Monthly Newsletter: February 2023

FEDERAL DEVELOPMENTS

Congress Eases Criminal Offense Restrictions for Employment with Financial Institutions

Included in the defense spending bill signed by President Biden in December 2022 is a section with key provisions for financial institutions that will ease restrictions on hiring candidates with criminal records. Section 5705 in the National Defense Authorization Act (NDAA) for Fiscal Year 2023, titled "Fair Hiring in Banking," further narrows convictions that would constitute a bar to employment under Section 19 of the Federal Deposit Insurance Act (FDIA) absent a written waiver by the Federal Deposit Insurance Corporation (FDIC). A representative for the FDIC confirmed that the changes are effective now and will be implemented by the FDIC in 2023.

Background

Section 19 generally prohibits any person who has been convicted of a crime of "dishonesty or a breach of trust or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense" from working in banking without first obtaining written consent from the FDIC.

Section 19 requires financial institutions to conduct criminal background checks on job candidates, regardless of whether state or local laws limit consideration of criminal histories in hiring. In July 2020, the FDIC issued a final rule that loosened the prohibitions in Section 19 by, among other things, expanding what are considered "de minimis" offenses and expanding the definition of "expungement" to include an order to seal a criminal record or a record relating to a pretrial diversion program.

Older Offenses

The Fair Hiring in Banking provisions go even further, providing that a waiver is not needed if it has been seven years or more since the offense occurred or if the individual was incarcerated with respect to the offense and it has been five years or more since the individual was released from incarceration. The need for a waiver also does not apply to conduct that an individual committed before the age of 21 and if it has been at least thirty months since the sentencing.

De Minimis Offenses

The provisions further permit the FDIC to exempt other "de minimis offenses" that they may determine by rule. Those rules must include a requirement that the offense "was punishable by a term of three years or less." Applicable de minimis offenses may include offenses for writing bad checks so long as the aggregate value of all the bad checks is $2,000 or less. The FDIC may further designate other "lesser offenses" to be exempt if one year or more has passed since conviction, "including the use of a fake ID, shoplifting, trespass, fare evasion, driving with an expired license or tag, and such other low-risk offenses."

Consent Applications

According to the provision, when reviewing an application to allow an individual with an applicable criminal conviction to work for a bank, the FDIC must make an "an individualized assessment." This assessment must take "into account evidence of rehabilitation, the applicant's age at the time of the conviction or program entry, the time that has elapsed since conviction or program entry, and the relationship of individual's offense to the responsibilities of the applicable position." They must further consider the individual's employment history, letters of recommendation, and the completion of any substance abuse or job preparation programs.

Key Takeaways

The Fair Hiring in Banking provisions clear some barriers for financial institutions to hire individuals who may have committed criminal offenses in the past but have since been rehabilitated, providing needed flexibility in hiring and recruitment. Further, the provisions go beyond the 2020 FDIC rule changes by amending Section 19 of the FDIA to create exceptions to hire individuals convicted of certain criminal offenses without burdensome consent review by the FDIC.

While the federal laws preempt conflicting state and local laws, the Fair Hiring in Banking provisions are in line with the growing number of jurisdictions across the country that have prohibited or limited consideration of job candidates' criminal histories in the hiring process. Those measures, such as so-called ban-the-box laws, have been imposed in part to promote rehabilitation and concerns that considering criminal histories in hiring disproportionately affects individuals in protected classes.

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EEOC Releases Guidance on Algorithms, Artificial Intelligence, and Disability Discrimination in Hiring

The U.S. Equal Employment Opportunity Commission ("EEOC") released guidance on employer use of algorithms and artificial intelligence ("AI") in the hiring and employee assessment processes to provide direction to employers on how they can avoid screening out applicants and employees with disabilities.

Importantly, the EEOC guidance offers "promising practices" for employers to utilize to comply with the ADA when using AI, including the following:

Training staff to recognize and process requests for reasonable accommodations as quickly as possible. To request an accommodation, an applicant or employee is not required to specifically mention the ADA or use the phrase "reasonable accommodation"; rather, if an applicant or employee mentions that a condition may make it difficult to test or it may cause a test result that is less than acceptable to the employer, the EEOC considers this a request for a reasonable accommodation. Examples of reasonable accommodations can include specialized equipment, alternative tests or testing formats, and exceptions to workplace policies. The guidance notes that employers do not have to "lower production or performance standards or eliminate an essential job function as a reasonable accommodation."

If using AI administered by a third-party entity authorized to act on the employer's behalf, asking the entity to forward requests for accommodations promptly so the employer can process them. Employers may be held responsible for the actions of other entities that the employer has authorized to act on its behalf. For example, if an applicant was taking a pre-employment test that was administered by a third-party software vendor (authorized to act on the employer's behalf) and the applicant were to tell the vendor that a medical condition was making it difficult to take the test (which qualifies as a request for a reasonable accommodation), and the vendor did not provide an accommodation as required under the ADA, the employer would likely be held responsible even though it was entirely unaware that the applicant reported a problem to the vendor or requested any accommodations. As such, it is important that if an employer is using AI administered by a third-party entity, the employer should ask the entity to forward any requests or feedback that might be considered an accommodation request promptly so the employer can address them. Alternatively, an employer could enter into an agreement with a third-party entity requiring it to provide reasonable accommodations on the employer's behalf, in accordance with the employer's obligations under the ADA.

Using AI that has been designed to be accessible to individuals with as many different kinds of disabilities as possible. AI can screen out individuals because of disability. "Screening out" occurs when a disability prevents an applicant or employee from meeting performance standards on a selection criterion and the applicant or employee loses a job opportunity as a result. For example, a chatbot (i.e., software designed to engage in communications online and through texts and emails) could be programmed with an algorithm that rejects applicants who indicate that they have a significant gap in employment history; however, if the individual's employment gap were caused by a disability, the chatbot could potentially screen out the individual because of the disability.

Cautions employers against relying on "bias-free" claims. Importantly, the guidance notes that an employer cannot rely on claims that AI is "bias-free." Even if vendors have taken steps to avoid Title VII bias (e.g., race, sex, etc.), these measures are typically distinct from steps needed to address disability bias. Steps employers can take to reduce the chance of screening out an individual because of a disability include clearly indicating that reasonable accommodations are available to people with disabilities, providing clear instructions on how to request accommodations, and providing applicants and employees undergoing any assessment that utilizes AI with as much information about it as possible.

Ensuring third-party vendor AI does not ask disability-related questions unless the inquiries are related to a reasonable accommodation request. AI cannot include unlawful disability-related inquiries or medical examinations. Prior to a conditional offer of employment, an employer could violate the ADA if it uses AI that "poses 'disability-related inquiries' or seeks information that qualifies as a 'medical examination.'" An assessment includes "disability-related inquiries" if it asks applicants or employees questions that elicit information about a disability or directly asks if the applicant or employee is an individual with a disability; an assessment qualifies as a "medical examination" if it "seeks information about an individual's physical or mental impairments or health." However, once an individual's employment has started, "disability-related inquiries may be made, and medical examinations may be required if they are legally justified under the ADA."

