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Recent Legislative Changes and How They Shift the Legal Landscape for Employers

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Breaking Developments In Labor and Employment Law 05/09/07

The Washington State Legislature ended its regular session on April 22, 2007. The 2007 legislative session resulted in the passage of several bills that will directly -- and likely significantly -- affect employers in Washington.

Signed by Governor Gregoire on May 4, 2007, SSB 5340 represents the legislative overrule of the Washington Supreme Court's 2006 decision in *McClarty v. Totem Electric, Inc.* SSB 5340 amends the Washington Law Against Discrimination ("WLAD" and codifies a definition of "disability" under state law that is much broader than the definition under the federal Americans with Disabilities Act ("ADA") previously adopted by *McClarty*. The WLAD has also been amended to include "honorably discharged veteran or military status" as a new protected category, and Washington's Fair Credit Reporting Act has been amended to limit employers' access to employee credit information. Another piece of new legislation provides for paid family leave for employees beginning in 2009, although no funding source has been identified.

SSB 5340: Washington State Legislature Redrafts Definition of Disability in Response to Supreme Court's Holding in *McClarty v. Totem Electric*.

In *McClarty v. Totem Electric, Inc.*, 157 Wn.2d. 214, 137 P.3d 844 (2006), the Washington Supreme Court adopted the definition of "disability" used in the federal ADA for application in cases brought under the WLAD. A 5-4 majority of the court held that "a plaintiff bringing suit under the WLAD establishes that he has a disability if he has (1) a physical or mental impairment that substantially limits one or more major life activities, (2) a record of such an impairment, or (3) is regarded as having such an impairment."

In sharp reaction to *McClarty*, the Washington Legislature immediately began to craft a bill to overturn the Supreme Court's decision and provide a statutory definition of "disability" under the WLAD. The amendment provides that it is effective immediately and retroactive to all causes of action occurring before July 6, 2006. Pursuant to the amendment, RCW 49.60.040 will define "disability" as the presence of a sensory, mental or physical impairment that is "medically cognizable or diagnosable," "exists as a record or history," or is "perceived to exist whether or not it exists in fact." Disabilities protected under the WLAD "may be temporary or permanent,

common or uncommon, mitigated or unmitigated,” and may or may not limit the ability of an individual to do a particular job or activity. “Impairment” is defined to include a variety of physical, physiological and mental conditions, including cognitive limitation. For purposes of reasonable accommodation only, an impairment must be known or shown through an interactive process to exist in fact and have a substantially limiting effect on the individual’s ability to perform his or her job, apply or be considered for a job, or access equal benefits, privileges, or terms and conditions of employment. A new subsection provides: “. . . a limitation is not substantial if it has only a trivial effect.”

The new definition of disability is a major departure from *McClarty*. Whether this will invite lawsuits based on “receding hairlines,” as the *McClarty* opinion cautions, remains to be seen. The governor’s signature on SSB 5340 does, however, likely increase the pool of potential disability discrimination claims.

Senate Bill 5123 Prohibits Discrimination Against Honorably Discharged Veterans and Members of the Military.

Signed on April 21, 2007, SB 5123 amends the various definitional and operative sections of the WLAD to prohibit discrimination on the basis of “honorably discharged veteran or military status.” This phrase is defined in a new subsection to RCW 49.60.040 as: “a veteran or active or reserve member of any branch of the armed forces of the United States, including the coast guard, national guard, and armed forces reserves.”

ESSB 5827 Limits Circumstances in Which Employers Can Obtain Employees’ Credit Information.

ESSB 5827 amends the Washington Fair Credit Reporting Act to specify that an employer may not procure a consumer report for employment purposes where any information contained in the report bears on the consumer’s creditworthiness, credit standing or credit capacity, unless the information is either “substantially job related” and the employer’s reasons for using the information are disclosed to the consumer in writing, or the information is required by law. ESSB 5827 was signed by Governor Gregoire on April 18, 2007, and becomes effective July 22, 2007.

E2SSB 5659 Provides for Family Leave Insurance.

In the last days of the session, the Legislature approved E2SSB 5659, directing a yet undesignated state agency to establish and administer a family leave insurance program to begin October 1, 2009. The program will provide for five weeks of paid leave for every eligible employee to care for a newborn child or newly adopted child, with wage replacement of up to \$250/week, after a one week waiting period. The benefit amount would be prorated for part-time employees. An employee must have been employed for at least 680 hours during his or her qualifying year. For an employer of 25 or more employees, an employee taking leave will be entitled to be restored to a position with his or her employer under the same circumstances set forth in Washington’s Family Leave Act.

No funding source has been identified and the bill establishes a “joint legislative task force on family leave insurance” to make recommendations to the Legislature by January 1, 2008, as to the specific manner in which the paid leave will be funded. Rejecting calls to have the task force make its recommendations regarding funding prior to setting the October 1, 2009 effective date, Governor Gregoire signed the full bill into law on May 8, 2007.

While the legislation is consistent with Washington’s history of protecting “bonding leave” rights for employees, it does not simply authorize a fund to pay for such leave (the source of which remains unknown), it also expands employer obligations by providing job-protected leave for the covered five weeks for qualified employees where the employer has more than 25 employees. The statute also prohibits discrimination against any employee who exercises his or her right to take paid family leave.

As a Postscript, Some Bills That Did Not Pass.

There were also a number of employment-related bills that did not pass. Here is just a sample:

- *HB 1154* would have prohibited an employer from making employment-related decisions (hiring, firing, terms and conditions) on the basis of an individual’s use of lawful tobacco products.
- *HB 2142* would have created new causes of action related to “workplace bullying” to provide legal redress to victims of workplace bullying, harassment and abuse.
- *SB 5873* would have redefined covered “employer” for purposes of the WLAD from an employer of more than eight employees to an employer of more than one employee.
- *SB 5153* would have encouraged employers to become “infant friendly” by adopting certain personnel policies meant to facilitate the expression and storage of breast milk.

What All This Means for Employers.

The short answer is that the scope of change to the legal landscape for employers that will result from the new legislation is not fully known. The newly passed legislation has yet to be tested by any Washington court. Nonetheless, employers should be keenly aware of the requirements and potential exposures created by this new legislation. Employers with questions about how the changes to the WLAD affect their accommodation obligations for disabled applicants and employees, or whether their own preemployment credit-checking practices continue to be appropriate under the recent amendments, should contact counsel to discuss the impact of the new legislation on specific programs and situations.

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