July | August 2017 Edition

EMPLOYMENT LAW AUTHORITY

Your Resource for Today's Hot Topics in Labor & Employment Law

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THE TIME IS RIGHT FOR . . . OSHA'S YEARLY SUMMER HEAT CAMPAIGN

by Melissa A. Bailey (Washington, D.C.) and Hera S. Arsen (Torrance)

On June 26, 2017, the Occupational Safety and Health Administration (OSHA) announced the return of its heat illness prevention campaign: Water. Rest. Shade. As part of the seventh annual health illness prevention campaign, OSHA's website outlines the dangers of working in heat, employers' responsibilities, and additional resources. These include OSHA's Occupational Exposure to Heat page and the agency's publications page, which offers educational articles on heat illness in addition to training materials for employers. The campaign's website also offers employers a number of videos and graphics that are free to use in publications and social media campaigns.

As in prior years, OSHA recommends that on hot days workers take "frequent breaks in a cool or shady environment, and drink[] water every 15 minutes." In addition, citing a recent study that found that most heat-related workplace fatalities occurred during workers' first week on the job, the agency urged "employers to allow new workers to acclimate and build up resistance to the increased temperatures."

This year, OSHA is encouraging employers to share their ideas on protecting workers from heat illnesses via email to HeatSafetyTips@dol.gov. The agency also provides links to the OSHA-National Institute for Occupational Safety and Health's Heat Safety Tool smartphone app (available on iTunes and the Google Play store) and is urging interested parties to share tips and photos on Twitter, using the hashtags: #WaterRestShade and #ProTips.

OSHA's Water Rest Shade campaign website also includes a link to the National Integrated Heat Health Information System, an Obama administration heat early-warning system that helps users prepare for extreme heat.

OSHA does not have a specific standard for exposure to heat and relies on the General Duty Clause of the Occupational Safety and Health Act to cite employers for heat-related hazards. The General Duty Clause requires employers to maintain a workplace free from recognized hazards—including excessive heat—that are likely to cause death or serious bodily harm. California has its own heat illness standard with which employers working in California must comply. California's heat illness standard contains specific requirements for water, shade, and rest periods.

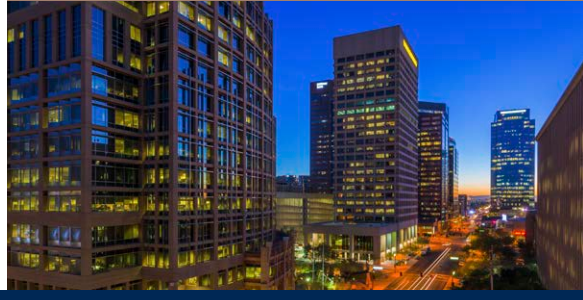
As the summer heats up, employers may want to consider implementing the following courses of action.

- **Water consumption.** Employers should consider using bottled water, as opposed to a container of potable water—to make it easier to track how much to bring and how much employees consume.
- **Shade access.** OSHA seems to favor canvas shades—many of which are easy to assemble and provide plenty of room for employees—or air conditioning such as in a running vehicle.
- **Rest periods.** While many affected employers implement mandatory rest periods of various durations depending on the temperature (with stop work orders when the temperature becomes dangerously high), each employee acclimates to the heat differently. One employee may only need a few minutes of rest every few hours while another may need 10 to 15 minutes every hour. Employers may want to implement a buddy system to encourage employees who work together to watch for and quickly spot the first signs of heat illness in their coworkers.

IN THIS ISSUE

OGLETREE DEAKINS LANDS SPOT ON BTI CLIENTOPIA 24

Ogletree Deakins ranked No. 15 on The 2017 BTI Clientopia 24—an exclusive group of 24 law firms that clients recognize for superior client relationships. The BTI Clientopia 24 was released as part of *The BTI Industry Power Rankings 2017* report. The BTI Clientopia 24 are the law firms with the most Clientopia relationships, in which a client considers a law firm as their "core, go-to" firm and the one they would recommend to their peers.



