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EMPLOYMENT LAW DIGEST

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BACKGROUND CHECKS

Employers are more frequently using credit history checks to screen job applicants because it appears to be an easy way to avoid a potential problem employee. The Equal Employment Opportunity Commission (EEOC), however, has taken renewed interest in this practice and is expected to issue new guidance in the area. The EEOC has recently filed a class action against a Dallas employer claiming the employer's use of credit histories and criminal background checks to reject job applicants discriminates against Blacks, Hispanics, and male job applicants in violation of Title VII.

The EEOC has long held the position that an employer needs a justifiable business reason for excluding individuals from employment on the basis of their conviction records because of its adverse impact on Blacks and Hispanics based on conviction statistics. To defend against a disparate impact claim based on the use of convictions, the EEOC's guidance provides that an employer must show it considered the following three factors to justify its decision based on business necessity:

- Nature and gravity of the offense or offenses.
- Time that has passed since the conviction and/or completion of the sentence.
- Nature of the job held or sought.

See EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964 (Feb. 4, 1987).

Pending the final resolution of the case and new guidance, employers should proceed with caution and avoid blanket exclusions based on background checks. Instead, employers should consider the conviction/credit history, job position, and the potential risk before excluding an applicant based on a criminal conviction or credit history. ****

What's Inside?

Internal Investigations

In a recent unanimous decision, the U.S. Supreme Court held that an employee who answers questions during an employer's internal investigation about sexual harassment is protected from retaliation as opposing discrimination under Title VII. Title VII is the federal law which prohibits you from discriminating against employees or applicants based on race, color, religion, sex, or national origin (the "protected classes") and generally applies to all members of those classes, not just minorities and women. In *Crawford v. Metro. Government of Nashville and Davidson County*, the employer questioned a female employee during its investigation of rumors of sexual harassment. The employee responded by saying she had been subjected to sexual harassment. After she was terminated, she sued claiming she was wrongfully terminated in retaliation for opposing discrimination during the interview. The U.S. Supreme Court held the employee's interview statements were sufficient to constitute protected activity and allowed her to proceed with her retaliation claim. The Supreme Court's analysis may be expanded to apply to investigations relating to any type of unlawful discrimination, such as age and disability discrimination.

What should an employer do when conducting an investigation in light of this new decision? Before beginning an investigation, carefully consider who needs to be interviewed. Expanding an investigation unnecessarily may increase the number of potentially protected employees without yielding useful information. Consider what each employee may be expected to know and how it relates to the complaint being investigated. Also, maintain confidentiality relating to statements made during the investigation. Information obtained during an investigation should be shared on a need to know basis only. A supervisor cannot retaliate against an employee for protected activity if the supervisor does not know about it. ****

New Notice and Disclosure Requirement - CHIPRA

Enrollment Reminder:

As a reminder, last year, the Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) went into effect. CHIPRA requires plans and issuers to permit employees and dependents who are eligible for, but not enrolled in, a group health plan to enroll in the plan upon:

- Losing eligibility for coverage under a State Medicaid or CHIP program, or
- Becoming eligible for State premium assistance under Medicaid or CHIP.

The employee or dependent must request coverage within 60 days of being terminated from Medicaid or CHIP coverage or within 60 days of being determined to be eligible for premium assistance.

New Notice:

Employers who maintain a group health plan in Texas and other states that provide premium assistance under Medicaid or CHIP (Children's Health Insurance Program) must notify all employees of potential opportunities for premium assistance in the State in which the employee resides. The Department of Labor (DOL) has published its model notice and compliance guidance. Employers are required to provide notice by the later of:

1. The first day of the first plan year after February 4, 2010, or
2. May 1, 2010.

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The model Employer CHIP Notice and the Federal Register notice are on the DOL website: http://www.dol.gov/ebsa/compliance_assistance.html#section2

New Disclosures:

In addition, plan administrators will soon be required to disclose information about their benefits to State Medicaid or CHIP programs upon receiving a request. States may begin requesting the disclosures with the first plan year after the model disclosure form is issued (January 1, 2011 for calendar year plans). A model disclosure form should be developed by August 4, 2010. ****

Unpaid Internships

The Department of Labor is stepping up enforcement in several areas including whether unpaid interns are in fact employees who should be paid. If you have unpaid interns or are considering implementing a program for unpaid interns, you should check to make sure your program meets the federal requirements. Under federal law, the following six factors must be met for an internship to be properly unpaid:

1. The training is similar to what would be given in a vocational school or academic educational instruction.

2. The training is for the benefit of the trainees or students.

3. Interns do not displace regular employees but work under their close observation.

4. The employer derives no immediate advantage from the activities of the intern, and on occasion the employer's operations may actually be impeded.

5. The trainees or students are not necessarily entitled to a job at the conclusion of the training period.

6. The employer and intern understand that the intern is not entitled to wages for the time spent in training to qualify as an intern.

Most for profit companies will have considerable difficulty meeting the criteria. Scrutinize the program closely under all six factors: Is your company benefitting from the services? Is the person performing work other employees could be doing? Does the person expect to be paid or has the person been promised a job? Is the person receiving real vocational/academic training? If the program does not meet the criteria, you have an employee who needs to be paid. ****

COSTLY STEREOTYPE REMARKS

Do your managers make sympathetic comments about the burdens of child rearing to mothers of young children? Such comments, even if innocently made, may be used by employees to support claims of sex discrimination. A case out of the First Circuit, *Chadwick v. WellPoint*, demonstrates the danger of sex stereotype comments especially when coupled with the failure to accurately explain the reasons for an employment decision. Chadwick, a long term female employee, applied for a promotion. She was well qualified; she had performed some of the duties of the sought after position and had received high evaluation scores. Ouelett, another female employee, with slightly lower evaluation scores, was selected based on her higher interview score. Chadwick sued claiming she was not selected based on the sex-based stereotype that mothers with young children neglect the duties of their job because of their child care obligations. Chadwick had 4 children – an 11 year old son and triplets who were 6 years of age (her husband was the primary caregiver).

