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An Employer's Notice Obligations Under The Family and Medical Leave Act

By: Pamela G. Cochenour, Esq. and Divya Wallace, Esq.

Imagine you are a human resources supervisor and an employee walks into your office and informs you that he has recently been diagnosed with cancer and will need to take time off work for treatment. The employee says nothing more. As an employer, what do you do and what are your legal obligations?

The federal Family and Medical Leave Act ("FMLA") should immediately appear on your radar screen. Pursuant to the FMLA, employers must provide eligible employees with up to 12 weeks of leave for certain qualifying conditions, including a serious health condition that makes the employee unable to perform the functions of his or her job.

If the employer provides an employee handbook that outlines employee benefits, good practice dictates that the handbook contain information on FMLA rights and responsibilities and the company's policies regarding the FMLA. Furthermore, the U.S. Department of Labor regulations impose a myriad of responsibilities upon a company to ensure that its employees are aware of their FMLA benefits.

Once an employee requests leave, the company's notice obligations under the FMLA substantially increase. In the scenario above, the employee failed to mention the FMLA, but the employee is not required to expressly assert their FMLA rights. The burden is on the employer to make further inquiry into whether the leave is FMLA qualifying. If leave is sought for a medical condition, for example, the company may request that the employee submit a medical certification form completed by the employee's health care provider.

After the company is satisfied that its employee's leave is FMLA qualifying, a new set of employer obligations is triggered. The company must notify the employee within a reasonable time (one to two business days if feasible) after obtaining such knowledge that the leave is being taken pursuant to the FMLA. The employer must notify the employee of his specific obligations and must explain the consequences of failing to meet those expectations. The notice must state, where appropriate:

- That the leave will be counted against the employee's FMLA leave.
- Any requirements for the employee to furnish ongoing certification of a serious health condition.
- Information pertaining to an employee's right to substitute paid leave and any conditions related to such substitution.
- Any requirement that the employee make premium payments to maintain health benefits and the arrangements for making such payments.
- Any requirement that the employee present a fitness-for-duty certificate in order to be restored to employment.
- An employee's status as "key" and the potential consequence that restoration to that status may be denied following FMLA leave.
- The employee's right to restoration to the same or an equivalent job upon return from leave.
- The employee's potential liability for payment of health insurance premiums paid by the employer during the employee's unpaid FMLA leave if the employee fails to return to work.

An employer must respond to questions from its employee concerning his rights and responsibilities under the FMLA. Bear in mind

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Special Employment Law Edition

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Practice Spotlight: Employment Litigation and Counseling

Left to right top row, Divya Wallace, Pamela G. Cochenour, Daniel J. McGravey, Sarah R. Lavelle and Jennifer R. Russell
Bottom row, Kathryn M. Kenyon, Eric P. Reif and Amy Lachowicz

Our attorneys litigate a variety of claims, provide training to employees and managers, prepare employment policies, contracts and manuals, and counsel employers daily on human relations, employment and benefits matters.

We litigate claims in judicial and administrative forums and represent both private and public employers in state and federal courts. Our trial lawyers have defended discrimination, harassment, retaliation and hostile work environment claims arising out of allegations of gender, age, disability, national origin, sexual and religious discrimination. Our expertise extends to claims brought under the Americans with Disabilities Act, the Family and Medical Leave Act, wage and hour laws, and the Employee Retirement Income Security Act. Our lawyers litigate complex matters involving employment contracts, trade secrets, covenants not to compete and confidentiality agreements.

Our success is based upon the simple but effective philosophy: Assume that each case will go to trial and prepare accordingly. This strategy yields substantial advantages to our clients. These advantages include positioning the case for a quick and fair settlement, strategically selecting witnesses to depose, preparing clients for their depositions, retaining the most effective experts, filing motions that gain tactical advantages and, ultimately, achieving favorable results.

In representing both private and public employers, we take the initiative and provide preventive advice designed to avoid costly litigation through training employees and managers on harassment, the Americans with Disabilities Act, Family and Medical Leave Act compliance, and workplace violence, as well as hiring, promotion, demotion, discipline and discharge issues. These efforts have successfully enabled our clients to avoid discrimination and other wrongful discipline or discharge claims.

Our lawyers prepare employment policies, manuals and agreements for all levels of employees, including personnel handbooks, FMLA policies, covenants not to compete, confidentiality agreements and separation agreements. We advise our clients on day-to-day issues that arise in the workplace.

We regularly speak to industry groups, human resource professionals and other lawyers on employment-related matters.

For more information, please contact Pamela G. Cochenour at (412) 263-2000 or via e-mail at PGC@PIETRAGALLO.com, or Daniel J. McGravey at (215) 320-6200 or DJM@PIETRAGALLO.com.

Essential Considerations For Protecting A Company's Most Valuable Information

By: Daniel J. McGravey, Esq. and Eric P. Reif, Esq.

In an increasingly competitive economy, employers must protect a broad range of confidential and proprietary business information from improper disclosure to competitors or use by former employees. A company's ability to protect its valuable information has been facilitated in 47 states by the adoption of a Uniform Trade Secrets Act.

