Northeast S.D. Society for Human Resource Management **June 2013**

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From the President

~ By Julie Plunkett

I recently attended the Upper Midwest Employment Law Institute Event in Minneapolis. The big news was in reference to the passing of the "Ban the Box" in Minnesota that will take effect January 1, 2014. Ban the Box requires businesses to remove the question on applications that ask if they have a criminal conviction. You can ask the question in the interview process, but not prior. Reason behind banning the box is to remove unfair barriers to employment of people with criminal records. Currently Ban the Box is in effect in WA, OR, CA, TX, MN (starting Jan1), IL, MI, TN, NC, FL, MI, OH, PA. NY. NJ. MD. RI. and CT.

I personally have mixed feelings about Ban the Box. Listening to what the attorneys had to say, got me thinking of what others maybe saying about Banning the Box. I came across this article from Allen Smith from SHRM.

Reactions to EEOC's 'Ban the Box' Suggestion Differ

An Equal Employment Opportunity Commission (EEOC) recommendation in its recent guidance on criminal background checks to not ask about convictions in employment applications as a best practice is bad advice, according to Don Livingston, an attorney with Akin Gump in Washington, D.C., and a former EEOC general counsel.

"A few jurisdictions ban the box," he noted. "In those jurisdictions, employers are barred from asking about criminal convictions at the application stage of the hiring process."

But he added that "in other jurisdictions, it is sound business practice to seek information at the outset of the application process that is important in screening applicants. This includes information about criminal convictions that are manifestly job related, such as a history of theft for someone seeking a bank teller position or a history of sexual crimes for a job in a high school. So, I do disagree with the EEOC 'best practice.' "

Livingston remarked that "the later in the hiring process the employer delays asking job-related questions of the applicant, the greater the cost to the employer of making hiring decisions."

Alternatives

One alternative to not asking about convictions on all applications is to have different applications and different questions relating to criminal history for different positions or job classes, Pamela Devata of Seyfarth Shaw in Chicago told SHRM Online. "The EEOC's guidance seems to indicate that what criminal history question employers should ask should be tailored to the specific job in question," she remarked.

Devata added that "Since the guidance is not binding, employers are not required to remove questions about criminal history from their employment applications. However, given that the EEOC is the administrative agency charged with enforcing Title VII, employers should evaluate what information they ask in relation to the position in question and when they should ask it. We are advising employers to consider asking about targeted criminal history convictions based on position or job class later in the hiring process to address the EEOC's concerns."

Devata noted, "Employers could ask an applicant about his or her criminal history later in the hiring process—for example, during the interview." She added that "employers should be mindful that there are state laws that have restrictions about what they can ask, even if they are asking about criminal history later in the hiring process. For example, Massachusetts, California, Connecticut and [some] other states have restrictions on what information an employer can ask about, and we recommend that employers never ask about sealed or expunged records to comply with the number of state laws that also have that prohibition."

Yet Devata remarked, "Because the EEOC has said that removing criminal history from the application is a best-practice recommendation, but not a mandate, and has provided some guidance to limit criminal history questions, it likely would be able to argue that it has not overstepped its statutory authority. However, there are many who have expressed that they think the EEOC has overstepped its authority."

No Rush to Remove Box

Katharine Parker, an attorney with Proskauer in New York, said that "assuming they are not in a jurisdiction that prohibits questions on applications about convictions, employers need not rush to remove a box inquiring about prior criminal convictions on their application forms."

But she added that "employers should review their application question and determine whether it is appropriately tailored for their business and the positions for which it is being used and to ensure it is compliant with current state and local law. For example, an employer can consider whether it is appropriate to limit the question to particular types of crimes or crimes that occurred within a specific period of time."

Parker stated, "A question about conviction history on an application form does not preclude individualized assessment. Indeed, an employer may expressly state on its application that a conviction is not an automatic bar to employment precisely because it intends to engage in an individualized assessment after the applicant reports that he or she has previously been convicted of a crime."

Relevancy of Criminal History

"The $1 million question" according to Barry Hartstein, an attorney with Littler in Chicago, is how employers can determine if criminal history is relevant and what kinds of questions would or would not have a nexus to job duties. "The EEOC does not provide any real guidance for employers. There may be some jobs in which it is obvious, such as the conviction of theft within a period of years, and hiring a housekeeper."

But Hartstein added that "what may be relevant or have a close nexus may vary depending on the work environment." He noted that he "recently had a discussion with one client that operates business hotels and resorts that cater to families. Certain disqualifying criminal offenses for the same position may vary, whether it is a typical business environment as compared to a resort in which children may be running around."

"The key," Hartstein said, "is for the employer to be thoughtful in its approach and consider documentation justifying the rationale for specific exclusions."

Allen Smith, J.D., is manager, workplace law content, for SHRM.

N O T I C E:

The 2013 NESD SHRM Compensation Surveys are due Friday, June 14th!

Participants receive the best price!
Survey documents are located on our website.