Chadwick supported her sex discrimination claim with the following comments made by those involved in the promotional decision:

The manager making the decision sent an email to Chadwick shortly before making the decision stating: "Oh my, I did not know you had triplets. Bless you!"

An interviewer dissatisfied with one of Chadwick's responses during the interview stated: " … you are a mother. Would you let your kids off the hook that easy if they made a mess . . .?"

The reason she was given for not being selected: "It is nothing you did or did not do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now." She was also told that if the other interviewers were in her position they would "feel overwhelmed." The manager later claimed she made these comments to "soften the blow" of the decision.

The court held there was enough evidence that a reasonable jury could find Chadwick was not selected for the promotion based on societal stereotypes about women, work, and child care, i.e., the stereotype that a woman will perform her job less well due to presumed family obligations. The fact that the employee selected for the promotion had two children (ages 9 and 14) was not considered significant by the court.

What can be learned from this case? Of course, the obvious, employers should not base decisions on sex-stereotypes. In addition, proper training of decision makers is critical, including training regarding: (1) proper interview techniques (questions and comments should only relate to work place conduct), (2) the importance of making decisions based on job performance and job qualifications, and (3) the importance of giving only accurate reasons for employment decisions. Giving a false reason for a decision does not "soften the blow" and instead may create doubt as to the real reason for the decision. ****

Breaks for Nursing Mothers

The recently passed health care reform law, the Patient Protection and Affordable Care Act, amends the Fair Labor Standards Act (FLSA) to provide protection for nursing mothers. Section 4207 of the Patient Protection and Affordable Care Act (P.L. 111-148), 29 U.S.C. § 207(r)(1). Under the FLSA employers must: (1) allow unpaid reasonable break times each time the employee needs to express breast milk for nursing children who are up to 12 months old, and (2) provide a private place, other than a bathroom, that is "shielded from view and free from intrusion by coworkers and the public." The FLSA does not define how long a break must be to be considered "reasonable" nor does it provide guidance regarding how many times an employee may need to express breast milk. Therefore, an employer should proceed with caution in allowing breaks until further guidance is provided.

The mandatory break requirements apply to all employers covered by the FLSA unless the employer can show that: (1) it employs fewer than 50 employees and (2) the requirements would impose an "undue hardship by causing the employer significant difficulty or expense when considered in relation to size, financial resources, nature or structure of the employer's business."

The FLSA does not preempt state laws that offer greater protection for nursing mothers. Texas law permits a mother to breastfeed her baby in any location in which she is authorized to be but does not require employers to provide breaks or a location to breastfeed. In Texas, a business may seek a "mother friendly" designation from the Texas Department of State Health by implementing and submitting policies that support worksite breastfeeding which address the following:

(1) Work schedule flexibility, including scheduling breaks and work patterns to provide time for expression of milk;

(2) The provision of accessible locations allowing privacy;

(3) Access nearby to a clean, safe water source and a sink for washing hands and rinsing out any needed breast-pumping equipment; and

(4) Access to hygienic storage alternatives in the workplace for the mother's breastmilk.

COBRA Premium Subsidy Extended

Recently, President Obama, signed into law another extension of the Consolidated Omnibus Budget Reconciliation Act (COBRA) premium reduction (65% premium COBRA subsidy). The Continuing Extension Act of 2010 (CEA) extends the qualifying period for the COBRA premium reduction until May 31, 2010. Additionally, under CEA an involuntary termination of employment that occurs on or after March 2, 2010 but by May 31, 2010 is a qualifying event for purposes of American Recovery and Reinvestment Act (ARRA) if it was preceded by a qualifying event that was a reduction of hours occurring at any time from September 1, 2008 through May 31, 2010.

The law offers retroactive eligibility for employees who lost their jobs after the prior COBRA subsidy expired on March 31, 2010. Please make sure terminated employees received proper COBRA notices and election forms. ****

If you, or anyone in your office, would like a copy of this newsletter on a quarterly basis, at no cost, please contact Deanna Jennings at (210) 824-8282.
E-mail copies are also available

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Keeping Employers Out of the Courtroom for over 20 Years

ABOUT THE FIRM

Holland & Holland L.L.C. Represents management in a wide variety of employment law matters. Our primary goal for clients will continue to be claims avoidance through timely advice and counsel before events occur which can lead to lawsuits. However our firm has significant experience in jury trial litigation in a wide variety of employment related claims in different venues throughout the great state of Texas.

Our expertise includes the following areas:

—**management counseling**

—review and preparation of **personnel policy** and procedures including employee handbooks;

—representation in administrative matters before the **Equal Employment Opportunity Commission**;

—**representation of management in state and federal court** for employment related claims involving Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, Age Discrimination in Employment Act, Family Medical Leave Act, Fair Labor Standards Act, Worker Adjustment and Retraining Notification Act, Consolidated Omnibus Budget Reconciliation Act, Polygraph Protection Act, and a variety state court causes of action such as retaliation, defamation, invasion of privacy, negligence, assault and battery;

—**protection of trade secrets** and other confidential information through the use of covenants not to compete and non-interference agreements;

—preparation of **arbitration agreements**, non-subscriber programs and waivers of jury trial agreements;

—**management training** on proper techniques on hiring, disciplining and discharging employees including seminars on recent Supreme Court decisions;

—general **human resource audits** to promote compliance with the myriad of legal and regulatory obstacles facing employers on a daily basis;

—**wage/hour compliance** audits and defense of FLSA collective actions.