D.C. DOWNLOAD

AN INSIDE LOOK AT KEY ISSUES FROM CAPITOL HILL

by James J. Plunkett (Washington, D.C.) and Harold P. Coxson (Washington, D.C.)

Jim Plunkett and Hal Coxson are Co-Chairs of Ogletree Deakins' Governmental Affairs Practice Group and Principals in Ogletree Governmental Affairs, Inc. (OGA), a subsidiary of Ogletree Deakins that assists clients in addressing regulatory and legislative changes emanating from Washington, D.C.

Overtime

On June 30, 2017, the U.S. Department of Labor (DOL) filed its reply brief with the Fifth Circuit Court of Appeals in the case that enjoined the previous administration's changes to the rules governing overtime eligibility. The DOL attempts to thread the needle in its brief by arguing that the Secretary of Labor should have the ability to set a salary basis level but declines to defend the salary level set by the 2016 rule. In conjunction with this filing, on July 26, 2017, the DOL issued a Request for Information (RFI) which will solicit additional comments on the overtime rule. This is the first step in the administrative rulemaking process that could result in the DOL proposing to swap out the previous administration's 2016 changes to the overtime regulations with its own changes—presumably with a more modest salary basis threshold increase.

Administrator's Interpretations

On June 7, 2017, the DOL withdrew the Wage & Hour Division's 2015 and 2016 informal guidance on joint employment and independent contractors. The DOL's repeal of the guidance documents perhaps signals a return to a more cooperative, rather than enforcement-based, approach to compliance with the Fair Labor Standards Act.

Return of Opinion Letters

On the heels of the rescission of the "Administrator's Interpretations," on June 7, the DOL announced that it will once again be issuing opinion letters, a process that allows stakeholders to ask the DOL's Wage & Hour Division to explain in writing how federal law would apply in specific circumstances. This approach to compliance was scrapped in 2010 in favor of generalized "Administrator's Interpretations," so this is welcome news for employers.

"Persuader" Regulation

On June 12, 2017, the DOL issued a Notice of Proposed Rulemaking that rescinds the 2016 persuader regulation. The public has until August 11 to file comments with the DOL. While this regulatory rollback is pending, the Fifth Circuit Court of Appeals agreed to the DOL and DOJ's request to hold the appeal of the nationwide injunction of the 2016 persuader rule in abeyance by granting a six-month stay.

NLRB Nominees

In the last two weeks of June, President Trump nominated labor attorney William J. Emanuel and Occupational Safety and Health Review Commission (OSHRC) counsel Marvin Kaplan to fill two empty seats on the five-member National Labor Relations Board (NLRB). If the nominees are approved, the NLRB will flip from its current 2-1 Democratic majority to a 3-2 Republican majority.

New EEOC Chair on the Way?

On June 29, 2017, President Trump nominated Janet L. Dhillon, Executive Vice President, General Counsel, and Corporate Secretary of Burlington Stores, Inc., to be chair of the U.S. Equal Employment Opportunity Commission (EEOC). It had been assumed that Acting Chair Victoria A. Lipnic—who has been serving in her current capacity since January and as a commissioner since 2010—would be named chair.

OSHA Electronic Injury and Illness Reporting

On June 27, 2017, the Occupational Safety and Health Administration announced that it is proposing December 1, 2017, as an initial deadline for the electronic filing of covered employers' 300A forms. Pursuant to a rule finalized in May 2016, covered employers originally would have had to submit the forms by July 1, 2017. The proposal was open for public comment until July 13.

Apprenticeship Executive Order

On June 15, 2017, President Trump signed an Executive Order that is intended to promote more practical, efficient, and streamlined apprenticeship programs. The order would limit "one size fits all" regulation of apprenticeship programs to provide employers with more freedom in developing programs that are tailored for their particular business needs. Proposed implementing regulations are expected to follow.

