MARYLAND STATE BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW

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NEWSLETTER

Albert W. Palewicz, *Editor*

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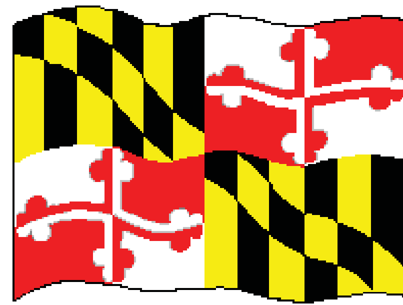

FROM THE CHAIR

By Thomas J. Gagliardo

This is my first letter as chair – ever – even though I've headed other committees and organizations. Until now I have been spared the onerous task of burdening the membership with my ramblings. In fact, I never spend more than a minute or so scanning the president's column in the several publications I read regularly. It seems to me that most presidents write about things that are covered elsewhere in a publication or exhort their constituencies to bigger and better things. I trust you will read the substantive parts of this newsletter and will keep yourself abreast of section events. Exhorting you to be true to your higher self (bigger and better things) is beyond my pay grade.

But there are two things I would like to share with you.

First, the section will soon launch an educational program on the Maryland statute prohibiting work place discrimination. Glendora Hughes, General Counsel to the Maryland Commission on Human Relations, and I along with others will be conducting programs in Western Maryland and on the Eastern Shore. Dates and locations to be announced. We are doing this to reach out on this very important topic to Section members for whom traveling to Baltimore or Columbia (our usual meeting places) isn't very convenient.

Along the same lines, we welcome your suggestions for programs and services we might provide to meet your practice needs. Let me, or any Section Council member, know what you are interested in having dealt with in our educational programs. We will do our best to meet your expressed needs.

The second item is personal. When my youngest daughter was about five, I had to leave one evening to testify on amendments to the antidiscrimination law being considered by the Montgomery County Council. When asked why I had to leave after dinner, I explained that I was president of

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EDITOR'S CORNER

By Albert Palewicz

This is the first issue under our new Section Council. The officers are listed at the top of this page. The entire council with all the contact information is shown on page two of the newsletter. Please feel free to contact the Council members regarding any issue you wish to bring to the attention of the Council.

Welcome to the new Section Council members. A special welcome to the new Section officers, Tom Gagliardo, Jon Krasnoff, and Gab Terrasa. All of them have served for a number of years on the council, and will be dedicated to making the Section's work during the next two years effective and useful for the members. Many on the Council have been with it for some time. However, a number of those on the list are new to the Council, and we look forward to their input and help in preparing the Section's programs for the coming two years.

I want to mention the meeting announcement that is found on the final page of the newsletter. It is for a program sponsored by the Maryland Chapter of the Labor and Employment Relations Association. The speaker at the September 22 meeting of LERA will be Mark Pearce, a new Member of the National Labor Relations Board. As the many Section members involved with "traditional" labor relations are aware, the newly constituted NLRB has been issuing decisions that refocus the emphasis of the Board in several areas. Mr. Pearce's comments will thus likely be of interest to all of us who practice in or follow the NLRB's policy course.

This issue has been prepared by attorneys of the Maryland Commission on Human Relations, including their General Counsel Glendora Hughes, who also coordinated the issue. Glendora has been the MCHR liaison to the Section Council since she was its President a couple of year's ago, and is thus well informed of Council and Section matters. As Tom sets forth in his remarks, he and Glendora are working, with a

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This Maryland State Bar Association Newsletter is not intended to provide legal advice, but rather to provide information concerning recent developments in the field of labor and employment law. Questions concerning individual problems or claims should be addressed to legal counsel. Any opinions expressed herein are solely those of the authors, and are not those of the Maryland State Bar Association. Finally, the articles contained herein are copyrighted, all rights reserved by the respective authors and/or their law firms, companies or organizations.

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FROM THE CHAIR (continued)

an employment lawyers association. Incredulous that I was The President, my daughter asked: “So when you’re dead will they put your picture on money?” Honor me as you will, if at all. It is my honor to serve as section council chair for the coming two years.

EDITOR'S CORNER (continued)

number of others, on preparing programs on the new Maryland workplace anti-discrimination statute. Her sharing of her knowledge is much appreciated.

Our next issue, the first one in our 16th year of publication, will be sponsored by The Employment Law Group of Washington DC. Coordinating the group will be David Fulleborn. We look forward to their articles.

Event Announcement of Interest to Section Members

Maryland Chapter, Labor & Employment Relations Association

Wednesday – September 22, 2010

LA TAVOLA

248 Albemarle Street - Little Italy - Baltimore, Maryland 21202
(1/2 block east of President St)

RECEPTION: 5:45 p.m. to 6:30 p.m. (CASH BAR)
SPEAKER: Mark G. Pearce
NLRB Board Member
(sworn in April 7, 2010)
TOPIC: Reflections of a Board Member on the 75th Anniversary of the NLRB
DINNER: 7:15 p.m.
COST: $33 per person for LERA members; $42 for non-members. Checks made payable to L.E.R.A.

PLEASE CALL TO RESERVE YOUR PLACE for the September 22, 2010, Dinner **by Monday, September 20, 2010** -- call Julie Loth at (410) 321-0990 or Vickie Hedian, or e-mail either at jloth@abato.com or vhedian@abato.com. If you cannot mail your reservation in advance, please call by Monday at the number above - but please, DO CALL! We must have an accurate count to plan the meal.

ARTICLES

Protected Class: Family Responsibilities?

By Glendora C. Hughes
General Counsel, MCHR

Background

In 2007, I received and read an email about an interesting article on Law.com entitled, “EEOC Looks at Caregiver Bias”. Fast-forward; during the 2010 session of the Maryland General Assembly, a bill was introduced, HB 463, addressing the very employment discrimination issue discussed in the 2007 article. The bill sought to add coverage of “family responsibilities” discrimination as a protected basis to the Maryland Commission on Human Relations’ (the Commission) jurisdiction by amending its statute, Title 20, State Government Article (former Article 49B). The proposed legislation was not departmental legislation and the Commission was not made aware of the bill until it dropped late into the 2010 session.