With the use of AI increasing in the employment context, employers should be aware how the use of such technology could lead to unlawful discrimination. While the EEOC has just recently released this guidance, states and municipalities have started passing laws related to the use of AI in employment. For example, a New York City law will require employers to conduct bias audits for software-driven tools that substantially assist in making decisions to hire or promote; this law is currently scheduled to go into effect on January 1, 2023, with enforcement of the law delayed until April 15, 2023. Additionally, the Office of Federal Contract Compliance Programs has included questions regarding the use of AI in its most recent proposed scheduling letter and itemized listing.

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FTC proposes rule banning and rescinding all employment non-compete agreements

The Federal Trade Commission issued a game-changing proposed rule that could change the employment terms of approximately 30 million American workers. The proposed rule would: (1) ban all non-compete agreements for employees and independent contractors; (2) rescind all employment non-compete agreements currently in place; and (3) require employers to affirmatively inform employees or independent contractors currently under an employment non-compete agreement that it is rescinded.

According to the FTC, by restricting workers' abilities to change jobs or start new businesses, non-compete clauses have the effect of decreasing competition, lowering wages, and stifling innovation.

The proposed rule defines what a non-compete agreement is, stating that it only applies to agreements that prevent workers from "accepting employment with a person, or operating a business, after the conclusion of the worker's employment with the employer." The rule also states that a contractual term that "has the effect" of prohibiting an employee from working in the same field or operating a business is a *de facto* non-compete. In other words, the proposed rule, on its face, does not ban non-solicitation of customers, but there could be some circumstances where a non-solicitation or non-disclosure agreement is so broad that it has the effect of prohibiting a worker from going to a competitor or starting a business.

The FTC has invited public notice and comments on the proposed rule. Such a major change in policy, which the FTC claims could affect one in five American workers, is likely to receive a substantial number of comments. The FTC will accept comments for 60 days after the proposed rule is published in the *Federal Register*. Sometime after the notice and comment period ends, the FTC will presumably issue a final rule. In all likelihood, the final rule will be subject to litigation.

Next steps for employers

What does this mean for employers now? For now, employers must continue to follow state law regarding non-compete and non-solicitation agreements. Many states, such as Oklahoma and California, already ban non-compete agreements in the employer context. Employers should carefully follow the progress of the FTC proposed rule and work with legal counsel in drafting or enforcing non-compete and non-solicitation agreements.

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The White House Blueprint for Renters Bill of Rights

It is important to note that exclusion in rental markets manifests in different ways, such as through inaccurate information appearing in tenant background checks. It is essential that tenant background checks are legal, fair, and non-discriminatory to ensure renters can access housing and have neighborhood choice. Housing providers are required by law to inform applicants for rental housing why they were denied or charged more. Housing discrimination also results from algorithms and credit reports used routinely in background checks and screening reports on tenant applicants, which can have negative effects on housing options, particularly for Black, Latino, and Asian households who are at greater risk of error in these reports. Although housing providers are legally required to provide adverse action notices (i.e., notice that information in a credit report was used to deny or alter the terms of the offer for credit, housing, employment, insurance, or other benefits), many applicants for rental housing do not receive any notice of the reason they are denied housing. Receiving notice of the reason for the denial would enable them to correct errors in a tenant screening report or address other reasons that might affect future housing access.

The CFPB has said it will identify guidance or rules that it can issue to ensure that the background screening industry adheres to the law, and coordinate law enforcement efforts with the FTC to hold tenant background check companies accountable for having reasonable procedures to ensure accurate information in the credit reporting system. The CFPB has also stated that it will continue to coordinate with federal and local government agencies to ensure that tenant screening companies do not illegally disseminate false and misleading information about tenants and that tenants can challenge erroneous information. People experiencing problems with a tenant background check can submit a complaint to the CFPB at www.consumerfinance.gov/complaint.

HUD, FHFA, FTC and USDA have said they will work with CFPB to release best practices on the use of tenant screening reports, including the importance of communicating clearly to tenants the use of tenant background checks in denying rental applications or increasing fees and providing tenants the opportunity to address inaccurate information contained within background screening reports. HUD, FHFA and USDA have said they will strongly encourage property owners in their respective portfolios to align with these best practices and inform them of any additional relevant legal requirements in their respective portfolios. HUD will also release guidance addressing the use of tenant screening algorithms in ways that may violate the Fair Housing Act.

Tenants know that the impact of an eviction extends well beyond the eviction itself. For example, eviction records are often included in background checks even when a case is dismissed on the merits or dismissed because the tenant pays overdue rent. An eviction filing often continues to appear on a tenant's screening report and impedes a renter's future ability to find housing. Although many states have passed laws to seal eviction records, when eviction records are not sealed immediately, they can still haunt families. This is because background check companies may fail to remove records from their databases after they are sealed.

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More information at:
FACT SHEET: Biden-Harris Administration Announces New Actions to Protect Renters and Promote Rental Affordability

U.S. House Bill Proposes Excluding Pandemic Evictions From Consumer Reports

On January 20, Representative Steve Cohen (D-Tenn) introduced the Keeping Evictions Off Credit Reports Act, H.R. 1594, in the U.S. House of Representatives seeking to prohibit evictions due to the COVID-19 pandemic from appearing on consumer reports. This is the third time that Representative Cohen has proposed this legislation. Representatives Bennie Thompson (D-MS), Yvette Clarke (D-NY), Andre Carson (D-IN), Bonnie Watson Coleman (D-NJ) and James McGovern (D-MA) are co-sponsoring the bill.

While the text of the current version of this bill is not yet available, previous versions of the bill proposed amending the Fair Credit Reporting Act to exclude from consumer reports any information related to a covered eviction for which notice was given during the period beginning March 13, 2020, and ending on the date that is 30 days after the termination date of the national emergency concerning the novel coronavirus disease (COVID–19). Covered eviction was defined as "any action by a landlord, owner of a residential property, or other person legally authorized to remove or cause the removal of a tenant or lessee from a residential property and does not include foreclosure on a home mortgage."

In the press release announcing the introduction of the bill, Representative Cohen stated, "American families have felt the negative economic impact of the pandemic for two years and should not be denied housing because of it. Many landlords across the country often do credit checks on prospective tenants to help determine if they are eligible to rent or lease. If there is an eviction on those reports, it often prevents prospective tenants from being approved for housing no matter the circumstances. The Keeping Evictions Off Credit Reports Act ends the stigma of an eviction and assures fairness in the rental application process."

