PETRIE PETTIT

SPRING 2023

NEW FEDERAL PROTECTIONS FOR PREGNANT AND NURSING EMPLOYEES

The federal omnibus spending bill President Biden signed into law last December included 2 significant provisions that will expand federal protections for both pregnant and nursing workers: the ***Pregnant Workers Fairness Act*** and the ***Providing Urgent Maternal Protections for Nursing Mothers Act.***

THE PREGNANT WORKERS FAIRNESS ACT ("PWFA") will go into effect in June of 2023 and it requires employers with 15 or more workers to grant temporary and reasonable accommodations (such as light duty, different office equipment, temporary leave or allowing more frequent bathroom breaks) for job applicants and employees with conditions related to pregnancy or childbirth. The PWFA also prohibits employers from discriminating or retaliating against a job candidate or employee because of their need or request for a pregnancy-related accommodation.

The PWFA mirrors protections for disabled workers under the Americans with Disabilities Act of 1990 ("ADA"), but for pregnant workers and on a temporary basis. Employees and applicants are qualified if they, with or without reasonable accommodation, can perform the essential functions of the employment position. An individual is still qualified if the inability to perform an essential function is for a temporary period, the essential function will be able to be performed by the individual in the near future, and the individual's inability to perform the essential function can be reasonably accommodated without undue hardship to the employer.

Like the ADA, the PWFA requires employers to engage in an "interactive process" with covered employees to try to identify an appropriate reasonable accommodation, and the PWFA prohibits employers from requiring an employee or applicant to accept an accommodation that is not developed through this interactive process. Additionally, employers may not require covered employees to take paid or unpaid leave if another reasonable accommodation can be provided.

THE PROVIDING URGENT MATERNAL PROTECTIONS FOR NURSING MOTHERS ACT ("PUMP ACT") amended the Fair Labor Standards Act (FLSA) to require that employers provide reasonable, ***unpaid*** break time for employees to express breast milk each time the employee has a need to express milk during the first year after the child's birth. Employers must provide a place, other than a bathroom, that is shielded from view and free from intrusion in which the employee can express breast milk. (Note that the PUMP Act does not apply to employers with fewer than 50 employees if certain requirements under the law would cause an "undue hardship" to the employer.)

While the Affordable Care Act of 2010 amended the FLSA to provide these protections to nonexempt employees, the PUMP Act extends the protections to all employees, nonexempt and exempt. The PUMP Act reemphasizes the FLSA principle that time spent to express breast milk is considered "hours worked" if the employee is not completely relieved from duty during the entirety of the break. If a nonexempt employee continues to work, or is interrupted during the break, then the employee must be paid for the entire break. And exempt employees must continue to receive their full weekly salary, regardless of any break.

If you have questions about how the PWSA and/or the PUMP Act affect your organization, please contact me.

David A. McClurg

Laura J. Petrie
PRESIDENT

EXECUTIVE REPORT

Greetings to all from Petrie + Pettit's main office at the northeast corner of Wisconsin and Broadway in downtown Milwaukee as well as various remote locations. Now in our 128th year of service, we hope you enjoy this latest edition of the Petrie + Pettit newsletter, highlighting our attorneys whose legal practices are currently focused on the following areas:

- Landlord + Tenant
- Business + Commercial Law
- Employment Law + Business Litigation
- Estates + Trusts

We thank you, as always, for your trust and confidence in us.

P.S. Special thanks to Gary Koch for his assistance with this edition of the P+P newsletter and his willingness to take over the reins as editor going forward.

Gary D. Koch

ANNOUNCEMENTS

GARY KOCH recently presented a seminar at the Kenosha Landlord Association's Membership Meeting titled ***Building a Good Eviction***, touching on eviction basics as well as common pitfalls we are seeing in court. He also led an engaging discussion on ***Emotional Support Animals***. Feel free to reach out to Gary or any member of Petrie + Pettit's Landlord-Tenant team to arrange for a presentation, and let us put our success and experience to work for you!

DAVE MCCLURG, based on his extensive experience as a Labor & Employment attorney, was invited to make presentations at two seminars for professional groups last January. As part of the "Seminar on Complex Commercial Contracts" hosted by the State Bar of Wisconsin, Dave spoke to fellow attorneys about the risks of misclassifying workers as independent contractors if they do not meet the varying tests applied by the agencies responsible for enforcing the unemployment, workers compensation, overtime, and income tax withholding statutes. Dave provided tips on drafting Independent Contractor Agreements that will help avoid misclassification claims and the costly litigation that can accompany them.

