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Ideas & Trends

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INSIDE

FAMILY AND MEDICAL LEAVE

DOL expands coverage of FMLA to same-sex couples

This article was developed for Ideas & Trends by Fennemore Craig attorneys John Balitis, chair of the Employment and Labor Relations Practice Group, and Kevin Green, attorney in the Employment and Labor Relations Practice Group.

On February 25, 2015, the United States Department of Labor (DOL) adopted new regulations that define the term "spouse" for purposes of the Family and Medical Leave Act of 1993 (FMLA). Under the regulations, which took effect on March 27, the term "spouse" includes all individuals in same-sex and opposite-sex marriages, without regard to whether the States in which those individuals reside and work recognize same-sex marriage.

The new regulations align the DOL with other federal agencies that have declared the determination of who counts as a "spouse" for federal benefits entitlement will be based upon the law of the State in which a marriage is celebrated, rather than the State in which the individuals seeking benefits reside. As of last month (March 27, 2015), eligible employees who have been married in States that recognize same-sex marriage will be entitled to utilize FMLA leave for spousal purposes whether or not the States in which those employees reside or work also recognize same-sex marriages.

Do's and don'ts. Although the DOL's new definition of "spouse" will expand the number of employees who may utilize FMLA leave to address a spouse's health or military duty issues, it is unlikely to cause a sea-change in FMLA leave. Spousal FMLA leave remains available only to individuals who are lawfully married; it does not apply to individuals in domestic partnerships or civil unions. As a practical matter, however, many employers already extend FMLA rights to individuals in same-sex marriages or domestic partnerships without regard to the legality of same-sex marriage. Nonetheless, as FMLA entitlements change, employers must take care to ensure that the FMLA is administered in accordance with the DOL's new definition of "spouse." One simple way to ensure that employees and management, alike, understand the implications of this new definition is to incorporate into an existing FMLA policy a definition for "spouse," which explains that FMLA leave for spousal purposes is available to eligible employees who have been lawfully married in any jurisdiction. Additionally, employers should clearly explain the manner in which employees may request leave to care for a spouse and the types of documentation that will be required for a FMLA leave to be approved.

Notably, the FMLA permits employers to obtain reasonable documentation of a spousal relationship. In obtaining such documentation, employers should take care to ensure that FMLA programs are administered in an equitable, non-discriminatory manner. Especially in those jurisdictions that have enacted protections for employees based upon sexual orientation, employers that request documentation of a spousal relationship should do so with all employees, regardless of whether the spouse at issue is same-sex or opposite-sex. ■

Wolters Kluwer

EMPLOYEE SELECTION PROCESS

Attorneys talk pitfalls in employee assessment, selection, onboarding

Employers can get tripped up trying to navigate the assessment and selection process for job applicants by inadvertently screening out a particular class of people. Abercrombie & Fitch's "look policy" testing, now under scrutiny before the Supreme Court, underscores some of the problems, according to Polsinelli shareholder Chris Mason. Speaking at the second webinar in a year-long series of five, Mason and a team of other Polsinelli attorneys discussed employee assessment, selection, and onboarding, pointing to the particular federal laws that employers need to keep in mind along the way.

Screening applicants. Employers should be careful when using aptitude and qualification testing to ensure that particular questions do not inadvertently screen out a class of people, creating disparate impacts, Mason suggested. Aptitude and qualification testing can implicate several federal laws, including Title VII, the ADA, the ADEA, and GINA.

Mason offered these pointers for employers to keep in mind to avoid potential ADA violations:

- Testing should be job related and consistent with business necessity.
- Consider the implications of reasonable accommodations that may be required for the testing process.
- Evaluate the impact of testing: Is the test screening out particular people or a protected class?

Mason also noted that personality testing, although not yet the subject of an EEOC decision, will be an issue in the future.

As to drug testing, employers should "be mindful that some medications taken by disabled individuals may result in a positive outcome," according to Mason. "Be sure to discuss any positive results with a potential employee to understand the implications."

Mason also reminded employers that background checks for employment fall within the Fair Credit Reporting Act (FCRA). "The definition of credit report is very broad, and includes background checks," he explained. "Before conducting background checks, be sure to get potential employees' consent and notify them of their rights under the FCRA."