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STATE, CITY, COUNTY, AND MUNICIPAL DEVELOPMENTS

Implementation of Connecticut's Clean Slate Law Set to Begin January 1, 2023

Earlier this month, Governor Ned Lamont announced the long-awaited implementation of the state's so-called "Clean Slate Act" – sort of. According to a recent press release, January 1, 2023 will see the full or partial erasure in some 44,000 cases involving convictions for cannabis possession. Individuals with eligible convictions for other crimes, including most misdemeanors and certain lesser felonies, will have to wait until the second half of 2023 as a result of implementation delays.

The Clean Slate Law & How it Works

Enacted in 2021, Clean Slate seeks to remove barriers to employment for eligible individuals convicted of certain low-level crimes, who have completed their sentence and have had no further involvement with the criminal justice system since their release, by setting forth a process for erasure of conviction records for most misdemeanor convictions and some felony convictions after a specified period.

Clean Slate provides for the automatic erasure of certain criminal records, including for offenses that have been de-criminalized (such as adult-use cannabis possession was in 2021), thereby eliminating the costly, time-consuming and cumbersome process of requesting expungement through the state's Board of Pardons and Parole for low-level offenses. The law also streamlines the process for expungement of other crimes through application to the Superior Court for convictions prior to January 1, 2000.

The law also added some new protections to those whose records have been erased. While Connecticut employers were already barred in many scenarios from making certain employment decisions based on an employee's or applicant's criminal history or erased criminal records, the Act makes it a discriminatory practice for an employer "to discriminate against [a] person in compensation or in terms, conditions or privileges of employment on the basis of that person's erased criminal history record information."

Impact on Employers

Once implemented, applicants or employees whose records have been erased will be able to truthfully tell employers that they have no history of arrest or criminal conviction (at least with respect to the erased offense). Prior to Clean Slate, existing law prohibited employers from taking certain actions based on an employee's or applicants' criminal history or erased criminal records or even asking about prior arrests or convictions on an employment application, except in certain circumstances where required by law (like education employees) or related to security or fiduciary requirements of the job. In those cases where inquiry is permissible, the law requires a notice, in clear and conspicuous language, defining erased records and advising that the applicant is not required to disclose arrests or convictions that have been erased.

Clean Slate further prohibits employers from advertising employment opportunities in a way that restricts employment of individuals whose criminal records have been erased.

By classifying violations of Clean Slate as discriminatory acts, employers are at risk of aggrieved individuals filing an employment discrimination complaint with the Commission on Human Rights and Opportunities or seeking declaratory or injunctive relief from the court. Employers should ensure their applications are compliant and that personnel involved in the hiring process are familiar with these requirements.

We await further updates on the rollout and implementation of the Clean Slate law in the new year.

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California's Civil Rights Department Adds More Detail to Regulations Regarding Consideration of Applicants' Criminal History

In the weeks and months since it changed its name from the Department of Fair Employment and Housing to the California Civil Rights Department ("CRD"), the agency has been busy. Most recently, the CRD released proposed modifications to the regulations under the Fair Employment and Housing Act ("FEHA") related to the use and consideration of criminal history information in employment decisions—a process that is already exceedingly complicated thanks to overlapping privacy laws (e.g., the California Consumer Privacy Act), the Investigative Consumer Reporting Agencies Act, and local "ban the box" ordinances in Los Angeles and San Francisco.

Mercifully for employers, the latest set of proposed changes, mostly, help clarify their obligations—although they do impose some additional burdens on the process. The latest round of proposed changes includes the following:

- The caveat that employers, with limited exceptions, generally do not have a legal obligation to check the criminal history of an applicant or current employee; however, if they choose to do so, they must abide by the legal limitations described in the regulations.
- Clarifying what it means for the employer or the employer's agent to be "required by law" to conduct a criminal background check such that the exemption from the prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made applies. Specifically, the new regulations clarify that "[a] state, federal, or local law requiring another entity, such as an occupational licensing board, to conduct a criminal background check will not exempt an employer from the prohibition[]."
- Supplementing the level of detail of the individualized assessment an employer must undertake before taking an adverse action based solely or in part on the applicant's conviction history, by including non-exhaustive considerations for each factor of the analysis.
- Adding a description of evidence of rehabilitation or mitigating circumstances that an applicant voluntarily may provide, including:
    - when the conviction led to incarceration, the applicant's conduct during incarceration, including participation in work and educational or rehabilitative programming and "other prosocial conduct;"
    - the applicant's employment since the conviction or completion of sentence;

    - the applicant's community service and engagement since the conviction or completion of sentence, including but not limited to volunteer work for a community organization, engagement with a religious group or organization, participation in a support or recovery group, and other types of civic participation; and/or
    - the applicant's other rehabilitative efforts since the completion of sentence or conviction or mitigating factors not captured above.
- A requirement that employers maintain any forms, documents, or information used to complete the forms described in the subsection on the Work Opportunity Tax Credit ("WOTC") in confidential files separate from the applicant's general personnel file and not use or disseminate these forms, documents, or information for any purpose other than applying for the WOTC.
- An expansion of the definition of "employer" to include "any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list."

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Upcoming Changes in California's Law Regarding Criminal Background Checks

Employers that rely on criminal background checks to vet candidates know all too well that they must comply with a legion of statutes, ordinances, and regulations. On December 15, 2022, the Civil Rights Council ("Council") of the California Civil Rights Department ("Department") released its latest draft revisions to the Fair Employment and Housing Act (FEHA) regulations that govern employers' use and consideration of criminal history in employment decisions under Cal. Code Regs. Tit. 2, § 11017.1. These changes were made in response to written comments on earlier proposed regulations received during a 45-day public comment period that ended August 10, 2022.[1] The following summarizes the primary changes in the latest round of proposed modification to the FEHA regulations regarding criminal history. As it stands, the changes are likely to be adopted in full.

Introduction to Regulations

In a proposed introductory section to the regulations, the Council seeks to clarify that "with limited exceptions," employers have no legal obligation to check the criminal histories of applicants or current employees. If employers choose to do so, they must abide by the legal limitations set forth in the regulations.

Individuals with claims under the Fair Chance Act[3] may file a complaint for the Department to investigate or may obtain an immediate right-to-sue notice.

Prohibition of Consideration of Criminal History Prior to a Conditional Offer of Employment

Only if an employer or employer's agent is *required by law* to conduct criminal background checks can any of the enumerated exceptions to the prohibition against inquiring about or using criminal history prior to making a conditional offer apply. If a state, federal, or local law requires another entity (*e.g*., occupational licensing board) to conduct a criminal background check, that will not suffice to exempt the employer from the prohibitions "in this subsection and other requirements of this section."

If an applicant volunteers information about their criminal history before receiving a conditional offer, the employer may not consider any of such information it is prohibited from considering under subsection (b) of the current proposal, which prohibits consideration of certain types of criminal history. Unless an enumerated exemption to the prohibition against inquiring about or using criminal history prior to making a conditional employment offer applies, the employer also may not consider any other volunteered conviction history information until after it has decided whether to make a conditional employment offer.

Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History

The Council proposed *additional* considerations for the individualized assessment an employer must perform when it considers rescinding a conditional offer of employment based solely or in part on the applicant's conviction history. In determining what constitutes a "direct and adverse relationship" that warrants rescinding the conditional offer, the Council clarified that an applicant's possession of a benefit, privilege, or right required in order to perform the job by a licensing, regulatory, or government agency or board is "probative" of the conviction history's *not* being directly and adversely related to the duties of the job. The Council also added specific factors to consider for each of the "nature and gravity of the offense or conduct," "time that has passed since the offense or conduct and/or completion of the sentence," and "nature of the job held or sought" prongs of the individualized assessment.

To the extent an applicant voluntarily provides evidence of rehabilitation or mitigating circumstances before or during the initial individualized assessment (when that evidence would otherwise follow being notified of the right to respond to the preliminary decision to rescind the conditional employment offer), it must nevertheless be considered as part of the initial individualized assessment. After an employer notifies an applicant in writing of a preliminary decision to disqualify based on the applicant's conviction history and offers the opportunity to submit evidence of rehabilitation or mitigating circumstances, any such evidence (including documentary evidence) must be optional and may only be provided by the applicant voluntarily. Evidence of rehabilitation or mitigating circumstances the employer may consider includes (but is not limited to):

- Whether the conviction led to incarceration, the applicant's conduct during incarceration, including "participation in work and educational or rehabilitative programming and other prosocial conduct";
- The applicant's employment history since the conviction or completion of sentence;
- The applicant's community service and engagement since the conviction or completion of sentence, including but not limited to volunteer work for a community organization, engagement with a religious group or organization, participation in a support or recovery group, and other types of civic participation; and/or
- The applicant's other rehabilitative efforts since the completion of sentence or conviction or mitigating factors not captured in the above subfactors.

An employer may not: refuse to accept additional evidence voluntarily provided by an applicant at any stage of the hiring process; *require* an applicant to submit any of the additional evidence described in this paragraph of the regulations; *require* an applicant to provide a specific type of documentary evidence; or *require* an applicant to disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable statuses or the existence of a disability.

Employers Seeking the Work Opportunity Tax Credit

An employer must maintain "any forms, documents, or information used to complete the forms described in this section [on the Work Opportunity Tax Credit (WOTC)] in *confidential* files separate from the applicant's general personnel file and shall not use or disseminate these forms, documents, or information for any purpose other than applying for the WOTC."

Definitions

The Council proposed expanded definitions of the following key terms for purposes of section 11017.1 only:

- *Applicant*includes "existing employees who have applied or indicated a specific desire to be considered for a different position with their current employer."
- *Employer*includes "any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list."

The above proposed modifications were subject to a 15-day written comment period, which ended on December 30, 2022. The schedule for the Council's next meeting in 2023 has not yet been publicly released.

In light of these impending changes in California, employers that use criminal records to vet candidates should consider a privileged review of all of the various policies, procedures, and other documents related to the screening process (*e.g.*, job applications, offer letters, guidelines for recruiters, adjudication standards, pre-adverse action notices, etc.). With the proliferation of new laws and ordinances, it is more important than ever for employers to keep abreast of developments regarding this topic nationwide.

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Employer Alert: SB 731 Will Expand Sealing of Criminal Records

Beginning July 1, 2023, SB 731 will provide for the automatic sealing of certain felony criminal records. Arrests that do not result in conviction will also be sealed. This law also permits individuals with violent or serious felony records to petition courts to order their criminal records sealed. Sealing of these records will make them unavailable to most employers through a background search, although school districts may still access these records for teacher credentialing or employment decisions.

Under SB 731, most defendants convicted of a felony are eligible to have their records sealed if they have completed their sentence, along with parole and probation, and they haven't been convicted of a new felony for 4 years. Those defendants with sex offender status are excluded.

Notably, Governor Newsom vetoed SB 1262, which would have facilitated criminal background searches by permitting searches of the California Superior Court online index using a defendant's date of birth and/or driver's license number. This law was proposed in response to the May 2021, ruling by the California Court of Appeals in *All of Us or None – Riverside Chapter vs. W. Samuel Hamrick*, that prohibited this practice. This case was later denied certiorari by the California Supreme Court. See our article here for more details.

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NY Employers to Provide Certain Notices Electronically

On December 16, 2022, New York Governor Kathy Hochul signed an amendment to New York Labor Law Section 201, mandating that employers make notices required to be physically posted at a worksite under federal and state law or regulation available electronically as well through the employer's website or by e-mail. The amendment took effect immediately.

Previously, NY Labor Law Section 201 required employers to physically post notices "in a conspicuous place" on each floor of its premises. Employers must now also either: (i) e-mail employees an electronic copy of the notices; or (ii) post an electronic copy of the notices on the employer's website. Additionally, employers must inform employees that the notices are available electronically (a requirement that appears to apply even if the employer e-mails the notices to their workforce).

Amended Section 201 aligns with guidance issued by the United States Department of Labor in December 2020 stating it is an employer's obligation to provide required notices to all affected individuals, that electronic notice can be used to meet notice obligations in some circumstances, and that electronic notice does not replace posting requirements. Notices that employers must typically post at the worksite that now should also be made available electronically under Amended Section 201, include U.S. and New York State wage/hour, leaves/benefits, workplace safety, and non-discrimination notices, among others. Note that the Amended Section 201 is silent on whether any notices mandated by local law or regulation are to be made electronically available, although employers may have separate posting and distribution requirements under the applicable local law or regulations.

Employers should be mindful when preparing electronic notices, just as when they post physical notices in the workplace, that some notices are only required based on an employer's headcount (*e.g.*, the new Veteran Benefits and Services posting requirement applies to private employers with over 50 full-time equivalent employees, pursuant to the recently enacted legislation establishing the January 1, 2023 posting deadline for this item), industry, and/or their status as a federal contractor, and that certain notices may require postings in English and other languages.

Employers should promptly ensure compliance with the new electronic notice requirement and notify employees of the method used to provide electronic notice, while still maintaining the practice of physically posting notices in the workplace. Employers should contact employment counsel for more detailed guidance on which notices may apply to their business.

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New York State Enacts Pay Transparency Law

On December 21, 2022, New York State Governor Kathy Hochul signed into law the New York State Pay Transparency Law (PTL), which adds a new § 194-b to the New York State Labor Law (NYSLL). When the PTL becomes effective on September 17, 2023, it will require covered employers to disclose the salary range and job description for any job, promotion or transfer opportunity that can or will be performed, at least in part, in New York State. In enacting this new law, New York State joins the states of California and Washington and several localities around the country, including New York City, in requiring employers to disclose wage information. Employers should be familiar with the details of the new law listed below and be ready to comply with it.

Covered Employers

The PTL covers all employers with at least four employees and employment agencies (temporary help firms as defined by § 916(5) of the NYSLL are excluded).

