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MCAD GUIDELINES ON MASSACHUSETTS MATERNITY LEAVE ACT MAY REQUIRE EMPLOYERS TO CHANGE LEAVE POLICIES

The Massachusetts Commission Against Discrimination (the "MCAD") published guidelines on the Massachusetts Maternity Leave Act (the "MMLA"). Generally, the MMLA allows eligible employees to take up to eight weeks of unpaid leave for the birth or adoption of a child. The guidelines set forth the MCAD's position on several important issues arising under the MMLA, including the intersection of employee rights under the MMLA and the federal Family and Medical Leave Act (the "FMLA"). While the MCAD's guidelines do not have the effect of law, they indicate the MCAD's position on enforcing the MMLA. In addition, because the MCAD is the state agency charged with enforcing the MMLA, courts may look to the guidelines for guidance in ruling on alleged violations of the MMLA.

Intersection Between The MMLA And The FMLA

Since 1993, in the absence of any guidance from the MCAD, employers have struggled with questions concerning varying rights granted to employees by the MMLA and the FMLA. The MCAD's guidelines provide answers to some of these questions.

- *May MMLA Leave And FMLA Leave Run Concurrently?*

Yes. The MCAD guidelines state that when a leave of absence is taken for a reason that qualifies for leave under both the MMLA and the FMLA, an employer may count the leave concurrently as both FMLA and MMLA leave. However, where an employee takes FMLA leave for a reason other than birth or adoption, the employee still may take an additional eight weeks of MMLA leave for the birth or adoption of a child after taking twelve weeks of FMLA leave for a reason other than birth or adoption.

- ***May Employers Require Employees To Use Paid Time Off During MMLA Leave?***

No. The MCAD guidelines state that employers may not require employees to use their accrued vacation, personal or sick leave for any part of their MMLA leave. This provision may present a problem for employers because the FMLA regulations expressly allow employers to require employees to use their paid time off concurrently with their FMLA leave. There is some question as to whether the MCAD exceeded its authority in stating that employers may not require employees to use their paid time off during MMLA leave. The MMLA itself is silent on the narrow issue of employers requiring employees to use paid time off during MMLA leave, but does state that MMLA leave “may be with or without pay at the discretion of the employer.”

MMLA-Specific Rights

The MMLA provides for an eight week job-protected leave of absence for eligible employees, but is less specific about other terms of the leave. Generally, if an employer provides pay, benefits or the costs of benefits to employees on other types of leave, it must do so for employees taking MMLA leave. The guidelines further define the terms and conditions of the leave by stating that the MMLA in no way limits the right of employees to use paid time off before the MMLA leave begins or after it ends, so long as such time is taken in accordance with the employer’s policies.

The MCAD guidelines provide that employees giving birth to twins are entitled to sixteen weeks of MMLA leave. Under the MCAD’s interpretation, the MMLA provides more generous leave for an employee having twins than the FMLA would allow because the FMLA

only would allow a twelve week leave of absence for the birth of twins. The guidelines also state that employees may take MMLA leave each time they give birth or adopt a child. Thus, according to the MCAD, an employee giving birth in January and adopting a child in March will be eligible for two separate eight week leaves of absence.

Eligibility For MMLA Leave

The guidelines state that MMLA leave is available at the time of the birth or adoption, but not “substantially earlier or substantially later.”

The MCAD guidelines also state that in order to be eligible for MMLA leave, an employee must have completed the initial probationary period set by the employer or, if the employer has no fixed probationary period, completed three consecutive months of full-time employment with the employer. The MCAD guidelines state that the initial probationary period must not exceed six calendar months. The MMLA itself does not set any maximum limit on the length of an employer’s initial probationary period.

Discrimination Issues

As the MCAD notes in the guidelines, the express language of the MMLA provides leave only for *female* employees. Therefore, the MCAD will not assume jurisdiction over claims by male employees seeking paternity leave. However, the MCAD states in the guidelines that providing maternity leave to female employees in excess of the eight weeks required by the MMLA, and not to males, would in most circumstances constitute unlawful sex discrimination under state law. In addition, the MCAD opines that employers who provide maternity leave to females only in compliance with the MMLA, may violate federal prohibitions against sex discrimination.

