EPSTEIN BECKER GREEN | TAKE 5 VIEWS YOU CAN USE

LABOR AND EMPLOYMENT

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1. Employers' Use of Applicants' Credit Information Comes Under Attack

In recent weeks, employers' use of credit checks as a pre-employment screening tool has been challenged in a number of ways. In late December, the Equal Employment Opportunity Commission filed a lawsuit against Kaplan Higher Education Corporation alleging that its rejection of applicants during the hiring process on the basis of their credit history had an unlawful discriminatory impact on African Americans and Latinos. The lawsuit came on the heels of the EEOC's public hearing in October 2010, during which the EEOC heard testimony contending that the use of credit history as an employment screening device may have a discriminatory impact on minority groups who typically have poorer credit histories. Coupled with the EEOC's focus on pursuing systemic discrimination lawsuits, we may see the EEOC take aim at more employers' use of credit reports in 2011.

State legislatures are also seeking to curtail employers' use of applicants' credit histories. The Illinois Employee Credit Privacy Act, which became effective on January 1, 2011, prohibits, with some exceptions, the use of an employee's credit history as a basis for hiring, firing, termination, promotion, or other employment-related decisions. (For more detail regarding the Illinois law, please see the article "Beware of the Newly Enacted Illinois Employee Credit Privacy Act.") Legislation has also been introduced in Maryland, New Jersey, and New York that would curb the use of credit checks on prospective or current employees. Not to be left out, legislation was reintroduced in Congress in late January that would limit the use of credit checks in employment screening.

With the heightened focus brought about by the EEOC and legislative activity, it should come as no surprise that the plaintiffs' bar recently joined the fray. In late November 2010, a class action lawsuit was filed in the Southern District of Florida against a major university alleging that the school's rejection of African American and Latino job applicants based solely on their credit history discriminated against them under Title VII of the Civil Rights Act ("Title VII").

For a list of actions employers should take to protect themselves if they use credit checks in the hiring process, see EpsteinBeckerGreen's *Act Now* Advisory entitled "EEOC Plans to Target Employer Use of Credit Information in Hiring and Other Employment Decisions."

2. New Jersey Supreme Court Thwarts an Employer's Ability to Terminate an Employee Who Has Pilfered Company Documents

In *Quinlan v. Curtiss-Wright Corp*., the New Jersey Supreme Court recently reinstated a multimillion dollar

verdict in favor of an employee who was fired for taking documents from her employer and using them in her lawsuit against the company. The Court's opinion, which adopts a multi-factor balancing test to decide whether an employee can establish a retaliation claim under the New Jersey Law Against Discrimination, provides new challenges for employers with operations in New Jersey.

Briefly summarized, a senior HR employee had sued her employer for gender discrimination after being passed over for a promotion. In support of her case, she gathered 1,800 pages of the employer's documents and produced them during discovery. The employer-defendant initially took no action against her for the disclosure of the documents. But, several weeks later, after she copied a witness's performance evaluation and her attorney used it during his deposition, the company terminated her employment for the "unauthorized taking of confidential and privileged information . . . constitut[ing] theft of Company property." The plaintiff amended her complaint to add a retaliation count based on her termination.

The Court adopted a virtually unworkable, seven-factor test to balance the employer's "right to safeguard its confidential documents" against the employee's "right to be free from discrimination or retaliation." In this instance, the court ruled that the employer could have terminated the plaintiff for engaging in self-help by taking or copying 1,800 documents because some included "plainly confidential information . . . and defendants had a reasonably clear company policy against taking the documents to which plaintiff had agreed." But it also ruled that the appraisal was directly relevant to her claim, she had "colorable basis to believe that [it] would not have been disclosed during discovery," and its disclosure did not threaten the company's operation. Under those circumstances, she had a stronger interest in remedying the company's discrimination and the Court held that the jury properly found that she was terminated for engaging in a protected activity.

The dissent underscores the problem with the decision: "From this point forward, no business can safely discharge an employee who is stealing highly sensitive personnel documents even as she is suing her employer and disregarding the lawful means for securing discovery."

As a result of this decision, New Jersey employers must move cautiously before terminating an employee who has stolen documents for the purpose of using them in a lawsuit against his or her company. Otherwise, they may find themselves in the same position as the employer in *Curtiss-Wright* – confident that the proper steps had been taken but left with having to write a very large check to the employee.

3. U.S. Supreme Court Expands Scope of Retaliation Protection Under Title VII

On January 24, 2011, in *Thompson v. North American Stainless, LP*, the U.S. Supreme Court expanded the scope of retaliation protection provided by Title VII. The Court ruled that prohibitions against retaliation extend not only to employees who oppose an unlawful employment practice or file a charge of discrimination, but also to a fiancé of an employee who filed a charge of discrimination against their common employer.

