

SEPTEMBER 2013 NEWSLETTER

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HOW AN EMPLOYER CAN PROTECT ITSELF WHEN TERMINATING AN EMPLOYEE ON MATERNITY LEAVE

NEWS ALERT:

1. Before addressing this topic, Pozzuolo Rodden, P.C. are pleased to announce the following:

A) PHILADELPHIA MAGAZINE FIVE STAR WEALTH MANAGER, BUSINESS PLANNING

Pozzuolo Rodden, PC is pleased to announce that Joseph R. Pozzuolo was designated as a 2013 PHILADELPHIA FIVE STAR WEALTH MANAGER, BUSINESS PLANNING by Philadelphia Magazine. The award will appear in the November, 2013 edition of the magazine. Mr. Pozzuolo was selected after an independent survey was conducted by Philadelphia Magazine of 64,000 registered financial services professionals, high-net-worth households and subscribers of Philadelphia Magazine all of whom have an income of greater than \$190,000.

2. Upcoming CLE Seminar- Wednesday September 18th

Judith P. Rodden, Esquire will be the instructor for the LAWLINE CLE/CPE seminar title “Marriage In Pennsylvania and New Jersey After the United States Supreme Court Struck Down DOMA” on Wednesday, September 18, 2013 at 10:00 am. To participate/view this CLE/CPE seminar free of charge, please visit our website or email Chrissy at chrissy@pozzuolo.com.

3. Free Online CLE/CPE Credits:

Pozzuolo Rodden, P.C. is pleased to announce the opportunity to obtain free CPE/CLE credits by viewing the Lawline webcast courses previously taught by Joseph R. Pozzuolo and/or Jeffrey S. Pozzuolo titled “The Negotiation and Documentation of Commercial Financing Documents Including The Use of Convertible Loans With Put and Call Options”, “How Middle Income Families Should Plan for Retirement Including Ethics” and “The Fundamentals of Starting a Business”.

- * How Middle Income Families Should Plan For Retirement - <http://bit.ly/ZvgNbr>
- * The Fundamentals of Starting a Business - <http://bit.ly/13Q8dei>
- * The Negotiation and Documentation of Commercial Real Estate Loan Documents- <http://bit.ly/17jfXSN>

Any problems, feel free to contact Chrissy at: chrissy@pozzuolo.com

QUESTION OF THE MONTH:

HOW CAN A BENEFICIARY REMOVE A CORPORATE TRUSTEE IN FAVOR OF A DIFFERENT TRUSTEE IF THE BENEFICIARY IS NOT SATISFIED WITH THE CURRENT CORPORATE TRUSTEE'S SERVICES?

Answer-See Page 5 of this Newsletter

HOW AN EMPLOYER CAN PROTECT ITSELF WHEN TERMINATING AN EMPLOYEE ON MATERNITY LEAVE?

As an employer it is always a pressing concern to limit one's liability to litigation following the termination of an employee. This concern is even more pronounced when the employee being terminated is on maternity leave. This is because the Family Medical Leave Act ("FMLA") entitles leave to employees for maternity, illness or to care for a family member. In addition to the FMLA, employees on maternity leave have legal protection under the Pregnancy Discrimination Act ("PDA"). Therefore, employers need to set sound policies and take the necessary precautions to ensure they do not violate any existing federal or state laws when terminating an employee who comes under the protection of the FMLA and PDA.

I. The Family Medical Leave Act

The FMLA applies to public agencies and private employers with fifty (50) or more employees. In addition, for an employee to be eligible for FMLA protection the employer must have fifty (50) or more employees within seventy-five (75) miles of that employee's jobsite and location. However, in order for employees to qualify to FMLA protections and leave they must have worked for their employer for at least twelve (12) months, although this does not have to be a consecutive twelve (12) month period, and have worked a minimum of 1250 hours in the twelve (12) months prior to seeking FMLA protections.