In preparing the Commission’s testimony for HB 463, the 2007 article was reviewed, enforcement guidelines researched and a just completed major study on the topic was consulted. According to the 2007 article, “family responsibilities” is a legal and social science term coined by experts to define the phenomenon of employees suing employers under a variety of local, state and federal laws for unlawful employment discrimination because of their caregiving responsibilities. The various federal laws that have been used were Title VII of the Civil Rights Act of 1964, the Pregnancy Discrimination Act, the Family and Medical Leave Act (FMLA) and the Americans with Disabilities Act (ADA). The protected classes under which most of the claims have been made were national origin, sex and disability. Due to the fragmentation of laws used in bringing a claim for caregiver discrimination, there has been movement in state and local jurisdictions to unify the various options under one specific protected basis.

State and Local Caregiver Laws

A recent study was conducted by Stephanie Bornstein & Robert J. Rathmell, published in December 2009, by the Center for Worklife Law (WLL), entitled “Caregivers as a Protected Class?: The Growth of State and Local Laws Prohibiting Family Responsibilities Discrimination” (“the Study”). The Study found 63 local governments in 22 states provided some form of specific coverage for caregivers as a protected class. It also found three states, Alaska, Connecticut, New Jersey and the District of Columbia had passed laws or regulations providing coverage at the time of the Study. At the time of the Study, eight states, excluding Maryland, had introduced legislation containing related coverage.

In Maryland, there were five jurisdictions identified with laws addressing caregiving discrimination; Montgomery County (Montgomery County Code §§ 27-1-21), Howard County (Howard County Code §§12.200-.218), Frederick County (Frederick County Code §§ 2-2-1 to -69), Prince George’s County (Prince George’s County Code §§ 2-186, 2-222) and the City of Cumberland (Cumberland Code §§ 9-26 to-30). Montgomery County was the only Maryland jurisdiction to adopt the term “family responsibilities”.

The Montgomery County Code defines the term “family responsibilities” as “the state of being financially or legally responsible for the support or care of a person or persons, regardless of the number of dependent persons or the age of any dependent person”. The definition encompasses children and adults regardless of the family relation. The other four Maryland jurisdictions use the term “familial status” with more limited definitions covering only care for persons under the age of 18, who are domiciled with a parent or an individual with legal custody. Pregnant women are also covered under the Maryland local codes “familial status” definitions.

The Study also found that nationally 51 of the 63 known local ordinances use the term “familial or family status”. According to the Study, 22 provide no definition within their code. Twenty other local jurisdictions adopted definitions identical or similar to the definition contained in their fair housing provisions. There are five localities nationwide, including Montgomery County, which goes beyond parental and family status by using the broader term, “family responsibilities” to address caregiving discrimination.

The sponsor of HB 463 proposed the broader term “family responsibilities” rather than “familial status”. The original bill did not contain a definition of “family responsibilities”, but simply added it as an additional protective basis under Title 20. The Commission raised the need for a definition of the term for clarity and enforcement purposes. The sponsor amended the bill by adopting the Montgomery County definition of the term “family responsibilities”. An unfavorable report was given to the proposed legislation by the House Health and Government Operations Committee. However, expect to see similar legislation on this issue in the future now that it is on the Maryland legislative radar screen.

Caregiver Discrimination

What are some of the charges raised by employees alleging discriminatory treatment by an employer because of caregiving responsibilities? As noted previously, even without an umbrella protected basis, lawsuits have been filed under other local, state and federal statutes. In 2006, a study of caregiver discrimination lawsuits was also conducted by the Center for Worklife Law (WLL) in which it analyzed 600 suits filed from 1971 to 2005. The 2006 study found a 400% increase in the number of caregiver cases filed in 1996 to 2005 as compared to the number filed from 1986 to 1995. Two thousand cases had been collected by WLL since 2006 to 2008.

Against this backdrop, the EEOC issued guidance in 2007 entitled, Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, addressing the issue of caregiver discrimination. The guidance provides a detailed explanation on how existing federal laws covering gender and disability discrimination provide protection for employees who are caregivers. Examples of potential discriminatory acts against caregivers stated in the guidance are as follows:

- Treating male caregivers more favorably than female caregivers;
- Gender role stereotyping of working women;
- Subjective decision-making;
- Assumptions about pregnant workers;
- Discrimination against working fathers;
- Discrimination against women of color;
- Stereotyping based on association with an individual with a disability;
- Hostile work environment affecting caregivers; and
- Retaliation

An employer's unlawful discriminatory actions upon discovering an employee's caregiving responsibilities may take a variety of forms. For example: an employer assumes that a female employee with a family will not want to move her family unlike a male employee with children and therefore denies her a promotion that requires relocation. *Lust v. Sealy, Inc., 383 F.3rd 580, 583 (7th Cir. 2004)*; single women without children and men are the only ones considered for hiring in a sales position that require travelling because the employer believes women with a husband and children should be at home and not traveling; an employee is removed from high profile cases because his supervisor finds out he is caring for a disabled son and assumed that his work performance would suffer, although there is no evidence of that happening; upon returning from using FMLA leave to take care of an ill father, an employee is continuously harassed and retaliated against by his supervisor for using said leave *Dage v. Time Warner Cable, No.1: 0490SJD (S.D. Ohio)*; or an African-American female employee receives an unsatisfactory evaluation and is terminated for complaining to human resources that she is being denied a flexible work schedule to pick up her young pre-school children in the afternoon, when her white female co-workers are permitted a flexible schedule to attend to their children.

Best Practices

What action should an employer take to avoid liability? In an effort to assist employers in avoiding unlawful acts of caregiving discrimination, EEOC issued a document in April 2009, titled "Employer Best Practices for Workers with Caregiving Responsibilities". This document was issued as a supplement to the 2007 EEOC guidance. It provides best practice suggestions on how an employer and its supervisory staff may take steps to avoid discriminating against an employee caregiver. Recommendations made include: an employer should train its managers on legal obligations; develop, disseminate and enforce a strong work-life policy; monitor compliance; and respond efficiently and effectively to complaints. These steps should be applied to recruiting, hiring and promotion practices, as well as to the terms, conditions, and privileges of employment with the company.

The most significant recommendation to encourage clients to consider and follow as a best practice is the creation of a strong caregiver workplace policy that is consistently implemented and followed. According to the EEOC's best practice publication, the policy should contain, at a minimum, the following key elements:

- Definitions that are clear and relevant of terms such as "caregiver and "caregiving";
- Descriptions of common stereotype biases about caregivers that may lead to unlawful conduct;
- Provide examples of prohibited conduct related to "caregiving responsibilities";
- Prohibit retaliation against individuals who complain of discrimination or are witnesses; and
- Clearly identify the office or individual responsible for receiving complaints, investigating and responding to questions related to caregiver discrimination.