Tread carefully on immigration issues. Polsinelli shareholder Dawn Lurie observed that "employers often run afoul of immigration regulations without knowing it by asking improper pre-employment sponsorship or citizenship status questions." She suggested that in order to determine if immigration-related pre-employment questions fall within the acceptable realm, employers should have those questions reviewed. Discriminatory question claims are not something any company wants to face, Lurie warned.

The immigration compliance expert said that pre-employment immigration questions which can lawfully be asked include:

- Are you legally authorized to work in the United States?
- Will you now or in the future require sponsorship for employment visa status?

Employers that are sponsoring foreign nationals "must be cognizant of timing and eligibility issues, and should consult counsel early on," Lurie said. She pointed out that business needs are often at odds with regulatory requirements.

"The importance of timely and accurate completion of the Form I-9 cannot be understated," Lurie stressed. When a new employee starts, employers should permit the employee to provide any acceptable documents. "You must be sure to preview original documents, rather than photocopies or over Skype," she cautioned. "This also highlights the importance of training employees to identify fraudulent documents. Form I-9 liability is expensive, so it's very important to minimize exposure."

Lurie also addressed E-Verify, which compares Form I-9 data with DHS and Social Security databases and confirms employ-

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David Stephanides, J.D.
Tulay Turan, J.D.

Newsletter Design
Publishing Production & Design Services

Newsletter Layout
Chris Tankiewicz

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ment eligibility. "E-Verify is for new hires only and cannot be used to verify existing employees, unless you are a government contractor," she explained. "E-Verify is not a substitution for Form I-9." She recommended that employers not implement E-Verify until they have completed an internal I-9 audit. Lurie also noted that E-Verify is mandatory, in some form or another, in 18 states and may be a federal mandate in the near future.

Keeping trade secrets secret. Polsinelli shareholder Gillian McKean talked about several issues related to intellectual property. She said employers should address ownership of intellectual property within the company, including who owns the rights—the creator/employee or the company? "Establish the ownership upfront through the onboarding process and in employment and intellectual property agreements," she recommended. "Be sure the language in your agreements accomplishes your goal." McKean observed that nearly all states have adopted the Uniform Trade Secret Act. "Under the Act, in order to prove that something is a trade secret your company must keep the information secret," she stressed. "This is usually accomplished through confidentiality agreements with employees." It's important that employers understand the nuances of their particular state's version of the Act and how it will impact their intellectual property rights. "For example, in one state a person's voice on a commercial is a trade secret, but in another state a customer list may not be a trade secret even where the list is kept secret," she explained.

Employers can get tripped up trying to navigate the assessment and selection process for job applicants by inadvertently screening out a particular class of people.

McKean offered these additional tips:

- When trade secrets exist within your organization, be sure to evaluate whether the right people have access to the information or whether too many people have access. Is the information stored in a controlled environment?
- Protection of IP must go beyond a provision in an employee handbook. Handbooks often have a disclaimer that they are not a contract and often employees are not aware of the provision within the handbook. If you choose to rely on a handbook to inform your employees of IP protection rights, include an acknowledgment of IP confidentiality, at a minimum.
- Decide what you are trying to protect—a relationship or a process or procedure? This will impact the type of restrictive covenant needed.

The IP expert also had a word of advice when it comes to modifying the company's standard restrictive covenants: "If you're trying to recruit a 'superstar' and he or she demands modifications to your restrictive covenant as part of the negotiation process, remember that these changes may make it more difficult for you to enforce your restrictive covenants with your other employees. A court may conclude that your standard restrictive covenant was broader than necessary and reasonable since the company agreed to a weaker restrictive covenant with the 'superstar.'"

Talking about benefits. Jamie Zveitel Kwiatek offered several points for employers to keep in mind when talking to employees about benefits. "The best chance to educate an employee about their benefits is during the onboarding process," according to the Polsinelli shareholder. "Have a checklist for both you and the employee to be sure all the benefits are covered and so the employee can refer back to understand the scope of benefits."

The types of benefits and commonly asked questions about them include:

- 401(k) contributions: Is there automatic enrollment and how can matching contributions be maximized?
- PTO, vacation, and accrual: What is the process?
- Welfare plans such as medical, life, disability: What are the coverage options, costs and benefits?
- Unique benefits: Does your company offer ID theft protection, sick leave, or adoption assistance?
- When is the employee eligible to receive each benefit?