Program Calendar

8/13 - Healthcare Reform: Beyond the Basics

9/27 - From Suits to Tattoos: Bridging the Generational Gap

10/8 – Workers Compensation

11/12 - TBD

12/10 - Holiday Social

Programs & dates may change.

Book of the Month!

2011-2012 Health Care Benchmarking: 6 Industries, 5 Geographic Regions, and 4 Employee Sizes

The purpose of this book is to provide HR professionals and other business executives with key health care benefits measures. In business, where the need to measure is strong, benchmarking can help identify an organization's strategic benefits plan's strengths and weaknesses, create a framework for managing change, and encourage employees toward continuous improvement. Yet for some HR professionals, when it comes to measuring benefits plans, concrete measures can feel elusive. Numbers that relate to the context of a specific business, particularly the same industry, employee size, and geographic location, are usually difficult to find.

2012, Paperback, 262 pages
ISBN: 978-1-58644-265-1
SHRMStore Item #: 61.11002

SHRM FOUNDATION NEWS:

SHRM Foundation News: The Executive Briefing Series

To make it easier for HR professionals to share important evidence-based management practices with their CEOs and line managers, the SHRM Foundation has introduced its new Executive Briefing series.

The executive briefings are based on solid research. They cover similar content to the popular Effective Practice Guidelines, however they are just 3-5 pages in length, making them ideal to share with colleagues at the office. The briefings highlight the most important, bottom-line implications on each HR topic. The following briefings are now available for free download:

• Wellness Strategies to Improve Employee Health, Performance and the Bottom Line

• *HR's Role in Corporate Social Responsibility and Sustainability*

• Leveraging HR Technology for Competitive Advantage, sponsored by ADP

This series is made possible by the generous support of SHRM members and chapters. Visit www.shrm.org/foundation and select "SHRM Foundation Products" to download the executive briefings.

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NESD SHRM MISSION STATEMENT

NESD SHRM Chapter's purpose is to advance the Human Resource profession by providing educational opportunities, legislative updates, informational programs, and a network to facilitate ideas, as well as promoting and encouraging membership and professional development through participation in the National SHRM organization.

New FMLA regs require employers to reexamine policies and practices

~ by Amanda Shelby, Employment Law Letter

The U.S. Department of Labor's (DOL) recently issued Family and Medical Leave Act (FMLA) regulations became effective on March 8. Although the new regulations don't radically change the landscape of the FMLA, they do contain some significant modifications. What do you need to know to ensure that your policies and practices are still in compliance?

Major changes
The new FMLA regulations revise several aspects of the law, ranging from required posters and recommended forms to the calculation of hours of service and available leave for airline flight crews. The regulatory changes that will affect most employers include modifications to the calculation of intermittent FMLA leave, the expansion of coverage for family members of certain military personnel and veterans, and revisions to the DOL's FMLA poster and notification and certification forms.

Intermittent FMLA leave.

The new regulations provide clarification on the calculation of intermittent FMLA leave. First, the regs clarify that employers must track intermittent FMLA leave using the smallest increment of time used for tracking other forms of leave (e.g., sick leave). However, no employer can track intermittent FMLA leave using increments of time larger than one hour. So, for example, if you calculate sick leave in quarter-hour increments, you must calculate intermittent FMLA leave in quarter-hour increments as well.

Second, employers may count only time actually taken as FMLA leave against employees' leave entitlement under the Act. In other words, you cannot count time an employee worked against his FMLA leave entitlement. Although that principle may sound straightforward, it can be complicated in practice. For example, if a company accounts for FMLA leave in one-hour increments but an employee returns to work after an intermittent leave absence of only 30 minutes, the employer cannot count the full hour against her FMLA leave entitlement. Instead, the company can count only the 30 minutes of leave against the employee's leave entitlement.

Military family exigency leave.

Military family exigency leave allows an eligible employee to take time off for a variety of qualifying exigencies arising from the fact that a family member is on or has been called to active duty. Qualifying exigencies previously have included:

- Assisting the military member with alternative childcare arrangements when active duty or the call to active duty necessitates a change in existing arrangements;
- Attending counseling arising from the military member's covered active duty or call to covered active duty;
- Making financial or legal arrangements related to active duty or the call to active duty;
- Attending certain military events and related activities; and
- Spending time with the military member while he is on short-term temporary rest and recuperation leave.

The new regulations contain several changes that expand the scope of military family exigency leave.

First, the regulations add "parental care leave" to the list of qualifying exigencies, permitting eligible employees to take military family exigency leave to care for a military member's parent when such leave is necessitated by the servicemember's active duty.

Second, the regulations clarify that family members of armed forces, National Guard, and military reserves personnel can qualify for military family exigency leave if the military member is deployed to a foreign country in support of a contingency operation.

Third, the regulations increase the amount of leave an eligible employee can take for rest and recuperation with the military member. Previously, eligible employees were limited to five days of leave; now they are permitted a maximum of 15 days. Fourth, the regulations expand the list of acceptable certifications for leave to include a copy of the military member's rest and recuperation leave orders and other military documentation establishing the dates of the servicemember's leave.