Conclusion

The issue of unlawful caregiving responsibilities will continue to be a part of the employment law landscape in Maryland regardless of whether an umbrella protected basis is passed by the General Assembly. The existence of protections in some of the localities in Maryland, as well as, protections under other state and federal laws will insure its continued presence. As more employees become responsible for taking care of children and aging parents, it is critical for employers to establish policies to address the appropriate handling of this issue.

Courts and Agencies Will Scrutinize Whether Any Interim Wages Will Be Deducted from Back Pay Award

By Patricia A. Wood

Back pay is presumed available to a victim of employment discrimination. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975). The calculation of back pay in an employment discrimination case may not be a simple matter. But difficulty or imprecision in calculating back pay will not prevent it from being ordered. *Bing v. Roadway Express, Inc.*, 485 F.2d 441, 453-54 (5th Cir. 1973). If there is a windfall as a result of imprecision or speculation, it will go to the victim of discrimination, not the discriminating employer. *Dailey v. Societe Generale*, 889 F.Supp 108 (D.C.S.N.Y. 1995). It is important to bear in mind that not all sums earned by the victim or earnable through reasonable diligence will automatically be deducted from a base back pay award.

Generally, a plaintiff in an employment discrimination case has the duty to mitigate damages by seeking comparable employment. *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Brady v. Thurston Motor Lines*, 753 F.2d 1269, 1273 (4th Cir. 1985). Any award of back pay must be offset by amounts earned or earnable with reasonable diligence by the person discriminated against. MD Code Ann., State Gov't, §20-1009(b)(4); *Ford Motor Co. v. E.E.O.C.*, 458 U.S. 219 (1982). However, where employment is at will or otherwise of indefinite duration, courts have presumed that a plaintiff would have continued to be employed at the discriminating employer indefinitely. *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1361 (11th Cir. 1982). The employer cannot limit his back pay liability by arguing that the plaintiff would not have remained in his job with the employer for the duration of the back pay period.

Further, if the plaintiff establishes a prima facie case of employment discrimination and the amount of damages due, the burden shifts to the employer to prove any offset to this amount. *Sais v. City Demonstration Agency*, 588F.2d 692, 696 (9th Cir. 1978); *Donnelly v. Yellow Freight Systems*, 874 F.2d 402, 411 (7th Cir. 1989); *aff'd on other grounds*, 110 S.Ct. 1566 (1990).

Employers usually try to limit damages by asserting that the employee failed to mitigate damages and/or all sums earned during the back pay period should be deducted from the base back pay award. Further, employers argue that loss of employment during the back pay period tolls back pay. These arguments are not guaranteed to succeed. Courts and administrative agencies have scrutinized and rejected these arguments.

It is the employer's burden to prove that a plaintiff is precluded from receiving an award of back pay because he failed to mitigate damages. The employer must produce sufficient evidence to establish the amount of interim earnings or lack of diligence in seeking employment. See, *Rasimas v. Michigan Dept. of Mental Health*, 714 F.2d 614, 623 (6th Cir. 1983); *Sangster v. United Airlines*, 633 F.2d 864, 868 (9th Cir. 1980), *cert denied*, 451 U.S. 971 (1981).

The key factors a court or administrative agency will consider in determining whether interim wages will be deducted from any back pay award are whether the wages derive from comparable work (*Ford Motor Co. v E.E.O.C.*, supra)(Discrimination victim has affirmative duty to seek out substantially equivalent employment)) and whether the amounts are excludable as coming from "moonlighting" employment. *Bing, supra.*

The Maryland Office of Administrative Hearings (OAH) has applied the rationale of *Ford Motor Co v. E.E.O.C.*. to hold that an employee has a duty to use reasonable diligence to obtain employment that is comparable to the former position. A plaintiff is not obligated to accept or keep a position that is noncomparable or inferior to the previous position in order to mitigate damages. *Sellers v. Delgado Community College*, 839 F.2d 1132, 1137 (5th Cir. 1988).

If a plaintiff earned wages from a job after leaving a defendant's employ, but could have held the second job while working for the defendant, then the interim wages are "moonlighting" wages and are not deducted from the base back pay award. *Bing, supra; Behlar v. Smith*, 719 F.2d 950, 954 (8th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984).

In *Kimberly Loman v. Fairhaven Nursing Home*, OAH Case No. 92-CHR-X-205-07, (J. Showalter, September 26, 1994), an ALJ at OAH found that the employer discharged the teenage complainant from her waitress job due to her disability, asthma. She held subsequent jobs as a babysitter, a clerk at a video store and a department store, and at fast food restaurants. Eventually, she enrolled in community college.[1]

The employer in *Loman* argued that the complainant was disqualified from receiving any back pay because she removed herself from the labor market by entering college, citing *Miller v. Marsh*, 766 F.2d 490 (11th Cir. 1985)(Victim who entered law school removed herself from labor market; was due no back pay from that

point). The ALJ rejected that argument and distinguished the time commitment of a first year law student from that of a freshman at a community college. She found that Loman could have attended college classes while working in her part-time waitress position at the nursing home. Hence, Loman did not remove herself from the job market and was due back pay. Some wages from part-time jobs were not deducted because the ALJ found that Loman could have worked those jobs while working at the nursing home. Those part-time jobs produced "moonlighting" wages, and were not deductible from a back pay.

The case of *Gloria Patterson v. Kennedy Krieger Institute*, OAH Case No. 95-CHR-BCTY-201-04 (J. Gordon, Decision and Order on Back Pay, Oct. 24, 1997) illustrated two lessons from the federal cases above. The first is that only wages from "comparable" jobs will be deducted from back pay. The second is that termination or resignation during the back pay period may not toll the accumulation of back pay.

In *Patterson*, an ALJ found that the employer discriminated against Patterson on the basis of her race and forced her to resign. KKI argued that the back pay period was tolled because Patterson was discharged from a subsequent job and she quit a job (twice) during the back pay period. KKI urged that she was entitled to no recovery.

This argument failed. The ALJ found that KKI was liable for back pay even after a subsequent employer terminated Patterson. (J. Gordon, Decision and Order on Back Pay, Oct. 24, 1997). Although Patterson was discharged from a motor repair company, the ALJ declined to find that the termination tolled the accumulation of back pay because that job was "not even remotely comparable." The ALJ also found that cashier jobs Patterson held were not comparable and deducted no wages from those jobs. That decision was affirmed on judicial review by the Circuit Court for Baltimore City, Case No. 9381661226/cc9960/99000636, (J. Strausberg, September 27, 1999).

