MEYER CAPEL

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## Travel Time—When to Compensate

In this era of constant travel for work, flex-time, working from home and multiple office locations, it may be confusing as to when hourly "non-exempt" employees go "on" and "off" the clock when traveling between work locations or when traveling overnight for work. This article is designed to provide some relatively simple guidance and direction.

The Fair Labor Standards Act (FLSA) and the Portal-to-Portal Act (an amendment to the FLSA) confirm that an employee's regular travel to and from work is not working time and need not be compensated unless the employee actually works during the commute.

Even if an employee works at different job sites, the travel time to and from the job site is not compensable time, **unless** employees are required to pick up their supplies, tools or receive their assignment at one central location then travel to another. The travel time to and from the central location is unpaid; however, from that location to the ultimate job site must be paid.

If it is possible, offer employees the alternative to report either to the central location or the ultimate work site. If the option is offered, travel time to either place is considered non-compensable.

If an employee must travel as a part of their daily duties during the course of a regular working day, the travel time to different job sites or during the work day to customers, or any other work-related travel, must be compensated.

**Single Day & Overnight Trips**

If an employee is required to travel to another city or for an assignment, they must be paid for travel time, except meal periods. Travel time does **not** include time from the employee's home to the airport or train station or other form of public transportation. Time from the airport to the ultimate destination is compensated. Time at the work destination, other than meal periods, is, likewise, compensable. Finally, time from that work site to the home airport is similarly compensated.

If an employee is required to stay overnight, you are required to compensate employees who travel for all travel time during their normal working hours, regardless of the day of the week. For example, if an employee leaves Sunday evening to be at a meeting in another location by 7:00am Monday morning, that Sunday travel time is compensable.

Compensation for travel time can be confusing. Contact Lorna K. Geiler to double check your practices if you are in doubt.

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### *Inside this issue:*

## "Ban the Box"

Many of you have on your employment applications, a box asking if an employee has been convicted of a felony. You use this for the very real concern that a felony conviction may effect an employee's ability to do the essential functions of the job for which they apply. Nonetheless, on July 21st, Governor Quinn signed into law the Job Opportunities for Qualified Applicants Act, commonly referred to as the "Ban the Box Bill". This Act prohibits an employer from pre-screening employees through the application process to disclose their criminal record or criminal history. Before an employer can inquire as to an applicant's criminal record or history, the applicant must be determined qualified for the position and notified that they have been selected for an interview. If an interview is not a part of the normal process, the applicant cannot be asked about their criminal history until they have been given a conditional offer of employment. This may sound familiar. It is the same process an employer must undertake to require pre-employment physical and/or drug test. While the physical and drug testing limitations are designed to prevent disability discrimination, Ban the Box, effectively, creates a whole new applicant protection.

As with most legislation, there are, and must be, exceptions. Those exceptions include: 1) employers who are required to exclude applicants with certain criminal convictions for employment as a result of a state or federal law (such as those laws prohibiting convicted child sex offenders from working with children); 2) employers who require a standard fidelity or similar such bond and the applicant's conviction of one or more specified criminal offenses will disqualify him from obtaining such a bond (in such a case, you should include a question on your application as to whether or not the applicant has been convicted of any of those enumerated offenses); or 3) the employer employs individuals licensed under the Emergency Medical Services Systems Act.

Employers are allowed to notify applicants in writing of specific offenses that will disqualify them from employment in a particular position due to the federal or state law or the employer's policy. Such a notification is most appropriate on an application. If you need assistance in articulating the relevant criminal offenses, please do not hesitate to contact Lorna K. Geiler and she will work with you to revise your application.

## Workplace Violence Protection Act

The Workplace Violence Protection Act (WVPA) has been amended to allow employers to seek orders of protection when their employees are subject to a credible treat of violence in their workplaces. Violence, in the workplace or otherwise, has long been a problem that courts and legislatures have tried to address. Historically, violence in the workplace was addressed in a reactive, as opposed to proactive, manner.

For example, in 2011, OSHA issued a directive on enforcement procedures for investigating and inspecting instances of workplace violence. Essentially, OSHA established consistent procedures for field staff in responding to workplace violence. Indeed, at the time, OSHA noted that workplace violence was among the top four causes of death in the workplace in the preceding 15 years.

Unfortunately, OSHA's approach is, by necessity, reactive as opposed to proactive. Recognizing that violence in the healthcare field was extraordinarily commonplace, the Illinois Legislature adopted the "Healthcare Workplace Violence Prevention Act". This required each healthcare workplace to adopt and implement plans to reasonably prevent employee violence at work. While this was more proactive than reactive, it again, had limited deterrent effect.

