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LABOR & EMPLOYMENT ALERT

DEVELOPMENTS IN LABOR RELATIONS & EMPLOYMENT LAW FOR PUERTO RICO

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WORKPLACE ANTI-BULLYING BILL READY TO STRIKE

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"Puerto Rico may become the first jurisdiction under the U.S. flag to have a workplace anti-bullying law"

Puerto Rico may become the first jurisdiction under the U.S. flag to have a workplace anti-bullying law if *Senate Bill 501* is approved by the local legislature.

Since California introduced a workplace anti-bullying bill in 2003, legislators in 24 other states have considered such legislation, generally following the model *Healthy Workplace Bill* (HWB), which was proposed by the academia over 13 years ago. Interest in the subject matter has varied over the years. Only 11 states are currently considering such bills, according to the Healthy Workplace Campaign, a group that advocates for anti-workplace-bullying laws. No state has yet approved such legislation.

Senate Bill 501, however, proposes to impose upon all employers the obligation to prohibit, prevent and remedy all forms of unjustified harassment *and* bullying in the workplace. The proposed law will broadly prohibit all types of oppressive or harassing conduct in the workplace -not only bullying- and impose liability on the employer for failing to ensure a non-harassing work environment.

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USERRA Right to Discretionary Promotion. The United States Court of Appeals for the First Circuit has clarified USERRA's "escalator principle" and how its "reasonable certainty" tests apply to all possible promotions an employee misses during military leave. Accordingly, the "escalator principle" applies even when advancement or promotion to the position normally would depend on employer discretion, rather than being automatic. *Rivera-Meléndez v. Pfizer Pharmaceuticals, LLC*, 730 F.3d 49 (1st Cir. 2013).

This case concerns a Navy Reservist employed as an "API Group Leader" at Pfizer Pharmaceuticals. Rivera-Meléndez was called to active duty in 2008. During his leave Pfizer made organizational changes in his department, redefining his former position and creating several new "API Team Leader" positions. The new Team Leader positions would have represented a promotion, but since they were posted and filled during his deployment, Rivera-Meléndez was unable to apply for them.

After returning from service, Rivera-Meléndez was reinstated under his prior rate of pay and rank and initially assigned "special tasks" because his position had been eliminated. Ultimately, another position was created for him, which was at a lower level of responsibility than the one he occupied before his military service.

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While the bills proposed in the states have been opposed for concern they will open the door to baseless lawsuits over trivial slights, the reality is that *Senate Bill 501* abandons the relatively more balanced approach suggested by the HWB.

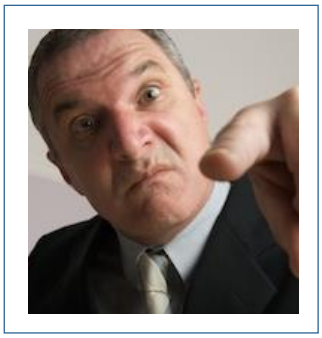
The *critical* definition under the model HWB provides that an actionable "abusive work environment" exists "when the defendant, acting *with malice*, subjects an employee to *abusive conduct so severe* that it causes *tangible harm* to the employee." *Senate Bill 501* contemplates a much lower threshold.

"If passed, private sector employers will need to establish preventive measures, training, notification and remedial procedures pursuant to rules or guidelines issued by the Puerto Rico Department of Labor"

The HWB includes incentives for employers to act preventively and responsively. Specifically, it will not hold employers liable for supervisor misconduct which does not culminate in an adverse employment decision when (1) the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and, (2) the complainant employee unreasonably failed to take advantage of appropriate preventive or corrective opportunities provided by the employer. *Senate Bill 501* provides no such consolation.

These are just some of the many differences between the model HWB and *Senate Bill 501*. Particularly noteworthy is that the local bill would permit employees claiming workplace harassment or bullying to obtain worker's compensation treatment/ benefit and upon the Corporation of the State Insurance Fund determining the condition was due to workplace harassment, the agency will be entitled to *recover* from the employer all treatment expenses. Moreover, even though the employer paid the insurance premiums and all treatment and benefit bills, it may still be liable for damages.

In terms of potential liability, employers will also be exposed to paying *double* the damages suffered by the harassed employee, plus other remedial measures, such as reinstatement.



If passed, private sector employers will need to establish preventive measures, trainings, notifications and remedial procedures pursuant to rules or guidelines issued by the Puerto Rico Department of Labor and Human Resources.

Senate Bill 501 was passed in the Senate on November 13, 2013 and sent to the House of Representatives on November 14. On same date the House Labor Committee received the bill and issued a Report recommending the approval of same with *amendments*. The bill was immediately placed on the Calendar for Special Matters, but the regular legislative session ended without it being voted upon. Unless recalled by the House Committee, the bill can be voted on at any moment after the Legislature commences its next session on *January 13, 2014*.

Surprisingly, the "*amendments*" recommended by the House Committee *deletes* the text of the bill passed by the Senate. Further, it replaced the Senate text with the text from *House Bill 79*, a similarly intended bill which had been unsuccessful at being acted upon in the House.