Disclosure Requirements

When the PTL takes effect on September 17, 2023, whenever a covered employer advertises a job, promotion or transfer opportunity, it will have to disclose the minimum and maximum annual salary or hourly range of compensation for such job, promotion or transfer opportunity that the employer in good faith believes to be accurate at the time the advertisement is posted, and the applicable job description, if one exists.

For positions paid solely on commission, covered employers need only state in the posting that compensation is based on commission.

Recordkeeping Requirements

The PTL requires covered employers to keep and maintain necessary records to comply with its disclosure requirements, including, but not limited to, the history of compensation ranges for each job, promotion or transfer opportunity and any existing job description.

Prohibited Retaliation

The PTL prohibits covered employers from refusing to interview, hire, promote, employ or otherwise retaliate against an applicant or current employee for exercising any rights under the law.

Enforcement

Persons who believe they have been aggrieved by a violation of the law may file a complaint with the New York State Commissioner of Labor (Commissioner) pursuant to § 196-a of the NYSLL, which authorizes the Commissioner to determine an appropriate remedy. Employers found in violation of the law are also subject to a civil penalty pursuant to § 218 of the NYSLL.

Interaction With Other Laws

The PTL expressly provides that it shall not be construed or interpreted to supersede or preempt any provisions of local law, rules or regulations. Thus, to the extent that any local law, such as the New York City Salary Transparency Law, may impose greater pay disclosure requirements, employers covered by such local laws must continue to comply with them. (See our prior alert, "New York City Salary Transparency Law Takes Effect on November 1, 2022.")

Additional Guidance

The PTL authorizes the Commissioner to issue rules and regulations to effectuate the law's provisions. When the Commissioner does so, covered employers should have a better understanding of their compliance obligations.

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New York City Mandates AI Bias Analysis

Businesses have become increasingly reliant on artificial intelligence (AI) to assist with hiring, promotion, and other employment-related tasks. These tools are facing increased scrutiny from regulators, especially in New York City which has passed the first law in the United States (Local Law 144) requiring employers to conduct bias audits of AI-enabled tools used to assist with or make employment decisions. The Law refers to these tools as automated employment decision tools (AEDTs). Local Law 144 applies to employers and employment agencies alike and sets forth several steps that employers must take before implementing or continuing to use AEDTs.

What Qualifies as an AEDT?

Businesses that use AI-driven hiring or promotion tools must answer the critical question of whether the tools used constitute an AEDT within the meaning of Local Law 144. Local Law 144 defines AEDTs as "any computational process, derived from machine learning, statistical modeling, data analytics, or artificial intelligence, that issues simplified output, including a score, classification, or recommendation, that is used to substantially assist or replace discretionary decision making for making employment decisions that impact natural persons."

In response to public comment, the New York City Department of Consumer and Worker Protection (DCWP) issued proposed rules that clarify the scope of an AEDT as processes designed "to substantially assist or replace discretionary decision making," such as:

1. Relying solely on the tool's simplified output (score, tag, classification, ranking, etc.) without considering other factors;
2. Using the tool's simplified output as one of a set of criteria where the output is weighted more than any other criterion in the set; or
3. Using the tool's simplified output to overrule or modify conclusions derived from other factors.

With this clarification, businesses can safely assume that an AI-driven hiring or promotion tool that is used as the final decision in hiring or to modify a conclusion derived from other factors, including modification of human decision-making, is likely to be in-scope for Local Law 144.

What Does the Law Require?

Employers who utilize AEDTs must:

1. Subject AEDTs to a bias audit, conducted by an independent auditor, within one year of their use;

2. Ensure that the date of the most recent bias audit and a "summary of the results", along with the distribution date of the AEDT, are publicly available on the career or jobs section of the employer's or employee agency's website;
3. Provide each resident of NYC who has applied for a position (internal or external) with a notice that discloses that their application will be subject to an automated tool, identifies the specific job qualifications and characteristics that the tool will use in making its assessment, and informs candidates of their right to request an alternative selection process or accommodation (the notice shall be issued on an individual basis at least 10 business days before the use of a tool); and
4. Allow candidates or employees to request alternative evaluation processes as an accommodation.

Enforcement & Penalties

The Law went into effect on January 1, 2023, but in response to the volume of public comments received in connection with proposed rulemaking, the DCWP has announced that it will postpone enforcement until April 15, 2023. Local Law 144 provides for enforcement by the NYC Corporation Counsel, and per the penalty schedule published by DCWP, penalties range from $375-$1,500 for each violation.

Next Steps

Organizations with employees in New York City should take advantage of the brief reprieve in enforcement and work with their vendors and outside counsel to assess their use of AI-driven tools for hiring and promotion decisions. In particular, businesses should determine in connection with their use of AI-driven tools, (1) the tool's decision-making objectives (what is the model trained to detect and what data was used to train the model), (2) what data does the tool collect; (3) what is the tool's evaluative criteria for filtering out candidates, and (4) what assurances have been provided regarding bias.

Once that evaluation is complete, businesses can then determine whether their process qualifies as an AEDT, and establish a roadmap for compliance with Local Law 144.

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Pennsylvania Expands Definitions of Race, Sex and Religious Creed in Human Relations Act

On December 8, 2022, Pennsylvania's Independent Regulatory Review Commission approved amendments to the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act regulations to add a subchapter providing new definitions of race, gender and religious creed under the acts, 16 Pa. Code, Chapter 41, Subchapter D, § 41.201 —41.20.

Of particular importance, the amended regulations expand the definition of race to include hairstyles associated with race and the definition of sex to include sexual orientation—protected categories that were not previously covered under express provisions of Pennsylvania law.

Under the new regulations, the term *sex*, "when used in connection with the unlawful discriminatory practices proscribed by the PHRA," includes pregnancy, childbirth and related medical conditions; breastfeeding; sex assigned at birth; gender identity or gender expression; affectional or sexual orientation, including heterosexuality, homosexuality, bisexuality, and asexuality; and "differences of sex development, variations of sex characteristics, or other intersex characteristics."

The term *race* includes ancestry, national origin or ethnic characteristics; interracial marriage or association; Hispanic national origin or ancestry; "traits historically associated with race, including, but not limited to: (i) Hair texture; (ii) Protective hairstyles, such as braids, locks, and twists"; and any other national origin or ancestry "as specified by a complainant in a complaint."

Religious creed includes all aspects of religious observance and practice, as well as belief.

The new regulations will become effective within 60 days of publication in the Pennsylvania Bulletin.

Pennsylvania employers should consider reviewing their discrimination and harassment policies and training programs in light of these expanded definitions which, the amended regulations assert, "ensure[] that all complaints filed with the Pennsylvania Human Relations Commission are investigated consistent with the rules outlined herein."

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Connecticut Clean Slate Law Brings New Requirements for Employers in 2023 and Beyond

On June 10, 2021, Governor Ned Lamont signed into law Connecticut's "Clean Slate" law, Public Act No. 21-32. The Clean Slate law became effective January 1, 2023, and it provides for the automatic erasure of certain criminal records.