According to these statutes, virtually anything that can give an owner an advantage over his or her competitors is protectable as a trade secret. Indeed, a "trade secret" is not confined solely to highly technical matters such as manufacturing processes, chemical formulae or engineering designs. Rather, as typified by the Pennsylvania Act, a "trade secret" encompasses a broad range of business information and is defined as "Information . . . [that]

- Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

This language allows employers to apply the trade secret label to information that may not historically have been thought of as a trade secret. For example, trade secrets in Pennsylvania include: business information, customer lists, cost and pricing information or formulae for a product or service, customer and bid information, inventory data and projections, unit costs and margin data, and information pertaining to business profitability - such as data related to materials, labor, overhead and profit margin. Trade secret protection is particularly advantageous because there is no initial expense to qualify the information as such and the protection is immediate.

The trick becomes what steps the company must take to protect its trade secrets in a manner that the courts will enforce. The company must illustrate that it engages in a systematic practice that prevents its trade secrets from becoming public. Several practical steps should be taken.

First, every employee should sign an agreement requiring that they maintain as a secret all of the information that they learn about the business. Every new employee should be required to sign such an agreement when they enter the employ of the company. Existing employees should sign the agreement in conjunction with the receipt of a raise, bonus or promotion that will provide consideration for the obligations assumed by the employee in the agreement.

The trick becomes what steps the company must take to protect its trade secrets in a manner that the courts will enforce.

The employer should broadly define what it considers to be valuable, confidential and/or trade secret information that the employee will acquire during the course of the performance of his service for the company. The employment agreement should prohibit the employee, both during and after his employment, from using or disclosing confidential or trade secret information except as required in the course of employment. The agreement may include a restrictive covenant precluding the departing employee from working in a competing business for a reasonable period of time. The employee, therefore, will have less opportunity to share the company's valuable information with a competitor.

Second, every employee should have an entrance interview upon beginning their employment and an exit interview at the end of their employment. During the entrance interview, the employee should be educated on the company's confidential information and his obligations with respect to such information. During the exit interview, the employee must return all confidential information and be reminded of the restrictions defined in his employment agreement and the ramifications of violating it.

Third, the company should take routine steps, including marking information as "confidential", defining areas of the company's facility as "restricted", and using signs and posters to remind employees of the company's confidential information and their obligations with respect to protecting it.

Fourth, the employer should confirm that the information labeled as a trade secret is not publicly available and is accessible within the company only by authorized users or individuals who have a legitimate right to access the information, such as management, on a need-to-know basis. Critical information in computers should be encrypted so that only authorized users can access the information and unauthorized attempts to access a restricted file are blocked by the system.

Fifth, written material such as customer lists, pricing and margin data, business or strategic plans, the particularized terms of customer contracts, compilations of customer material, etc., should only be distributed to those employees or individuals who utilize the information in the operation of the business.

These important steps should be taken by an employer with the advice and counsel of a lawyer experienced in protecting confidential information and who is thoroughly familiar with the nature and scope of the employer's business and the nature of the trade secrets that require protection.

For more information, please contact Daniel J. McGravey at (215) 320-6200 or via e-mail at DJM@PIETRAGALLO.com or Eric P. Reif at (412) 263-2000 or via e-mail at EPR@PIETRAGALLO.com.

The Emerging Trend Of Wage And Hour Litigation: Are You Prepared?

By: Amy C. Lachowicz, Esq. and Kathryn M. Kenyon, Esq.

Class action wage and hour litigation has erupted in the past few years. Actions brought under the Fair Labor Standards Act (FLSA) - the federal wage and hour law - doubled between 2001 and 2006. Class action wage and hour lawsuits have now surpassed class actions for both employment discrimination and violations of the Employee Retirement Income Security Act (ERISA).

Indeed, the dramatic rise in wage and hour class action litigation has impacted a litany of familiar names, including Starbucks, Applebees, Radio Shack, Rite Aid and U-Haul. Perhaps one of the most startling figures is the amount that juries have awarded in damages against retail giant Wal-Mart: $251 million since December 2005. Some of the most substantial verdicts, however, have arisen out of simple and preventable errors.

The FLSA establishes employment rules including overtime pay, recordkeeping and minimum wage with respect to full-time and part-time workers in the private sector and at the federal, state and local levels of government. It affects more than 100 million workers. In addition to the FLSA, many states have wage and hour laws that can be more stringent than the FLSA. The damages available for violations of either state or federal wage laws is considerable. An employer who violates the FLSA can be required to pay significant sums of unpaid compensation, as well as liquidated damages and attorneys' fees. State wage and hour laws contain similar damages provisions.

Given the number of plaintiffs in wage and hour class actions, an adverse verdict can be devastating to employers. Wal-Mart was recently hit with a $6.5 million verdict for violations of state wage law based on its failure to pay employees overtime, cutting employees' break time and allowing employees to work "off the clock." In the past few years, Wal-Mart has suffered similar verdicts to the tune of $172 million and $78 million for violations of California and Pennsylvania wage and hour laws, respectively.

There are basic steps that employers can institute to protect themselves from exposure under federal or state wage and hour laws:

Put it in writing. Employers must maintain accurate records of the hours worked by employees and keep track of the amount of overtime pay owed to its employees. In addition, all policies and procedures should be in writing and easily accessible by all employees. Any incidents, good or bad, should be documented. All negotiations, schedules and compensation packages (including benefits) should be in writing.