EEOC/OFCCP Merger?

As part of its FY2018 budget proposal released at the end of May, the administration is proposing to merge the EEOC and the Office of Federal Contract Compliance Programs (OFCCP). The administration claims that eliminating redundancies between the agencies will create efficiencies and cost savings. Congress will have the final say on the proposal, of course, and so far both the civil rights and contracting communities have voiced opposition.

Fiduciary News

On June 9, 2017, certain components of the DOL's fiduciary rule went into effect. Additionally, the U.S. Securities and Exchange Commission (SEC) announced that it will be soliciting input on the current regulatory framework and the state of the market for retail investment advice.

New H-1B Regulations?

In response to a congressional inquiry into the H-1B visa program, United States Citizenship and Immigration Services (USCIS) replied in a May 24 letter that the agency "will, as soon as practicable and consistent with the applicable law, propose new rules and issue new guidance relating to the H-1B visa program." The letter further states that such rules and guidance would "protect the interests of U.S. workers."

STATE AND INTERNATIONAL ROUND-UP

Arizona

On June 30—the day before Arizona's new paid sick leave law went into effect—the Industrial Commission of Arizona (ICA) issued 18 pages of new frequently asked questions (FAQs). Some of the FAQs merely restate the draft regulations, while others provide useful examples illustrating the draft supplemental regulations recently issued. These include examples of how to calculate "same hourly rate" for various employee groups and notations that a commissioned employee's acknowledgement of a handbook policy, setting forth the hourly rate, is sufficient to set the "same hourly rate."

California

On July 1, regulations drafted by California's Fair Employment and Housing Council addressing issues related to gender identity went into effect. The regulations address several key issues, including the following: updated definitions; guidance on issues related to the use of facilities (restrooms, showers, locker rooms, etc.); use of information related to gender and inquiries regarding gender; pronoun and name preferences; dress and grooming standards; and communication between employees and company representatives.

Florida

The City of St. Petersburg, Florida, recently amended its wage theft ordinance to require employers to provide pay notice to employees at the time of hire and to display "in a location accessible to all employees" a poster about wage theft. These requirements are not yet in effect. The effective date is on hold pending the completion of a memorandum of understanding by the City, which is engaging a "community-based" organization to "implement the purposes of this article."

Georgia

Governor Nathan Deal recently signed into law the Family Care Act, a new statute requiring certain employers to allow their employees to use up to five days of their available paid sick leave to care for immediate family members. The new law applies to employers with 25 or more employees, as well as to state government employees. Importantly, the law applies only to employers that already provide paid sick leave in addition to short-term or long-term disability plans. The new law went into effect on July 1, 2017.

Illinois

The City of Chicago has issued final rules for its Paid Sick Leave Ordinance. The ordinance was passed on June 22, 2016, and went into effect on July 1, 2017. The long-awaited final Chicago paid sick leave rules are actually abbreviated from the draft rules that were made available to the public on May 30. Of note in the final rules is the City's decision to delete examples on how to calculate paid sick leave in various scenarios and modified language stating that covered employees are entitled to use no more than 40 hours of accrued regular paid sick leave during any accrual period.

Missouri

On June 30, Governor Eric Greitens signed a bill (SB 43) that makes sweeping reforms to the Missouri Human Rights Act (MHRA). The MHRA is the state of Missouri's primary anti-discrimination statute. The MHRA codifies for the state many of the federal anti-discrimination provisions found in the Americans with Disabilities Act, the Age Discrimination in Employment Act, and Title VII of the Civil Rights Act of 1964. The new law takes effect on August 28, 2017.

New York

On June 21, the New York State Assembly advanced AB A2040C, which would restrict an employer's ability to ask job applicants about their salary histories. If passed, the legislation would amend the New York Labor Law and apply to all New York State employers, including all public and private employers. The bill is currently before the New York State Senate. If a majority of the New York senators approve, the bill will be sent to the governor to sign. The bill would take effect 180 days after the governor signs it.