The MCAD also explains that the Supreme Judicial Court has not yet considered whether the MMLA's requirement of leave for female employees only violates the Massachusetts Equal Rights Amendment and states that "[g]iven the possibility of a successful challenge to the constitutionality of the MMLA, employers should consider providing leave to all members of their workforce who otherwise meet the eligibility requirements of the MMLA."

The MCAD provides some specific guidance regarding employer conduct in connection with a pregnant employee's desire to continue performing her normal duties. The guidelines state that employers may not deny a woman the right to work or restrict her job functions, such as heavy lifting or travel, during or after pregnancy or childbirth when the employee is physically able to perform the necessary functions of her job. Moreover, the guidelines prohibit employers from requiring a pregnant woman to take a leave of absence prior to giving birth if she is willing to continue working and prohibits employers from preventing a woman from returning to work for a fixed period of time before or after the birth of her child.

With respect to public and private schools, the MCAD's position that an employer may not prevent a woman from returning to work for a fixed period of time after the birth of her child is inconsistent with the FMLA regulations. When an employee takes a leave of absence within certain time-frames near the end of an academic term, the FMLA regulations allow schools to require teachers and other instructional employees to remain out on a leave of absence until the end of the semester. At this time, it is unclear whether the MCAD will observe a similar exception for schools under the MMLA.

In addition to discussing possible sex discrimination issues associated with the MMLA, the MCAD provides some guidance with respect to potential disability-related issues

that may arise in connection with the MMLA. The MCAD guidelines provide that generally, a normal, uncomplicated pregnancy will not be considered a disability, even if the employee is unable to work for a period of time as a result of the pregnancy or childbirth. However, the guidelines also state that under some circumstances a "pregnancy-related physical or mental impairment" may include any physical or mental impairment "associated with an individual's pregnancy, miscarriage, abortion, childbirth, or recovery therefrom."

The MCAD's MMLA guidelines set forth positions not previously enunciated by the MCAD with respect to several issues arising under the MMLA. In light of this new guidance from the MCAD, employers should review their parental leave policies. Please contact Mike Bertoncini, or the attorney assigned to your account, at (617) 479-5000 for further information about the MMLA.

NLRB EXTENDS UNION RIGHTS TO NON-UNION EMPLOYEES

In a decision with far-reaching implications for **all** employers, the National Labor Relations Board ("NLRB") decided on July 10, 2000, that the so-called *Weingarten* right of unionized employees (to have a co-worker present at an investigatory interview that the employee reasonably believes may lead to discipline) also applies to **non-union employees**. *Epilepsy Foundation of North East Ohio*, 331 NLRB No. 92 (2000). In *NLRB v. J. Weingarten* (1975), the Supreme Court ruled that a union-represented employee had the right to request and have present a co-worker at an "investigatory" interview if that employee had a reasonable belief that he/she might be disciplined as a result of the interview.

As this right has evolved at the NLRB, *Weingarten* rights may be summarized as follows:

1. An employee is entitled to the presence of a co-worker or union representative (typically a co-employee such as a shop steward) at a meeting with a supervisor if - and only if - the meeting is investigatory in nature and the employee has a reasonable belief that discipline might result from the meeting;
2. An employee is not entitled to the presence of a co-worker or union representative at a meeting with a supervisor if the meeting is only to inform the employee of, and to impose, previously determined discipline. The employee should simply be informed of the discipline and the reasons for it, and there should not be any “back and forth” about those reasons;
3. It is the employee’s responsibility to request the presence of a co-worker or union representative;
4. Generally the employee is not entitled to the co-worker or union representative of his/her choice, but a co-worker or union representative.

So what does this mean for non-union employers? It means that it is an unfair labor practice under the National Labor Relations Act to discipline an employee for refusal to participate in an interview if his/her request for a co-worker’s presence is denied or to deny the presence of a co-worker if requested. The remedy at the NLRB would be to expunge the discipline and make the employee whole for any losses suffered. In *Epilepsy Foundation*, the employer was ordered to reinstate the employee (who had been terminated for “gross insubordination”) with backpay and interest. Moreover, part of the standard NLRB remedy is a sixty (60) day “posting,” which is a large poster in the workplace stating that the employer

violated the Act for whatever reasons were found by the NLRB. An increasingly used remedy is also to order the employer actually to read the posting aloud to assembled employees. The NLRB also has embarked on an initiative to increase the amount of monetary penalties including front pay and punitive damages in appropriate cases.