Who Is Affected?

The Clean Slate law's automatic erasure provision affects individuals with misdemeanors and low-level felony records. Individuals who have been convicted of sexual offenses, family violence, and firearm-related crimes are not eligible for the erasure of those records under the new law.

The law provides for the automatic erasure of records after seven years from the date on which the court entered the convicted person's most recent judgment of conviction of a classified or unclassified misdemeanor offense.

The law also provides for the automatic erasure of the following records after ten years from the date on which the court entered the most recent judgment of conviction:

- Convictions for any class D or E felony
- Any unclassified felony offense carrying a term of imprisonment of not more than five years

Misdemeanors committed by persons under eighteen years of age will be automatically erased if the offense or offenses occurred on or after January 1, 2000, and before July 1, 2012. Misdemeanor offenses committed by minors prior to January 1, 2000, may be erased upon petition by the convicted person to the Connecticut Superior Court "at the location in which such conviction was effected."

Now that Connecticut's Clean Slate law is effective, employers may want to consider what impact the law will have on hiring and employment practices, especially in the wake of new prohibitions that make it an unlawful discriminatory practice for an employer to make decisions based on an employee's or job applicant's erased criminal record.

Connecticut's "ban the box" law prohibits employers from denying employment solely on the basis of, or inquiring about, a job applicant's prior arrests, criminal charges, or convictions on an initial employment application, unless certain exceptions applied. In addition, employment application forms that include questions concerning an applicant's criminal history are required to contain a notice, in clear and conspicuous language, that the applicant is not required to disclose the existence of any erased arrest, criminal charge, or conviction.

The Clean Slate law expands upon these prohibitions by prohibiting employers from requiring a job applicant with erased criminal records to disclose those records, denying employment based on an applicant's erased criminal history record, or inquiring about an applicant's criminal history on a job application unless it contains, in a clear and conspicuous manner, a notice essentially stating the following:

The applicant is not required to disclose the existence of any erased criminal history record information. Erased criminal history record information are records pertaining to a finding of delinquency or that a child was a member of a family with service needs, an adjudication as a youthful offender, a criminal charge that has been dismissed or nolled, a criminal charge for which the person has been found not guilty or a conviction for which the person received an absolute pardon or criminal records that are erased pursuant to statute or by other operation of law. Any person with erased criminal history record information shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath.

The Clean Slate law applies to current employees, not just job applicants, and prohibits employers or their agents from discharging, causing to discharge, or in any manner discriminating against any employee solely on the basis that the employee has an erased criminal history record.

How to Comply and Best Practices

What does this all mean for employers? Employers may want to consider discussing these changes with appropriate personnel and managers, especially those responsible for hiring and interviewing prospective candidates, so that they are aware of the latest prohibitions and not relying on erased criminal records when making employment decisions. Employers may also want to review job application forms for inquiries concerning criminal record histories and make revisions to bring the forms into compliance with the Clean Slate law.

As the law made changes to the requirements for employment applications and background checks, employers that use third-party services for background checks may want to consider contacting those vendors to confirm they are complying with the new law. Employers may also need to revise their equal employment opportunity policies in light of the new law.

Finally, employers may want to be aware that a violation of the Clean Slate law may constitute a "discriminatory practice," pursuant to which an employee or prospective employee may file a complaint with the Connecticut Labor Commissioner or the Connecticut Commission on Human Rights and Opportunities, or bring an action in Connecticut Superior Court.

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Gainesville, Florida Fair Chance Act Alert

Update we recently received from Seyfarth Shaw LLP about a law that was recently passed in Gainesville, Florida. The City of Gainesville passed the Fair Chance Hiring Ordinance (Ordinance No. 2022-617 | Code of Ordinances | Gainesville, FL | Municode Library).

Applying to any employer with 15 or more employees, it prohibits any questions regarding an applicant's criminal history in the application process until a conditional offer of employment has been made. Once a conditional offer of employment is made, a background report may be run. An employer can only take adverse action against an applicant based on their criminal history if the employer has determined that the applicant is unsuitable for the job based on an individual assessment.

If an employer chooses to take adverse action based on an applicant's criminal history, the employer must inform the applicant of the decision, provide the applicant with a copy of the criminal history relied upon, provide the applicant with a reasonable opportunity to provide additional information or context, including information related to any rehabilitation undertaken, a statement that the decision was made based on the applicant's criminal history.

Importantly, the Ordinance also requires the notice include mandated language contained within the statute.

The penalty for violation may only be enforced by the city of Gainesville. The first violation is $500, with half going to the Complainant. Each additional violation is $500.

Due to this legislation, we recommend revision of any adverse action notices or sample adverse action notices. Please reach out to Seyfarth Shaw LLP if you have questions or need recommendation or guidance.

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COURT CASES

Nevada Supreme Court Allows Employees to Sue Employers for Failure to Accommodate Medical Marijuana Use, Rejects Possible Related Claims

Resolving prior uncertainty as to whether Nevada law provides workplace protections to employees who use medical cannabis away from work, the Nevada Supreme Court has decided that NRS 678C.850(3), a statute in the NRS Chapter on the Medical Use of Cannabis, provides employees with a private right of action to claim an employer has failed to seek reasonable accommodations of off-work medical marijuana use. However, the court also held that employees in these circumstances may **not** bring a claim for tortious discharge (in violation of public policy) or unlawful discrimination for engaging in the lawful use of a legal product protected by NRS 613.333, or for negligent hiring, training, or supervision.

In *Freeman Expositions, LLC v. Eighth Judicial District Court,* the plaintiff accepted a journeyman position with the employer, dispatched through a union. After an incident occurred on the worksite, the employee was required to take a drug test, and tested positive for cannabis. The employer terminated his employment, consistent with a collective bargaining agreement with a zero-tolerance provision for drug use, and also sent the union a letter stating that the employee was no longer eligible for dispatch to the employer's worksites. At the time of the termination, however, the employee held a valid medical cannabis identification card issued by the state of Nevada.

The employee filed suit, asserting multiple causes of action against the employer. The defendant employer moved to dismiss all claims, but the district court allowed the following claims to proceed: (1) unlawful employment practices under NRS 613.333, the state's law against discrimination for lawful use of any product outside work which does not adversely affect job performance or safety of others; (2) tortious discharge; (3) negligent hiring, training, and supervision; and (4) violation of the medical needs of an employee pursuant to the state's medical marijuana law. The employer filed a petition with the Nevada Supreme Court, seeking dismissal of all remaining claims.