Dave also had the opportunity to speak to HR professionals at the Annual Legislative Update Seminar hosted by the Metro Milwaukee Society for Human Resources Management (MMSHRM). Dave's portion of this Seminar focused on the employment issues arising from the Supreme Court's reversal of ***Roe v. Wade***, including coverage for FMLA leave for travel to obtain abortion services in other states, tax implications for employer's voluntary payment of travel expenses incurred to obtain those services, and the potential threats to an employer's ability to maintain the confidentiality of records relating to leave, and any voluntary payment of travel expenses, provided to obtain abortion services.

LAURA PETRIE was recently named as a 2023 Milwaukee Five Star Investment Professional in the area of estate planning. This Five Star designation, with which Laura has been honored for 12 consecutive years, will be published in the July edition of Milwaukee Magazine and on FiveStarProfessional.com.

TRISTAN PETTIT presented his all-day Landlord Boot Camp on Saturday March 18, 2023, in conjunction with the Apartment Association of Southeastern Wisconsin (AASEW). So far in 2023, Tristan has also presented 4 private sessions of his Landlord Boot Camp to property management companies across the state of Wisconsin.

RENEE RUFFIN NAWROCKI has been selected as a training coach for the Family Mediation Center's 2023 Mediation Training. Renee will work closely with the training participants in the areas of identifying interests, actively listening, and maintaining mediator impartiality and neutrality.

Beware of Clauses Requiring More than 28-Days' Notice to Terminate Month-to-Month Tenancies

Clauses requiring tenants to provide a 60-Day Notice to terminate a month-to-month tenancy are popular – we see them in a lot of rental agreements. Recently, though, we have seen the Wisconsin Department of Agriculture, Trade and Consumer Protection ("DATCP") take issue with provisions in rental agreements in month-to-month tenancies that require tenants to give anything more than a 28-Day Notice to terminate the tenancy.

These DATCP challenges can end one of two ways: (1) the landlord can fight the Department, or, more likely, (2) the landlord concedes and removes the clause from its rental agreements, potentially paying a fine for the pleasure of doing so.

We have not yet had a client want to fight DATCP on this issue, but we believe that there may be statutory grounds to do so.

DATCP's argument is found in Wisconsin Administrative Code ATCP § 134.06(3)(a)(2), prohibiting withholding from the security deposit for any charges other than for "Unpaid rent for which the tenant is ***legally*** responsible, subject to s. 704.29, Stats." (Emphasis added). DATCP believes that any notice period in excess of 28 days is illegal.

Wis. Stats. § 704.19 discusses what notices are necessary to terminate periodic tenancies (such as month-to-month tenancies). Wis. Stat. § 704.19(3) provides that "***At least*** 28 days' notice must be given" to terminate a month-to-month tenancy (emphasis added). It seems straightforward that "at least" does not mean "exactly".

Elsewhere in the same statute, we find that a month-to-month tenancy can be terminated "only by giving to the other party written notice complying with this section, ***unless*** any of the following conditions is met: (1) [t]he parties have agreed expressly upon anther method of termination and the parties' agreement is established by clear and convincing proof." (Emphasis added). Again, it seems straightforward that a clause in the rental agreement calling for a 60-Day Notice to terminate the month-to-month tenancy would be clear and convincing proof that the parties have expressly agreed upon another method of termination.

Nevertheless, DATCP takes the position that landlords can ONLY require a 28-Day Notice to terminate the tenant's month-to-month tenancy.

Do DATCP's arguments win? That remains to be seen. It might be a serious undertaking to find out the answer, but the Landlord-Tenant team at Petrie + Pettit is ready to take on that challenge for you!

Tristan Pettit, Gary Koch & Jennifer Hayden

WHEN THINGS GET PERSONAL:

PERSONAL GUARANTIES IN WISCONSIN

If you've ever taken out a loan for your company, entered into a commercial lease for your business, or co-signed a contract for a relative, chances are you have been asked to sign a personal guaranty. While personal guaranties can serve a valuable purpose for creditors in these types of business dealings, they can also be dangerous for the unwary signatory. Below is a summary of some of the key legal issues surrounding personal guaranties.

CONTINUING VS. LIMITED GUARANTIES. A personal guaranty is usually triggered when the principal obligor under a contract like a loan agreement or a lease breaches the contract. With an unlimited continuing guaranty, the guarantor is liable for all obligations of the principal obligor, whether such obligations are derived from one or more transactions, and regardless of the amount owed.