If an employer sabotages an employee's job search efforts, the employer may be liable for back pay during periods of unemployment up to three years. The case of *Terry Heward and Janet Kuhnert v. Double T Diner Inn, Inc. T/A Double T Diner*, Case Nos. CHR-CITY-202-200100001 and CHR-CITY-202-200100002 (formerly 98-CHR-CITY-2002-06-207-05SH and 98-CHR-CITY-2002-07-207-06SH)(J. Kehinde, Dec. 17, 2001), teaches that an employer must not only assert, but must prove that there was comparable work available for which the former employee failed to apply or which she refused when it was offered. Further, if the employer is to blame for any unemployment which follows, he will be liable in lost wages for those periods of unemployment.

In these consolidated cases, an ALJ found that the owner of the diner sexually harassed two waitresses. This conduct forced them to resign. The ALJ also found that the Diner gave bad references for the women after they resigned. The owner visited another restaurant and saw one of the former waitresses working there. He spoke to the proprietor in view of the waitress. That same day, her new boss told her that her services were no longer required, and she was unemployed again. The other woman had trouble finding waitress work. When she stopped listing the diner on applications, she was hired almost immediately.

The employer argued that it was not liable for back pay for periods when the women were unemployed, as there were many available waitress jobs advertised in the newspaper, but they failed to seek work. The ALJ applied the rationale of *Ford Motor Co. v. E.E.O.C.* and *Rasimas, supra*, and found that the women searched for work and mitigated their damages. The ALJ also found that the women were given bad references, which adversely affected their ability to find comparable work. The final back pay award was $26,960.00 to one woman and $55,712.00 to the other, which included years worth of prejudgment interest.

In sum, it will be presumed that the employee would have remained in his job with the discriminating employer for the duration of the back pay period. The employee will thus be presumed

entitled to back pay for the entire back pay period, minus interim earnings from comparable employment. If the employer asserts that the employee failed to mitigate damages, the employer must prove that claim and must prove what the employee could have earned if he had searched for work. It is the employer's duty to show that there was comparable work available which was offered to the employee but refused. Any imprecision in calculation will be resolved in favor of the victim of discrimination, perhaps more than ever in a poor economy.

Endnote:

[1] The victim of employment discrimination lost her hearing after her dismissal by the nursing home. She attended classes at Carroll County Community College, which has a highly developed program for deaf and hard-of-hearing students. Her deafness would not prevent her from working during the back pay period as she reads lips.

The Immigration Reform and Control Act: Looking Back 25 Years

By Terrence J. Artis, Esq.

The current intense immigration debate in Arizona and elsewhere is not original. The nation has confronted this issue previously and similar to the present, during a period in which many maintain was a recession. When Congress passed, and President Ronald Reagan signed into law the Immigration Reform and Control Act of 1986 (IRCA), the result was the first major revision of America's immigration laws in decades.

Brief History of IRCA

In 1980, the United States Census Bureau calculated that there were over two million undocumented immigrants in the United States.(D. Aaron Lacy, *The Aftermath of Katrina: Race, Undocumented Workers, and Color of Money*, 13 Tex. Wesleyan L. Rev. 497 (2007)). Congress, mixed with the political swing in the nation, believed it had to address the pressing immigration concern. The sentiment was that the Immigration and Naturalization Service was not adequately performing its job of monitoring.

Consequently, on November 6, 1986, President Ronald Reagan signed the IRCA, which signaled a major shift in the attitude toward immigration law. The new legislation marked the first time that if an individual or firm knew they were hiring an undocumented immigrant, the employer was now in violation of the law. In addition, the IRCA established a procedure requiring that each employee hired after November 6, 1986, have his employment eligibility verified. Prior to the law, efforts to prevent employment of undocumented immigrants were limited to deportation.

Key Provisions of IRCA

- Required employers to attest to their employees' immigration status, and granted amnesty to certain illegal immigrants who entered the United States before January 1, 1982, and had resided here continuously;

- Made it illegal to knowingly hire or recruit illegal immigrants who do not possess lawful work authorization;

- Granted a path towards legalization to certain agricultural seasonal workers and immigrants who had been continuously and illegally present in the United States since January 1, 1982.

- Introduced the I-9 form. This form was to be used by an employer to verify an employee's identity and establish that the worker is eligible to accept employment in the United States.

IRCA Mandated Employer Sanctions

As mentioned, through IRCA, Congress adopted penalties for employers who hired illegal aliens. The belief was that aliens would not enter the United States or remain illegally if they were made aware that they were not going to find work. This position was fueled by the opinion that employers would not hire aliens due to the fear of being sanctioned.

In fact, of the $123 million increase in the Immigration and Naturalization Service budget allocation from 1986 to 1987, $ 33.7 million was dedicated to enforcing employer sanctions. (Betsy Cooper, Kevin O' Neil, Migration Policy Institute, *Lessons From the Immigration Reform and Control Act of 1986*, (2007)).

Employers being in Compliance with IRCA & Avoiding Penalties

Employers may demonstrate compliance with IRCA by following the verification (I-9 Form) requirements and treating all new hires the same. (Department of Justice, Office of Special Counsel, *Immigration Reform and Control Act Prohibits Employment Discrimination*, revised 02/02/09.) This includes the following:

- Establish a policy of hiring only individuals who are authorized to work. An employer may require United States

citizenship for a particular job only if it is required by federal, state, or local law, or by government contract. Otherwise, a United States citizens only hiring policy is illegal. (*Ibid.*)

- Complete the I-9 form for all new hires. This form gives employers a way to establish that the individuals they hired are authorized to work in the United States. (*Ibid.*)

- Allow employees to present any document or combination of documents acceptable by law. Employers cannot prefer one document over others for purposes of completing the I-9 Form. Authorized aliens do not carry the same documents. For instance, not all aliens who are authorized to work are issued "green cards." As long as the documents are allowed by law and appear to be genuine on their face and relate to the person, they should be accepted. (*Ibid.*)

However, inside the debate over the passage of IRCA, there was deliberation surrounding the potential discriminatory effects of the newly established law. The primary concern was that the employer sanctions could lead to discrimination against minorities in this country akin to racial profiling.