Oregon

Governor Kate Brown is expected sign Senate Bill 828, which will impose predictive scheduling requirements on certain large employers. The law applies to Oregon employers that employ 500 or more employees worldwide who provide services relating to "retail trade," "hotels," "motels," or "food services." Separate entities that constitute an "integrated enterprise" will be considered a single employer for purposes of determining the number of worldwide employees. Most provisions of the law will take effect on July 1, 2018.

Pennsylvania

In accordance with a 2016 decision by the Commonwealth Court of Pennsylvania, employers in the state have been required to allow recently separated employees access to their personnel files on the same footing as current employees. In a recent opinion issued by the Supreme Court of Pennsylvania, that 2016 decision was reversed. The state supreme court held that a recently terminated employee is not an "employee" and, thus, is not entitled to inspect his or her personnel file according to the Pennsylvania Inspection of Employment Records Law. *Thomas Jefferson University Hospital, Inc. v. Pennsylvania Department of Labor and Industry*, No. 30 EAP 2016 (June 20, 2017).

Rhode Island

A Rhode Island trial court recently held that a hairdresser's noncompetition agreement with the salon for which she had been working, which sold its assets to a successor salon, was not transferable to the successor business because the noncompetition agreement lacked an assignability clause. The decision is the first in Rhode Island to examine the assignability of employee restrictive covenants in the context of the sale and purchase of a business. *BlueZ4 Corp., D/B/A Blue Sky Spaworks v. Macari et al.*, No. KC 2016-1087 (June 13, 2017).

Washington

With Governor Jay Inslee's signature on July 5, 2017, Washington State joined just a handful of states mandating paid family and medical leave. Washington's leave is funded by both employers and employees, and employees will be eligible to receive benefits beginning in 2020. The new paid leave program provides benefits of up to 90 percent of the employee's income and matches Washington, D.C., in providing the highest percentage of income benefit of any state or district in the United States.

Wisconsin

Recently signed by Governor Walker, 2017 Wisconsin Act 11 went into effect on June 23, 2017. The act has two objectives. First, it seeks to modernize the language used in the Wisconsin Statutes to refer to labor performed by minors. More specifically, references to "child labor" have been replaced with the phrase "employment of minors." The second, more substantive change made by the act is the repeal of the requirement that 16- and 17-year-olds obtain a state-issued permit before they can begin most work activities.

THE DEFEND TRADE SECRETS ACT: A Q&A WITH NEIL MCKITTRICK

by James M. McGrew (Atlanta)

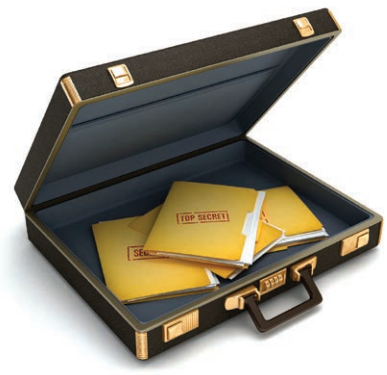
The Defend Trade Secrets Act (DTSA), which created a private federal right of action for trade secret misappropriation, went into effect on May 11, 2016. Many American companies looked forward to the new protection afforded by the DTSA, but questions remained about how the courts would interpret certain provisions. Now that the DTSA has been in effect for over one year, we interviewed Neil McKittrick, a shareholder in Ogletree Deakins' Boston office, to find out how courts have applied some of the DTSA's provisions and what employers can expect going forward. A special thanks to Francesco A. DeLuca, an associate in the Boston office, for his assistance.

Jim McGrew: May 11, 2017 marked the DTSA's one year anniversary. What are the most important provisions of the DTSA for employers?

