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Employers Beware: Washington Legislature Enacts Substantial Changes to Disability Law and Places New Restrictions on Credit Checks

Washington Legislature Establishes New Definition of "Disability"

You may recall that the Washington Supreme Court last year swept away several decades of confused and contradictory Washington state disability law in favor of adopting the federal definition of *individual with a disability* from the Americans With Disabilities Act ("ADA"). Before the Court's 2006 decision in *McClarty v. Totem Electric*, Washington used a different test than the ADA for determining which employees were considered to be disabled, and thus entitled to a reasonable accommodation or protection from discrimination. The Court's *McClarty* decision generally was welcomed by Washington employers because it made Washington law consistent with federal law, and it moved Washington to a federal standard that generally made it more difficult for employees to claim they were legally disabled.

Last month the Washington Legislature overturned the Supreme Court's *McClarty* decision by creating a new statutory definition of disability. One nationally known speaker on the subject recently advised us that Washington has now distinguished itself as having the most complicated definition of disability of any of the 50 states. Bob Howie will discuss the subject in detail at his annual Labor and Employment Law Update on June 6. In the meantime, here is a quick summary of the new Washington definition of disability:

- Most of the Washington Law Against Discrimination's disability provisions remain the same. Only the definition of the term disability has been changed.
- A "disability" now is defined as any sensory, mental or physical impairment that is (a) medically cognizable or diagnosable; (b) exists as a record or history; or (c) is perceived to exist whether or not it exists in fact.
- An impairment includes any physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin, and endocrine, or any mental, developmental, traumatic, or psychological disorder, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.
- A "disability" exists irrespective of whether the condition is temporary or permanent, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job, or whether or not it limits any other activity within the scope of this chapter.

As a practical matter, nearly every person in Washington is now disabled for purposes of Washington law.

- Only for purposes of qualifying for reasonable accommodation in employment, impairment must be known or shown through an interactive process to exist in fact, and the impairment must have a substantially limiting effect upon the individual's ability to perform his or her job.
- For purposes of reasonable accommodation, a limitation is not substantial if it has only a trivial effect.

By this new provision, the Washington Legislature has now established two definitions of disability under the Law Against Discrimination--one for purposes of determining the existence of unlawful discrimination, and one for determining an individual's right to reasonable accommodation. Employers do not need to accommodate disabilities that have only a trivial effect on the employee's ability to do their job, but they must enter into an interactive process and consider providing a reasonable accommodation for any sensory, mental or physical impairment that has more than a trivial effect on the employee's ability to do that job.

Washington Legislature Limits Credit Checks During Or Prior To Employment

Restrictions on an employer's ability to conduct pre-employment background checks have long existed under both the federal Fair Credit Reporting Act ("FCRA") and under Washington law. Both sets of laws generally have required employers to obtain written consent from applicants before the employer can obtain a third-party "consumer report," which term generally refers to any report about the individual's creditworthiness, reputation or character. Last month the Washington Legislature amended current law to further restrict an employer's ability to obtain "credit reports" (in the literal sense of that term) for either current employees or applicants.

According to the updated Washington law:

- A person may not procure a consumer report for employment purposes where any information contained in the report bears on the consumer's creditworthiness, credit standing, or credit capacity, unless the information is either (a) substantially job related and the employer's reasons for the use of such information are disclosed to the consumer in writing; or (b) required by law.

The law's legislative history offers the following reasons for the new restrictions: "Permitting employers to screen job applicants based on their credit makes it more difficult for low-income workers to move into middle class. Many credit reports contain errors and not every employer is going to take the time to ask a job applicant whether the information in the report is correct. There are plenty of other reliable ways to screen employment applicants. Credit checks by employers unfairly penalize lower class and middle class people who have had financial difficulties in the past; these are often precisely the people who need employment the most. It is unfair to assume that someone is criminal just because they are in a precarious financial situation."

Unfortunately for employers, the Legislature did not provide any guidance as to when an individual's creditworthiness is "substantially job related." We will provide more guidance on this subject when it becomes available.

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