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# February, 2017

## I. EMPLOYMENT LAW

### City of Philadelphia Ordinance Makes It Unlawful for Employer to Inquire About Prospective Employee's Wage History

On January 23, 2017, the City of Philadelphia passed an ordinance that will make it unlawful for employers to inquire into an applicant's wage history during the hiring process. The new law is an amendment to the Philadelphia Fair Practices Ordinance. Specifically, the ordinance makes it unlawful for an employer to inquire into a prospective employee's wage history (in writing or otherwise). The new law also makes it unlawful to retaliate against a prospective employer for failing to disclose wage history

"Wages" are broadly defined as all earnings, including fringe benefits, "wage supplements or other compensation whether payable by the employer from employer funds or from amounts withheld from the employee's pay by the employer," such as other lawful deductions.

The Ordinance, however, provides an exception: allowing inquiries into wage history where "any federal, state or local law … specifically authorizes the disclosure or verification of wage history for employment purposes." This exception applies not only where such inquiries are required, but wherever disclosure or verification is "authorized."

The law was passed to encourage employers to base salary offers on the job responsibilities of the position sought, rather than on the applicant's prior wages. The law goes into effect on May 23, 2017.

## II. ARBITRATION AGREEMENTS

### Agent Did Not Have Authority to Sign Arbitration Agreement

*Peterson v. Kindred Healthcare, Inc.*, __ A. 3d ___, 2017 Pa.Super. 26 (Pa. Super. February 1, 2017) involves claims of negligence on the part of Kindred in relation to care rendered to Petersen during her stay as a patient at a Kindred facility. Petersen filed a complaint on July 5, 2013. Kindred filed preliminary objections on July 26, 2013, seeking, inter alia, to enforce an arbitration agreement signed by Petersen's daughter, Darlene Uriarte, pursuant to a power of attorney ("POA") appointing Uriarte as successor agent in the event her sister, Kathleen Morrison, was unwilling or unable to act. Petersen filed a response, in which she asserted that the agreement was "unenforceable, void, unconscionable, and/or a contract of adhesion." Petersen also claimed that the agreement "was signed under duress or by someone without proper legal authority." The parties engaged in limited discovery on the issue of arbitration and filed supplemental briefs. Following oral argument, the trial court issued an order on September 8, 2013, overruling Kindred's preliminary objections and directing Kindred to file a response to Petersen's complaint.

On appeal to the Pennsylvania Superior Court, Kindred claimed that the trial court erred in concluding that Petersen's daughter, Darlene Uriarte, lacked authority to execute the

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arbitration agreement pursuant to Petersen's power of attorney. Specifically, Kindred challenged the court's findings that: (1) as the named successor agent, Uriarte did not have authority to act on behalf of Petersen until it was determined that the primary agent, Kathleen, was unable or unwilling to act; and (2) the power of attorney document in question did not authorize the agent to enter into ADR agreements on behalf of the principal.

The Pennsylvania Superior Court found that a party dealing with an agent, known to the party to be “acting only under an express grant of authority (such as a power of attorney), has a duty to take notice of the nature and extend of the authority conferred.” Failure to do so is at the party’s own peril.

Specifically, the Pennsylvania Superior Court said that since Kindred received a copy of the POA, it had actual notice that Darlene only had authority to act under certain conditions. The court said that Kindred should have questioned Darlene’s authority and investigated the matter to determine whether Darlene had the authority to sign her mother’s paperwork. There was also no evidence of record that Kathleen was, in fact, unable or unwilling to act. Accordingly, the Superior Court found that Darlene had no authority to sign the arbitration agreement, and thus the arbitration agreement was unenforceable.

The court also rejected Kindred’s agency by estoppel argument. Kindred alleged that since Petersen accepted the benefits laid out in the admission agreement Uriarte signed on her behalf, the patient can not back out of the arbitration agreement just because she doesn’t want to arbitrate the present action. The court rejected an identical argument in 2015 holding that “because the ADR agreement was separate from the admission agreement, and admission was not conditioned upon agreeing to arbitrate, the agreement was not part of the contractual quid pro quo for admission to the facility and its attendant benefits.”

