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34th annual WORKFORCE MANAGEMENT BRIEFING

High Stakes and High Priorities

Limiting Exposure and Mitigating Risk: An Update for Financial Services Employers

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Your Workplace. Our Business.®

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Agenda

- Introduction of Speakers
- Workshop Topics
  - Developments in Whistleblower Protections
  - Worker Classification and White-Collar Exemptions
  - Credit Checks in Employment Decisions
  - Workplace Violence and the ADA
  - Pregnancy Discrimination and Accommodations
- Action Items
  - Evaluate the risk
  - Consider approaches to address risks and, if applicable, implement a uniform approach to employment documents and policies

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Developments in Whistleblower Protections

Legal Landscape
Sarbanes-Oxley

- The Sarbanes-Oxley Act of 2002 ("SOX") was enacted July 30, 2002, in response to the Enron bankruptcy
  - Section 806 is the whistleblower protection provision, prohibiting adverse employment actions against whistleblowers (18 U.S.C. § 1514A)
  - Protects internal and external reports or complaints related to fraud or SEC regulations
  - Criminal penalties for retaliation

Legal Landscape
Dodd-Frank

- On July 21, 2010, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922(a), 124 Stat. 1841 (2010)
  - Dodd-Frank amends the Securities Exchange Act of 1934 by codifying the whistleblower program at Section 21F ("Securities Whistleblower Incentives and Protection", 15 U.S.C. § 78u-6)
  - As of August 12, 2011, Rule 21F-17 prohibits employers from taking any action to "impede" an employee from communicating with the SEC about a possible securities law violation, including enforcing or threatening to enforce a confidentiality agreement

Legal Landscape

- FINRA Regulatory Notice 14-40 (October 2014)
  - Confidentiality provisions in settlement agreements cannot interfere with the communication of a possible securities law violation
  - "Confidentiality provisions in settlement agreements should be written to expressly authorize, without restriction or condition, a customer or other person to initiate direct communications with, or respond to any inquiry from, FINRA or other regulatory authorities"

Legal Landscape *(continued)*

SEC Office of Whistleblower Chief Sean McKessy has long made public statements warning employers that the SEC was actively looking for the right case to bring an enforcement action on this issue

SEC: *In the Matter of KBR, Inc.*

- KBR required employees interviewed in connection with an internal investigation to sign a confidentiality agreement
  - No evidence that KBR enforced the agreements or that any employee was prevented from communicating with the SEC
- The SEC targeted this agreement because it "potentially discouraged employees from reporting securities violations"
- In April 2015, KBR settled with the SEC for $130,000 and amended the confidentiality provision
  - The SEC did not address interviews that may be protected by the attorney-client privilege

SEC: *In the Matter of KBR, Inc.*

- KBR agreed to the following amended language:

"Nothing in this Confidentiality Statement prohibits me from reporting possible violations of federal law or regulation to any governmental agency or entity, including but not limited to the Department of Justice, the Securities and Exchange Commission, the Congress, and any agency Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. I do not need prior authorization of the [KBR] Law Department to make any such reports or disclosures, and I am not required to notify the company that I have made such reports or disclosures."

EEOC Initiatives

- In 2014, the Equal Employment Opportunity Commission ("EEOC") brought several lawsuits alleging that the release language was overbroad:
  - *EEOC v. Baker & Taylor*
  - *EEOC v. CVS*
  - *EEOC v. CollegeAmerica*
- 2013-2016 Strategic Enforcement Plan
  - Six core priorities (including "Preserving Access to the Legal System")
  - EEOC will target:
    - "policies and practices that discourage or prohibit individuals from exercising their rights under employment discrimination statutes, or which impede the EEOC's investigative or enforcement efforts. These policies or practices include retaliatory actions, **overly broad waivers, settlement provisions that prohibit filing charges with the EEOC or providing information to assist in the investigation or prosecution of claims of unlawful discrimination**, and failure to retain records required by EEOC regulations" (emphasis added).

EEOC v. CVS Pharmacy

The EEOC challenged:

Non-Disparagement clause

Cooperation clause—cooperate with GC upon receiving a subpoena, deposition notice, interview request, or other inquiry regarding, among other things, an administrative investigation.