Regularly review and audit job descriptions and job duties. The FLSA categorizes employees as "exempt" versus "non-exempt" for purposes of overtime compensation. Sometimes job titles and descriptions do not accurately represent an employee's actual responsibilities. What an employee does, not what a written job description says, controls whether an employee may earn overtime. Employers must keep actual job function in mind; not simply whether an employee is paid on a salaried basis.

Be aware of state laws where there are offices/employees. State laws can be narrower than their federal counterparts. Moreover, each state has a different statutory scheme and corresponding reglations. It is, therefore, critical for an employer to review and compare the various laws, regulations and local practices in each jurisdiction where it maintains offices or employees.

Conduct routine training. Employees with any type of managerial or supervisory responsibility should receive regular training in employment and human resources issues so that they can react consistently and properly to developing situations in the workplace or when a complaint or inquiry is made.

Be aware of alternate or flexible schedules. In today's workplace environment, many employees telecommute and/or have flex schedules. These alternatives to the 9-5 workday create litigation exposure for employers. It is only through knowledge of the wage and hour laws that an employer can protect itself from unnecessary litigation.

Encourage open lines of communications. Employees must understand and believe that there will be no retaliation if they come forward with a concern or discrepancy in payment.

Avoid creative compensation packages that might raise red flags with the IRS. If you want to explore such options, use a consultant or attorney familiar with employment and tax law to avoid any conflict and potential problems in the future.

Know thy personnel file. Each employee should know what his or her expected performance standard is and when they fail to meet that standard. Employers must routinely document the personnel file when any failures or deviations from that standard occur.

Know your own policies and procedures. Regularly review and audit your own policies and procedures to make sure they are current, consistent and actually enforced. Compare the policies and procedures to the actual authority given to and used by employees.

In short, an employer's awareness of the potential exposure under federal and state wage and hour laws is only the beginning. They must obtain sound advice from experienced attorneys to insulate themselves from the substantial verdicts sweeping across the country.

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Protection Afforded To Employers By Job Reference Immunity Statutes

By: Jennifer R. Russell, Esq.

In today's volatile economy, employees are routinely changing jobs and prospective employers actively seek job references for potential candidates. An employer who receives an inquiry regarding one of its current or former employee's job performance should rightfully be concerned about the risk of a lawsuit for defamation, invasion of privacy, intentional interference, or other similar torts, if the employer provides negative information regarding the former employee's performance, character or other traits.

This concern has caused some employers to adopt a "no reference" policy, where employers provide either no information or limit the information to dates of employment, job title and salary. Employers could face additional litigation exposure if they fail to disclose information about a current or former employee who subsequently engages in violent or other inappropriate behavior in the new employer's workplace. The new employer, consequently, may itself have exposure for negligently hiring the new employee without the benefit of complete information regarding the employee's job performance.

Fortunately for employers, however, a majority of states have passed laws protecting employers who disclose information regarding past employees' performance in connection with job references, also known as "job reference immunity" statutes. The terms of each state's statutes vary widely and management should critically review the applicable law before providing a reference. Some laws direct that an employer who provides information regarding an employee or former employee is immune from suit. Other statutes, however, provide immunity only for disclosure of information regarding "job performance."

Pennsylvania

In 2005, Pennsylvania enacted a job reference immunity statute, 42 Pa. C.S. § 8340.1, providing employers with immunity from civil liability for responding in good faith to a request from a potential employer about a current or former employee's job performance. The Pennsylvania statute, however, does not define "job performance." In operation, the statute presumes that an employer has provided information in good faith unless the plaintiff can prove by clear and convincing evidence that the employer knew or should have known that the information was false, materially misleading, made with reckless disregard for its truth or falsity, or that a contract or law prohibited the disclosure. 42 Pa. C.S. § 8340.1(a).

New Jersey

New Jersey does not have a job reference immunity statute for its employers. New Jersey courts, however, apply a common law qualified privilege to employers who disclose job reference information and have held that a clear and convincing evidence standard applies to the rebuttal of such privilege. See *Erickson v. Marsh & McLennan Co.*, 569 A.2d 793, 805-807 (N.J. 1990) (qualified privilege extended to employer for statements made to prospective employers).

> The terms of each state's statutes vary widely.

New Jersey does immunize health care entities and health care professionals who disclose information in good faith, N.J. Stat. Ann. § 26:2H-12.2c; N.J. Stat. Ann. § 26:2H-12.2d. The statute requires employers to provide information about current or former employees' job performance "as it relates to patient care" and the reason for former employees' separation. An employee's "job performance" is to relate to "the suitability of the employee for re-employment at a health care entity, and the employee's skills and abilities as they relate to suitability for future employment at a health care entity." Penalties are available should the health care provider fail to provide the requested information.

Delaware

Delaware's job reference immunity statute, 19 Del. C. § 709, provides a presumption of good faith disclosure of "information" about a current or former employee's job performance and that such presumption may be rebutted by a showing that the information was knowingly false, deliberately misleading, rendered with malicious purpose or disclosed in violation of a non-disclosure or other agreement or law providing for its confidentiality.

Unlike Pennsylvania's statute, however, Delaware does not require that the plaintiff rebut the presumption of good faith with clear and convincing evidence. Notably, Delaware's law is more limiting than many other states' laws, as it excludes employers from protection if they disclose confidential information, despite the truth of such information and the fact that it was disclosed in good faith.