The result is that discipline of employees - and probably basic investigation of workplace issues - just got a new layer of procedural protections that savvy employees and plaintiff attorneys can enforce at the NLRB.

If you have any questions about this case or have other questions, please contact the attorney handling your account, or Attorney Geoffrey P. Wermuth, at (617) 479-5000.

IMMIGRATION UPDATE

Professional Nurses And The TN Visa

The shortage of nurses continues to be an issue for hospitals and other healthcare providers. The TN visa can be used to hire Canadian citizens who are licensed registered nurses or who have an interim permit to practice nursing in the state of intended employment in the United States. The TN visa will only be issued for one year but can subsequently be renewed. Applicants must apply for the TN visa directly at the port of entry into the United States and must provide the prescribed application fee, together with the following supporting documentation, at the time of application:

- Proof of Canadian citizenship;
- A letter offering employment in the United States;

- Evidence of professional qualifications and compliance with any applicable state licensure requirements;
- Confirmation of arrangements for remuneration for services; and
- Evidence of anticipated length of stay.

Employers can attract Canadian nurses by advertising in newspapers in towns or cities which border the Canadian border. Employers can also surf the web for placement agencies with access to Canadian nurses.

The Nursing Relief For Disadvantaged Areas Act (“NRDAA”)

On August 22, 2000, interim final regulations governing the implementation of the Nursing Relief for Disadvantaged Areas Act (“NRDAA”) were issued by the Department of Labor and are expected to become effective on September 21, 2000. The NRDAA was enacted by Congress on November 12, 1999 to create a new temporary visa program modeled after the H-1A temporary visa program which expired on September 1, 1995. Under the new program, non-immigrant aliens will be permitted to work as registered nurses for up to three years in facilities which serve “health professional shortage” areas (“HPSAS”). HPSAs are defined as either (1) urban and rural geographic areas, (2) population groups and (3) facilities with shortages of health professionals.

The NRDAA temporary visa program will expire four years from the date of implementation of the regulations, which based on the current schedule, would occur on September 21, 2004. Unlike the H-1A program which did not have a numerical cap, only 500 visas a year may be issued under this program nationally and each state is

limited to a maximum of 25 or 50 visas depending on its population.

H-1B Processing

In March 21st of this year, the Immigration and Naturalization Service (“INS”) announced that the cap for H-1B visas had been reached. The announcement was followed by statements from the INS declaring that it would stop accepting new petitions for FY 2000 and would continue processing until it recorded 115,000 approvals. The unfortunate consequences for employers were that all future petitions would need October 1st, 2000 start dates and delays in processing times would increase.

On August 7, 2000, the INS reported that it has begun processing H-1B cases for FY 2001 with October 1st start dates. The current cap for FY 2001 is 107,500. In order to prevent the cap issues employers confronted in FY 2000, it is advisable to submit petitions as soon as possible for FY 2001.

Several bills have been introduced in Congress proposing narrow cap increases for the current and next two fiscal years. However, since Congress has been on August recess, the future success of these bills remains uncertain.

If you have any questions about these articles or have other questions contact Geoffrey P. Wermuth, Chairman of the Immigration Practice Group, Rosa M. Celorio or Ethlyn M. E. O’Garro at (617) 479-5000.

UPDATE ON MASSACHUSETTS LAW AFFORDING “WHISTLE-BLOWER” PROTECTION TO HEALTH CARE PROVIDERS

A Massachusetts law that became effective on July 1, 1999 protects health care “whistle-blowers” from retaliatory action by their employers. This law contains both protections and obligations for health care providers and has very broad coverage.

Given the considerable efforts of organized labor to push this law through the legislature, the law seems to have had little impact on the health care industry since its passage. There are no reported decisions by any state or federal courts under this statute. The Office of the Attorney General, which is charged with enforcing the statute, has yet to issue any regulations or advisories regarding the statute. Although there have not yet been any major developments under this law, employers in the health care industry should be aware of the significant protections the law affords employees and should be prepared to deal with employee complaints about alleged unsafe practices in health care facilities. With the current focus on staffing and mandatory overtime issues in the health care industry, it is likely that we will see some activity under this statute in the coming months.