Questions about unique benefits are best addressed during the onboarding process, Kwiatek said. Employers should also notify employees of how to make various benefits elections (paper or electronic), where to get more information, and timing restrictions on elections. "If benefits are covered in the employee handbook, keep it general, reserve the right to make changes, and provide that the plan documents prevail in the event of an inconsistency," she suggested.

Kwiatek also cautioned that when a married employee opts to designate a beneficiary other than his or her spouse under a qualified retirement plan such as a 401(k) plan, the spouse must consent and the spouse's signature must be notarized or witnessed by a plan representative.

Webinar series. Polsinelli's webinar, Life Cycle of an Employee: Assessment, Selection and Onboarding, was moderated by shareholder Eric Packtel. Although originally presented on March 3, the recorded version remains available. The no-charge, five-webinar series is designed to provide not only practical advice but also to highlight how various employment laws come into play at virtually every step of the employment process, Packtel pointed out. ■

Source: *Written by Pamela Wolf, J.D., this article was originally published as "Polsinelli attorneys talk pitfalls in employee assessment, selection, onboarding," in the March 17, 2015 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

REPORTING REQUIREMENTS

Experts review health care reporting on Form 1095-C

The reporting requirements for applicable large employers and health insurance providers under Code Secs. 6055 and 6056 are effective starting in 2015, reminded practitioners and Stephen Tackney, deputy division counsel/associate chief counsel, IRS Tax-Exempt and Government Entities Division, Office of Chief Counsel, during a March 5, 2015, American Bar Association webcast. The webcast presenters discussed many of the basics of how to report coverage for employees in Parts II and III of Form 1095-C, Employer-Provided Health Insurance Offer and Coverage Insurance.

Who must report. Health coverage providers use Form 1095-B, Health Coverage (and its corresponding transmittal Form 1094-B), to report health coverage to the IRS. Applicable large employers (ALEs), however, would report offers of coverage and other requisite information relating to coverage on Form 1095-C and its transmittal Form 1094-C. ALEs for purposes of the health care coverage and reporting requirements are defined as employers that employed an average of at least 50 full-time employees on business days during the preceding calendar year.

ALEs can technically also include members of a controlled group with fewer than 50 full-time employees if the number of full-time employees among all members of the controlled group is more than 50 for 2014, said Tiffany Santos, director, Trucker Huss, APC. In such a case, each member of the controlled group would be subject to the health coverage reporting requirements, regardless of that member's actual number of employees.

A small employer may also choose to offer health coverage, even if it is not required to do so in order to avoid penalties under Code Sec. 4980H. If a small employer has an insured plan, it would not fill out a Form 1095-B or Form 1094-B, said Santos. A small employer with a self-funded plan–however unlikely this may be–would need to file a Form 1095-B.

Santos noted that ALEs with between 50 and 99 full-time employees received transition relief exempting them from liability for any penalties under Code Sec. 4980H until 2016. However, these employers would still be subject to the reporting requirements for 2015. ALEs and ALE members with between 50 to 99 full-time employees with insured plans would file Form 1095-C Parts I and II, but not Part III. The insurer would file Form 1095-B, Santos said. And although an ALE this small would not normally have a self-insured health plan, if it did, it would need to file all three parts of Form 1095-C (Parts I, II, and III), Santos said.

Tackney noted that there was a box on the Form 1094-C transmittal form for ALEs to check if claiming eligibility for the Code Sec. 4980H transition relief due to having between 50 and 99 full-time employees.

ALEs with 100 or more full-time employees that have an insured plan would file Form 1095-C Parts I and II, but not Part III. Once again, the insurer would file Form 1095-B. An ALE member with 100 or more full-time employees and a self-insured plan, however, would file Form 1095-C Parts I, II, and III. ALEs with self-funded plans would file a Form 1095-C for each employee who was classified as a full-time employee for one or months during the year or was enrolled in health coverage, despite not being full-time during any month of the year, Santos explained. They must also complete either a Form 1095-B or Form 1095-C for each individual who was enrolled in coverage for one or more months during the year, but was not an employee during any month of the year.