What an Employer should know to avoid Discrimination under the Act

As a safeguard under IRCA, when hiring, discharging, or recruiting/referring for a fee, employers with four or more employees may not:

- Discriminate because of national origin against United States citizens, and United States nationals, and authorized aliens. (Employers of 15 or more employees should note that the ban on national origin discrimination against any individual under Title VII of the Civil Rights Act of 1964 continues to apply.) (*Ibid.*)

- Discriminate because of citizenship status against United States citizens, United States nationals, and the following classes of aliens with work authorization: permanent residents, temporary residents (individuals who have gone through the legalization program), refugees, and asylees. (*Ibid.*)

Court Decisions involving IRCA

Nationally, *Hoffman Plastic Compounds Inc., v. National Labor Relations Board*, 535 U.S. 137 (2002), the United States Supreme Court, upheld one major provision of the Immigration Reform and Control Act of 1986 surrounding the hiring of undocumented workers. The employer, Hoffman Compounds Inc., hired Jose Castro on the basis of documents appearing to verify his authorization to work in the United States. However, Castro and other workers were laid off after they supported a union-organizing campaign at Hoffman Compounds Inc., plant. The National Labor Relations Board believed that the lay-offs were in violation of the National Labor Relations Act (NLRA) and ordered back-pay to Castro. An ALJ believed otherwise and held that Castro could not receive back-pay under IRCA because the employer knowingly hired Castro who was undocumented. The NLRB Appeal Board reversed the ALJ.

The Supreme Court however held that federal immigration policy expressed by Congress under IRCA prevented the NLRB from awarding back-pay to Castro as an undocumented alien who has never been legally authorized to work in the United States.

In the view of many, the *Hoffman Plastic Compounds* decision illustrates one major problem with IRCA. When a undocumented worker complains of wrongful employer conduct, many argue, the employee often faces retaliation such as demotion, loss of employment, or the initiation of deportation proceedings. The remedies afforded to undocumented workers under current law for such wrongful conduct are limited, undermining incentives for the undocumented worker to expose employer abuses.

Closer to home in Maryland, the Court of Appeals held in *Design Kitchen and Baths et.al. v. Diego E. Lagos*, 388 Md. 718 (2005), that IRCA did not prohibit an alien worker from receiving worker compensation benefits. In this case, Diego E. Lagos was an undocumented alien. Lagos was injured at work while using a saw. He suffered a serious injury to his hand which required major surgery.

The employer argued that Lagos' undocumented status prevented him from being a "covered employee" and that his employment status was in conflict with IRCA. Therefore, the employer reasoned, the employee should not have his medical expenses and collateral benefits paid. The Court of Appeals nonetheless held that an undocumented alien who is injured in the course of employment "is a covered employee" under Maryland's Workers' Compensation Act. IRCA did not preempt Maryland's Workers' Compensation Act and consequently did not stop an award of benefits to Diego E. Lagos.

The Fourth Circuit has also spoken regarding IRCA. In the case of *Obiora E. Egbuna v. Time-Life Libraries Inc.*, 153 F.3d 184, 187 (4th Cir. 1998), the court decided a case concerning a former employee who initially had a valid student work visa, but it expired six months after he was hired. The former employee brought action against his former employer under Title VII for unlawful retaliation alleging that the employer refused to rehire him in retaliation for his participation in another employee's discrimination claim.

The Fourth Circuit held that the former employee, who was an alien without proper work authorization, was not qualified for the position at the time he sought reemployment and therefore had no cause of action for retaliation. The court added that IRCA made it unlawful for employers to employ, recruit, or refer for a fee all unauthorized aliens. The court also stated that IRCA identifies unauthorized aliens as those individuals, who at the particular time relating to employment, are aliens neither lawfully admitted for permanent residence, nor authorized to be so employed under IRCA.

Impact of IRCA

As previously stated, a provision of IRCA lights a path to citizenship. When IRCA was first enacted, there was program initiated to assist with aliens becoming permanent residents of the United Sates. The arrangement was titled the State Legalization Impact Assistance Grant (SLIAG). The initiative mandated that applicants complete an english/civics class or pass a test to gain permanent residency. States were responsible for providing the course-work necessary to qualify for permanent residency. Unfortunately, states also had to swallow the public assistance and public health services costs of the legalizing population. To reimburse states for these anticipated costs, IRCA provided $1 billion for four fiscal years between 1988 to 1991 (United States General Accounting Office, May 1991) to help pay for the costs to states. (Betsy Cooper, Kevin McNeil, Migration Policy Institute, *Lessons From the Immigration Reform and Control Act of 1986*, (2007)). Nevertheless, federal bureaucratic requirements led to the delays in state reimbursement. The program terminated in 1991.

The world's largest retailer learned a costly lesson regarding IRCA. In March 2005, instead of facing criminal charges, Walmart agreed to pay $11 million dollars to settle a civil lawsuit because its cleaning contractors were employing undocumented workers. (*United States of America v. Walmart Stores Incorporated*, United States District Court for the Middle District of Pennsylvania, Civil No.1: CV-05-0525 (2005)). The United States Immigration and Customs Enforcement (ICE) raided 61 Walmart stores located in 21 states. As a result, federal agents arrested approximately 245 undocumented workers who were laboring as janitors or cleaners during the evening and night at stores for the mega retailer. Walmart was held liable and agreed to develop ways in which it can verify whether its independent contractors are complying with the IRCA and other relevant immigration laws. (*Ibid.*).

Conclusion

There is little argument that the United States is in serious need of comprehensive immigration reform. Looking back, some opponents believe that IRCA did more harm than good. It is asserted that the legislation granted amnesty to persons who had been continuously illegally residing in the United States. This was seen as a reward to those who had broken the law.

On the other hand, supporters mention that IRCA granted legal status to millions of immigrants. The proponents contend that the undocumented immigrants who were legalized per IRCA, went on to better jobs and higher wages. And many of them invested in higher education which increased their skill level, socio-economic mobility and created a positive impact on the economy.

Regardless of your position, immigration reform legislation should seek to strike the delicate balance between enforcement and human rights for all individuals.

Supreme Court Update

By Tanyka M. Barber, Esq.

The Supreme Court ended its October 2009 Term with a few labor and employment law decisions. The Court handed down two unanimous (and two 5-4) decisions while tackling issues related to the timeliness of a Title VII disparate impact claim, the privacy of workplace text messages, the authority of a two-member NLRB, and an employee's ability to challenge the fairness of an arbitration agreement in court.