Employees Protected

The new law protects all “health care providers” that are employed by or that have a contractual relationship with a “health care facility.” A “health care provider” is defined as any individual who is licensed under Chapter 112 of the Massachusetts General Laws, such as:

- registered and licensed practical nurses;

- physicians and physician assistants;
- chiropractors, dentists, occupational and physical therapists, optometrists, pharmacists, podiatrists, psychologists, and social workers.

The term “health care providers” also includes any other employees that perform or have performed health care related services “for and under the control of a health care facility.”

Entities Covered

The new law defines “health care facilities” as:

- entities that are subject to licensing by or operated by the Department of Public Health, among them, any hospital, clinic, convalescent or nursing home, charitable home for the aged or community health agency;
- any detox facility;
- any facility offering treatment to mentally ill and/or mentally retarded persons.

Protections

Health care facilities covered by this law cannot:

- refuse to hire;
- terminate a contract with; or
- take other retaliatory action defined as “the discharge, suspension, demotion, harassment, denial of a promotion or layoff or other adverse action

against a health care provider affecting the terms and conditions of employment.”

Because a covered health care provider has:

- disclosed or threatened to disclose to a facility manager or to a public body information about any activity, policy or practice that the health care provider “reasonably believes” to be a legal or regulatory violation or a violation of professional standards that poses a risk to the public health;
- provided information or testified as part of an investigation, hearing or inquiry into any violation of law, rule, regulation, policy or professional standards of practice that the health care provider “reasonably believes” poses a risk to the public health;
- objected to, or refused to participate in any activity, policy, or practice that the health care provider “reasonably believes” to be a legal or regulatory violation or a violation of professional standards that the health care provider “reasonably believes” poses a risk to the public health; or
- participated in any committee or peer review process, or filed a report, complaint, or incident report discussing allegations of unsafe or potentially dangerous care.

Obligations for Whistle-blowers

Health care providers are subject to certain obligations before reporting their concerns to a public body. They need to fulfill these obligations in order to receive statutory protection. The health care provider must first communicate the matter to a manager of the health care facility

by written notice. The provider must also offer a “reasonable opportunity” to the health care facility to correct the matter before he or she discloses to a public body a suspect activity, policy or procedure.

The law broadly defines a “manager” as:

- an individual given authority by a health care facility to direct and control the work performance of the affected health care provider;
- who has authority to take corrective action regarding the complained violation of a law, rule, regulation, activity, policy, professional standard of practice; or
- who has been designated by the health care facility to receive the written notices.

Exceptions To The Whistle-Blower Notice Requirement

There are several exceptions to the requirement that health care whistle-blowers first provide their employers with notice of the alleged unsafe practice and allow the employer to correct it before the whistle-blower reports the alleged unsafe practice to a government agency. The employee does not have to comply with the notice requirements listed above when:

- a health care provider gives information to a public body conducting an investigation, hearing, or inquiry into a violation that the health care provider “reasonably believes” poses a risk to the public health, or

- the health care provider is reasonably certain that facility managers are already aware of the emergent issue, or
- the health care provider reasonably fears physical harm resulting from disclosure, or
- the health care provider reasonably believes the matter to involve a crime.

Some would argue that these exceptions swallow the rule. In any event, it is likely that some health care providers will disclose purported unsafe practices to government agencies without first alerting the employer and then claim that they are covered by this exception.

Employer Posting Requirement

This new law requires employers to notify their employees about its protections and obligations. First, employers must “conspicuously display notices” that are “reasonably designed to inform its health care providers of their protections and obligations” under the law. Second, besides displaying notices, health care facilities are required to use “other appropriate means to keep its health care providers so informed.” The notice must also include the name of the persons designated to receive internal complaints.

Remedies for Violations

Any health care provider that has been the victim of a violation of this new law may, within two years, institute a civil action in the Superior Court. The remedies include:

- the issuance of a temporary restraining order, a preliminary injunction, or a permanent injunction to “restrain continued violation” of the law;

- reinstatement of the health care provider to the same or equivalent position;
- reinstatement of full fringe benefits and seniority rights;
- compensation for lost wages, benefits and other remuneration;
- payment by the health care facility of reasonable litigation costs, expert witness fees and attorneys’ fees;
- all remedies available in “common law tort actions.”