Ohio

Ohio provides immunity from suit for employers who disclose information regarding current or former employees' job performance to prospective employers at the request of such prospective employers or current or former employees. Ohio Rev. Code Ann. § 4113.71(B). There is no immunity, however, for an employer that discloses information "with knowledge that it was false, with the deliberate intent to mislead the prospective employer or another person, in bad faith, or with malicious purpose" or that the disclosure of information by the employer constitutes an unlawful discriminatory practice.

Plaintiffs in Ohio have a lighter burden than those in Pennsylvania as they are held to a preponderance of the evidence standard. Ohio specifically provides that the court has discretion to order the plaintiff to pay the employer reasonable attorneys' fees and court costs if the court finds by a preponderance of the evidence that the plaintiff's lawsuit was frivolous. Ohio Rev. Code Ann. § 4113.71(C).

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Employment Manuals: Why Every Employer Should Have One And What Should Be Included

By: Sarah R. Lavelle, Esq.

Often, the first request made of an employer client in defending them against claims of racial, gender, age or other forms of discrimination is to see their employee handbook or manual. When we learn that the company does not have one, or that it has not been recently updated, we recognize that the plaintiff may already have a tactical advantage. Employee handbooks and manuals are an extremely effective way of preventing or, at least, minimizing exposure to discrimination claims and other unnecessary employment litigation.

Indeed, significant employee rights and employer liabilities begin at 15 employees. For example, the Federal Civil Rights Act and American with Disabilities Act ("ADA") are triggered at 15 employees. Individual state laws, moreover, can offer more protection to the employee and are triggered with fewer than 15 employees, such as Pennsylvania, whose employment discrimination statutes apply to employers with as few as four employees.

If well drafted, the employment manual allows a company to clearly and concisely publish its rules, policies and guidelines, while preserving flexibility and employer discretion. More importantly, it fosters the consistent application of work rules. This is particularly crucial when an employer must convince a fact-finder that the actions it has taken against an employee were not taken arbitrarily or were not taken based on that employee's race, gender, age, religion, or other protected classification. But having a manual is only the first step; it should contain essential provisions to maximize its effectiveness.

Initially, every employee handbook must contain a conspicuous disclaimer to maintain the "at-will" relationship between employer and employee. Without an effective disclaimer, the handbook may increase litigation risk by creating an implied contract that destroys the at-will relationship. This conspicuously placed disclaimer should expressly state that:

- Nothing in the handbook should be construed as a contract;
- The employee's job is terminable at the will of the employer, with or without cause; and
- The employer reserves the right to modify the handbook policies on a unilateral basis.

The handbook must include a provision professing the employer's equal employment opportunities and intolerance for discrimination and harassment in the workplace. The failure to maintain an anti-discrimination or anti-harassment policy creates the appearance that the employer is not committed to equality. Moreover, if properly drafted, the anti-discrimination and anti-harassment policies can aid in later defending against claims of discrimination and harassment.

> An employer must carefully craft its disciplinary policies and procedures for inclusion in the manual.

The policies must clearly describe the complaint procedure that an employee, purportedly victimized by harassment, should follow. If the steps are clearly stated, but the employee fails to follow the complaint procedures, the employer will have buttressed its defense. For the defense to be valid, however, the procedures must be easily navigated by the employer's average worker. Indeed, the complaint procedures must be written such that a company's most unsophisticated employee can follow them.

Company integrity issues should be included in the manual. For example, the employer's definition of confidential information and each employee's obligation to maintain the confidentiality of that information should be clearly articulated. Wage and hour policies are another critical component of any comprehensive manual.

An employer must carefully craft its disciplinary policies and procedures for inclusion in the manual. The manual, for example, should contain an itemized list of employee violations that may trigger disciplinary action. Included within that list should be "the violation of any rule or regulation of the employer." In addition, the manual should describe the disciplinary process and the disciplinary options available to the employer, up to and including termination.

With more litigation emanating from the widespread use - and misuse - of the Internet and e-mail, employers would be wise to have provisions governing their employees' use of such mediums. More specifically, it should include a description of when employees may use the Internet and whether their access to it should be limited "for work-related purposes only."

Employers that are governed by the Family and Medical Leave Act ("FMLA") must include certain FMLA provisions within their handbook. Specifically, the handbook should incorporate information regarding the employees' FMLA rights and responsibilities, as well as the employer's policies regarding FMLA. Including policies regarding FMLA can reduce disputes over interpretation. For example, the employer should explain whether an employee is permitted the use of paid sick leave and whether employees leaving the organization would be paid for unused sick leave. Also, the handbook should state whether the employer calculates the 12 weeks available leave on the basis of a calendar year, some other fixed period (e.g., fiscal year), 12 months forward from the leave date or 12 months retrospectively from the leave date. If the employer fails to specify a method of calculation, the employees may use the method which affords them the most advantage.

An additional provision to be included in the handbook concerns certain whistleblower rights. Depending on what state the employer operates in, it may be required to provide written notice to its employees of their whistleblower rights. For example, pursuant to New Jersey's Conscientious Employee Protection Act ("CEPA"), an employer who has 10 or more New Jersey employees is required to provide written notice of their rights and obligations under the law. Also, under Pennsylvania's proposed Whistleblower Act, an employer is required to post notices and use other appropriate means to notify employees of their protections and obligations under the law, should they identify workplace fraud or other misconduct.

