as "a long-term committed relationship between two unmarried individuals of the same gender."

The paid sick leave law also provides protection for victims of domestic or sexual abuse who are absent for reasons relating to medical attention needed to recover from physical or psychological harm caused by domestic or sexual violence or stalking; services from a victim services organization; psychological or other counseling; relocation due to the domestic or sexual violence or stalking; or legal services.

Under the ordinance, a specific "sick leave agency" was to be created by September, but by all accounts, that has not yet happened. Instead, the paid sick leave law has been administered by the city's Managing Director's Office. On Oct. 26, the managing director issued its paid sick leave guidance on compensation. Therein, the city clarified that employees are to be paid their hourly rate, or, at a minimum, the Pennsylvania minimum wage of \$7.25 per hour when paid sick time is used.

In certain situations in which employees earn a regular hourly rate or a wage not calculated per hour, compensation under the ordinance for these specific job categories was outlined and guidance provided. For example, the guidance includes a compensation structure for employees who are hourly, salary tipped, per diem, and commission using the state minimum wage as a base, but the compensation guidance does not preclude employers from paying employees a rate higher than the minimum wage.

Employees who are denied leave under the law, or are retaliated against for asserting their rights, are entitled to bring a private right of action. While there are no reported cases under the ordinance to date, we expect that court dockets in 2016 will see plenty of activity under the law. Until then, I wish you all a very prosperous, fulfilling and thought-provoking New Year. Cheers. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.

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