Employee's Title VII Disparate Impact Claim Timely to Challenge Employer's Implementation (Not Adoption) of Policy

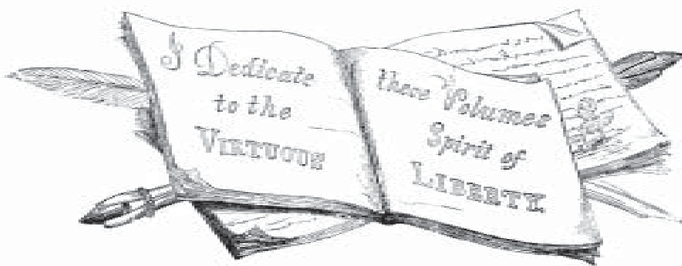
In *Lewis v. City of Chicago*, No. 08-974 (May 24, 2010), the Supreme Court addressed the timeliness of a disparate impact claim under Title VII. The petitioners were African American applicants for firefighter positions with the City. In July 1995, the City administered a written examination to over 26,000 firefighter applicants. The City scored the exams and reported the results. Based upon the scores from the written examination, the City developed a three-tier ranking system categorizing the applicants as: "well qualified," "qualified," or "not qualified." In January 1996, the City issued a press release stating that it would begin to randomly draw individuals who were categorized as "well qualified" to proceed to the next phase in the hiring process. Individuals who were categorized as "not qualified" were later informed by letter that they were no longer being consid-

ered for a firefighter position. The City informed the "qualified" applicants that they had passed the written examination; however, it was unlikely that they would proceed further in the hiring process given the number of "well qualified" applicants and the City's projected hiring needs. The written notice also informed the "qualified" applicants that their names would be kept on the Department of Personnel's eligibility list for as long as the list was used. The City subsequently developed an "Eligible List." In May 1996, the City selected its first class of applicants from the "well qualified" group. The City selected its second class of applicants on October 1, 1996 and continued to follow the same process over the next six years to make several other selections to fill firefighter positions.

On March 31, 1997, an African American applicant from the "qualified" group who was not hired as a firefighter filed a discrimination complaint with the EEOC. Five other applicants followed suit. In July 1998, all six were issued right to sue letters and they filed a civil action against the City in September 1998. The City sought summary judgment challenging the timeliness of the complaint. The trial court rejected the City's argument finding that the City's ongoing reliance on the 1995 test results constituted a continuing violation. After a bench trial in favor of the petitioners, the Seventh Circuit reversed holding that the suit was untimely because it was filed more than 300 days after the discriminatory act– which the Seventh Circuit reasoned to be when the City sorted the test scores into the three categories.

In reversing the Seventh Circuit, the Supreme Court unanimously held that the petitioners filed a timely disparate impact claim challenging the City's practice of excluding the applicants ranked as "qualified" when selecting those to advance to the next level in the hiring process. The Court noted that while the petitioners' complaint was not timely to challenge the City's adoption of the practice, the complaint was timely to challenge its implementation under a disparate impact theory. Thus, each time the City implemented its practice of selecting a new group of applicants from the "well qualified" group, a new violation occurred giving rise to a new 300-day window to file a complaint.

By taking this position, the Supreme Court recognized that employers may face new disparate impact lawsuits for employment practices they have used for years. Nonetheless, the Court noted that Congress allowed disparate impact claims to be brought against employers and that it is not the Court's task to "assess the consequences of each approach and adopt the one that produces the least mischief."



City's Search of Text Messages on Employee's Work Pager was Reasonable

City of Ontario, California v. Quon, No. 08-1332 (June 17, 2010) is the Supreme Court's first ruling on the privacy of workplace text messages. Here, the City provided two-way pagers to its police officers. Prior to issuing the pagers, the City implemented a "Computer Usage, Internet and E-Mail Policy" which included a provision stating that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." Quon signed a statement acknowledging that he had read and understood the policy. Although the policy did not explicitly cover text messages, through information conveyed at a staff meeting and a subsequent written memorandum, the City informed employees that text messages sent on the pagers would be treated the same as e-mails.

Under the City's service contract with the wireless provider, there was a monthly limit on the number of characters each pager could send and receive with an additional fee incurred for any overages. Quon and another officer exceeded their character limit several times within a few months period. After allowing Quon to simply reimburse the City for the overages he incurred each month, the Police Chief requested an audit to determine if the character limits under the service contract were sufficient. As part of the audit, the Police Department obtained transcripts of the text messages from the wireless provider for Quon and the other employee who had exceeded the character limit. After reviewing the transcripts, it was determined that the majority of the messages Quon sent and received on his pager were not work-related and some were even found to be sexually explicit. Consequently, Quon was disciplined. He filed suit against the City, the police department and the police chief alleging that they violated his Fourth Amendment right against unreasonable searches by obtaining and reviewing the transcripts of his text messages. After a jury trial in favor of Quon, the Ninth Circuit reversed in part holding that while Quon had a reasonable expectation of privacy in his text messages, the City's search of those messages was not reasonable as there were less intrusive means for the City to achieve it's purpose.

In a unanimous opinion, the Supreme Court reversed the Ninth Circuit stating that it would dispose of this case on narrow

grounds given its potential implications for future cases which cannot be predicted. After assuming that Quon had a reasonable expectation of privacy in the text messages, the Court held that the City's search of the text messages was reasonable because the search was motivated by the legitimate work-related purpose of determining whether the monthly character limit was sufficient and the scope of the search was not excessive as the review of the transcripts was an "efficient and expedient" means to determine whether Quon's overage was work-related.

Two-Member NLRB Panel Lacked Authority to Decide Hundreds of Cases

In *New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457 (June 17, 2010), the Supreme Court held that the two-member NLRB did not have the authority to issue nearly 600 decisions that is handed down during a 27-month period.

In late 2007, there were four members on the NLRB. With the end of the term for two members approaching, the Board delegated its authority to three of its members. As of January 2008, only two board members remained. The two-member Board continued to issue decisions as a two-member quorum of the three-member group. This two-member Board remained in place until March 27, 2010, when President Obama made two recess appointments to the Board.

Here, New Process Steel sought review of a decision issued by the two-member NLRB in which they challenged the Board's authority to act. Section 3(b) of the National Labor Relations Act provides that the "Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." 29 U.S.C. § 153(b). The Act also provides that "three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group" to which the board has delegated its powers. Id. In interpreting the language of the statute, the Supreme Court held, in a 5-4 decision, that the two-member panel did not constitute a quorum as the Board's powers must be vested at all times in at least three members. As a result, the Supreme Court called into question the validity of hundreds of NLRB cases decided by the two-member panel. However, it should be noted that the Court's decision did not address the fate of those cases.