The following are *examples* of prohibited harassment presently listed in Senate *Bill 501:*

- Libelous, defamatory or harmful expressions about the person while using profanity or filthy language;
- Hostile and humiliating comments of the person's professional qualifications expressed in the presence of coworkers;

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- Unjustified threats of dismissal expressed in the presence of coworkers;
- Abusive or reckless imposition of multiple disciplinary actions;
- Humiliating disregard of a person's work-related opinions or proposals;
- Public comments or ridicule of an employee's physical appearance or dress;
- Making public an employee's intimate or private, personal or family matters;
- Imposing duties clearly unrelated to the employee's job obligations;
- Imposing obviously disproportionate demands for the performance of the assigned work;
- Making sudden changes as to where the work is to be performed without any objective reason related to the business or services provided by the employer;
- The employer or other employee's refusal to provide materials and information relevant and necessary for the performance of the employee's duties.

The broad and inclusive nature of the term "harassment" and the draconian exposure and liability imposed on the employer under *Senate Bill 501* is a matter of significant concern. Whether this type of legislation is actually necessary, given Puerto Rico's Constitution and other local laws that presently provide a significant level of protection against abusive workplace conduct, is not clearly settled.

Since *Senate Bill 501* has recently advanced on a "fast track" basis, its ultimate destiny will depend on the effectiveness of employer and employer associations lobbying efforts.

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Believing he should have been granted one of the Team Leader promotions, he brought suit against Pfizer alleging discrimination under USERRA. The district court rejected his claim, finding that since the Team Leader promotion was not an "automatic promotion," the employee could not show it was "reasonably certain" that he would have been promoted.

The First Circuit overturned the district court's decision, holding that the "reasonably certain" test is not limited to automatic promotions. The Court held that even when promotions are discretionary, an employer must inquire as to "whether it was reasonably certain that the returning servicemember would have attained the promotion but for his absence due to military service."

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Accordingly, the Court vacated and remanded the case to the district court for reconsideration of the employer's motion for summary judgment in light of above described legal standard.

Note: This decision clearly advises employers to scrutinize all promotions – discretionary or automatic – that were given while a servicemember was deployed. In addition to granting the automatic promotions the employee would have received, employers also need to analyze the discretionary promotions that are made during military leave, and determine whether it is "reasonably certain" the servicemember *would have* received the promotion in the absence of the deployment. Of course, this may be the case of a "legal rule" that is easier to state than implement.

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Use of Seniority in Workforce Reductions. The Puerto Rico Supreme Court recently examined the seniority rules that need to be followed in order to avoid liability under Puerto Rico's Wrongful Discharge Act, Law No. 80 of May 30, 1976, as amended, and how to apply said seniority rules when the employer operates more than one physical establishment. *Reyes Sánchez v. Eaton Electrical*, 2013 TSPR 108.

In *Eaton Electrical*, the Court held Law No. 80 requires that in workforce reductions, reorganizations and closing scenarios where certain employees are to be retained while others are dismissed, the employer must select the employees to be laid off within the affected classification according to their seniority with the employer and not the time (seniority) in the occupational classification affected by the reduction.

In this case, the plaintiff alleged the employer operated several plants in an integrated manner with regard to personnel matters and "transferred" employees between establishments as a normal and regular practice. Accordingly, she claimed Eaton should have established a seniority list including employees from all the plants.

The Court rejected this allegation, explaining that while the company program allows employees to apply for job openings between plants, Eaton retained the right to decide whether or not to hire the employee for the openings and such a transaction did not constitute an employee transfer under Law No. 80. Moreover, four of the alleged employee transfers came from jurisdictions outside Puerto Rico and the Court concluded that Law No. 80 does not require an employer to consider international employee transfers.

Retaliation. The United States District Court for the District of Puerto Rico ushered in the new year with a decision that highlights the difficulty in promptly disposing of retaliation claims when an employee has previously presented an internal complaint of illegal discrimination or harassment, even when the original internal complaint was presented almost 3 years prior to the employment termination. *Levine-Díaz v. Humana Health Care*, 2014 U.S. Dist. LEXIS 292 (January 2, 2014).

In *Levine-Díaz* the Court declined to grant the employer's summary judgment motion requesting the dismissal of a retaliation claim under Title VII based on the employee's protected activity of filing an internal complaint against a supervisor's inappropriate sexual comments; a complaint filed 35 months prior to the discharge, because less than 3 months before to the discharge the employee had presented another internal complaint regarding the supervisor's request for documentation to support her health related absences.

This more recent complaint alleged that subsequent to the prior harassment complaint, the work relation between her and the supervisor had become very "tense;" he had also recently failed to grant her request to change from full-time to part-time due to family care needs; and eliminated a previously granted reduced meal period arrangement.

In declining to grant the summary dismissal of the retaliation claim, the Court found (1) there was sufficient temporal proximity between the more recent complaint and the dismissal date to infer discriminatory intent; and (2) there were *factual controversies* as to the scheduling arrangements and whether the employee had timely presented the documentation required to justify her absences. Accordingly, the Court authorized the retaliation claim be submitted to the jury.

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