The Nevada Supreme Court ruled that the district court had properly denied the employer's motion to dismiss the claim brought pursuant to NRS 678C.850(3), finding the statute implied a private right of action to enforce its provisions. Specifically, the statute requires employers to: attempt to make reasonable accommodations for the medical needs of an employee who engages in the medical use of cannabis if the employee holds a valid registry identification card, provided that such reasonable accommodation would not:

(a) Pose a threat of harm or danger to persons or property or impose an undue hardship on the employer; or

(b) Prohibit the employee from fulfilling any and all of his or her job responsibilities.

In concluding that a private right of action exists, the court looked to the Legislature's intent and held that the plaintiff was part of the class for whose benefit the statute was enacted. The Nevada Supreme Court also noted that the legislative history of the statute demonstrates that the Nevada law was modeled on Arizona's medical cannabis statute and that a federal district court in Arizona concluded that the analogous Arizona law included an implied right of action to implement the statutory directive.

The Nevada Supreme Court also reasoned that because no other Nevada statute provides medical cannabis users with a cause of action against employers that violate the directives of the state's medical cannabis law, Nevada, like other jurisdictions with statutes directing employers to accommodate employees using medical cannabis, would recognize a private right of action even where the legislators did not expressly include such a remedy in the statutory scheme. The court concluded that recognizing an implied right of action would give force to the public policy sought to be advanced by the statutory scheme.

Notably, since the issue before the Nevada Supreme Court was essentially an appeal of the trial court's resolution of a motion to dismiss for failure to state a claim, the court declined to address the merits of the case, as for example whether an employer must attempt to accommodate an individual who uses marijuana after the individual has been involved in a workplace incident. In a footnote, the court explicitly declined to speculate as to what the defendant employer owed the plaintiff under NRS 687C.850(3) to "attempt to make reasonable accommodations for the medical needs of an employee who" uses medical cannabis.

As for the claim for tortious discharge, the Nevada Supreme Court held that the public policy of prohibiting discrimination against medical marijuana users was qualified, in that it does not mandate a particular response by employers, and therefore is not a public policy sufficiently compelling to support claims for tortious discharge.

In regard to the claim for unlawful discrimination against an individual who engages in the lawful off-work use of a product that does not affect work performance, pursuant to NRS 613.333, the Nevada Supreme Court extended its holding in *Ceballos v. NP Palace, LP* to hold that that law does not provide a basis for a claim for employment discrimination for the use of medical cannabis outside of the workplace because medical cannabis remains illegal under federal law.

Finally, as to the plaintiff's negligent hiring, training, and supervision claims, the Nevada Supreme Court held the alleged wrong related to the employer's decision to end the plaintiff's employment because he used medical cannabis, and therefore the plaintiff had failed to state a claim for negligent hiring, training, or supervision. The Nevada Supreme Court accordingly concluded that the district court erred by not dismissing the claims for tortious discharge, unlawful employment practices under NRS 613.333, and negligent hiring, training, and supervision.

Employers in Nevada should be prepared to engage in the interactive process if an employee discloses medical cannabis use outside of the workplace or tests positive for cannabis use, absent cause to discipline the employee for other reasons. However, NRS 678C.850 does not require employers to allow the medical use of cannabis in the workplace or to "modify the job or working conditions of a person who engages in the medical use of cannabis that are based upon the reasonable business purposes of the employer." NRS 678C.850(2)-(3). Employers should confer with knowledgeable counsel as needed regarding these issues.

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Court Rules Apple's Face-ID Does Not Violate BIPA

An Illinois appellate court has ruled that Apple's biometric unlock features, including Touch ID fingerprint scanning and Face ID facial geometry scanning, do not violate the state's Biometric Information Privacy Act (BIPA). The case involved a group of Illinois residents who alleged that Apple's Face ID feature impermissibly collects facial geometries from pictures stored in the Photo app on Apple devices. The plaintiff class claimed that Apple violated BIPA by collecting, possessing, and profiting from biometric information without the knowledge or consent of users. According to the complaint, Apple did not have an established retention policy for biometric data and failed to obtain written permission to collect the information.

According to the appellate opinion, Apple never collected, stored, or managed the data collected by Touch ID and Face ID because the biometric data are stored locally on the user's device. The court distinguished this local storage, which Apple contends is strictly controlled by the user, from cloud-based storage that takes the data out of the user's custody. BIPA doesn't define "possession," so this ruling supports a narrow reading of the law based on the data's physical storage location.

The court did not address whether technology that stores biometric data locally but still actively "phones home" for updates would change the calculus. For now, tech companies have a tested roadmap for BIPA-compliant security features: store the data locally and encrypt it.

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Employer Justified in Terminating Employee Over Inappropriate Social Media Posts

Q: Can a private employer terminate an employee for social media posts that violate internal policies?

A: The Third Circuit, in a nonprecedential opinion, recently determined that a major airline acted permissibly in firing an employee for sharing offensive social media posts, affirming the district court's grant of summary judgment grant on all counts.

The employee brought suit against her former employer, an airline, alleging retaliation and gender and disability discrimination. In August 2016, she requested a disability accommodation so she would not need to engage in "excessive walking." Her employer denied her requested accommodation but provided a different accommodation. In July 2017, the employee again requested the original accommodation, which was granted after she appealed to a company vice president. In September 2017, the employee posted several comments on social media having nothing to do with her medical condition or request for accommodation. Her posts included statements that too many "blue-eyed people" were reproducing with "brown-eyed people," stating that "blue-eyed people" should "unite." Another post suggested that Black people should be thankful that their ancestors were brought to the United States as slaves, claiming that the standard of living is higher here than in Africa.

The employee's posts went viral, and other airline employees made internal complaints, stating that they did not want to work with her because of her racist posts. Additionally, members of the public posted collages of the employee's posts to the airline's public social media pages. In response to the outcry, the airline suspended her, and in October 2017, she was terminated. In February 2018, she filed complaints with the EEOC and the Pennsylvania Human Rights Commission for failure to accommodate her disability. She then brought suit against her former employer in federal court, alleging that the social media posts were a pretext to fire her due to her gender and/or disability.

The district court granted summary judgment on all counts in favor of the employer, and the Third Circuit affirmed. The Third Circuit determined that the employee failed to provide any evidence that the social media posts were a pretext to fire her. There was a two-month gap between her second request for accommodation and when she was fired, which the court concluded was too long a period to infer retaliation. The court also noted that no other evidence supported a connection between the plaintiff's accommodation requests and her termination or to refute the airline's basis for her termination — the social media posts.

The plaintiff further argued that she was treated differently from a male airline employee who made social media posts disparaging Trump voters. The court rejected this argument since there was no evidence in the record that the airline knew of the other employee's social media posts, whereas the airline was made aware of the plaintiff's posts by many sources. Knowledge by the employer, the court stated, was the dispositive factor.

As the employee presented no evidence of a pretextual firing, the Third Circuit concluded her termination was proper. She was terminated for violating company policies and generating an outcry from both customers and other employees, which legitimately justified termination.

