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Effective January 1, 2022: Vast Expansion of VESSA

Legislation introduced in the 102nd General Assembly will vastly expand the Victims' Economic Security and Safety Act (VESSA), 820 ILCS 180/1, *et seq.*, on and after January 1, 2022. P.A. 102-487 (eff. Jan. 1, 2022) [<https://www.ilga.gov/legislation/publicacts/102/PDF/102-0487.pdf>].

VESSA generally provides unpaid leave to private and public sector employees for a qualifying reason based on the total number of employees, as follows:

1. 50 employees or more: up to 12 workweeks of leave in a 12-month period;
2. 15 – 49 employees: 8 workweeks of leave in a 12-month period; or
3. 1 – 14 employees: 4 workweeks of leave in a 12-month period. 820 ILCS 180/20(a)(2).

The amendment makes clear that leave may be taken consecutively, in addition to intermittently or on a reduced work schedule.

As amended by P.A. 102-487, the qualifying reasons for leave are expanded to also include

1. experiencing an incident of domestic violence, sexual violence, or gender violence or other crime of violence;
2. homicide, sex offenses, bodily harm (assault/battery), harassing and obscene communications, armed violence;
3. recovering from the violence;
4. seeking or receiving medical help, legal assistance (including participation in legal proceedings), counseling, safety planning, or other assistance;
5. temporarily or permanently relocating; or
6. taking other actions to increase the safety of the victim from future domestic, sexual, or gender violence, or to ensure economic security.

The above are in addition to the prior qualifying reasons of domestic violence, sexual violence, or gender violence. Sexual violence was clarified by the legislative amendment to mean sexual assault.

The definition of “family or household member” is also expanded to now include the following:

[S]pouse or a party to a civil union, parent, grandparent, child, grandchild, sibling, or any other person related by blood or by present or prior marriage or civil union, other person who shares a relationship through a child, or any other individual whose close association with the employee is the equivalent of a family relationship as determined by the employee, and persons jointly residing in the same household. 820 ILCS 180/10(12).

The most significant change is the addition of “any other individual whose close association with the employee is the equivalent of a family relationship as determined by the employee” to 820 ILCS 180/10(12).

Employers can still request certification of the need for leave, but under P.A. 102-487, the employee (not the employer) chooses the document to accompany their sworn statement (but only if the employee has possession of the document):

1. documentation from an employee, agent, or volunteer of a victim services organization; an attorney; a member of the clergy; or a medical or other professional from whom the employee or the employee’s family or household member has sought assistance in addressing the qualifying reason for leave;
2. a police or court record; or
3. other corroborating evidence.

An employee’s right to privacy is reinforced through P.A. 102-487, with the addition of language making it clear that documentation submitted by an employee shall be maintained in the strictest confidence and disclosed only if requested or consented to in writing by the employee or as otherwise required by law.

Employers should review and update their VESSA policies and procedures prior to the new year to ensure full compliance with VESSA, as amended.

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First District Concludes PSEBA Benefits Are Post-Employment Benefits

In *McCaffrey v. Village of Hoffman Estates*, 2021 IL App (1st) 200395, the First District (Justices Pucinski, Lavin, and Cobbs) addressed (1) whether dependent Medicare eligibility extinguished the obligation to pay health insurance premiums under the Public Safety Employee Benefits Act (PSEBA), 820 ILCS 320/1, *et seq.*, and (2) whether unpaid PSEBA health premiums constituted wage supplements under the Illinois Wage Payment and Collection Act (Wage Act), 820 ILCS 115/1, *et seq.*, and required proof of an employment contract or agreement. 2021 IL App (1st) 200395 at ¶14.

By way of background, in 2002, Paul McCaffrey, a full-time Hoffman Estates police officer, was injured in the line of duty and became disabled. He received a line-of-duty disability pension and applied for PSEBA benefits for himself, his wife Margaret, and his son Christopher. PSEBA benefits were granted on February 9, 2006. Subsequently, both Margaret and Christopher became Medicare eligible based on disability. Although initially opting to take Medicare, Margaret then voluntarily opted out of Medicare Part B for the period of 2015 – 2018. In May 2018, the village notified the McCaffreys that it would cease paying PSEBA benefits for Margaret and Christopher because of their Medicare eligibility. Subsequently, the village stopped making premium payments and informed Blue Cross Blue Shield (the village's third-party insurance administrator) that it had paid premiums in error during the time that Margaret and Christopher were eligible for Medicare. Blue Cross then reimbursed the village for the premiums paid in error and sought reimbursement from those medical providers that Blue Cross had paid on Margaret and Christopher's behalf. The medical providers, in turn, sought payment of those medical expenses from the McCaffreys. 2021 IL App (1st) 200395 at ¶¶3 – 4.

The McCaffreys filed suit against the village, alleging that (1) their Medicare eligibility did not extinguish the village's obligation to pay health insurance premiums and asked for a judgment of mandamus to require the village to pay the premiums, (2) the court should declare that the village was obligated under PSEBA to pay the premiums, and (3) the failure to pay the premiums was a violation of the Wage Act. *McCaffrey v. Village of Hoffman Estates*, No. 19 CH 6258 (Cook Cty.Cir. Jan. 27, 2020). At the trial court level, Judge Neil Cohen dismissed the McCaffreys' complaint, pursuant to 735 ILCS 5/2-619, because the village's responsibility to pay PSEBA health insurance premiums was extinguished when Margaret and Christopher became eligible for Medicare. The trial court also dismissed the Wage Act claims as there was not an employment or other agreement between Paul and the village and PSEBA benefits were strictly post-employment benefits.