Tackney clarified that if the spouse or dependent was enrolled through the employee, coverage would be reported on the Form 1095-C that is sent to the employee. "It's only for folks who for the entire year were not employees–that could be a retiree, a non-employee COBRA beneficiary–those are the folks to whom you could give a Form 1095-B instead of a 'C' form," he said.

Eligibility. Form 1095-C, Part II focuses on eligibility, Santos explained. Line 14 helps the IRS to determine an individual's eligibility for the premium tax credit under Code Sec. 36B. The indicator codes provided in the form's instructions address the employee's (and his/her family members') eligibility for the premium tax credit.

Line 15 shows the employee's share of the lowest cost premium for self-only coverage under the plan. That helps the IRS determine the employer's compliance with the requirements to offer minimum essential coverage.

Line 16 helps the IRS to compute an ALE's obligation, if any, for payments under Code Sec. 4980H. "This is where you indicate whether an employee is not a full-time employee and is also the place where you can indicate what the appropriate code was, whether the employer is eligible for any safe harbor relief–for example the multiemployer interim rule relief, the Form W-2 affordability safe harbor or non-calendar year safe harbor," Santos said.

Enrollment. Part III of Form 1095-C focuses on enrollment. This helps the IRS determine an individual's compliance with the individual shared responsibility provisions under Code Sec. 5000A. It shows whether the individual and his/her family members were enrolled in health coverage during the year.

Failure to file. If an entity fails to timely file a return or provide statements or files or provide an incomplete or incorrect return or statement, the entity may be liable for pen-

alties under Code Sec. 6721 for the failure to file a correct information return and Code Sec. 6722 for the failure to furnish a correct statement.

Each of these penalties is generally $100 per failure, up to $1,500,000 for one calendar year. "Those are separate $100 penalties under those Code provisions," Santos explained. "So for example if an employer fails to report a full-time employee, and also fails to provide an employee with a statement, a $200 penalty may be assessed with respect to that employee." ■

Source: *Article originally published in the March 24, 2015 edition of the Employee Benefits Management Directions Newsletter (Issue 582), a Wolters Kluwer Law & Business publication.*

HR QUIZ

Are contract workers "employees" for ACA health insurance coverage purposes?

Q Issue: *Your organization uses contract workers hired through employment service companies and pays the companies directly for the services of these workers. Under the Patient Protection and Affordable Care Act (ACA), are these contract workers considered your employees such that you must offer them health insurance coverage?*

A Answer: It depends. Generally, a worker would be your company's employee for purposes of the ACA if he or she is an employee under the common law standard. This general rule is subject to certain exceptions, such as for a sole proprietor, a partner in a partnership, a leased employee under Internal Revenue Code Sec. 414(n)(2), and certain direct sales and real estate workers under Internal Revenue Code Sec. 3508. Treasury regulations provide that an employer–employee relationship exists when the service recipient has the right to direct and control the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. Your company does not need to actually direct and control the individual; the mere right to do so is enough.

The ACA also addresses workers provided by staffing firms. The law provides that in a situation where the client and not the staffing firm is the employer, an offer of health insurance coverage to the worker by the staffing firm under a plan established or maintained by the staffing firm is treated as an offer of coverage made by the client. This rule applies, however, only if the fee that the client pays to the staffing firm for an individual enrolled in health coverage under the staffing company's health plan is higher than the fee that the client pays to the staffing firm for the same individual if he or she did not enroll in the staffing company's health plan.

WHISTLEBLOWERS

As new report is published showing whistleblower retaliation on the rise, OSHA finalizes regs governing such claims

Although there was no significant increase in employee reports of retaliation in 2014 (5,189 vs. 4,594 in 2013), the substantiation rate for those reports increased a hefty 125 percent over 2013—from 12 percent in 2013 to 27 percent in 2014, according to the *2015 Ethics and Compliance Hotline Benchmark Report*, released by ethics and compliance software and services provider NAVEX Global®. This significant increase may signal that ethics and compliance program leaders are taking a more serious approach to managing and investigating allegations of retaliation, NAVEX said. And it's a statistic worth tracking, given the focus that external regulatory bodies are placing on retaliation.