This holding comes days after the same panel found for Kindred Healthcare Inc. in Cardinal v. Kindred Healthcare, Inc., ___ A.3d ___, 2017 WL 382943 (Pa.Sper. January 27, 2017) involving another appeal seeking to compel a patient’s nephew to arbitrate similar allegations. There the same panel held that there wasn’t clear and convincing evidence to support the lower court’s conclusion that Kindred patient Carmen Cardinal lacked the capacity to enter into the arbitration agreement he signed, nor that the pact was unenforceable.

# III. INSURANCE LAW

## Anti-Assignment Clause Is Not a Barrier to the Post-Loss Assignment of a Claim

In *Givaudan Fragrances Corp. v. Aetna Casualty & Surety Co.*, ___ A.3d ___, 2017 WL 429476 (N.J. February 1, 2017), a much anticipated case decided by the New Jersey Supreme Court, Givaudan Fragrances (“Fragrances”) is the corporate successor of an enterprise, Givaudan Corporation, that held primary, excess and umbrella insurance policies for decades from the defendant insurers. Givaudan Corporation was split into divisions and Givaudan Roure Flavors (“Flavors”) became the successor-in-interest to the named insured under the policies.

In 2006, Fragrances was sued by the DEP on environmental contamination claims. Fragrances notified defendants of the environmental claims, but all defendants declined to provide coverage because Fragrances was not the named insured under the policies. Fragrances filed the instant complaint in February 2009 seeking a declaratory judgment that it was entitled to coverage under the policies.

In February 2010, while the declaratory judgment action was pending, Fragrances notified defendants that Flavors intended to assign its post-loss rights under the insurance policies to Fragrances. Defendants refused to consent to the assignment. Nevertheless, Flavors executed the assignment to Fragrances, which Fragrances maintains transferred its rights with respect to coverage for claims related to the fragrances operations that had been transferred pursuant to the 1998 restructuring.

After the assignment was executed, Fragrances filed a motion for summary judgment, asserting (1) that Fragrances has the rights of an insured under the policies because of the post-loss assignment of the claims or, alternatively, (2) that Fragrances is entitled to coverage under the policies as a corporate affiliate of Givaudan Flavors. Defendants cross-moved for summary judgment, arguing that Flavors' rights were not assignable without defendants' consent because the claim had not been reduced to a judgment, and that Fragrances does not have policy rights as an affiliate.

The trial court denied Fragrances's motion for summary judgment and granted defendants' cross-motion for summary judgment.

On appeal, Fragrances continued to maintain that the assignment was valid as a post-loss assignment of claims, not an assignment of a policy. Fragrances argued that the assignment, executed after the policies had expired, assigned claims under the policies and represented “no change in the risk” to the insurers. Fragrances also argued that, as an affiliate, it should have been covered under policies where Givaudan Corporation was the named insured.

Defendants countered that the 2010 assignment from Flavors to Fragrances was a policy assignment because it aimed to grant all rights under the policies to Fragrances. Defendants stated that insurance policies are personal contracts specific to the insured party that may not be assigned without the insurer's consent.

The Appellate Division entered summary judgment in favor of insurers holding that although the anti-assignment clauses in the policies would normally prevent an insured from transferring a policy without the insurer’s consent, claims under a policy can be assigned without the insurer’s consent once a loss occurs. Defendants filed petition for certification, which the Supreme Court granted.

The New Jersey Supreme Court held that, as matter of first impression, successor's assignment of its right to coverage under CGL policies for the occurrence of environmental contamination to corporation was a post-loss claim assignment, and thus, consent-to-assignment condition, or anti-assignment provisions, in the policies were void as applied to the assignment. As such, the Court found Fragrances had been validly assigned the rights to these insurance policies after Givaudan Corporation was restructured and split into divisions. Because of this, the court ruled that Fragrances was entitled to $500 million in insurance coverage for environmental contamination claims.

***Copies of the full text of any of the cases discussed in this Newsletter may be obtained by calling our office. The articles contained in this Newsletter are for informational purposes only and do not constitute legal advice.***