

Articles in this issue provided by Campbell Durrant Beatty Palombo & Miller, P.C.



PELRAS UPDATE

414 North Second Street ♦ Harrisburg, PA 17101 ♦ (800) 922-8063 ♦ www.pamunicipalleague.org

INSIDE THIS ISSUE:

Paid Suspension is not an Adverse Employment Action in Title VII Discrimination Claims **2**

U.S. Department of Labor Proposes Dramatic Changes for FLSA Exempt Requirements **3**

Register Now!

2015 PELRAS Regional Workshops

Bad cops... What are you going to do? Police Misconduct Investigations & Discipline Essentials for 2015

Join the PELRAS membership at a convenient afternoon meeting (including lunch).

October 9—Cranberry Highlands Golf Course

October 23—Comfort Suites Hotel, Carlisle

October 30—Upper Merion Township Building

Registration and additional information can be found at www.pamunicipalleague.org under the training tab.

Child Protective Services Law Background Clearances Update

by Julie A. Aquino, Esq.

You probably know that the Child Protective Services Law (“CPSL”) was amended to require background checks for all paid employees, age 14 or older, who have “direct contact with children” or who are “responsible for the welfare of a child.” The update on this front is that the General Assembly further changed some of the provisions of this law through additional amendments enacted on July 1, 2015.

The 2014 amendments to the CPSL were a major change in the law for Pennsylvania employers, requiring criminal background clearances for covered employees. The three clearances required come from the Pennsylvania State Police (“PSP”), the FBI, and the Pennsylvania Department of Human Services (“DHS”). For new hires covered under this law, the clearances must be submitted to the employer prior to commencement of employment. For current employees not previously subject to these clearances, the employee must submit them to the employer no later than December 31, 2015. Covered employees are also required to self-report arrests and convictions of certain enumerated criminal offenses within seventy-two

(72) hours. Similar, although not identical, requirements also apply to adult volunteers.

So what changed in July 2015 regarding these requirements? One major change is that the 2014 version of the law required a new set of background clearances every thirty-six (36) months, which was changed under the July 2015 amendments to a recurring period of every sixty (60) months. In regard to this obligation, be aware that an “employer, administrator, supervisor or other person responsible for employment decisions” that intentionally fails to require an applicant or employee to submit the required clearances commits a third degree misdemeanor. Another minor change is that the Commonwealth reduced the cost of the reports from PSP and DHS from \$10.00 to \$8.00 each, although the cost of the FBI clearance still remains the same, \$27.50.

The July amendments also inserted the phrase “program, activity or service” into the provision requiring clearances of paid employees who have “direct contact with children,” or are

The PELRAS Update is a bimonthly publication of the Public Employer Labor Relations Advisory Service, a program of the Pennsylvania Municipal League. It is published in February, April, June, August, October, and December. PELRAS membership information requests and other inquiries should be directed to 800-922-8063. The articles for the newsletter are provided by Ballard Spahr LLP in Philadelphia and Campbell Durrant Beatty Palombo & Miller, P.C. in Pittsburgh.

responsible for a child's welfare. It remains to be seen how insertion of this phrase, which has its own detailed definition, impacts coverage under the law.

Other July 2015 amendments pertain to adult volunteers. The good news for volunteers is that they can now obtain one set of clearances at no cost every fifty-seven (57) months, which cannot be used, however, for employment purposes. New covered adult volunteers must obtain the background clearances by August 25, 2015, while existing covered volunteers now have until July 1, 2016. Adult volunteers are not required to obtain the FBI clearance if they have been a resident of the Commonwealth for the entirety of the previous ten (10) years and they swear or affirm in writing that they have not been convicted of certain enumerated criminal offenses.

The amendments also attempted to narrow, to some extent, under what circumstances adult volunteers are required to obtain clearances, by including a separate definition of "direct volunteer contact." Per this new definition, DHS provides the following instruction: "When determining whether a volunteer is responsible for the welfare of a child consider whether the volunteer is acting in lieu of or on behalf of a parent. If they are acting in lieu of or on behalf of a parent, they will need certifications. If a determination is made that the volunteer is not responsible for the welfare of a child, you then move on to the second avenue for consideration; whether they have direct volunteer contact with children . . . because they provide

care, supervision, guidance or control of children and have routine interaction with children. As the terms care, supervision, guidance or control are not defined in the statute we suggest that the common meaning of these terms be used, with child safety serving as the paramount consideration. With regard to routine interaction with children, consideration should be given to what the volunteer's role is within the agency. Is their contact with children regular and repeated contact that is integral to their volunteer responsibilities?"

The July amendments also include an exception to the background clearance requirement for students who volunteer at events on school grounds, under certain conditions. Student volunteers interested in understanding whether they are required to obtain background clearances should review the specific criteria for this exemption.

Lastly but not least important, remember that the CPSL was also amended in 2014 to expand requirements for the "mandatory reporting" of "child abuse" to a greater number of employees and volunteers, and under less narrow circumstances. Individuals who are mandatory reporters of child abuse due to their employment or volunteer work are required to report suspected child abuse to the Commonwealth's ChildLine system, which is accomplished by calling 1-800-932-0313. For details regarding these significant mandatory reporting obligations, see the June 2015 PELRAS Update.

Paid Suspension is not an Adverse Employment Action in Title VII Discrimination Claims

by Joseph M. Motto, Esq.