"Retaliation is perhaps the one compliance violation most likely to do irreparable damage to a company's culture and employee morale," according to Carrie Penman, chief compliance officer and senior vice president, Advisory Services, NAVEX Global. "Retaliation is personal and strikes at the heart of an employee's well-being: job assignments, pay, and their sense of 'belonging' in the workplace community. It stifles transparency, erodes trust in leadership, eliminates future reports and, at its worst, it drives the disenfranchised employee outside the organization and into the arms of regulators."

The five-year trend of rising report volume is continuing, the report also found, with a 44-percent increase in volume per

100 employees since 2010. NAVEX said this is a likely indicator that ethics and compliance programs are continuing to mature, aided by additional awareness of whistleblower cases and protections.

Case-closure times rising. One finding of concern is that case-closure times also continue to climb—from a median of 36 days in 2013 to 39 days in 2014. "With longer closure times, organizations risk the loss of employee trust and confidence in leadership, and the threat of getting too close to the waiting period for reporting to external regulatory bodies," Penman explained. "The increase may in part be due to the increase in volume year-over-year, without an apparent increase in the number of compliance professionals available to investigate these claims."

Retaliation is perhaps the one compliance violation most likely to do irreparable damage to a company's culture and employee morale.

Out of five report allocation categories, case-closure time was highest for the Accounting, Auditing, and Financial Reporting allegation type, but the substantiation rate for this type dropped by ten percentage points over last year— and below 50 percent for the first time in several years. NAVEX warned that at an average of 57 days' closure time for that particular category, organizations are reaching the halfway point to the 120-day opportunity for employees to also report directly to the SEC.

Employee intention. The report now tracks a new statistic—an analysis of the intention behind an employee's report: whether the report is an allegation of misconduct or an inquiry related to policy or company practices. Data from the last five years show that employees overwhelmingly use reporting channels for allegations. Employers can encourage greater use of channels to tap ethics and compliance information and guidance, and avoid missteps altogether, NAVEX said.

New OSHA regulations

OSHA has released its final rule governing employee retaliation or whistleblower claims under Sec. 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (SOX), which was amended by Secs. 922 and 929A of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank). The final rule was scheduled for publication in the Federal Register on March 4, according to the rulemaking notice. It becomes effective upon publication.

On November 3, 2011, OSHA published an interim final rule governing these provisions with a request for comments. The final rule responds to five comments that were received and establishes the final procedures and time frames for the handling of retaliation complaints under SOX, including procedures and time frames for employee complaints to OSHA, investigations by OSHA, appeals of OSHA determinations to an administrative law judge (ALJ) for a hearing de novo, hearings by ALJs, review of ALJ decisions by the Administrative Review Board (ARB) (acting on behalf of the Secretary of Labor), and judicial review of the Secretary of Labor's final decision. The final rule also sets out the Secretary of Labor's interpretations of the SOX whistleblower provision on certain matters. ■

INTERNATIONAL ASSIGNMENTS

Quality of Living survey finds San Francisco is the top-ranked city in the U.S.; Vienna takes the top spot globally

Vienna has the world's best quality of living, according to the Mercer 2015 Quality of Living rankings. Overall, European cities dominate the top of the ranking along with major cities in Australia and New Zealand. Zurich, Auckland, and Munich are in second, third, and fourth places respectively. In fifth place, Vancouver is the highest-ranking city in North America and the region's only city in the top 10. Singapore (26) is the highest-ranking Asian city, whereas Dubai (74) ranks first across the Middle East and Africa. Montevideo in Uruguay (78) takes the top spot for South America. In the US, San Francisco (27) is the highest ranking city, followed by Boston (34), Honolulu (36) and Chicago (43). New York City and Seattle rank 44 respectively.

Mercer conducts its Quality of Living survey annually to help multinational companies and other employers compensate employees fairly when placing them on international assignments. Employee incentives include a quality-of-living allowance and a mobility premium. Mercer's Quality of Living Reports provide valuable information and hardship premium recommendations for over 440 cities throughout the world; the ranking covers 230 of these cities.

"Taking a short- or long-term work assignment in a new country is both an exciting and challenging experience for employees and their families," said Slagin Parakatil, Principal at Mercer. "Cultures, societies, and comparatively different climates, as well as political instability, high crime rates, and poor infrastructure can be difficult to navigate and settle down in for employees and their families. Employers need to assess whether their staff and families will encounter any drop in quality of living when relocating and ensure they are fairly compensated for it."