The Role of the Attorney General

The Attorney General may bring an action in the name of the Commonwealth against any health care facility to enforce the protections and notice requirements of this new law. In such action, the court may also impose, in addition to the remedies available in a private action, civil penalties up to \$10,000 per violation as well as attorneys’ fees and expert witness fees.

What Employers Should Do

The Office of the Attorney General has not yet developed the notice contemplated by the law. Therefore, health care facilities may develop their own posters notifying their employees of these whistle-blower protections. These notices should include the protections and obligations for health care providers and the names of managers that will be receiving internal complaints. Further, the notices should be posted in places where the affected employees are likely to see them.

Moreover, every health care facility must use “other appropriate means” to keep providers informed of the law. For example, employers can include information about the statute in their employee handbooks or can send memoranda to their employees.

Employers should educate supervisors and other managerial employees about the protections of the law. Employers should advise supervisors and managers about how to handle situations where health care providers refuse to perform a job assignment because they “reasonably believe” it poses a risk to the public health.

If you have questions about training managers or responding to employee allegations of unsafe practices, contact the attorney assigned to your account for advice on the preparation of notices and memoranda to all employees educating them about the law and for training of managers and supervisors.

GOVERNOR CELLUCCI SIGNS LAW PROHIBITING DISCRIMINATION ON THE BASIS OF GENETIC INFORMATION

On August 22, 2000, Governor Cellucci signed into law a bill prohibiting employers from collecting, soliciting or requiring disclosure of genetic information from any person as a condition of employment and prohibiting discrimination in employment on the basis of an individual’s genetic information. The law defines “genetic information” as “a written, recorded individually identifiable result of a genetic test as defined in this section or explanation of such a result” and defines a “genetic test” as “a test of human DNA, RNA, mitochondrial DNA, chromosomes or proteins for the purpose of identifying the genes or genetic abnormalities, or the presence or absence of inherited or acquired characteristics in genetic material.”

Significantly, this definition expressly excludes tests given “for the exclusive purposes of determining the abuse of drugs or alcohol.” This new law amends Chapter 151B of the Massachusetts General Laws, covering employers with six or more employees. The new law is effective on November 20, 2000.

Employers should consult with their employment counsel to determine whether their Equal Employment Opportunity policy and/or employee handbook need to be revised in light of this recent amendment to Chapter 151B.

REEVES V. SANDERSON AND ABRAMIAN V. HARVARD: ATTEMPTS TO CLARIFY THE BURDEN-SHIFTING ANALYSIS IN EMPLOYMENT DISCRIMINATION CASES

Two key decisions by the United States Supreme Court and the Massachusetts Supreme Judicial Court seek to settle the question of what type of evidence a plaintiff must produce in order to have his/her case proceed to a jury or other fact-finder in employment discrimination cases. The decisions of the United States Supreme Court in *Reeves v. Sanderson Plumbing Products, Inc.*, and of the Massachusetts Supreme Judicial Court in *Abramian v. Harvard College*, benefit plaintiffs by making it easier for them to survive efforts by employers to have the case dismissed prior to trial or public hearing.

Following these decisions, it is clear that an employer now may be found liable where the employee establishes both a “prima facie case” of discrimination and “pretext” - a showing that the employer’s stated explanation was not the real reason for the employment action taken. Before *Reeves*, some federal courts had held that in order to prove discrimination plaintiffs must establish a prima facie case and then prove the employer’s stated reason for the

UPCOMING MHT&L PRESENTATIONS

Date	Topic	Presenter	Event	Location
Sept. 19, 2000	Overview of Current Legal Decisions	Katherine A. Hesse	International Society of Certified Employee Benefits Specialists Annual Symposium	Hyatt Regency San Diego, CA
Sept. 20, 2000	Wage and Hour Update	Kathryn M. Murphy	The Commonwealth Institute	Fleet Boston Boston, MA
Sept. 25, 2000	Proactive Performance Appraisals: The Latest Techniques for Monitoring Employee Performance and Increasing Productivity in the Public Sector Workplace	Katherine A. Hesse	Council on Education and Management	Back Bay Hilton Boston, MA
Oct. 26, 2000	Business Law Update	Donald L. Graham Michael F.X. Dolan, Jr. Rachel A. Israel Ethlyn M.E. O'Garro	Neponset Valley Chamber of Commerce	Newton, MA
Nov. 13, 2000 and Nov. 14, 2000	Fiduciary Considerations in the Selection of Pension Fund Investment Manager	Katherine A. Hesse	International Foundation of Employee Benefits Plans 46th Annual Employee Benefits Conference	Hawaii Convention Ctr. Honolulu, HI
Nov. 13, 2000	Refresher on Health Care Plans - Compliance Check-Up	Kevin P. Feeley	International Foundation of Employee Benefits Plans 46th Annual Employee Benefits Conference	Hawaii Convention Ctr. Honolulu, HI
Nov. 28, 2000	Human Resources Update	Katherine A. Hesse	South Shore Economic Development Corporation	Quincy, MA
Dec. 12, 2000	Issues Under the Family Medical Leave Act	Kathryn M. Murphy	Council on Education and Management	Boston, MA
Mar. 8, 2001	Employment Law Update	Arthur Murphy Katherine A. Hesse Nan O'Neill	South Shore Chamber of Commerce	Lantana Randolph, MA