A plaintiff must suffer an "adverse employment action" in order to state a prima facie case of discrimination under Title VII of the Civil Rights Act of 1964. "Adverse employment actions" include, among other actions, terminations, suspension, demotions, refusal to hire, failure to promote, etc. In *Jones v. Southeastern Pennsylvania Transp. Auth.* ("SEPTA"), 796 F.3d 323 (3d Cir. 2015), the United States Court of Appeals for the Third Circuit recently joined six of its federal sister courts in holding that a paid suspension does not constitute an adverse employment action for purposes of discrimination claims under Title VII.

Underlying *Jones v. SEPTA*, Jones worked as an administrative assistant from 2001 to 2010. As an hourly employee, Jones' time reports were generated based on timesheets she submitted to her supervisor, Alfred Outlaw, for his approval. In the course of preparing Jones' annual performance review for 2010, Outlaw discovered discrepancies between the official records of Jones' hours and his personal records of her absences. On December 1, 2010, Outlaw suspended Jones with pay pending an investigation into possible fraud related to her timesheets and false reporting of her time. Jones contacted SEPTA's Equal Employment Opportunity Office the next day and complained—for the first time—that from 2001 through 2010, Outlaw harassed her by

asking about her deceased husband, making unwelcome sexual comments, looking down her blouse, and assigning her work related to his personal business. Jones alleged her suspension was in retaliation for opposing Outlaw's improper conduct.

SEPTA terminated Jones on February 22 after conducting a thorough investigation of her time reports which revealed that Jones had engaged in an elaborate scheme to defraud SEPTA of roughly \$6,874. Jones subsequently initiated legal action against SEPTA in response. Jones filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging discrimination and retaliation under Title VII and corresponding state-law claims under the Pennsylvania Human Relations Act ("PHRA"). She also included claims based on the Equal Protection Clause of the United States Constitution and the Family and Medical Leave Act ("FMLA"), as well as a common law wrongful termination claim.

At the district court level, SEPTA filed a motion for summary judgment arguing that Jones' paid suspension was not an adverse employment action and therefore was not actionable under Title VII (or the PHRA, its state law counterpart). The district court agreed and granted summary judgment in favor of SEPTA. Jones then appealed to the Third Circuit and asked the court to consider whether a paid suspension constitutes a cognizable adverse employment action under Title VII.

Upon review, the Third Circuit decided to follow the Second, Fourth, Fifth, Sixth, Eighth, and Ninth Circuits and held that Jones' paid suspension pending investigation into her time reports was not an adverse employment action for purposes of discrimination claims under Title VII. The court explained that an adverse employment action is ordinarily "an action by an employer that is serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." Moreover, while Title VII explicitly prohibits discrimination in the hiring, firing, compensation, and terms and conditions of employment, a "paid suspension is neither a refusal to hire nor a termination, and by design it does not change compensation." The court concluded that Jones did not suffer an employment action when SEPTA suspended her with pay. As for Jones' claim that the decision to terminate her employment was the result of unlawful discrimination, the court concluded that there was no evidence linking that decision, which was the natural result of SEPTA's investigation into allegations of time sheet fraud, to unlawful discrimination.

Importantly, the court declined to consider whether a paid suspension could constitute an adverse employment action under Title VII in the context of retaliation claims, which are distinct from discrimination claims. Therefore, no bright line rule yet exists regarding whether a Plaintiff can successfully assert a paid suspension as a basis for a retaliation claim.

U.S. Department of Labor Proposes Dramatic Changes for FLSA Exempt Requirements

by David E. Mitchell, Esq.

The U.S. Department of Labor recently issued proposed regulations that would convert many employees who are currently exempt from the Fair Labor Standards Act's overtime requirements into non-exempt employees who would be entitled to overtime pay if they work more than forty hours in a week.

The FLSA's minimum wage and overtime requirements do not apply to "any employee employed in a bona fide executive, administrative, or professional capacity" 29 U.S.C.A. § 213(a)(1). The Department of Labor's FLSA regulations detail duty-related requirements for each of these exempt categories, which were revised extensively in 2004. Those requirements generally remain

unchanged under the Proposed Regulations. However, under the current regulations, in addition to meeting the other requirements for exempt status, an employee must also be paid at least \$455 per week on a salary basis, the equivalent of \$23,660 per year (with the exception of teachers, lawyers, physicians and licensed medical practitioners, to whom the salary basis test does not apply). Employees who earn less than that amount do not qualify for FLSA exempt status and must be paid overtime if they work more than forty hours per week in addition to being paid at least the minimum wage for all hours worked. Under the proposed regulations the \$455 per week threshold for the executive, administrative, or professional exemptions would be increased to \$921 per

week, which is the equivalent of \$47,892 per year. Many currently exempt employees would fall below this proposed higher threshold. The Department of Labor has further indicated that the threshold could increase to \$970 per week, the equivalent of \$50,440 per year, as soon as 2016, with automatic annual updates thereafter. If the Proposed Regulations remain unchanged when the Final Rule is issued, employees below the threshold would be entitled to overtime pay for working more than forty hours per week. The Department has also proposed increasing the threshold for the “highly compensated employees” exemption from \$100,000 to at least \$122,148.

The comment period for the Proposed Regulations closed on September 4, 2015. The Department will consider the extensive comments it received, numbering approximately 250,000, and will likely issue a Final Rule sometime in the next year. The Department’s refusal to extend the sixty day period for public comments, despite numerous requests to do so, suggests that the Final Rule will be placed on the fast track and issued as soon as possible, with a likely effective date sixty days after it is released. The proposed change to the minimum salary requirement for exempt employees would not only result in increased overtime costs, it would require employers to closely monitor and accurately record the precise hours worked by such formerly exempt employees.