Once an employee qualifies for protections under the FMLA they are entitled to twelve (12) weeks of leave time within a twelve (12) month period. An employee can take such leave for maternity issues, including before the birth for medical appointments, morning sickness, or required bed rest, and time for and following the birth of their child. FMLA leave time can also be taken after a qualified employee adopts a child. Both the mother and father are entitled to leave time in order to bond with the new addition to their family; however, this leave must be taken within a year of the child's birth or adoption. FMLA leave is job-protected time off and is unpaid leave. This means that after taking FMLA leave the employee can return to their position or one that is nearly identical. While the FMLA mandates this job-protected leave time an employee must still follow the rules and regulation of employer's regarding notice and time off.

Therefore, if you wish to terminate an employee who is using FMLA regulated leave time you must ensure that the leave time is not a factor in making the decision to terminate the employee. For example, an employer could terminate an employee on maternity leave for misconduct of the employee discovered while that employee was on leave, but an employer could not terminate that employee for taking leave related to the birth of their child. It is important that an employer retains records and documentation that relate to the employee's termination so if litigation arises or is threatened the employer could properly respond to any allegations made by the employee.

Another factor that will be heavily considered when terminating an employee on FMLA leave is the timing of the termination as it relates to the reason for termination. For example, if an employee goes on maternity leave and while on leave the employer discovered that the employee was embezzling company funds then there is a reason to terminate the employee while they are on maternity leave that is unrelated to the leave. In contrast, if the embezzlement was discovered a month before the maternity leave was taken and the employee was only terminated once they elected to take maternity leave, the Court may find that the termination is related to the FMLA leave of the employee and not the stated

misconduct. Accordingly, it is important for an employer to take quick action and not delay disciplinary actions until an employee elects to take FMLA leave.

Although Pennsylvania is an at-will employment state, meaning an employee can be terminated for any legal reason, the employer must have documentation or records demonstrating that the employee's termination was not based on FMLA leave and that other factors were considered, such as employee downsizing, elimination of certain departments and/or employee misconduct.

Additionally, it may be possible to terminate an employee who does not follow the FMLA requirements when taking leave time. When possible an employer should be given thirty (30) days notice of an employee's intention to take to FMLA leave. However, with pregnancy and child birth the exact date is often unknown and this requirement can and should be somewhat flexible. If the FMLA leave is related to a sudden or unexpected matter then the employee must give notice to the employer as soon as possible.

Moreover, an employer may request that an employee provide a medical certification from their physician to support that the FMLA leave is related to the medical necessity or maternity. The employee must provide this certification to their employer within fifteen (15) days of the request or the employer may deny the employee's FMLA leave request.

In the event of a violation, the FMLA authorizes an award of damages- not only against the employer, but also against responsible individuals. The damages can include lost wages, employment benefits, attorneys fees, and "liquidated damages". The employee can also seek reinstatement and promotion.

II. Pregnancy Discrimination Act

Similar to the FMLA, the PDA offers certain protections to employees who are pregnant or go on maternity leave. However, the PDA focuses on protecting pregnant employees from discrimination as opposed to mandating job-protected leave. Pursuant to the FMLA, an employer cannot discriminate against an employee based upon her pregnancy and birth of her child. While the FMLA covers employees with fifty (50) or more employees, the PDA is more expansive and covers employers with fifteen (15) or more employees.

The PDA does not require that pregnant employees receive special treatment or set time off but requires that an employer treat them the same as any other employee. Mainly, the PDA requires that the employer consistently apply their policies to pregnant and non-pregnant employees. For example, if an employer allows an employee who was in a motor vehicle accident to take three (3) weeks unpaid leave to recover then a pregnant employee may also be entitled to three (3) weeks unpaid leave as a result of her condition.

The purpose of the PDA is to help offset preconceived notions that an employee will be incapable of working due to her pregnancy or impending motherhood. Accordingly, an employer cannot terminate an employee solely because she is pregnant. However, if the employer's policies allow for the termination of an employee due to excessive absenteeism then a pregnant employee could be terminated for that reason if the policy is similarly enforced against non-pregnant employees. Again, it is important that an employer retain detailed employment files and records to show that their policies are consistently enforced against pregnant and non-pregnant employees.