adverse action was false and that the real reason was discrimination. However, in *Reeves*, the United States Supreme Court held that a plaintiff who demonstrates the existence of a prima facie case of discrimination and produces sufficient evidence to reject the employer's proffered reason for the adverse action may proceed to trial even in the absence of independent evidence that the reason for the employer's adverse action was unlawful discrimination. Similarly, in *Abramian*, the Massachusetts Supreme Judicial Court held that a plaintiff could prove unlawful employment discrimination if he established a prima facie case of discrimination and that the reasons given by the employer for the adverse action are untrue.

Perhaps the most important long-term effect of these decisions is that it will now be easier for plaintiffs to present their cases in front of a jury because the decisions make it more difficult for an employer to obtain summary judgment in an employment discrimination case. More than ever before, it will be important for employers to be able to produce direct evidence of the true and permissible

consideration that led to a termination or other adverse action.

MHT&L WELCOMES NEW ATTORNEYS



Rachel A. Israel emphasizes tax law and focuses on counseling business and tax-exempt organizations, including business formations, mergers & acquisitions and leveraged buy-outs, corporate spin-offs, split ups and exempt financing. Ms. Israel is a member of the Massachusetts Bar Association, the

Boston Bar Association, the Massachusetts Women's Bar Association, the Louisiana Bar Association and the American Bar Association. Ms. Israel received her JD from LSU Law School in 1996 and her LLM in taxation from Boston University in 1997.



Do you have a colleague who would find this newsletter useful? If so, simply provide the information below and mail the reply card to us. We would be happy to send your colleague future issues of the **MHT&L Employment and Benefits Legal Update.**

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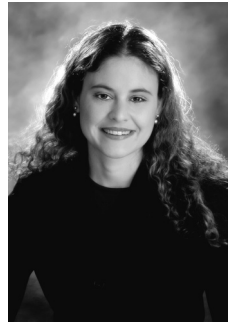
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Ethlyn M.E. O'Garro's practice is concentrated in corporate and immigration law. Ms. O'Garro is a member of the bar of the Commonwealth of Massachusetts and the U.S. District Court for the District of Massachusetts. Prior to practicing law, Ms. O'Garro was an Assistant Vice President in the Corporate

Loan Review Department at BayBank, Inc. for three years, where she worked closely with middle market borrowers. Before joining BayBank, Inc., Ms. O'Garro was a Corporate Loan Officer at Bank of Boston for two years, working with Fortune 500 multinational corporations. Ms. O'Garro holds a bachelor's degree in Economics and Political Science, *cum laude*, from Wellesley College where she was named a Wellesley College scholar and is a graduate of the Boston University School of Law.



Rosa M. Celorio practices labor, employment and immigration law. Ms. Celorio is a member of the Bar of the Commonwealth of Massachusetts. She received her law degree from Boston College Law School in 1999. She is also a graduate of the School of Foreign Service at Georgetown University.

While in law school, Ms. Celorio was an Articles Editor for the Boston College International and Comparative Law Review. She was also a 1998 recipient of the Amnesty International's Patrick Stewart Scholarship. Prior to joining Murphy, Hesse, Toomey & Lehane, LLP, Ms. Celorio spent her summers working for the law firm of O'Neill & Borges in San Juan, Puerto Rico and for the United Nations Development Fund For Women in Quito, Ecuador. Ms. Celorio is fluent in English, Spanish and French.

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