Parakatil added: "As with last year's survey, we continue to recognize emerging cities that are increasingly becoming competitors to traditional business and finance centers. These so called 'second-tier emerging cites' are investing, particularly in infrastructure to improve their quality-of-living standards and ultimately attract more foreign companies."

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Americas. In North America, Canada and the United States continue to offer a high standard of living. Vancouver (5) tops the list for this region, followed by fellow Canadian cities Toronto (15) and Ottawa (16). San Francisco (27), Boston (34), and Honolulu (36) are the highest-ranking US cities. Mexico's highest-ranking city is Monterrey (109), while Mexico City is ranked 126th. The lowest-ranking cities in the North American region are Havana (193) and Port-au-Prince (228). According to Steve Nurney, Partner and Mercer's North America Global Mobility business leader, "Quality of living remained high in North American cities overall due to the range of consumer goods and services that are available."

In South America the quality of living varies; Montevideo (78), Buenos Aires (91), and Santiago (93) are the highest-ranked cities, whereas La Paz (156) and Caracas (179) rank lowest. "Economic woes and high levels of crime continue to remain a major problem in many of the region's cities," said Mr. Nurney. In Brazil, Mercer has identified Manaus as an emerging city – it is ranked 127th. The city is already a thriving industrial center and has a free economic zone – its good supply of consumer goods and relatively advanced infrastructure partially counteract the impact of Manaus' lack of international schooling options for expatriates and remote location.

Europe. Despite concerns about economic growth, the cities of Western Europe continue to offer a stable environment for employees and employers. Vienna (1) is followed by Zurich (2), Munich (4), Düsseldorf (6), and Frankfurt (7). With Geneva and Copenhagen in 8th and 9th places, respectively, Western European cities take seven places in the top 10. The lowest-ranking cities in Western Europe are Belfast (63) and Athens (85). Cities in Central and Eastern Europe have a wider range of quality-of-living standards. The highest-ranking cities are Prague (68), Budapest, and Ljubljana (both ranked 75th). Emerging city Wroclaw (100), Poland, has a thriving cultural and social environment and good availability of consumer goods. The region's lower-ranking cities are Kiev (176), Tirana (180), and Minsk (189), with Kiev experiencing a considerable drop in the rankings following political instability and violence in Ukraine overall.

In the UK, London (40) is the highest-ranking city, followed by Birmingham (52), Glasgow (55), Aberdeen (57), and Belfast (63). "UK cities overall enjoy high standards of quality of living and remain stable and attractive locations for businesses," said Ellyn Karetnick, Principal at Mercer.

Asia-Pacific. Asia is the region with the largest range in quality-of-living standards, with the highest-ranking city, Singapore, in 25th place and the lowest-ranking, Dushanbe, Tajikistan, in 214th place. Topping the ranking across East Asian cities is Tokyo in 44th place; Other key cities in this part of the region include Hong Kong (70), Seoul (72), Taipei (83), Shanghai (101), and Beijing (118). Notable emerging cities in this part of Asia include Cheonan (98), South Korea, and Taichung (99) in Taiwan. Chinese cities Xi'an and Chongqing (both ranked 142nd) are also emerging as business destinations. Their main challenges to improving quality-of-living standards are clean water provision and air pollution. However, advances in the telecommunications and consumer sectors have had some positive offsetting effects on their ranking.

Behind Singapore, the second highest-ranking city in Southeast Asia is Kuala Lumpur (84); other major cities here include Bangkok (117), Manila (136), and Jakarta (140). In South Asia, Colombo (132), ranks highest and is followed by emerging Indian cities Hyderabad (138) and Pune (145). Both cities rank higher for quality of living than the country's more traditional business centers, Mumbai (152) and New Delhi (154). Considerable population increases in Mumbai and New Delhi in recent decades have increased existing problems, including access to clean water, air pollution, and traffic congestion.

In the Pacific, New Zealand and Australian cities are some of the highest-ranked cities globally, with Auckland in

3rd, Sydney in 10th, Wellington in 12th, and Melbourne in 16th.