Effective January 1, 2015, the Workplace Violence Prevention Act provides different proactive remedies. Historically, orders of protection have been available to members of the same family or household who have been or who live with victims of domestic abuse. This type of preventive protection has been limited to family or household members. As a result, if there was no familial relationship, there was really no proactive remedy. The WVPA is a dramatic change. It now provides order of protection remedies to non-family members, effectively broadening the Illinois Domestic Violence Act. Now, under the WVPA an **employer** may seek an order of protection to prohibit further violence or threats of violence by a person if an employee has suffered unlawful violence or a credible threat of violence from the person and the unlawful violence has been carried out at the employee's place of work or the credible threat of violence can reasonably constructed be carried out at the employee's place of work. Now, if an employer has reason to believe that an employee is at risk for violence at the employer's place of business, an order of protection can be requested from the court and, if granted, is enforceable to the same extent as domestic orders of protection. Again, an order of protection is reactive in part; however, because it can be granted based on a credible threat of violence, not just in reaction to actual violence, it provides broader protection.

## Pregnancy Protection Under the Illinois Human Rights Act

The Illinois Human Rights Act has been amended once again. Now, an employer is not only prohibited from discriminating against an employee because she is, or may become pregnant, an employer must provide reasonable accommodations to a job applicant or employee (including part-time, full-time or probationary employees) for any "medical or common condition she has related to pregnancy or child birth", unless the employer can demonstrate an accommodation would impose an undue hardship on the employer's business. Does this sound familiar? It should because it is remarkably similar to the disability accommodation requirements provided for in the Federal Americans with Disabilities Act and the Illinois Human Rights Act. Historically, pregnancy has not been perceived or looked upon as a disability for the purposes of any of these laws. Now, however, it is effectively being treated as a disability. As a result, reasonable accommodations are required.

An employer may request documentation from the employee's healthcare provider confirming the need for the requested accommodation, as is allowable when an employee is requesting an accommodation under the disability provisions of the Human Rights Act.

Similar to the Americans with Disabilities Act, the employer is required to engage in an interactive process with the employee regarding the requested/needed accommodation. There can be liability for failure to engage in the interactive process when there is no liability for failure to provide a reasonable accommodation.

An employer cannot require an employee to take a leave under any leave of absence law or policy of the employer if another reasonable accommodation can be provided for the pregnancy or childbirth related condition. Further, an employer cannot refuse to reinstate an employee effected by pregnancy, childbirth, medical or common conditions related to pregnancy and childbirth to her original job or an equivalent position with equivalent pay, seniority, retirement and fringe benefits unless the employer can demonstrate that such an accommodation would impose an undue hardship on its operations.

Effectively, those employees who need/take a leave of absence during the first year of their employment for pregnancy/childbirth or a related condition, automatically receive a leave of absence, even if they were not otherwise qualified under an employer's policy or under the Family Medical Leave Act. As a result, not only is this amendment to the Illinois Human Rights Act a substantial increase in the reasonable accommodation requirement imposed by that Act, it also effectively expands the Family Medical Leave Act. This statute requires an employer to allow a leave of absence for an employee who needs such a leave as a result of pregnancy or childbirth. In other words, at least as it pertains to a pregnant employee, the twelve month, 1250 hour requirements provided in the Family Medical Leave Act are not applicable. This is a substantial change to the obligations imposed on an employer of a pregnant employee. Again, this is one more requirement on Illinois employers that, in many circumstances, can be quite burdensome and adds support to the claim that Illinois is not an employer friendly state.

## Pregnancy Under Federal Law

The Pregnancy Discrimination Act of 1978 was an amendment to Title VII of the Civil Rights Act of 1964. Since 1978, pregnancy discrimination has been specifically identified and prohibited under federal law. The Federal Pregnancy Discrimination Act prohibits discrimination based on pregnancy. In other words, employers are required to treat pregnant employees the same as any other employee. For example, if leaves of absence are allowed for those with a heart condition, or cancer treatment or any other medical condition, similar leaves of absence must be provided for pregnancy related conditions. If an employee's job is held for a given period of time while they are off work due to a non-pregnancy health-related condition, those job protection rights must be provided to pregnant employees too. Under the federal law, if light duty was not offered to employees as an accommodation for a temporary condition other than pregnancy, it need not be offered to employees who requested such an accommodation due to pregnancy.

Of course, the Illinois law has changed that for Illinois employers. In this particular circumstance, I think the federal government "got it right". Pregnancy should be treated like any other health condition that effects or impacts an employee's ability to due their job. It should not receive better or "special" treatment, but should be treated the same. Unfortunately, Illinois has gone much broader in providing greater protections to Illinois employees. Therefore, for our Illinois employer clients, non discrimination isn't enough. The standard is that of a reasonable accommodation of pregnant employees.