Neil McKittrick: The DTSA was largely modeled on the Uniform Trade Secrets Act (UTSA). However, the DTSA contains several unique provisions. Under extraordinary circumstances, an owner of a trade secret can obtain a civil seizure order to prevent the disclosure of its trade secrets, meaning that a court can order the U.S. Marshal Service to seize property (such as a server or computer) that contains the owner's trade secrets. Additionally, the DTSA contains a provision exempting "whistleblowers"—which it defines as those who disclose trade secret information in confidence to a government agency or attorney solely for reporting or investigating a suspected violation of law—from civil and criminal liability for misappropriation of trade secrets. The DTSA also provides that an employer may recover up to double damages and attorneys' fees for willful and malicious misappropriations, but only if it had notified the employee of the DTSA's provision regarding whistleblower immunity in any contract with the employee regarding the use of trade secrets or confidential information. Finally, once an employer has initiated litigation against a current or former employee under the DTSA, it will have to consider the scope of relief that it seeks, as the DTSA prohibits injunctions that prevent individuals from entering into an employment relationship and requires all injunctions to comply with applicable state laws.

JM: What have we learned about the DTSA since it went into effect?

NM: There are two key takeaways from the first year of litigation under the DTSA. First, though the DTSA is a federal statute, state law has influenced courts deciding DTSA cases. Because Congress largely borrowed the definitions of "trade secret" and "misappropriation" from the UTSA, and because many plaintiffs bring companion UTSA claims, courts have relied on existing UTSA case law to determine whether a misappropriation occurred. Second, likely because of the high standard for obtaining a civil seizure order, employers have not routinely sought such relief. In fact, in only one reported case has an employer sought such an order, and the court denied the request because the employer could obtain fast and effective relief through a temporary restraining order.



JM: What are some policies or best practices that employers can put in place to protect their trade secrets?

NM: An employer's primary goal should be to ensure that trade secrets remain "secret." For example, employees who have access to trade secrets should sign confidentiality agreements. Employers should also consider taking other reasonable steps to maintain the confidential nature of their trade secrets, such as limiting access to trade secrets to those employees who have a legitimate business reason to use that information, reminding departing employees of their confidentiality obligations, storing trade secrets only in password-protected locations and on password-protected devices, and implementing a strong password policy.

JM: Can you provide an example of a case in which a company successfully employed the protections of the DTSA?

NM: In *First Western Capital Mgmt. Co. v. Malamed*, No. 16-cv-1961-WJM-MJW, ECF Doc. 45 (D. Colo. Sept. 30, 2016), the court preliminarily enjoined a former employee from soliciting his former employer's customers and required him to return to the former employer its trade secrets. The court found that there was sufficient evidence of threatened misappropriation to support such an injunction based on the employee's refusal to disavow his intention to seek employment at a competitor of his former employer, his expressed belief that the client information in his possession did not contain any trade secrets, and his professed ability to recreate that information based on publicly available information and his own memory. Many employees in trade secrets cases make similar statements, which may form the evidentiary basis, in the right case, for the threat of irreparable harm that is necessary to support an injunction.

JM: What is on the horizon for the DTSA? Are there aspects of the DTSA that haven't been explored by the courts?

NM: The DTSA is only in its infancy, and many of its provisions require judicial interpretation. The section regarding whistleblower immunity is particularly worth following. Under the DTSA, an individual cannot be held liable for misappropriation for certain disclosures made to report or investigate a "suspected" violation of law. No court has addressed the meaning of "suspected," and there is no apparent standard governing this provision. That is, must an individual who discloses a trade secret to report or investigate a violation of law have a subjective, good faith belief that a legal violation has occurred, have an objectively reasonable belief that a violation has been committed, or both? We do not know, at least not yet.