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U.S. House Of Representatives Passes ADA Amendments Act

By: Jennifer R. Russell, Esq.

On June 25, 2008, the U.S. House of Representatives overwhelmingly approved by a vote of 402 to 17 the ADA Amendments Act of 2008, a bipartisan bill that proposes to reverse a number of U.S. Supreme Court decisions rendered since 1999 that have found employees to be ineligible for protection provided by the Americans with Disabilities Act of 1990 ("ADA"), and to, thus, broaden the application of the ADA.

Proponents of the legislation within the legislature and various organizations, including civil rights groups, disability advocates and trade organizations, argue that, since the ADA was enacted, courts have drastically reduced the number of workers protected from disability discrimination and that the ADA must be broadened in order for it to apply as it was intended.

The amendments would more fully define "disability" under the ADA, and develop a more comprehensive list of "major life activities" adding eating, sleeping, standing, lifting, bending, reading, concentrating, thinking, communicating and the operation of major bodily functions to the existing list.

In addition, the amendments would clarify that the standard applied to the definition of "disability" is not intended to be a strict and demanding standard, thus rejecting the Supreme Court's decision in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002), which requires an employee to prove that his or her disability limits a major life activity "significantly" or "to a large degree" in order to qualify as disabled under the ADA.

As amended, the Act would also prohibit any consideration of ameliorating effects or mitigating measures, including medication, prosthetics and hearing aids, in determining whether an employee has a disability and is thus, protected by the ADA. This change essentially overrules the Supreme Court's decision in *Sutton v. United Air Lines, Inc.*, 527 U.S. 471 (1999), that the determination of whether an individual is disabled should be made with reference to measures that mitigate the individual's impairment.

In addition, the amended statute would include within its coverage employees who are perceived as having an impairment, regardless of whether they actually experience a disability or whether the employer perceives them as having an impairment that limits a major life activity.

The House bill includes a proposed effective date of January 1, 2009. The U.S. Senate introduced the Act in August with 57 sponsors. It is not clear whether President Bush will veto the legislation. Although he supports the intent of the House bill, it has been noted that he is concerned that it could unduly expand the ADA's coverage and significantly increase litigation. Our lawyers will continue to follow this proposed legislation and will report any future changes or updates.

For more information, please contact Pamela G. Cochenour at (412) 263-2000 or via e-mail at PGC@PIETRAGALLO.com or Jennifer R. Russell at (412) 263-2000 or via e-mail at JRR@PIETRAGALLO.com.

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that if an employer fails to provide notice, it is precluded from commencing any action against the employee for failing to comply with any provision set forth in the notice.

Employees do not, however, always know that FMLA leave is available to care for an identified relative, to obtain intermittent treatment for their own medical condition or to handle matters related to the deployment of certain family members to serve in the armed forces. Employers must be able to recognize situations that are, or may be, covered by the FMLA and give the employee notice of their rights.

To be able to comply with the notice requirements of the FMLA, employers are advised to:

- Develop a written FMLA policy.
- Distribute the policy to all employees on a regular basis.
- Post the policy in an area frequented by employees.
- Train supervisory employees on the FMLA and circumstances which give rise to qualifying leave.
- Train Human Resources personnel on how to effectively communicate with employees about their FMLA rights.
- Train Human Resources personnel on how to effectively manage the employer's rights and obligations under the FMLA.

The FMLA presents unique challenges and opportunities to employers. A company that carefully follows the FMLA notice provisions can protect itself and, at the same time, send a message to its employees that they are valuable and appreciated. A law firm with substantial experience in this area can be a critical asset to any employer seeking to reduce its exposure under the FMLA and to control employee absences.

For more information, please contact Pamela G. Cochenour at (412) 263-2000 or via e-mail at PGC@PIETRAGALLO.com, or Divya Wallace at (215) 320-6200 or via e-mail at DW@PIETRAGALLO.com.

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West Virginia

West Virginia employers who provide "job-related information" that may be "reasonably considered adverse" about a current or former employee are presumed to do so in good faith and are immune from civil liability. The statute defines "job-related information" as "information concerning a person's education, training, experience, qualifications, conduct and job performance which is offered for the purpose of providing criteria to evaluate the person's suitability for employment." Notably, in order to be immune from suit, employers must provide such information in writing and provide a copy to the current or former employee at the time of the diclosure.

General Guidelines

Employers can insulate themselves from civil liability in connection with providing job references by acting in good faith. Employers should vigilantly document an employee's performance issues or other work-related problems as that record-keeping will be critical in demonstrating the employer's good faith. Employers should prepare a written policy defining the company's procedure for disclosing information about current or former employees and distribute it to their employees. Employers, moreover, should consider obtaining consent or waivers from their employees before providing job reference information.

For more information, please contact Jennifer R. Russell at (412) 263-2000 or via e-mail at JRR@PIETRAGALLO.com or Pamela G. Cochenour at (412) 263-2000 or via e-mail at PGC@PIETRAGALLO.com.