Middle East and Africa. In 74th place, Dubai ranks highest for quality of living across the Middle East and Africa region. It is followed by Abu Dhabi (77), also in the UAE, and Port Louis (82), Mauritius. In South Africa, Durban (85) is an emerging city and ranks higher than the country's traditional business centers, Cape Town (91) and Johannesburg (94). Durban's higher ranking is mainly due to its high-quality housing, plentiful recreational offerings and good consumer goods availability. However, the city's crime problems keep it from reaching the top 50.

Ranking 230th, Baghdad is the lowest-ranking city in the region and on the overall list. ■

Source: *Mercer.*

ACCOMMODATIONS

McDonnell Douglas applies to pregnancy accommodation claims

Applying the *McDonnell Douglas* standard to a UPS driver's Pregnancy Discrimination Act (PDA) claim, which asserted that UPS accommodated lifting restrictions for those with on-the-job injuries or disabilities but categorically and unlawfully refused to accommodate pregnant employees' lifting restrictions, a divided Supreme Court found an issue of fact on whether UPS gave more favorable treatment to at least some workers whose situations cannot reasonably be distinguished from the employee's situation. Reversing the Fourth Circuit, the High Court left it for the appeals court to determine the issue of whether there were issues of fact on pretext (*Young v. United Parcel Service, Inc.*, March 25, 2015, Breyer, S.).

The employee, who worked as a part-time driver for UPS, became pregnant after taking FMLA leave for in vitro fertilization and extended her leave. Approximately three months into her leave, she communicated that she wanted to return to work and that she had a medical 20-pound lifting restriction. The UPS occupational health manager explained to her that (1) UPS offered light duty for those with on-the-job injuries, those accommodated under the ADA, and those who had lost DOT certification, but not for pregnancy; (2) she had exhausted her FMLA leave; and (3) UPS policy did not permit her to continue working as a driver with her 20-pound lifting restriction. She was unable to return to work and took an extended leave of absence, lost her medical insurance, and returned to work at UPS at some point after her child was born. She sued for pregnancy discrimination under the PDA and disability discrimination under the ADA. (She voluntarily dismissed a race discrimination claim.)

Prior proceedings. The district court granted summary judgment for UPS and the employee appealed. Affirming, the Fourth Circuit held that the UPS policy providing light-duty work only to employees who had on-the-job injuries, employees with disabilities accommodated under the ADA, and employees who had lost Department of Transportation (DOT) certification was not direct evidence of pregnancy-based sex discrimination. Nor could the employee make out a prima facie case of pregnancy discrimination under the PDA because she was not similarly situated to employees with work-related injuries, ADA disabilities, or those who had lost DOT certification. Summary judgment on the ADA claim was also affirmed.

Pregnancy discrimination under *McDonnell Douglas*. The employee filed a petition for certiorari, asking the Supreme Court to review the Fourth Circuit's interpretation of the PDA.

At issue was the second clause of the PDA, which states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." Reversing the appeals court, the High Court first rejected both parties' interpretations of this clause. It also found that it could not rely significantly on the EEOC's latest guidance, which appeared to change the government's prior litigation position without explanation.

Ultimately, the High Court held that a pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. Specifically, a pregnant employee may make out a prima facie case by showing: (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer did accommodate others "similar in their ability or inability to work." An employer can justify its refusal to accommodate the employee with a legitimate, nondiscriminatory reason, but that reason normally cannot be simply that it is more costly or less convenient to add pregnant women to the category of those it must accommodate. If the employer proffers a legitimate reason, the employee then has the opportunity to show pretext.

Applying that here, the Supreme Court held that the Fourth Circuit's judgment must be vacated because the record showed an issue of fact on whether UPS provided more favorable treatment to at least some employees whose situations cannot reasonably be distinguished from the employee's situation. For example, if the facts were as the employee alleged, she could show that UPS accommodated most nonpregnant employees with lifting restrictions while categorically failing to accommodate pregnant employees

with lifting restrictions. Indeed, UPS had three separate accommodation policies (on-the-job, ADA, DOT), raising the question of "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"

The court did not determine whether the employee actually raised a genuine issue of material fact as to whether UPS' reasons for treating her less favorably than nonpregnant employees were pretextual, leaving that for the appeals court.