Covered servicemember leave.

The new regulations expand the scope of covered servicemember leave, which allows an eligible employee to take time off to care for a family member who is a "covered servicemember" with a "serious illness or injury."

First, the regulations expand the definition of "covered servicemember" to include veterans undergoing medical treatment, recuperation, or therapy for an illness if the veteran was released or discharged (other than dishonorably) at any time during the five-year period before the first date the eligible employee takes military caregiver leave. Second, the regulations expand the definition of "serious injury or illness" to include a preexisting injury or illness aggravated by active duty. Third, the certification requirements are relaxed to allow any healthcare provider to certify covered servicemember leave for a veteran's serious injury or illness.

Posters and forms.

One change that's sure to affect all employers covered by the FMLA is the DOL's new "Employee Rights and Responsibilities" poster. The new poster incorporates the recent revisions in the requirements for leave to care for military servicemembers.

The DOL also revised several of its recommended FMLA forms, including Form WH-381 ("Notice of Eligibility and Rights and Responsibilities") and Form WH-384 ("Certification of Qualifying Exigency for Military Family Leave").

Bottom line

If you are covered by the FMLA, you must review your policies and procedures to ensure they are consistent with the new regulations. If your FMLA leave policy purports to list all the qualifying exigencies for military family exigency leave, make sure it includes the new qualifying exigency for parental care. If it includes a list of defined terms, ensure they reflect the recent revisions to the definitions of "covered servicemember," "veteran," and "serious injury or illness." And if it includes a copy of the DOL's old "Employee Rights and Responsibilities" poster, replace it with the new one.

You also must display the new "Employee Rights and Responsibilities" poster in a place where all employees and applicants can see it. You can print the poster free of charge from the DOL's website at www.dol.gov/whd/regs/compliance/posters/fmlaen.pdf. And you should consider whether to update any of your forms in light of the DOL's revisions to its notification and certification forms. You can find the forms and print them free of charge on the DOL's website at www.dol.gov/compliance/laws/comp-fmla.htm#recordkeeping.

Finally, to better familiarize yourself with the new regulations, consider taking an educational seminar on the topic. And if you still have questions about how the FMLA regulations apply to you, consult with legal counsel.

NESD SHRM Board Meeting
Drake
621 5th St. SE, Watertown, SD 57201

605-886-8411

May 28, 2013

Agenda

Attendance: Leigh Kuecker, Laurie Gates, Bobbie Halonen, Sheila Mennenga, Matt Sawyer, Tammy Davis

Additions to Agenda - none

Approve minutes of Board meeting (minutes in newsletter) approval Laurie Gates, second Bobbie Halonen

Past President — Laurie Gates

Wage Survey Update

Julie will send out reminder. Board members will be asked to call 3 Companies to remind them of the survey due date. Due June 14th.

President Elect — Leigh Kuecker

No report

Treasurer — Theresa Tesch

No report

Financial Statement

Audit

Membership Director — Nicole Nuttbrock

No report

SHRM Foundation Representative — Matt Sawyer

Silent auction doubled what was expected – great turnout

Diversity Advocate — Bobbie Halonen

No report

Government Affairs Representative — Leslie Hendrickson

No report

Workforce Readiness Advocate — Traci Stein

No report

Certification Representative — Sheila Mennenga

Need fall program information to submit for certifiation

Vice-Presidents of Programming — Amber Dahl & Kathy McInroy

Sept Program Time

August Program – looking into Health Care Reform – speaker Eide Bailly.

September Program – Kosta's from ND is going to speak.
October Program – Worker's Comp

Secretary — Tammy Davis

No report

Old Business

Strategic Planning – If you haven't sent me your information, PLEASE do so.

New Business

State Conference Final Update

Still need bill from Ramkota

Still waiting on some vendor payments

Great sponsorships and we had a successful State Conference.

Laurie Gates motioned to adjourn, Tammy Davis second.

Test Your HR IQ!

The EEOC instructs employers to develop a "targeted screen' for candidates with a past conviction on their records. Consider(1) the nature and gravity of the offense, (2) the time since the conviction or the end of the sentence, and (3) the nature of the job. That process is enough, right?

- **1)** It certainly ought to be, and it is.
- **2)** Yes, that would seem to be all there is to ensuring your hiring decisions are job-related and consistent with business necessity, which is what the EEOC advises.
- **3)** No, it's definitely not enough. The EEOC says that in some cases, you must also conduct an "individualized assessment," in which you seek employment and/or character references, rehabilitation efforts, job history, and more. Or an employer might have to validate the criminal conduct screen for the position by reviewing statistical models in the Uniform Guidelines on Employee Selection Procedures on how likely an individual is to repeat a particular crime. Good luck.
- **4)** No, not until you hear directly from the candidate that he or she is now on the straight and narrow and promises never to run afoul of the law again.

Answer: #3.