PAID SICK LEAVE: KEY COMPLIANCE TIPS FOR EMPLOYERS

by Matthew K. Johnson (Greenville)

Although paid sick leave statutes and ordinances have been adopted by state and local municipalities for years, many employers are only now realizing they are not compliant. Ordinances in Chicago and Cook County, Illinois, and Minneapolis and St. Paul, Minnesota, became effective July 1, 2017. The Washington state statute becomes effective January 1, 2018. Employers must be able to spot issues and craft compliant policies before it is too late. Below are some key compliance considerations.

Accrual Over Time Versus Frontloaded Accrual

An initial question is whether to allow employees to accrue over time or to accrue in advance (i.e., "frontload" paid sick leave). The paid sick leave laws contemplate an accrual-over-time method whereby an employee accrues sick leave for working a certain number of hours. Most state and local laws alternatively allow frontloaded accrual, which can avoid issues with tracking accrual and annual carryover requirements.

Most jurisdictions require accrual of paid sick leave at 1 hour for every 30 hours worked, but 1 hour for every 40 is fairly common. In a few jurisdictions, accrual rates vary based on the overall size of the employer. Fortunately, the differences in these accrual rates can be resolved in several ways. First, in most jurisdictions employers may frontload the full annual amount on a date certain each year. Alternatively, employers have the option of accruing at the rate of 1 hour for every 30 worked, the most favorable rate in all jurisdictions. Finally, despite potential challenges, employers may draft separate policies for each jurisdiction or a subset of jurisdictions.

Many employers find accrual over time to be cumbersome, particularly when they operate in multiple jurisdictions with different accrual requirements. If the administrative burden is too great, or if an employer's payroll vendor will not reasonably support accrual over time, frontloaded accrual may be preferable. Fortunately, none of the current paid sick leave ordinances forbid frontloading. However, even frontloading accrual is not without potential pitfalls.

Frontloading should be calculated to be within the relevant jurisdiction's allowable accrual cap or more. Because accrual, use, and carryover caps vary, often depending upon employer size, implementing a uniform policy covering multiple jurisdictions may be problematic. Solutions for this problem are similar to those where an employer is grappling with accrual over time at different rates in different jurisdictions—i.e., an employer could: (1) frontload accrual in all jurisdictions at the amount required in the jurisdiction with the highest applicable accrual cap; (2) implement separate policies for all jurisdictions; (3) implement one policy for all jurisdictions that uses different accrual caps in the relevant locations; or (4) if the majority of applicable locations allow similar accrual caps, create a "standard" policy with separate policies for outliers.

As with the accrual rate issue, the concern here is simplicity of administration versus the economics of frontloading more paid sick leave than an ordinance might require or an employee might accrue in a year. Further, employers must consider whether administration of multiple policies has costs in addition to administrative headaches that negate potential economic advantages. This is a complicated analysis that can only be performed through a careful analysis of the applicable jurisdictions' accrual, use, and carryover requirements.

While frontloaded accrual appears to be an option in all jurisdictions, employers must be careful in employees' first year of employment, or in any partial year in which a paid sick leave policy is implemented. Most employers want to prorate accrual for these partial years, but the statutes, ordinances, or enforcement guidance rarely suggests doing so would be lawful. Fortunately, the availability of waiting periods prior to use or accrual are helpful in eliminating potential problems with abuse early in employment.

Waiting Periods

Paid sick leave laws typically require new employees to wait some period of time before they are eligible to use or accrue paid sick leave. These waiting periods are far from uniform or consistent, which makes multistate policy drafting difficult. Most paid sick leave laws require immediate accrual for eligible employees, but have a 90-day waiting period before use, whether it is accrued over time or frontloaded. Although some jurisdictions have longer waiting periods, or comparable waiting periods before accrual, a 90-waiting period is generally sufficient for broader compliance purposes (except in SeaTac, Washington).

Accrual, Use, and Carryover "Caps"

Differences in lawful limits on accrual, use, and carryover are particularly troublesome in policy drafting. Many jurisdictions allow employers to cap accrual annually. Others allow a total accrual cap without regard to annual accrual. In many jurisdictions, different annual accrual caps apply to businesses depending on employee numbers. Similarly, some jurisdictions allow for different limits on total accrual depending upon employer size, but not necessarily annual accrual.