The Court reiterated its earlier holding in *Burlington N. & S. F. R. Co. v. White*, 548 U.S. 53 (2006), that Title VII's anti-retaliation provision prohibits any employer action that "well might have dissuaded a reasonable worker from making or supporting a charge of discrimination." Under this standard, Justice Scalia wrote for the Court in *Thompson*: "We think it obvious that a reasonable worker might be dissuaded from engaging in protected activity if she knew that her fiancé would be fired." The Court declined "to identify a fixed class of relationships for which third-party reprisals are unlawful" and said only that "[w]e expect that firing a close family member will almost always meet the *Burlington* standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so."

As a consequence of the *Thompson* opinion, employers should expect an increase in the number of lawsuits filed by employees who will attempt to establish a close relationship with another employee who filed a charge or opposed alleged discrimination. The opinion gives decision-makers another risk to consider when making an adverse employment decision.

For a list of steps that employers should take to avoid litigation as a result of this decision, see EpsteinBeckerGreen's *Act Now* Advisory entitled "Supreme Court Rules that Fiancé of Protester Is Protected from Retaliation."

4. New York State Department of Labor Issues Hospitality Industry Wage Order

On January 1, 2011, the Hospitality Minimum Wage Order issued by the New York State Department of Labor ("NYSDOL") became effective. Among other things, the wage order does the following:

- **Increases the minimum wage for tipped employees and reduces tip credit**. The minimum wage required to be paid to tipped food service employees has increased from $4.65 to $5.00. The tip credit that employers may take toward the state and federal minimum wage of $7.25 per hour has been reduced to $2.25 per hour (from $2.60 per hour). Employers have a grace period, until February 28, 2011, to implement the increases, but they must provide back pay retroactive to January 1.
- **Permits employers to require food service workers to participate in tip pool.** The wage order permits employers to require food service workers to participate in a tip pool and may set the percentage to be distributed to each occupation from the tip pool. Only food service workers may receive distributions from the tip pool. Prior to the wage order, mandatory tip pooling was prohibited. Eligible employees must perform or assist in performing personal service to patrons at a level that is a principal and regular part of their duties. Examples of eligible employees include wait staff, counter personnel who service food or beverages, bus persons, bartenders, barbacks, food runners, hosts, and captains who provide direct food service to customers.
- **Imposes new recordkeeping requirements on employers that operate a tip-sharing or tip-pooling system.** Employers that operate a tip-sharing or tip-pooling system must establish, maintain, and preserve certain records for at least six years.
- **Permits tip credits for overtime calculations.** The regulations provide that when an employer is taking a credit toward the basic minimum hourly rate, the overtime will be the employee's regular rate of pay before subtracting any tip credit, multiplied by 1½, minus the tip credit. It is a violation of the overtime requirement for an employer to subtract the tip credit first and then multiply the reduced rate by 1½.

For a more detailed summary on the provisions of the Hospitality Minimum Wage Order, see EpsteinBeckerGreen's *Act Now* Advisory entitled "New York Department of Labor Issues New Wage-Hour Regulations Covering the Hospitality Industry - Restaurants, Hotels and Clubs."

5. NYSDOL Issues Opinion Letter on Internships

On December 21, 2010, the NYSDOL issued an opinion letter on whether internships (including summer internships) may qualify for an exception to the minimum wage law. To determine whether interns are exempt from the minimum wage law, the NYSDOL uses the six-factor test relied upon by the U.S. Department of Labor, and adds five additional factors. Thus, in order to be exempt from New York's minimum wage laws, an internship must satisfy all of the following 11 factors:

- The training, even though it includes actual operation of the facilities of the employer, is similar to training that would be given in an educational environment.
- The training is for the benefit of the intern.
- The interns do not displace regular employees and any work they may do is under close supervision.
- The employer who provides the training derives no immediate advantage from the activities of the trainees or students and, on occasion, operations may actually be impeded.
- The trainees or students are not necessarily entitled to a job at the conclusion of the training period and are free to take employment elsewhere in the same field.
- The trainees or students have been notified, in writing, that they will not receive any wages for such training and are not considered employees for minimum wage purposes.
- Any clinical training is performed under the supervision and direction of individuals knowledgeable and experienced in the activities being performed.
- The trainees or students do not receive employee benefits.
- The training is general, so as to qualify the trainees or students to work in any similar business, rather than designed specifically for a job with the employer offering the program.
- The screening process for the internship is not the same as for employment, and does not appear to be for that purpose, but involves only criteria relevant for admission to an independent educational program.
- Advertisements for the program are couched clearly in terms of education or training, rather than employment, although employers may indicate that qualified graduates may be considered for employment.

For more information on these 11 factors and how employers can ensure that their internship programs are exempt from minimum wage requirements, see EpsteinBeckerGreen's *Act Now* Advisory entitled "New York State Department of Labor Issues Opinion Letter on Internships."

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