The PSEBA provides lifetime health insurance benefits for law enforcement officers, firefighters, correctional and probation officers, and their qualifying dependents if the officer is killed or sustains a catastrophic injury in the line of duty while responding to an emergency. Although "catastrophic injury" is not defined in the Act, the Illinois Supreme Court broadly construes "the phrase 'catastrophic injury' as synonymous with an injury resulting in a line-of-duty disability under section 4-110 of the [Pension] Code." *Krohe v. City of Bloomington*, 204 Ill.2d 392, 789 N.E.2d 1211, 1215, 273 Ill.Dec. 779 (2003). The benefits paid under the PSEBA continue to be the responsibility of Illinois public employers even if the PSEBA recipient is working elsewhere with access to health insurance. However, the PSEBA "[h]ealth insurance benefits payable from any other source shall reduce benefits payable under [the PSEBA]." 820 ILCS 320/10(a)(1).

On appeal, the First District first addressed "whether Margaret's and Christopher's mere eligibility for Medicare — as opposed to the actual receipt of Medicare benefits — relieve[d] defendant of its obligation to provide health insurance for them." *McCaffrey, supra*, 2021 IL App (1st) 200395

at ¶20. Citing to *Pyle v. City of Granite City*, 2012 IL App (5th) 110472, 978 N.E.2d 1086, 365 Ill.Dec. 583, the First District concluded that the plaintiffs' Medicare benefits are benefits payable from another source. However, the First District still had to address whether those benefits were primary or secondary. The plaintiffs argued that the benefits were secondary as Paul had a current employment status with the village because he was associated in a business relationship with the village. In rejecting this argument, the First District examined §3-116 of the Pension Code, 40 ILCS 5/3-116. 2021 IL App (1st) 200395 at ¶25. Although the Pension Code subjects Paul to being recalled for an examination to determine his fitness for duty and to be recalled in an emergency, this did not necessarily create a business relationship between Paul and the village, nor did it confer employment status on Paul. After reviewing both Illinois law and the Medicare Secondary Payer Act, the First District concluded that "an employee whose active employment with an employer has ended because of disability is not associated in a business relationship with the employer simply by virtue of the receipt of employer-funded health benefits." 2021 IL App (1st) 200395 at ¶31. The First District also held that the requirement of submitting for an examination and responding in an emergency was not a business relationship with the village but "a statutory condition of his continued receipt of those statutory benefits." 2021 IL App (1st) 200395 at ¶33. The First District found conclusive the fact that Paul had retired because of his line-of-duty injury and that the PSEBA benefits are post-employment benefits in determining that Paul's employment had terminated. 2021 IL App (1st) 200395 at ¶39.

Paul argued that, by opting out of Medicare, Margaret and Christopher did not have any expenses actually paid from another source. The court rejected this argument on the basis that the Act did not require expenses to be actually paid but only payable from another source. 2021 IL App (1st) 200395 at ¶42. The court's conclusion is instructive:

In sum, because Paul is not actively working as an employee for defendant, is not associated with defendant in a business relationship, and has not retained employment rights or met the other requirements for current employment status on that basis, Paul does not have "current employment status" with defendant. Absent "current employer status" for Paul, Medicare is not a secondary payer for Margaret and Christopher, and defendant was entitled to take their eligibility for Medicare into consideration when determining whether their medical expenses were payable from another source. As a result, once Margaret and Christopher became eligible for Medicare, defendant was no longer required to provide health insurance benefits for them under the Benefits Act. 2021 IL App (1st) 200395 at ¶48.

Further, because the First District affirmed the dismissal of the claims for the PSEBA benefits, there could be no claim for unpaid wages. Consequently, the village "was not obligated to provide health insurance benefits for Margaret and Christopher under the Benefits Act after they became Medicare eligible. Accordingly, plaintiffs' claims for mandamus, declaratory judgment, and relief under the Wage Act were properly dismissed." 2021 IL App (1st) 200395 at ¶52.

The implications of this decision are significant for several reasons. The decision makes clear that

1. Medicare eligibility relieves a unit of Illinois government's obligations to pay health insurance premiums under the PSEBA;
2. an employee receiving a line-of-duty disability pension neither has a current employment status, nor is associated in a business relationship, with the governmental unit;

3. the Pension Code's requirement of examination and possible emergency duty is limited to the statutory jurisdiction of the Pension Board and does not create a relationship with the former employing governmental unit;
4. PSEBA benefits (and line-of-duty disability pensions) are post-employment benefits; and
5. there is an open question as to the meaning of "reduced" benefits under PSEBA when benefits are payable from another source.

This ruling will have a significant impact on governmental budgets. The Illinois Commission on Government Forecasting and Accountability's *Study of the Public Safety Employee Benefits Act Pursuant to P.A. 98-0561*, p. 4 (Dec. 2020)

[<https://www.ilga.gov/reports/ReportsSubmitted/2341RSGAEmail3990RSGAAttach2020%20PSEBA.pdf>], shows that a large number of current PSEBA recipients are at or nearing Medicare eligibility and that an even larger number will reach eligibility in the next five to ten years.

Therefore, with total PSEBA premium costs totaling more than \$10 million, with an average per recipient yearly premium of \$18,467 in 2019, it is important that Illinois governmental entities and injured individuals closely monitor Medicare eligibility because of the relationship between Medicare eligibility and the payment of PSEBA benefits. *Study of the Public Safety Employee Benefits Act Pursuant to P.A. 98-0561*, p. 13.

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