Non-Disclosure of Confidential Information

General Release of Claims that released, among other things, "charges" and included as released "any claim of unlawful discrimination of any kind."

No Pending Actions; Covenant Not to Sue provision in which the employee agrees "not to initiate or file or cause to be initiated or file, any action, lawsuit, complaint or proceeding asserting any of the Released Claims against any of the Released Parties…."

NLRB: General Counsel Memo (March 2015)

- Identified "unlawful" confidentiality rules in employee handbooks:
  - "Prohibiting employees from disclosing details about the Employer."
  - "If something is not public information, you must not share it."
  - Defining "Confidential Information" as "All information in which its loss, undue use or unauthorized disclosure could adversely affect the Employer's interests, image and reputation or compromise personal and private information of its members."
- *Quicken Loans, Inc.,* 28-CA-075857 (2013)
  - Confidentiality provisions in an employment agreement that potentially restrict rights to engage in protected activity under the NLRA were unlawful.

Practical Applications

- Panel Discussion

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What to Do Now

Be Proactive: Conduct a comprehensive review of:

- Offer Letters
- Employee Handbooks and Related Policies
- Employment Agreements
- Compensation Incentive and Equity Plans
- Confidentiality Provisions
- Separation Agreements
- Restrictive Covenants

Identify provisions that may impact reporting rights

Consider an explicit reservation of rights provision

- How explicit?
- Follow KBR's language?
- Integrate EEOC/NLRB Rights?

Revise all of the company's employment documents with a unified approach

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Worker Classification and White-Collar Exemptions

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FLSA Overtime Exemptions

- Executive, administrative, professional, outside sales, highly compensated, and computer professionals
- To qualify for the exemption, must meet:
  - **Duties Test**
    - Ex.: Administrative Primary duties
      - Performance of office or non-manual work directly related to the management or general business operations of the employer or customers
      - Must exercise discretion and independent judgment on matters of significance
  - **Salary Basis Test**
    - Current threshold: employees who earn $455 per week ($23,660 per year)

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FLSA Overtime Exemptions

- Highly compensated employees
  - Total compensation of at least **$100,000** annually
  - **Primary duty:** Office or non-manual work
  - Performance of at least one exempt duty from other exemption tests

FLSA Overtime Exemptions

- The DOL's Proposed Regulations
  - More than double the current salary basis threshold to $970 per week ($50,440 annually)
  - Increase highly compensated exemption to $122,148
  - Automatic adjustment for inflation
  - No change in the duties requirements to qualify for a white-collar exemption
    - o But still possible
    - o The DOL is "considering" a quantitative test
- Almost 250,000 comments received
- Many believe that the proposed regulations will result in more litigation and administrative costs to employers

Misclassification
Employees vs. Independent Contractors

- The distinction between employees and independent contractors is a significant risk issue for employment and tax law purposes:
  - In general, employees are entitled to benefits and protected by anti-discrimination, wage and hour, and other employment laws while independent contractors are not entitled to benefits and are not covered by most employment laws
  - Employers withhold income, Social Security, and other taxes against employee earnings, but there is no tax withholding obligation for payments to independent contractors
  - Employers do not provide unemployment insurance or workers' compensation benefits to independent contractors

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Misclassification
Employees vs. Independent Contractors

- It is up to the hiring entity to properly classify a worker
  - Generally, independent contractors are self-employed, providing services on a contractual basis with minimal supervision and control by the hiring company
  - It does not matter what you call workers or what their agreement says—the key is what they actually do
- Risks associated with getting the decision wrong—so-called "worker misclassification"
  - Government fines and penalties
  - Private class actions for lost wages and benefits
  - Criminal charges

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Misclassification
Employees vs. Independent Contractors (*continued*)

- The DOL's new Interpretation notes that the FLSA defines the term "employ" as "to suffer or permit to work." Based on that definition, the DOL concludes that "**most workers are employees**"[1]
- The Interpretation cites the six-factor "economic realities" test that the DOL applies as indicia of employment but emphasizes certain aspects of that test finding employee status—most particularly "control"
- The DOL is essentially attempting to end, or severely limit, the classification of independent contractors

[1] U.S. DOL Wage and Hour Division, Administrator's Interpretation 2015-1 (July 15, 2015) (Weil, David)

Practical Applications

- Panel Discussion

Action Items

Identify exempt employees below the salary basis threshold

- Highly compensated employees below $122,148
- Other exemptions below $50,440

Determine whether to reclassify or increase compensation

- Account for future increases
- Opportunity to reclassify potentially misclassified employees?