Supreme Court Lays Out Proper Forum for Determining Enforceability of Arbitration Agreement

Rent-A-Center, West v. Jackson, No. 09-497 (June 21, 2010) addressed the proper forum for challenging the enforceability of an arbitration agreement. In this case, Jackson filed an employment discrimination suit against his former employer, Rent-A-Center, West in U.S. District Court for the District of Nevada. Rent-A-Center, West filed a motion under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 3-4 to dismiss or stay the proceedings and to compel arbitration pursuant to a "Mutual Agreement to Arbitrate Claims" that Jackson previously signed as a condition of his employment. Under the arbitration agreement, Jackson agreed to arbitrate all past, present, or future disputes, including discrimination claims, arising out of his employment with Rent-A-Center. The arbitration agreement also included the following delegation clause: "[t]he Arbitrator, and not any federal, state, or local court or agency, shall have exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability or formation of this Agreement including, but not limited to any claim that all or any part of this Agreement is void or voidable." Jackson opposed the motion claiming that the arbitration agreement was unenforceable because it was unconscionable under state law. Rent-A-Center responded arguing that Jackson's claim of unconscionability was not properly before the court as the arbitration agreement stipulates that the arbitrator would resolve disputes related to the enforceability of the agreement.

The District Court granted Rent-A-Center's motion to dismiss and compel arbitration finding that since Jackson challenged the validity of the arbitration agreement as a whole, the arbitration agreement clearly gives exclusive authority to the arbitrator to decide whether the arbitration agreement is enforceable. Without oral argument, the Ninth Circuit reversed the District Court's decision on this issue and held that the threshold question of unconscionability is for the court to decide where a party challenges an

arbitration agreement on the grounds that he could not meaningfully assent to the agreement.

In a 5-4 decision, the Supreme Court reversed the Ninth Circuit and held that pursuant to the FAA, an arbitrator will decide the enforceability of an arbitration agreement as a whole where the agreement delegates that issue to the arbitrator and a party fails to challenge the delegation clause specifically. However, where a party challenges the delegation clause, the district court will consider the issue. The Supreme Court also noted that Jackson raised the issue of the delegation clause for the first time in his brief to the Supreme Court; however, the Court noted that it was too late and refused to consider it.

MCHR & Navigating Employment Discrimination Claims Under State Law: Top Ten Hints

By Glendora C. Hughes
General Counsel, MCHR

It has been a few years since the State's employment discrimination law, Title 20, MD. Code Ann., State Gov't (2009); the former (Article 49B, MD. Ann. Code of 1957) underwent substantial amendments in 2007. The amendments went into effect October 2007. Since that time, the Maryland Commission on Human Relations (the Commission) has fielded numerous questions and has encountered new attorneys entering into the area of employment discrimination for the first time with their first case. This article is an attempt to address some of the repeated queries and misunderstandings that the Commission has encountered since the new amendments went into effect.

1. Read the statue and the accompanying regulations COMAR 14.03.01. Numerous inquiries and challenges to the Commission's staff have occurred because this basic step was not taken by counsel. The attempts to superimpose procedures and laws followed in other legal disciplines have created conflict and delay.

2. Attorneys should make sure their appearance has been entered for the party they are representing prior to calling the agency for information regarding the case. MD. Code Ann., State Gov't §20-1101 (2009) prohibits the Commission's staff from providing information to non-parties during the investigation without the consent of both the complainant and the respondent in writing.

3. The complainant is the major witness for the complaint. The complainant or any other relevant witness should not be withheld from an interview with the MCHR investigator. The investigator is charged with gathering and analyzing objective facts; not those recounted by representatives of either party when the actual witness is available. Any person that may have first hand knowledge and information should be made available to the investigator. Withholding access to the complainant has led to complaints being administratively closed for failure to cooperate.

4. One of the most frequently asked questions received is why the Commission requires a complaint on its own form when counsel has already drafted one. A complaint drafted by counsel for a complainant many times contain additional allegations that are not covered under Title 20 and thus not within the Commission's jurisdiction. The Commission cannot investigate claims not within its jurisdiction; therefore a complaint is taken alleging only those issues of unlawful employment discrimination. The complaint prepared by counsel will be attached to the Commission's complaint form, however, we will only investigate those issues set forth on our complaint form.

5. Under Title 20, a complainant may file with a local, state or federal agency to satisfy administrative exhaustion. MD. Code Ann., State Gov't §20-1013 (a) (2009). A complainant may file with any of the three agencies, wait 180 days and then file a private civil action in state court. There is no requirement to file with all three. The agency that receives the complaint first will conduct the investigation. The Commission and those local agencies with work sharing agreements with EEOC will cross file with the federal agency and visa versa. The civil action must be filed within two years after the alleged unlawful employment action occurred. MD. Code Ann., State Gov't §20-1013 (a) (3). PLEASE NOTE: MCHR does NOT issue "right to sue" letters. EEOC issues "right to sue" letters to go into federal court. However, MCHR has no provisions for "right to sue" letters within its statute or its regulations.

6. The statute of limitation for the Commission is six months not 180 days. What happens if you miss the deadline? A complaint can still be filed with EEOC under the 300 day rule. The 300 day rule allows EEOC to accept a complaint,

if there is a fair employment practice agency (FEPA) within the state. In Maryland, there is the State and several local agencies that are FEPAs.

