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**OCRC's Revised Pregnancy
Discrimination Regulation on Hold**

On December 3, the Joint Committee on Agency Rule Review (JCARR) by a vote of 9 to 1 determined that the Ohio Civil Right Commission's (OCRC) rule summary and fiscal analysis for the Proposed Pregnancy Leave Regulations was incomplete and inadequate and postponed any further consideration for at least 90 days.¹

In accordance with the JCARR ruling, the OCRC may not file the revised rule summary and fiscal analysis until after March 2, 2008. Once the OCRC files the revised rule summary, JCARR will then review the proposed regulation to determine whether the Commission exceeded the scope of its authority in promulgating the rule or whether the propose rulemaking conflicts with the original intent of the legislature in enacting the Ohio Civil Rights Act.

JCARR's action was the culmination of a rule making process initiated two months ago when the Ohio Civil Rights Commission (OCRC) voted to approve a revised Ohio Administrative Code regulation which was ostensibly intended to clarify an employer's obligation with respect to pregnant employees under Ohio's employment discrimination laws. The OCRC voted to approve the changes over vigorous opposition by small employers and despite a request by Governor Strickland to delay approval of the new rule in order "to assure that Ohio businesses have time to fully understand the implications the proposed rule change will have on their business."²

¹Before a revised rule can go into effect, the changes must be approved by the Ohio Joint Committee on Agency Rule Review. Although this Committee generally approves such rule changes, it refused to do so in this instance.

² See, "Civil Rights Commission Plans to Press for Revised Pregnancy Leave Rule Despite Governor's Requested Delay," *Gongwer's Ohio Report*, Vol. 76, No. 230 (Nov. 23, 2007).

What would the proposed revision require?

The proposed OAC section would have required Ohio employers with four or more employees to provide a minimum of 12 weeks of unpaid leave if medically required due to pregnancy or childbirth-related medical conditions. Currently, the OCRC's pregnancy leave rule only requires Ohio employers to provide pregnant employees with leave "for a reasonable period of time."

Would eligibility for unpaid leave be dependent on the employee's length of service?

No. Under the proposed rule, employers with four or more employees would be required to provide at least 12 weeks of unpaid leave due to pregnancy or childbirth-related medical conditions regardless of how long the employee has worked for the employer. This is in contrast to current federal law under the FMLA, which limits eligibility to 12 weeks of unpaid leave to only those employees who have worked at least 1,250 hours during the 12-month period preceding the employee's need for leave due to pregnancy or childbirth-related medical conditions.

Does the proposed rule create any additional employer obligations?

Yes. The proposed regulation would have required covered employers to afford pregnant employees with temporary medical restrictions the opportunity to work in any suitable light duty jobs or modified work duty programs "where practical." This would have been required even if the employer normally limited light duty work assignments to employees recovering from industrial injuries covered by Ohio's workers' compensation system. The proposed rule also would have required employers to reinstate workers to their former positions or to an equivalent position upon return to work from unpaid leave (of up to 12 weeks in duration) due to pregnancy or childbirth-related medical conditions.

Summary

While the proposed rule has been delayed, employers should be aware that more likely than not the OCRC will continue in its effort to have these changes adopted as part of the regulations governing implementation of the State's civil rights laws.

Using Consumer Credit Reports To Make Employment-Related Decisions

The OCRC recently issued policy guidance addressing employers' use of consumer credit reports in making hiring and other employment-related decisions. According to the OCRC, using consumer credit reports to make hiring decisions has a significant discriminatory impact on minority job applicants. As a result, the OCRC issued policy guidance, to be used internally and published externally, indicating that consumer credit reports should not be used to screen or disqualify otherwise qualified applicants for employment, **except when job-related and based upon legitimate and objectively verifiable business necessity**. The OCRC's policy guidance makes it clear that if an employer denies an applicant employment based on his or her consumer credit report, the employer must have valid, objective proof – preferably in the form of an EEO job validation study – that its use of such reports is not only related to the job in question, but also based upon “business necessity.”

Ohio Supreme Court Limits the “Voluntary Abandonment” Doctrine

In September 2007, the Ohio Supreme Court vacated its previous decision in *State ex rel. Gross v. Industrial Commission* (2006), 112 Ohio St. 3d 65, and ruled that an employee who is injured while violating a written workplace rule is entitled to receive temporary total disability (TTD) compensation for that injury, even if the employee is terminated for engaging in the work rule violation that led to injury. *State ex rel. Gross v. Industrial Commission* (2007) 115 Ohio St.3d 249, 2007-Ohio-4916. In *Gross*, a 16-year old fast food worker was seriously injured when he placed water in a pressurized deep fryer, heated the fryer, and then opened the lid, thereby resulting in severe burns. After an investigation, the employer fired Gross

because Gross violated a written workplace safety rule and also ignored repeated verbal warnings in the past against cleaning the deep fryer in the above-described manner. In the 2006 decision, the Ohio Supreme Court ruled that Gross was properly denied TTD compensation because Gross' misconduct constituted “voluntary abandonment”³ of his employment.

However, on reconsideration the Court stated that it never intended to inject fault or negligence into the no-fault nature of the Ohio workers' compensation system. Reversing its prior decision, the Court held that **voluntary abandonment can never be based on “preinjury conduct or conduct contemporaneous with injury.”** *State ex rel. Gross v. Industrial Commission* (2007) 115 Ohio St. 3d 249, 2007-Ohio-4916. Rather, a denial of TTD compensation due to voluntary job abandonment, arising from termination, can only be based on *post*-injury misconduct that otherwise satisfies the three-part *Louisiana Pacific* test for “voluntary abandonment.” The Court in *Gross II* reasoned that the causal link between the injury and loss of employment was established by the termination letter sent to Gross, which stated that the termination resulted from Gross' actions giving rise to his injury.

³i.e., the claimant's employment was terminated for violation of a written work rule or policy that (1) clearly defined the prohibited conduct, (2) had been previously identified by the employer as a dischargeable offense, and (3) was known or should have been known to the employee.

About Marshall & Melhorn, LLC

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