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What to Do Now

Be Proactive: Initiate an audit of your workforce for:

- Employees who may qualify for white-collar exemptions
- Workers that are classified as independent contractors

Review what these employees actually do

Assess where and what records are kept at your company

Consider alternate retention arrangements with appropriate protections and indemnifications

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Credit Checks in Employment Decisions

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Legal Landscape

The Stop Credit Discrimination in Employment Act amended the New York City Human Rights Law ("NYCHRL") to prohibit the use of credit checks in employment decisions

- Certain **positions** are exempt
- Applies to employers with four or more employees
- Includes part-time workers, independent contractors, undocumented workers, and interns
- Effective September 3, 2015

Includes payment history, credit worthiness, credit standing, or credit capacity

- Examples:
  - Credit card debt or student loans
  - Child support
  - Bankruptcies or foreclosure
  - Judgments or liens

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Legal Landscape

Exemptions

- Use of an individual's consumer credit history for employment purposes is required by law:
  - State law or regulations
  - Federal law or regulations
  - FINRA
- Positions involving:
  - Responsibility for fund or assets with $10,000 or more
  - Bonding under federal, state, or New York City law or regulation
  - Digital security systems
  - Security clearance under federal or state law
- Non-clerical positions having regular access to trade secrets, intelligence information, or national security information
- If an exemption is claimed:
  - Inform the job applicant of the exemption
  - Keep an "exemption log" for five years from the date that the exemption is used

Legal Landscape

Violations

Requesting credit history from applicants	Requesting or obtaining credit history from a consumer reporting agency	Using credit history in employment decisions

- Violations are unlawful discriminatory practices under the NYCHRL, whether or not an adverse employment action was taken
- Does not include online research, such as Google or LinkedIn searches

Legal Landscape

Penalties and Damages

- Violations may subject an employer to penalties up to $125,000
  - Include an "honest mistake" about exemptions
  - $250,000 for willful, wonton, or malicious conduct
- Remedies available under the NYCHRL: back pay, front pay, compensatory and punitive damages, and attorneys' fees

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Legal Landscape
When Is a Credit Check Required by Law?

- FINRA Rule 3110(e) (effective July 1, 2015)
  - Requires member firms to "ascertain by investigation the good character, business reputation, qualifications and experience of an applicant before the member applies to register that applicant with FINRA"
  - Requires firms to "establish and implement written procedures reasonably designed to verify the accuracy and completeness of the information contained in an applicant's initial or transfer Form U4"
  - "Such procedures shall, at a minimum, provide for a search of reasonably available public records to be conducted by the member, or a third-party service provider, to verify the accuracy and completeness of the information contained in the applicant's initial or transfer Form U4"

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Legal Landscape
When Is a Credit Check Required by Law?

- FINRA Regulatory Notice 15-05 (March 2015)
  - Firms ***may*** consider credit reports
  - But ***must*** ensure investigations are conducted in accordance with all applicable laws
  - "FINRA notes that the public records search requirement ***does not require*** firms to obtain a credit report, which contains both public and non-public records"
  - Per FINRA, public records include:
    - Name and address
    - Criminal records
    - Bankruptcy records
    - Judgments and liens
  - *However*—"[a] firm may find it necessary to conduct a more in-depth search of public records depending on the job applicant's job function, responsibilities or function"

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Legal Landscape
When Is a Credit Check Required by Law?

- SEC Form ADV, Part 2B—Requirements for State-Registered Advisers
  - "[I]f the supervised person has been involved in one of the events listed below, disclose all material facts regarding the event . . . .
  - If the supervised person has been the subject of a bankruptcy petition, disclose that fact, the date the petition was first brought, and the current status." (Item 7B)
- Under the amended NYCHRL, Form ADV may require a credit check or inquiry into credit history

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Legal Landscape
When Is a Credit Check Required by Law?