The penalties for a violation of PDA are the same as those under Title VII of the Civil Rights Act of 1964. Under Title VII, an employer who is found liable for sex discrimination can be ordered to pay damages and provide injunctive relief; to take action to remedy the discrimination. Penalties include:

- Back pay (compensation for wages lost due to discrimination, such as if an employee was wrongfully terminated or denied a promotion);
- Out of pocket costs (for example, if an employee was wrongfully terminated and had to pay for health insurance);
- Injunctive relief, such as reinstatement or promotion;
- Front pay (money intended to compensate the employee for wages lost from the date of judgment going forward, if she cannot be reinstated right away or the workplace has become so poisoned that reinstatement isn't a viable option); and,
- Court costs.

In addition, Title VII allows for an award of damages for pain and suffering (sometimes called emotional distress or compensatory damages) and punitive damages (intended to punish the employer for wrongdoing). Together, these two types of damages are capped at an amount between \$50,000 and \$300,000, depending on the size of the employer.

If state law also prohibits sex discrimination, it might offer additional damages. For example, some states allow employees to be awarded compensatory and punitive damages without limit. Because these damages often make up the lion's share of the employee's remedy, it often makes sense to sue under state law in this situation.

III. Conclusion

Any employer considering terminating a pregnant employee or an employee electing to take maternity leave should contact legal counsel to further discuss the matter and their potential liability. Often Courts will view these terminations on a case-by-case basis and examine the specific facts supporting the termination to determine if the employer is liable for violating the FMLA or PDA. If you have any questions relating to the termination of a pregnant employee or an employee on maternity leave, please contact this office to further assist you.

QUESTION OF THE MONTH:

HOW CAN A BENEFICIARY REMOVE A CORPORATE TRUSTEE IN FAVOR OF A DIFFERENT TRUSTEE IF THE BENEFICIARY IS NOT SATISFIED WITH THE CURRENT CORPORATE TRUSTEE'S SERVICES?

First, he should check the trust document to determine if there is a "portability" clause which allows removal of the corporate trustee and appointment of a successor trustee, thereby making the trust "portable" from one corporate trustee to another. If the document has one, then he follows the document's provisions. If the trust document does not contain a portability clause or the relevant portability clause is inadequate to effect removal, the beneficiary may have to petition a court to remove the corporate trustee.

Fortunately, in Pennsylvania, a corporate trustee may be removed from its office despite the trust document's lack of a portability clause. Section 7766 of the Pennsylvania Probate, Estates and Fiduciaries Code permits removal of a trustee. Specifically, section 7766 permits removal where there has been "fault" on the part of the trustee such as, for example, when the trustee has

committed a serious breach of trust. Section 7766 also allows removal in “no fault” situations. Whether a trustee may be removed where there is no fault is not as clear cut. However, in a recent case, *In re McKinney*, 2013 Pa. Super. 123 (Pa. Super., May 21, 2013), the Superior Court of Pennsylvania addressed trustee removal and, applying the no fault removal provision, effected removal of the corporate trustee pursuant to the beneficiaries’ request.

The *McKinney* Court stated that in order for a court to remove a corporate trustee under the no fault provision: i) the removal must serve the best interests of the beneficiaries; ii) the removal must not be inconsistent with a material purpose of the trust; iii) a suitable successor trustee is available; and iv) a substantial change in circumstances has occurred. Which trustee “best serves the interests of the beneficiaries” is determined not by what the beneficiaries say is in their “best interests”, but rather by weighing the following factors:

- Personalization of service;
- Cost of administration;
- Convenience to the beneficiaries;
- Efficiency of service;
- Personal knowledge of trusts’ and beneficiaries’ financial situations;
- Location of trustee as it affects income tax;
- Experience;
- Qualifications;
- Personal relationship with beneficiaries;
- Settlor’s intent as expressed in the document; and
- Any other material circumstances.

The list is incomplete and no single factor is controlling. The *McKinney* Court, for example, noted that the beneficiaries resided much closer to the proposed successor trustee than they did the current corporate trustee. The beneficiaries also did not have an established relationship with the current corporate trustee’s personnel as the corporate trustee had undergone multiple reorganizations and mergers over the years. Furthermore, the proposed successor trustee was already serving as trustee for the beneficiaries on other trusts and the beneficiaries wanted to consolidate their trustee services. Ultimately, the Court determined that the beneficiaries’ interests would be best served by the proposed successor trustee and the proposed successor trustee was a suitable replacement.