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The manual must include an acknowledgement page that both management and the employee sign to verify that the employee has received, read and understands the policies contained in the employment manual.

Once management decides to prepare a manual, then drafts the critical policies and procedures and distributes it to the employees, there is one final step: All supervisors should be trained regarding the appropriate use of the handbook, so that enforcement of the policies is even-handed.

Well-drafted employment manuals that are consistently followed by management are a key device for employers to minimize or eliminate exposure to discrimination claims and other unnecessary employment litigation. The manual, however, should be written to accommodate the individual needs of management by an attorney thoroughly familiar with the employer's objectives and the latest trends in the law.

For more information, please contact Sarah R. Lavelle at (215) 320-6200 or via e-mail at SRL@PIETRAGALLO.com or Daniel J. McGravey at (215) 320-6200 or via e-mail at DJM@PIETRAGALLO.com.

James E. Abraham Joins Pietragallo

James E. Abraham has joined Pietragallo as of counsel. He is based in the firm's Pittsburgh office.

Mr. Abraham is a member of the firm's business group and has extensive experience in the areas of employee benefits, tax, estate planning, mergers & acquisitions, and nonprofit law.

Mr. Abraham had started his own law firm on January 1, 2006. Prior to that, he had been a partner and co-chair of Schnader Harrison Segal & Lewis' employee benefit practice. He was also one of the founders of the law firm Doepken Keevican & Weiss, where he chaired the tax and employee benefit department.

His industry experience includes the energy, pharmaceutical and steel sectors. Additionally, he serves as the "family lawyer" for several families, where he oversees such diverse areas as asset acquisitions and divestitures, asset protection, stock market investment and estate planning. Mr. Abraham also serves as counsel to a number of nonprofit corporations with particular emphasis on mergers and strategic alliances.

Two Attorneys Join Philadelphia Office of Pietragallo

Alexandra C. Gaugler has joined the Philadelphia office of Pietragallo as a senior associate and Douglas K. Rosenblum as an associate.

Ms. Gaugler joins the firm from Chadds Ford-based Endo Pharmaceuticals, where she was senior manager of ethics and corporate compliance. In that role, she developed and implemented compliance policies and procedures related to all aspects of a publicly traded pharmaceutical company specializing in pain management.

Ms. Gaugler concentrates her litigation practice on white collar criminal defense, federal and state qui tam litigation, and complex commercial litigation.

Mr. Rosenblum had been with the Office of the District Attorney of Montgomery County, where he served as an assistant district attorney and special assistant U.S. Attorney for the Eastern District of Pennsylvania.

Mr. Rosenblum practices in the firm's white collar criminal defense, federal and state qui tam litigation and commercial litigation practice groups.

Recent Successes

Race Discrimination Defense: Daniel J. McGravey and **Amy C. Lachowicz** obtained the dismissal of a race discrimination lawsuit brought against their client, a regional transportation authority. The plaintiff had alleged that the transportation authority refused to hire him because he was African-American, in violation of the Pennsylvania Human Relations Act and Title VII. After their motion for summary judgment was denied, the Pietragallo attorneys renewed their arguments in the form of a motion for judgment on the pleadings. They argued that the Court of Common Pleas lacked jurisdiction over the plaintiff's claims. The Court of Common Pleas dismissed the plaintiff's case in its entirety.

Disability Discrimination Claim: Pamela G. Cochenour and **Jennifer R. Russell** obtained summary judgment on behalf of a regional health care provider in a disability discrimination claim brought by a former employee who was terminated following the full exercise of all her leave rights. The employee appealed the decision to the U.S. Court of Appeals for the Third Circuit, which affirmed the dismissal of the plaintiff's claims.

Fair Labor Standards Act Violation Defense: Pamela G. Cochenour and nationwide counsel for a financial services institution obtained summary judgment in a case where the plaintiff, a former employee, challenged her dismissal by alleging disability discrimination. She also alleged violation of the Fair Labor Standards Act by arguing that she had been misclassified as an exempt employee. Summary judgment was entered on behalf of the employer on all counts.

Sexual Harassment Settlement: Pamela G. Cochenour successfully negotiated a favorable settlement on behalf of an international manufacturer on a claim of sexual harassment brought by an employee who alleged that she had been stalked by a co-worker.

Product Liability Defense: Joseph J. Bosick won a jury verdict in the U.S. District Court for the Eastern District of Pennsylvania on behalf of a manufacturer of gasoline-powered hedge clippers. The plaintiff, who spoke only Spanish, sustained severe and disabling injuries to fingers on his left hand including an amputation in the incident. The plaintiff alleged that the design of the hedge clipper was defective for failure to incorporate an operator's presence control on the front handle of the machine and that the manufacturer failed to adequately instruct the user as to which hands should be on the rear handle and front handle of the hedge clipper. The jury found that the hedge clipper was not defectively designed and that the manufacturer did provide users with all the warnings and instructions necessary to make the product safe for its intended use. The case had an interesting damage issue. The plaintiff, a Mexican national who was an employee of a landscaping company and in the U.S. on an H-2B seasonal visa, had been seeking in excess of $2.5 million in damages. Mr. Bosick argued that the lost future earnings and future medical costs claims were made in U.S. dollars and that there was no guarantee the plaintiff would be able to return to the U.S. every year in light of the limited amount of available work visas. Another unique aspect of the case was that the trial judge, Louis Pollak, who is the former dean of Yale Law School, told the attorneys that he had never before presided over a trial with an all-female jury.