- Banking Rule—FDIC Guidance (August 2009)
  - Pre-employment background screenings should reveal convictions
  - *However*—"[t]he sensitivity of the position or the access level of an individual staff member may warrant additional background screening"
    - Includes verification of references, experience, education, professional qualifications, and identity
  - Screening must comply with the Fair Credit Reporting Act

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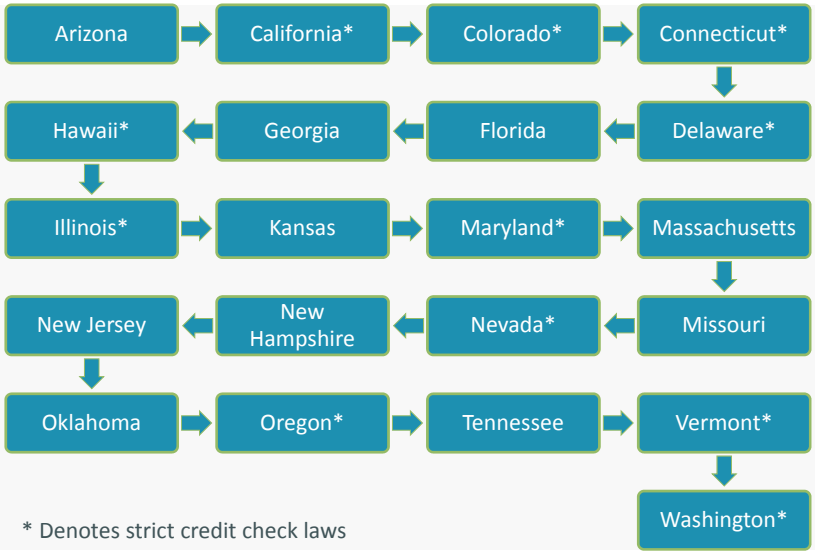
Similar Laws and Pending Legislation



* Denotes strict credit check laws

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Practical Applications

- Panel Discussion

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What to Do Now

Review employment applications

Identify positions that fall into the exemptions

Revise policies

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Workplace Violence and the ADA

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Workplace Violence

- As many as two million employees are victims each year of some form of workplace violence, and 18% of violent crimes are committed at the workplace
- 94% of workplace violence involves assaults
- 21% of workplace crimes involve weapons, most often guns
- Workplace suicides rose from 196 cases in 2007 to 251 cases in 2008, an increase of 28%—the highest number ever reported by the Bureau of Labor Statistics' fatality census; in 2011, there were 242 cases
- Estimated annual cost of lost productivity due just to non-fatal assaults: $16 million with over 876,000 workdays lost per year
- Jury awards average between $1.2 million and $3 million; settlements average $600,000
- Yet, as of the issuing of a 2005 BLS survey, less than 30% of employers had workplace policies/programs and only about 20% provided training on preventing workplace violence

Source: Bureau of Labor Statistics

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Sources of Workplace Violence

- Domestic Violence
  - Spouses (along with current and ex-boyfriends/girlfriends) were responsible for the on-the-job deaths of 346 women and 38 men from 1997-2010 [1]
  - Domestic violence victims lose nearly eight million days of paid work annually [2]
  - 41% of batterers have job performance problems and 48% have difficulty concentrating on the job as a result of their abusive conduct [3]

[1] U.S. Department of Labor, Bureau of Labor Statistics

[2] National Center for Injury Prevention and Control. Costs of Intimate Partner Violence Against Women in the United States. Atlanta (GA): Centers for Disease Control and Prevention; 2003.)