Annual use limitations also vary. Most jurisdictions allow employees to use all accrued paid sick leave in a year, but some allow annual use to be capped. Of those that allow use caps, they vary in terms of related carryover caps.

Barring frontloading options, most jurisdictions require carryover of unused paid sick leave from one benefit year to the next, often in some limited amount. As with limits on accrual or use, carryover limits may vary depending on the employer's size.

Drafting Tips

Employers may still have time to implement compliant policies, but should act soon. For those companies operating in only one or a few of the relevant jurisdictions, policy drafting on an individual basis is simpler and often more compliant. Employers with a broader base of operations who choose a single policy over individual policies in each jurisdiction should consider the details of specific provisions of each state and local law. A single policy is generally possible, subject to some concessions to account for the more restrictive requirements in relevant jurisdictions.

TOP 10

TOP 10 MISTAKES EMPLOYERS MAKE IN EMPLOYMENT APPLICATIONS—AND HOW TO AVOID THEM

by Jennifer R. Cotner (Raleigh)

Employment applications—they may seem innocuous, but they contain a number of minefields of which employers should be aware. In addition to being one of the company's first contacts with applicants, employment applications are also written documents that can later be used as evidence in an adversarial proceeding. Below are10 of the most common mistakes that employers make in application materials and best practices for avoiding these blunders.

1 Including any disability-related or medical questions.

Employers should steer clear of questions related to whether an employee is disabled or has a medical condition. Any such inquiry would violate guidance from the U.S. Equal Employment Opportunity Commission (EEOC) and possibly the Americans with Disabilities Act (ADA) and similar state laws. If an employer asks an applicant such a question, the EEOC or a court may presume prohibited information was a factor in hiring.

2 Not including an at-will disclaimer.

Employers may want to inform applicants that the application is not intended to and does not create a contract or offer of employment and state that, if hired, employment with the company would be on an at-will basis and could be terminated at the will of either party. This disclaimer is helpful to avoid any claim that the application is an offer of guaranteed employment or to defend a claim of breach of contract if the employee is not hired or is later discharged.

3 Not including a non-discrimination statement.

Employers may want to inform applicants that the company is an equal opportunity employer (i.e., through an EEO statement) and does not discriminate in hiring based on federally-protected classifications (i.e., race, color, national origin, ancestry, religion, sex, disability, veteran status, age (40 or over), or genetic information). Employers may want to include additional protected classifications under state or local law (e.g., sexual orientation or marital status).

4 Requesting graduation dates in the education section.

Asking applicants for graduation dates (usually in the education section of the employment application where it inquires about degrees obtained) may lead to a finding of discriminatory intent on the basis of age under the Age Discrimination in Employment Act (ADEA) or state law—particularly if the employee's graduation date has no bearing on the qualifications for the position—as it enables the hiring manager to guess the age of the applicant. It is appropriate to ask questions regarding the experience of the applicant if it is relevant to a job qualification.

5 Asking about arrests and convictions, without appropriate disclaimers.

A number of states and local jurisdictions expressly prohibit employers from asking about applicants' criminal histories on employment applications (these are called "ban the box" laws). EEOC guidance further recommends that employers not ask about convictions on job applications; but, if they do, such inquiries should be limited to convictions for which exclusion would be "job related for the position in question and consistent with business necessity." The EEOC discourages employers from asking about arrests on applications at all, because it reasons that the fact that an individual was arrested is not proof that he or she engaged in criminal conduct. The EEOC also has taken the position that an arrest record, standing alone, may not be used to screen out an applicant. An employer may make an employment decision based on the conduct underlying the arrest if the underlying "conduct makes the individual unfit for the position in question." Employers may want to use caution in this area.