Failure to Diagnose Claim: Paul K. Vey won a jury verdict in Beaver County Common Pleas Court on behalf of an ophthalmologist who was alleged to have failed to diagnose an impending retinal detachment and of ignoring the patient's complaints of visual disturbance prior to the detachment. The patient had to undergo retinal reattachment and suffered a permanent loss of central vision. The jury found that the physician responded as quickly as he could to the patient's complaints and met the appropriate standard of care.

Wire Fraud Defense: James W. Kraus obtained dismissal of a federal wire fraud indictment in the U.S. District Court for the Western District of Pennsylvania. The dismissal of all criminal charges came after a four-day jury trial in Pittsburgh.

Indian Tribal Court Jurisdiction Dispute: Alfred S. Pelaez and **Louis C. Long** were successful in the Superior Court of Pennsylvania in a highly unusual case for the firm. Representing the natural mother of two Native American children who have been the subjects of complicated proceedings before an Indian Tribal Court in Arizona and the Court of Common Pleas of Westmoreland County (and who are soon to be the subjects of proceedings before a different Indian Tribal Court in Montana), Mr. Pelaez and Mr. Long convinced a panel that the order transferring the case to the Arizona tribal court had to be set aside and the case remanded to Westmoreland County because the natural mother had not been given proper notice of the Pennsylvania proceedings, nor was she given counsel, all as required by the Indian Child Welfare Act.

Power of Attorney Dispute: Rochelle L. Brightwell and **Michelle L. Gorman** obtained judgment as a matter of law in the Circuit Court of Brooke County (WV) in an unusual power of attorney case. Our client was sued for exercising his power as an alternative power of attorney and removing his great aunt, under the instruction of co-defendant Northwestern Area Agency on Aging, from her home in West Virginia and placing her in a Pennsylvania nursing home. The primary power of attorney was the elderly woman's cleaning lady. Our client had given the latter several weeks to clean the house, which was full of dog feces and trash, and to get medical attention for his great aunt. When the cleaning lady failed to take action, our client took his great aunt under the pretense of taking her to a graduation party in Pennsylvania, where he admitted her to a nursing home and she was able to get the needed medical attention. He also obtained guardianship in a Pennsylvania court. The cleaning lady then filed an action in federal court in West Virginia and obtained an order to return the elderly woman to her custody under the terms of the power of attorney. Our client was then sued for fraud, civil conspiracy,

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Recent Successes continued from page 9

negligence, tortuous interference with business relationships and intentional infliction of emotional stress. Ms. Brightwell was able to locate and interview the elderly woman's neighbors and hair stylist and convinced the Pennsylvania nursing home doctor to travel to West Virginia and testify in person. These witnesses were key to the case and at the close of the defense case, Ms. Brightwell and Ms. Gorman moved for and were granted a judgment as a matter of law.

Professional Negligence Defense: In the Allegheny County Court of Common Pleas, **Mary Margaret Hill** successfully obtained an order granting judgment on the pleadings to a psychologist in a professional negligence action brought by a father and his sons for emotional harm caused by expert testimony rendered by the psychologist on the mother's behalf in the course of a long and bitter custody dispute.

Medical Malpractice Defense: Tyler J. Smith won a jury verdict in Westmoreland County Common Pleas Court on behalf of an ob/gyn who admitted to performing a risky procedure to remove scar tissue from the patient's abdomen with the use of a Yag laser. Despite two Westmoreland County doctors testifying - without expert pay - that the ob/gyn breached the standard of care, the jury returned its verdict in 30 minutes.

Surgical Death Case: Paul K. Vey won a jury verdict in Allegheny County Common Pleas Court on behalf of a physician in a case involving the death of a patient during gynecological surgery. The patient, suffering from significant abdominal pain, sought surgical intervention for the treatment of her pain. It was alleged by the plaintiffs that the physician punctured the patient's small bowel in three places during laproscopic exploratory surgery and failed to diagnose the iatrogenic injuries until the patient had developed diffuse peritoneal infection, which resulted in her death. The jury determined that a physician sets a standard of care by providing an appropriate informed consent and found that the physician appropriately performed surgery from a technical standpoint. The jury, moreover, found that the physician met the standard of care in the treatment provided in the post-operative period.

Professional Negligence Action: Tyler J. Smith and **Jeanette H. Ho** sucessfully persuaded a plaintiff to withdraw her lawsuit against a psychologist in connection with the suicide of a young mother. The case had tremendous sympathy value since the decedent's only child, a four-year-old girl, saw her mother hanging from a rafter. Despite this significant leverage and having two experts to support their position regarding professional negligence, the plaintiff withdrew her claim on the eve of trial.