[3] Maine Dep't of Labor, *Impact of Domestic Violence Offenders on Occupational Safety & Health: A Pilot Study* (2004)

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Sources of Workplace Violence

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Legal Landscape
Potential Liability

To employees and third parties	To individual employee-victim	To individual employee-accused
Failure to provide a safe workplace (OSHA General Duty clause)	Failure to provide a harassment-free workplace	Disability discrimination (ADA accommodation issue)
Negligent hiring	Violation of FMLA (failure to provide leave or retaliation for taking leave)	Invasion of privacy (confidentiality of medical information, policies regarding employee monitoring)
Negligent supervision / retention	Retaliation / whistleblowing	Defamation
		Wrongful termination

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Legal Landscape
Potential Liability

- The Occupational Safety and Health Act ("OSH Act")
  - "Each employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1)
- Workers' Compensation
  - Injuries sustained in the course or scope of employment
- Negligent Hiring
  - Employer has a duty to investigate when a reasonably prudent person would investigate a prospective employee [*T.W. v. City of New York*, 286 A.D.2d 243, 245 (1st Dep't 2001)]
- Negligent Supervision and Retention
  - Employer can be liable when it "knew or should have known of the employee's propensity" to commit the injury or tortious act. [*T.W. v. City of New York*, 286 A.D.2d 243, 245 (1st Dep't 2001); *Naegele v. Archdiocese of N.Y.*, 39, A.D.3d 270 (1st Dep't 2007)]

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Legal Landscape
Domestic Violence

- Title VII of the Civil Rights Act prohibits sex discrimination, which may include differential treatment based on domestic violence status
- 21 states provide leave protection to victims of domestic violence
  - For example: California, Illinois, Maryland, New Jersey, New York, Virginia
- Six states prohibit discrimination/retaliation on the basis of domestic violence status
  - California, Connecticut, Hawaii, Illinois, New York, Oregon, Rhode Island
  - Some state statutes require reasonable accommodation
- 34 states make unemployment insurance benefits available to victims who resign due to domestic violence

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Legal Landscape
Domestic Violence

- The New York State Human Rights Law and the New York City Human Rights Law prohibit discrimination based on domestic violence victim status
  - Applicable to hiring, termination, and all other aspects of employment affecting compensation, terms, conditions, or privileges of employment
  - Under City law, employers must make a reasonable accommodation to the needs of domestic violence victims to enable such persons to satisfy the essential requisites of a job

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Legal Landscape
Mental Health

Americans with Disabilities Act

- Generally requires employers:
  - Not to discriminate based on disability
  - To reasonably accommodate an employee's or applicant's "disability" if doing so does not cause an undue burden on the employer

Risks:

- Misconduct vs. disability
- Making assumptions
- Employees who don't report unusual behavior or request accommodations for themselves
- Failure to engage in the interactive process

Practical Applications

- Panel Discussion

What to Do Now

Prepare an action plan

Form a multidisciplinary **response team**

- Include senior management, human resources, security, legal, health/medical, communications, and the Employee Assistance Program (EAP)
- Implement procedures for responding to critical issues as soon as they arise

Conduct training

Provide support

Communicate local resources

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Pregnancy Discrimination and Accommodations

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Legal Landscape

- Title VII, as amended by the Pregnancy Discrimination Act of 1978
  - Prohibits discrimination based on current or past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth
- Americans with Disabilities Act
  - Some pregnancy-related conditions may qualify as disabilities
  - Reasonable accommodations may be required
- Family and Medical Leave Act
- Executive Order 13152
  - Prohibits discrimination due to status as a parent
- Patient Protection and Affordable Care Act
  - Section 4207 requires "reasonable break time" to express breast milk

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Pregnancy
and Related Accommodations

- Many jurisdictions require providing some form of accommodation related to pregnancy, child birth and accompanying medical conditions

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Pregnancy
and Related Accommodations

- The EEOC recently issued Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015)
  - Incorporates the Supreme Court's holding in *Young v. UPS*, 135 S. Ct. 1338 (2015)
  - Adopts the *McDonnell Douglas* test for pregnancy discrimination
- Under New York City law, all employers must provide notice to every new hire (male and female) "of the right to be free from discrimination in relation to pregnancy, childbirth, and related medical conditions"
  - A handout is available on the NYC Commission of Human Rights website

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Pregnancy
and Related Accommodations

Available at http://www.nyc.gov/html/cchr/html/publications/pregnancy-employment-poster.shtml.

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Practical Applications

- Panel Discussion

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What to Do Now

Audit your employee onboarding process

Review policies and handbooks