6 Putting a background check acknowledgement on the employment application.

Under the Fair Credit Reporting Act (FCRA), the disclosure of an employer's intent to obtain a background check must be in a "stand-alone" document separate from the application.

7 Not including language telling applicants how to request a reasonable accommodation to apply or participate in the interview process.

The ADA imposes a duty on employers to provide reasonable accommodations to applicants during the application process to ensure equal access to available positions. In light of this obligation, employers may consider instructing applicants on how to initiate that process independent of the employer's online application system and hiring manager.

8 Requesting a photograph.

Guidance from the EEOC prohibits employers from asking applicants for photographs. If needed for identification purposes, an employer may obtain a photograph of an applicant after he or she accepts an offer of employment.

9 Asking about marital or familial status.

Asking questions about an applicant's marital status, the number of kids he or she has, the ages of his or her children or dependents, or provisions for childcare could be construed as discrimination on the basis of sex. Furthermore, in many states, marital or familial status is a protected classification about which employers may not inquire during the application process—similar to the federally-protected classifications listed above.

10 Asking about citizenship.

The anti-discrimination provision of the Immigration Reform and Control Act prohibits employers from discriminating against an applicant because he or she is not a U.S. citizen. The Form I-9, rather than an employment application, is the appropriate document to determine an applicant's citizenship status. Rather than inquiring about citizenship, employers may want to ask if an applicant is legally qualified to work in the United States.

SPOTLIGHT ON OGLETREE DEAKINS' BACKGROUND CHECKS PRACTICE GROUP

Ogletree Deakins' Background Checks Practice Group—led by Greenville shareholder Stephen Woods—has been providing advice and counsel to employers and assisting with background check litigation for more than 20 years. The work has increased, in volume and complexity, because of the tidal wave of class action lawsuits alleging technical violations of the federal Fair Credit Reporting Act (FCRA), the proliferation of state and local background check laws (including those arising from the "ban the box" movement), and Title VII discrimination claims filed by the U.S. Equal Employment Opportunity Commission. Because one mistake can lead to significant financial penalties for every background check an employer conducts, the stakes are high.

Below we highlight some interesting facts about this area of the law:

- Cities and counties across the country continue to enact local ordinances (commonly known as "ban the box" legislation) restricting the ability of private employers to inquire into the criminal histories of applicants during various stages of the job application process. However, one state has now prohibited "ban the box" ordinances. The Indiana General Assembly recently passed a statute prohibiting local governments from enacting ordinances that interfere with an employer's ability to obtain or use criminal history information during the hiring process.
- According to the practice group's chair, Stephen Woods, one of the topics that is most challenging for employers is keeping up with the meteoric pace of new state, local, and even federal background check requirements.
- Lawyers in the Background Checks Practice Group assist employers in the design and implementation of lawful best practices and real-world background check processes. They also help employers understand and apply the myriad federal, state, and local restrictions and requirements related to employer consideration and use of background check information once it is received.
- The number of cases involving FCRA claims continues on an upward trend. In January 2017, there was a 48.6 percent increase in FCRA cases—the highest increase in consumer litigation filings.
- To assist with federal and multistate compliance, Ogletree Deakins created *O-D Comply: Background Checks*, an innovative subscription service that keeps employers abreast of federal, state, and major locality background check laws. A subscription includes continually updated, compliant forms, letters, and documents (e.g., background disclosure and authorization forms/screens, pre-adverse action letters, and adverse action letters) and up-to-date federal, state, and locality summaries.

Did You Know?

- ☑ 13 states and 1 locality require disclosure language in addition to the language mandated by the FCRA (and this language must be separate from the required federal disclosures).
- ☑ 8 states and 8 localities place restrictions on an employer's consideration and use of background check information beyond the federal "job related and consistent with business necessity" standard.
- ☑ 10 states and 15 localities have adopted "ban the box" laws with restrictions on private employers.

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