With a limited guaranty, as the name implies, the guarantor's obligations are limited in some way. This could include limiting it to a specific transaction, putting a cap on the amount the guarantor can be held liable for, or including a date after which the guaranty expires.

GUARANTY OF PAYMENT VS. GUARANTY OF COLLECTION. A guaranty of payment binds the guarantor to pay the principal obligor's debt, as determined by the underlying contract, according to the terms and conditions of the personal guaranty. With a guaranty of payment, both the principal obligor and the guarantor have joint and several liability for the debt, meaning a creditor can decide to pursue either, or both, of them for the same debt.

A guaranty of collection, on the other hand, is a promise from the guarantor that if the creditor cannot collect on valid claim against the principal obligor after making a diligent effort to do so, the guarantor can then be held liable for the debt. So, a guaranty of collection requires the creditor to first attempt to collect from the principal obligor before it can pursue collection from the guarantor.

NOTICE ISSUES. With a continuing guaranty, a creditor must provide notice to any guarantors of a contract of any changes to the underlying contract's terms, or of any additional extensions of credit thereunder. The reason for this requirement is that it enables the guarantors to keep track of their liability, and thus plan their financial affairs.

There is a limited exception to this requirement where a guarantor has a pecuniary interest in, or close relationship with, the principal obligor. The most common example of this type of relationship is with an owner or officer of a company guaranteeing the company's debts. A guarantor in this situation usually requests the extension of credit on behalf of the company and can therefore be expected to be aware of any further transactions they are guaranteeing. Wisconsin courts have found that this type of close relationship does not exist based solely on a familial relationship between the parties, such as a parent guaranteeing an obligation of one of their children.

BANKRUPTCY ISSUES. Confusion often occurs when a guarantor files for bankruptcy and receives a discharge. A discharge precludes further enforcement of any "debts" that arose before the bankruptcy petition was filed. So, the key question in this situation is whether the specific debt a creditor wishes to enforce "arose" prior to the bankruptcy petition being filed, or afterwards. If it arose before the bankruptcy filing, any enforcement actions by the creditor would violate the bankruptcy code's discharge provisions and could result in sanctions being imposed against the creditor.

If you have questions about guaranties in Wisconsin, please let us know.

David J. Espin

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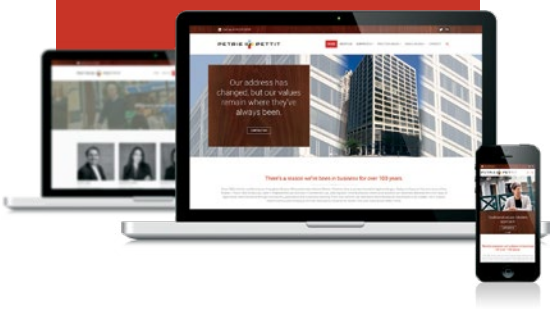

REFUSING EMERGENCY RENTAL ASSISTANCE FUNDS MIGHT BE DISCRIMINATORY

It finally happened – we've had a fair housing challenge to a landlord's refusal to accept rental assistance. In this case, it's Wisconsin Emergency Rental Assistance ("WERA") funds, but the lesson here is applicable to any / all assistance funding.

Under the Wisconsin Open Housing law (found at Wis. Stat. § 106.50), discrimination in housing is prohibited. This includes discrimination against any "lawful source of income" (Wis. Stats. §106.50(1m)(h)). Per the Wisconsin Administrative Code, the term lawful source of income "includes, but is not limited to, lawful compensation or lawful remuneration in exchange for goods or services provided; profit from financial investments; any negotiable draft, coupon or voucher representing monetary value such as food stamps; social security; public assistance; unemployment compensation or worker's compensation payments." Wis. Admin. Code. DWD § 222.02(8).

In our current case, the Wisconsin Department of Workforce Development's Equal Rights Division (ERD) has advanced the (unsubstantiated) assertion that "Rental assistance can be viewed as a lawful source of income". Obviously, the ERD thinks that rent assistance falls into one of the definitions of lawful source of income.

This case is just in the initial stages of investigation. As it works its way through the system, beware, as with almost anything, that if you are taking an action such as refusing to accept rental assistance, our team recommends that your reasons for refusing are non-discriminatory, non-retaliatory, and made across-the-board (i.e., for ALL tenants, not just the "problem" ones). We also recommend that your non-discriminatory, non-retaliatory, across-the-board reasons be internally documented to establish a record should one become necessary in future.

I guess we aren't done penalizing landlords because of the pandemic. Stay tuned!

Gary D. Koch