Upcoming Events

- September 8, 2008, Washington, DC; **Marc S. Raspanti** and **Michael A. Morse** will speak at the 8th annual Taxpayers Against Fraud Conference.
- September 16, 2008, Pittsburgh, PA; **James W. Kraus**, **Heather A. Trostle** and **Shannon L. Voll** will speak on “Document Destruction and Retention in Pennsylvania”, a Lorman Education Services seminar. Contact: Lorman at 866-352-9539.
- September 30, 2008, Philadelphia, PA; **Marc S. Raspanti** will speak on “Two Steps Forward, or Three Steps Back? The Impact of Recent Landmark False Claims Act Events on Prosecuting & Defending Qui Tam Cases” at the BNA Audioconference.
- October 5, 2008, Baltimore, MD; **Marc S. Raspanti** will speak on "Negotiating the Resolution of Healthcare Fraud Allegations" at the AHLA/HCCA Fraud and Compliance Forum. Contact: Laurie Garvey at 202-833-0783.
- October 6 and 7, 2008, Baltimore MD; **Michael A. Morse** will speak on "How to Conduct an Internal Investigation and Not Screw Up" at the AHLA/HCCA Fraud and Compliance Forum. Contact: Laurie Garvey at 202-833-0783.
- October 2008, Toronto, Canada; **Michael A. Morse** will speak on "Federal Anti-kickback and Stark Laws" to a symposium of medical industry experts.
- October 28, 2008, Philadelphia, PA; **Marc S. Raspanti** and **Michael A. Morse** will speak on "Preparing for the Fight of Your Life: Anatomy of a Health Care Fraud Prosecution" at the Pennsylvania Bar Institute's annual A Day on Health Law. Contact: PBI at 800-932-4637.

Attorneys in the News

Michael A. Morse Martin T. Durkin and **Eric G. Soller** have been admitted to practice in New York. **Philip P. Keating**, **Mary Margaret Hill**, **Bernard W. O'Keefe** and **Christopher L. Wildfire** were admitted to practice in West Virginia.

Amy C. Lachowicz was appointed a Hearing Committee Member of the Disciplinary Board of the Supreme Court of Pennsylvania. The Hearing Committee hears matters and files written reports and recommendations to the Disciplinary Board, which reviews the conduct of Pennsylvania lawyers and assures compliance by all attorneys to the Pennsylvania Rules of Professional Conduct.

Eric A. Fischer was reappointed to the Pennsylvania Bar Association's Judicial Administration and Corrections System Committees. The former studies and makes recommendations on legislative issues pertaining to the operation, procedure and reform of the state and federal court systems. The latter studies the corrections system in Pennsylvania and makes recommendations for its improvement.

Bryan S. Neft and his fellow co-chair of Attorneys Against Hunger accepted on behalf of the Allegheny County Bar Foundation a 2008 Hunger Day Awarness Award presented by the Greater Pittsburgh Community Food Bank. The award recognizes the organization's contribution to the fight against hunger in Allegheny County and beyond. Since its inception in 1993, Attorneys Against Hunger has given more than $700,000 to local anti-hunger agencies.

William Pietragallo, II was a member of the faculty for the Pennsylvania Bar Institute's "Appellate Advocacy Practicum: Oral Argument in the Superior Court."

Marc S. Raspanti was interviewed by *Rx Compliance Report* for an article titled "How to Conduct an Effective Internal Investigation: Leading Qui Tam Attorney Cites Key Questions to Pose."

Joseph J. Bosick authored an article in the July/August issue of *Breaking Ground* magazine, the publication of the Master Builders' Association of Western Pennsylvania, titled "Professional Liability Risk Management for General Contractors in Design/Build Projects."

Joseph D. Mancano and **Divya Wallace** have had accepted for publication by the National Association of Criminal Defense Lawyers' *Champion* magazine their article titled "The Antitrust Division's Corporate Leniency Policy: A Deal is a Deal?"

Marc S. Raspanti spoke on "State Qui Tam Enforcement" at the annual National Institute on Civil False Claims Act and Qui Tam Enforcement.

Joseph D. Mancano spoke at the Professional Lines Attorney Network regional workshop on "Riding Out the Subprime Mortgage Crisis", discussing white collar criminal liability arising out of the crisis.

Gayle L. Godfrey spoke at the Pennsylvania Bar Institute's "The Brave New World of Medical Malpractice Litigation" CLE seminar.

Michael A. Morse spoke at the American Health Lawyers Association 2008 Annual Meeting and In-House Counsel Program with the Vice President of Trinity Health Systems on "Apologies and Medical Errors."

Tyler J. Smith authored an article in the August issue of *Compliance Today*, the publication of the Health Care Compliance Association, titled "Safe Informed Consent: A Cost-Effective Systems Approach."

Richard F. Moroco spoke at the Northwest Industrial Resource Center: Building a China Strategy Series on "Developing an Effective China Strategy and Business Plan."

Marc S. Raspanti made a presentation to the Pennsylvania Institute of Certified Public Accountants on "Current Trends in Fraud Prosecutions."

Michael A. Morse authored "Deficit Reduction Act of 2005: False Claims Education Requirements and the Rise of State False Claims Acts," *Health Law Handbook*, 2008 ed. (Gosfield, A., ed.), June 2008

Kevin E. Raphael and **Marc S. Raspanti** co-authored "Investigations", *Medicare and Medicaid Fraud and Abuse*, 2008 ed. (Gosfield, A, ed.), June 2008.

Pamela G. Cochenour spoke to the Butler Society for Human Resource Management on issues recently addressed by the U.S. Supreme Court.

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BOSICK & RASPANTI, LLP

ATTORNEYS AT LAW

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