As for whether the removal of the trustee would be inconsistent with a material purpose under the trust, the *McKinney* Court examined the trust document language. The Court determined that the settlor did not specifically appoint an individual to act, but rather, appointed a bank. That bank was no longer in business. The Court went on to note that there was no express provision that the trustee be a Pennsylvania bank and nothing in the document barred the appointment of a bank from another state. The Court concluded that removal of the current trustee would not be inconsistent with a material purpose of the trust.

Finally, the Court looked to see if a substantial change of circumstances had occurred. The Court noted that a corporate reorganization itself is insufficient to find that a substantial change in circumstances had occurred. What is important is whether there has been a substantial change in character of the service or location of the trustee. Ultimately, the Court determined that based on the number of corporate reorganizations which had occurred over

the years, coupled with the loss of trusted bank personnel and the movement of the beneficiary family to another state all constituted a substantial change in circumstances. The Court approved the beneficiaries' request to remove the trustee and appoint the request successor.

The potential result of the *McKinney* case is that a door has opened to increased market competition for and among corporate fiduciaries. Whereas before, generally incumbent trustees were protected and unsatisfied beneficiaries were restricted to use the current corporate trustee, beneficiaries now can pursue their options for a suitable successor in the marketplace. Moreover, the market among corporate fiduciaries is likely to become more competitive as they are now able to sell their services to beneficiaries and trusts that were once otherwise off the market.

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- If there are any legal questions you would like this office to answer in the future, please email the question to us at info@pozzuolo.com. Each month, the question with the most relevance to our privately held business clients, advisors, and friends will be answered in our monthly newsletter. The questions can relate to any of the areas practiced by this office including business planning and transactions, corporate law, commercial litigation, employment law and litigation, commercial real estate and development, construction law and litigation, estate planning, estate administration, tax and pension law, family law litigation.
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PUBLICATIONS

All of the following professional publications and past newsletters written by attorneys of this office are available by clicking here: [http://pozzuolo.com/Pubs Articles.shtml](http://pozzuolo.com/Pubs%20Articles.shtml)

- **Corporate/Tax Articles**
- Bankruptcy - How To Prevent It And How To Cope With It Should It Happen To Your Business
- Deferred Compensation Rewards And Retains Key Employees
- Design Buy-Sell Agreements For Maximum Utility
- How An S Corporation Avoids The Double Taxation Incurred When Excessive Compensation Is Treated As A Dividend
- How Mortgage Lenders Should Draft Broker Agreements To Avoid RESPA Violations
- How To Look, Act And Sound Like A Professional Corporation
- How to Structure a Suitable Buy-Sell Agreement
- How To Use Non-Qualified Deferred Compensation Arrangements As A Business, Retirement And Tax Planning Tool
- Money Purchase Pension Plan Falls Out Of Favor
- Protecting A Client's Business From Unfair Competition Using Restrictive Covenants

- Structuring Loans From Qualified Plans - How To Handle The Strict Tax Rules
- What Type of Qualified Corporate Retirement Plan Best Serves Your Business, Tax And Retirement Needs
- Why An Employment Contract Is Mandatory
- **Estate Planning Articles**
- Adapt Estate Planning Strategies to Fit the Needs of Same-Sex Couples
- College Funding Tool Offers Estate Planning Advantage
- Diversify Strategies For An Effective Estate Plan
- Divorce and Estate Planning
- Divorce Raises The Need For Performing An Estate Planning Review
- Drafting The Durable Power Of Attorney For Wealth Protection Purposes
- Estate Planning For Pet Owners
- Remarriage Situations Can Raise Special Estate Planning Considerations
- Six Proven Estate Planning Techniques
- Special Needs Trust - An Estate Planning Tool For The Disabled
- The Limited Liability Company -A Sophisticated Tool For Estate Planning
- Using Trusts To Maximize Family Protection And Minimize Estate Tax
- Why Living Wills- Advance Directives Are An Essential Part Of Estate Planning

Actual resolution of legal issues depends upon many factors, including variations of facts and state laws. This newsletter is not intended to provide legal advice on specific subjects. It is to provide insight into legal developments and issues. You should always consult with legal counsel before taking any action on matters covered in our updates.

This newsletter is courtesy of Pozzuolo Rodden, P.C.

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