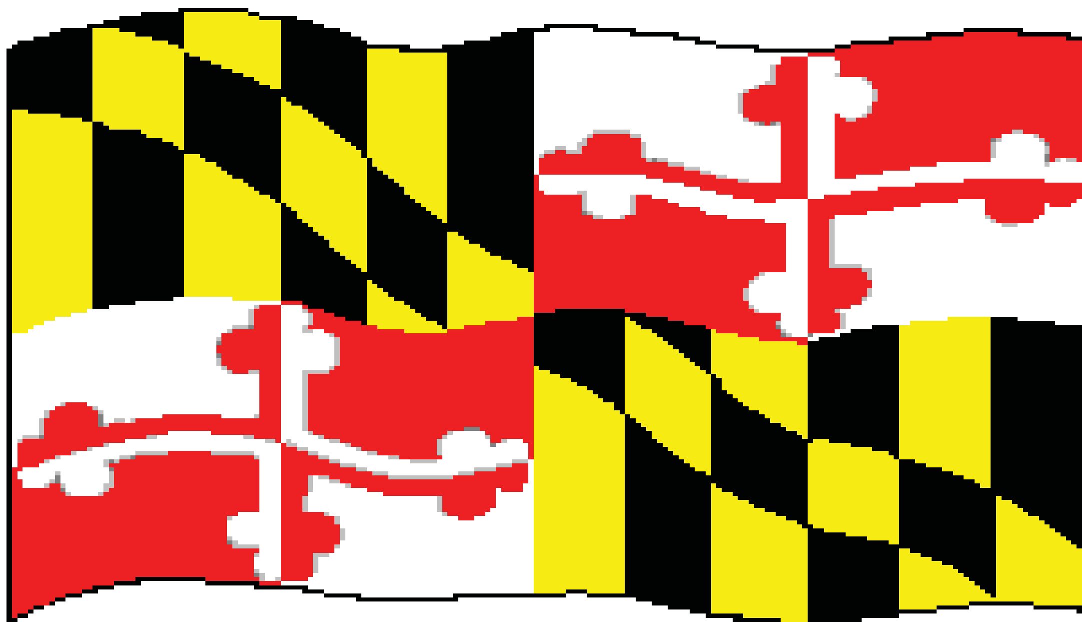
7. The Commission does not have oversight authority over local agencies. MD. Code Ann., State Gov't §§ 20-1201-20-1203 are a part of Title 20, but are not enforced by the Commission. These sections were passed for the named local jurisdictions to constitutionally authorize civil actions and damages for unlawful discriminatory acts under local laws. See *McCrory Corp. v. Fowler*, 319 Md. 12, 15, 570 A.2d 834, 835 (1990); *Sweeney v. Hartz Mountain Corp.*, 319 Md. 440, 442, 573 A.2d 32, 33 (1990); and *Montrose Christian School Corp. v. Walsh*, 363 Md. 565, 770 A.2d 111, 129 (2001). The locations of these sections are for subject matter consistency.

8. On occasion, complaints filed with the Commission are settled between the parties without the agency being involved in the discussion or execution of the agreement. However, when problems of compliance arose, the parties looked to the Commission to resolve their differences. If an agreement is entered into without the Commission as a party to the agreement, it does not become an order of the agency and will not be enforced by the agency should there be a breach. Terms placed in an agreement obligating the Commission to carry out an action or actions without our participation, permission and signature will not be fulfilled by the agency.

9. What is the elections process? After a finding of probable cause, failure of conciliation and certification of the file for public hearing, either the complainant or respondent may elect to have the case heard in circuit court before a jury rather than before an administrative law judge (ALJ) at the Office of Administrative Hearings (OAH). MD. Code Ann., State Gov't §20-1007. The Commission must file the action within 60 days. MD. Code Ann., State Gov't §20-1012 (a). If there is no election the default hearing is OAH. The ALJ is authorized to award the compensatory damages as available in circuit court. MD. Code Ann., State Gov't §20-1009 (b) (1) (iii). The complainant of course has the third option of filing a private civil action in state court. Punitive damages are available in a private action.

10. Please notify all parties, including the Commission, of your intent to file in court. We cannot cease processing unless we are made aware of your intent. Once you have filed in court send the Commission a copy of your pleading. In the past, the Commission has been informed that a party plans on filing in court and their attorney failed to do so. Thus, in effort to protect the complainant's rights the Commission normally will not close its case until we have evidence that an action has been filed in court. However, if counsel informs us of their intent to file and wants us to hold the case open for convenience, the Commission may administratively close the file. The agency cannot keep cases open that are not intended for processing.

Hopefully, the above information is both helpful and instructive for better understanding and cooperating with the Commission. If you have further questions or need additional explanations I am available.



Rules of Procdure Changes at Office of Administrative Hearings

By Terrence J. Artis, Esq.

The Office of Administrative Hearings (OAH) has implemented amendments to its Rules of Procedure (COMAR Title 28, Subtitle 02) effective March 19, 2010. Attorneys who may practice before OAH should pay close attention.

Highlighted below are some of those amendments that may impact litigation involving OAH. However, it is strongly recommended that counsel review the changes in their entirety.

Notice of Hearing – If notice is given by U.S. mail, the notice is effective at the end of the 5th day after its deposit. In addition, proof that the notice has been given may be made by the dated file copy in the case file. (COMAR Title 28, Subtitle 02.05(2)(3)).

Discovery – On Motion by either party, the Administrative Law Judge (ALJ) may now establish reasonable limits on the scope of discovery and/or prohibit specific discovery. In addition, the parties may enter into a binding agreement concerning the inadvertent production and handling of privileged materials. Further, the new rule permits the ALJ to grant sanctions or compel discovery if a reply has not been received by the party who filed a timely discovery request. (COMAR Title 28, Subtitle 02.13(C)(D)(E)).

Subpoena – A subpoena request for the production of medical records shall be made in accordance with the Annotated Code of Maryland Health General Article §4-306. (COMAR Title 28, Subtitle 02.14(B)(5)).

Prehearing Conference- The parties now have the option of conducting a Prehearing conference by telephone or videoconference. (COMAR Title 28, Subtitle 02.14(D)(2)).

Motions- An answer to a written motion must be filed 15 days after the date the motion was filed. Please note, this rule is distinguished from the filing of an answer to a motion for an expedited hearing in which a party has 10 days to respond. (COMAR Title 28, Subtitle 02.12(3)(a)).

Motion for Summary Decision- Any party may file a motion for summary decision on all, or part of an action, at any time, on the ground that there is no genuine dispute as to any material fact, and that the party is entitled to judgment as a matter of law. A motion for summary decision must be supported by affidavits. (COMAR Title 28, Subtitle 02.12(D)(1)).

Evidence- Stipulations may be filed in writing or entered on the record at the hearing. The ALJ may require additional development of stipulated matters. Also, the ALJ may admit an affidavit as evidence. (COMAR Title 28, Subtitle 02.21(G)(2)(3)(H)).

Request for Reasonable Accommodation- If a party or witness requests a reasonable accommodation required by the Americans with Disabilities Act, OAH shall provide the accommodation. (COMAR Title 28, Subtitle 02.09(C)).

Failure to Attend or Participate in a Hearing or Conference- A party may move to vacate a final order of default within 30 days after the date of the order. The motion shall state the reasons for the failure to attend or participate in the proceedings. If the ALJ finds that there is good cause for the party's failure to attend or participate in the proceedings, the ALJ shall vacate the order and set the case in for further proceedings as appropriate. (COMAR Title 28 Subtitle 02.23(1)(2)).

The Record- All exhibits marked for identification whether offered in evidence, and if offered whether or not admitted, shall be retained for purposes of judicial review. (COMAR Title 28, Subtitle 02.22(C)).

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