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Newsletters

Employment Practices Newsletter - August 2015

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Yet Another Reason to Document: EEOC Uses its Record Keeping Requirements to Police Criminal Background Checks

By: Linda K. Horras

We don't think much about personnel files—we just have them. Everything from employment applications to benefits enrollment forms to discipline and discharge documents go into those files. But did you know that the EEOC requires employers to keep all personnel and employment records for at least one year? When an employee is terminated, his or her employment records must be kept for one year following the termination date. Just as importantly, to the extent the employer uses a screening technique, like a pre-employment test, information on its impact on candidates by sex, race, and ethnicity must be kept. These requirements are set forth in the EEOC's Uniform Guidelines on Employee Selection Procedures.

On July 10, one Pennsylvania janitorial and facilities management company found this out the hard way, when the EEOC filed suit against it for failure to maintain disparate impact information relating to its criminal background checks. Many employers routinely use criminal background information as a screening tool, and some of these policies and practices have been in place for years without employers revisiting their purpose. As the law evolves, however, such policies and practices can wind up on the wrong side of the law. For example, in Illinois, use of arrest records as a screening tool now violates the Illinois Human Rights Act: effective January 1, 2015, Illinois joined a number of other states by "Banning the Box" via the Job Opportunities for Qualified Applicants Act. (New York City just passed an ordinance doing the same thing, as discussed elsewhere in this newsletter.) The law prohibits most Illinois employers from even considering an applicant's criminal background until the employer has determined the person is qualified and will be interviewed for the position (or a conditional offer of employment has been made).

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Federal law—namely, Title VII—also prohibits employers from using any screening criteria that has a disparate impact on minority groups, which includes the use of criminal background information. In fact, policing the use of criminal background checks is one of six national priorities identified by the EEOC's Strategic Enforcement Plan. As a result, if an employer uses criminal record information in making employment decisions, it should strongly consider adopting the "best practices" guidelines suggested by the EEOC. The starting point of these guidelines is to eliminate sweeping policies that exclude all candidates from employment on the sole basis of any criminal conviction. Employers should tailor their criminal background policies as narrowly as possible, with the goal of ensuring that criminal background inquiries actually help determine whether candidates can perform the duties and responsibilities of the job in question. For example, a ten-year old drug conviction may not have anything to do with an individual's current ability to answer phones, file documents, process inventory, or perform other tasks associated with a given job.

When using criminal background information in employment decisions, employers should take the time to identify their reasons for doing so. Document why candidates' criminal background would impact their ability to do the job and list the specific offenses (and the age of the convictions) that will typically disqualify a candidate for a particular job. As in the example above, a ten-year old drug conviction, perhaps a crime committed by the job candidate in his or her youth, is probably too old to be predictive of the type of employee he or she would be today. The ultimate goal is to ensure that the particular screening practice is a valid indicator of future job performance, not an arbitrary set of criteria that will impact minority groups disproportionately.

The takeaway is that employers should DOCUMENT, DOCUMENT, and DOCUMENT some more why they are using criminal background information as part of a job screening process. Make sure to have carefully-written policies and procedures that are tailored to ensure that there is a business necessity to use criminal background information. Confirm that all involved in the screening process understand the proper role of criminal background checks in the process. Finally, retain records supporting any justification for using criminal background checks for at least one year after a position is filled. If possible, retain pre-hire records, or a sampling of those records in the case of extensive hiring, for a year after a position is filled, should the EEOC come knocking to ask how hiring decisions are made at your company.

EEOC Will Start Treating All Sex Orientation Claims as Title VII Discrimination

By: Brett A. Strand

In 1989, the US Supreme Court issued its decision in *Price Waterhouse v. Hopkins*, approving of a clever theory that, since then, has been the sole means of bringing sexual orientation-related claims in federal courts—rather than bringing a claim based on sexual orientation itself, plaintiffs have been required to prove that they were discriminated against based upon failure to conform to gender norms, thereby reshaping their claim into one based on "sex." In a bombshell decision issued on July 15, however, the EEOC forcefully stated that, as far as it is concerned, "sexual orientation is inherently a 'sex-based consideration,' and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." In other words, the EEOC will hear and act on claims brought by employees for alleged sexual orientation discrimination just like any other claim. Thus, employers should be doubly alert for discrimination against LGBTQ employees in the workplace going forward—one of the only remaining brakes on the EEOC's push for greater legal rights for LGBTQ employees has been removed. While the courts will have the final say on this, we've said it before and we'll say it again: what the EEOC thinks matters.

Pizza Chain Pays Big to End Background Check Case

The parent company of Chuck E. Cheese's restaurants, CEC Entertainment, Inc., has agreed to pay $1.75 million to settle a class action lawsuit in California brought by applicants who claimed the company provided improper background check notices during the hiring process. The kid-friendly restaurant chain will pay approximately 28,500 job seekers about $38 each with their attorneys pocketing up to $577,000. In the case, *Franchesca Ford, Isabel Rodriguez v. CEC Entertainment, Inc*., job applicants claimed that their rights were violated under the Fair Credit Reporting Act and California law when they were not provided a separate, stand-alone pre-authorization form to secure background checks; the company allegedly made the critical mistake of bundling the disclosure form with other application documents. This agreement is just the latest example of retailers paying hefty multi-million dollar settlements for allegedly failing to comply with the requirements of the FCRA and its California counterparts (the California Consumer Credit Reporting Agencies Act and the California Investigative Consumer Reporting Agencies Act). A careful review of a company's background check procedures and

related applicant notices is imperative to minimize the prospects of costly litigation.

Department of Labor Significantly Expanding Overtime Eligibility

By: Evan J. Bonnett

The Department of Labor (DOL) recently issued proposed new rules that seek to expand overtime wage coverage to more than 4.6 million workers. The proposed rules make three broad revisions: significantly raising the salary basis (from $455 a week to $970), simplifying the identification of exempt and nonexempt employees, and providing for automatic updates of the salary basis. These proposed rules are not yet final, and the DOL seeks comments. However, now is the time to begin considering how employees are classified, and whether they may continue to be exempt from overtime wages in the future. Employers should take two important actions: first, begin to reevaluate employee classifications, and second, consider submitting comments and proposals to the DOL in order to influence the final rules.

"Ban the Box" Coming to the Big Apple...

By: Gregory S. Glickman

On June 29, 2015, New York City Mayor Bill de Blasio signed into law an amendment to the New York City Human Rights Law that requires private employers to remove criminal-convictions questions from job applications and defer background inquiries to the point of a conditional job offer. Under the law, after an employee is interviewed and is extended a conditional job offer, an employer is allowed to ask about an applicant's criminal history and to conduct a background check. However, if the employer decides to withdraw the offer afterward, it must give the applicant a written explanation of the decision and hold the position open for at least seven business days to give the applicant an opportunity to respond. NYC's new "ban the box" rules go into effect on September 27, 2015.