Takeaways

It is important for companies to have comprehensive social media and electronic communication policies and communicate them to all employees, making clear that the employer policies prohibiting discrimination and harassment extend to electronic communications. While employers may not chill employees' right to engage in concerted activity by discussing terms and conditions of employment, this case makes clear that such rights do not extend to racist or otherwise discriminatory conduct.

In addition, this case provides a good reminder that employers must be careful when making employment decisions close in time to when employees engage in protected activity, such as by requesting a disability accommodation. Documentation is key to clarify the legitimate business reason for the adverse employment action and to refute any claims of retaliation. Additionally, it is important when taking adverse employment action to act consistently to avoid discriminatory bias claims against a protected class.

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INTERNATIONAL DEVELOPMENTS

Canada's Competition Bureau Publishes Draft Guidelines for Enforcement of New "Wage-Fixing Agreement" and "No-poach Agreement" Prohibitions

- Canadian agency issued draft enforcement guidance on new wage-fixing agreement and no-poach agreement prohibitions included in amendments to Competition Act, which take effect on June 23, 2023.
- Violators of the law could face monetary and criminal penalties, including jail time.
- Public input on this draft is open through March 3, 2023.

When Bill C-19, *Budget Implementation Act, 2022, No. 1* received Royal Assent in June 2022, it amended Canada's Competition Act *(Act) by including* a new provision, s. 45(1.1), which comes into force on June 23, 2023. Section 45(1.1) will prohibit employers from conspiring, agreeing or arranging to enter into "wage-fixing agreements" and "no-poach agreements" with another employer that is not affiliated with them. The *Competition Act* applies to all businesses operating in Canada, whether they are provincially or federally regulated.

On January 18, 2023, Canada's Competition Bureau (Bureau) published draft enforcement guidance on wage-fixing and no poaching agreements (Draft Guidelines) for public consultation. The Draft Guidelines describe the Competition Bureau's proposed approach to enforcing s. 45(1.1), and supplement the Bureau's existing Competitor Collaboration Guidelines (CCGs). Those interested in submitting their views on the Draft Guidelines may do so by completing an online feedback form by March 3, 2023 (11:59 pm Pacific time).

Summary of Draft Guidelines

Set out below is a summary of key aspects of the Bureau's Draft Guidelines:

New Agreements and Conduct that Reaffirms or Implements Older Agreements

Section 45(1.1) will apply only to new agreements entered into by unaffiliated employers ("regardless of whether they compete in the supply of a product") on or after June 23, 2023, and to "conduct that reaffirms or implements older agreements" as of that date. "Employers" includes directors, officers, and certain agents/employees acting on the employer's behalf.

Sharing Sensitive Employment Information

The Bureau does not consider "conscious parallelism" ("when a business acts independently with awareness of the likely response of its competitors or in response to the conduct of its competitors") a violation of section 45; however, under subsection 45(3), "parallel conduct coupled with facilitating practices, such as sharing sensitive employment information or taking steps to monitor each other's employment practices," could result in the Bureau's drawing an inference of an agreement between the parties in violation of subsection 45(1.1). Employers are cautioned to be mindful that, when sharing information with each other in the course of collaborative activities (*e.g.*, benchmarking employment terms), their conduct does not raise concerns under subsection 45(1.1).

Prohibited Wage-Fixing Agreements

The "wage fixing" prohibition in s. 45(1.1) applies to agreements to fix, maintain, decrease or control salaries, wages, or "terms and conditions" of employment that could affect a person's decision to enter into or remain in an employment contract, *i.e.*, responsibilities, benefits and policies associated with a job such as job descriptions, allowances (*e.g.*, *per diem* and mileage reimbursements), non-monetary compensation, working hours, location and non-compete clauses, or other directives that may restrict an individual's job opportunities.

Prohibited No-poaching Agreements

The no-poaching agreement prohibition in s. 45(1.1) applies to agreements between employers that limit their employees' opportunities to be hired by each other, *e.g.*, by "restricting the communication of information related to job openings and adopting hiring mechanisms, such as point systems, designed to prevent employees from being poached or hired by another party to the agreement." The offence occurs when two or more employers agree or arrange to not solicit or hire each other's employees by reaching a consensus, either explicitly or tacitly. It is not an offence, however, when only one employer agrees to not poach another employer's employees.

Ancillary Restraints Defence

The ancillary restraints defence (ARD) in s. 45(4) of the Act may protect wage-fixing or no-poach agreements provided the restraint (a) is ancillary to, or flows from, a broader or separate agreement that includes the same parties and that, when considered without the restraint, does not violate subsection 45(1.1); and (b) is directly related to and reasonably necessary for achieving that broader or separate agreement's objective. The Bureau's proposed approach to the ARD in the Draft Guidelines is consistent with its approach to it in its CCGs.

Mergers, Joint Ventures and Strategic Alliances

The Bureau will generally not assess wage-fixing or no-poaching clauses that are ancillary to merger transactions, joint ventures or strategic alliances under the criminal track, except when they are "clearly broader than necessary" (*e.g.*, as to covered employees, territories or duration), or when the merger, joint venture or strategic alliance is a sham.

Other Defences and Exceptions

Employers are encouraged to consult the CCGs and other applicable legislation and case law for other legal defences (*e.g.*, the regulated conduct defence) or exceptions (*e.g.*, agreements reached between employers in the course of collective bargaining) that may apply.

Penalties

If the Commissioner concludes that an offence under section 45 was committed, the Bureau may refer the case to the Director of Public Prosecutions (DPP) and recommend criminal charges. It is then up to the DPP to decide whether to prosecute.

In accordance with the 2022 amendments to the Act, as of June 23, 2023, a person found guilty of an offence under ss. 45(1) or (1.1) may be imprisoned for up to 14 years or subjected to a fine at the discretion of the court, or both.

Other penalties and remedies available to the Bureau and persons who have suffered loss or damage as a result of a violation are described in the CCGs.

Immunity and Leniency Programs

The Bureau's Immunity and Leniency Programs (currently being updated to reflect the June 2022 amendments to section 45) are available for s. 45(1.1) offences. To be eligible, applicants must provide sufficient information pertaining to the applicable offence(s), including information about hiring practices and employee compensation.

Bottom Line for Employers

Employers interested in submitting their views on the Draft Guidelines should complete an online feedback form by March 3, 2023.

As well, to mitigate the potential risk of criminal prosecution, employers are encouraged to take proactive steps to ensure that they will be in a position to comply with s. 45(1.1) when it comes into force on June 23, 2023. Such steps may include conducting a review of whether they are engaged in any activities that will become prohibited, developing policies and practices that ensure that such activities will not be engaged in as of June 23, 2023, and providing internal training to encourage their adoption.

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MISCELLANEOUS DEVELOPMENTS

Feds announce massive takedown of fraudulent nursing diploma scheme

A massive, coordinated scheme to sell false and fraudulent nursing degree credentials has been brought down by a joint federal law enforcement operation, Justice Department officials announced Wednesday.

Officials said the scheme involved peddling bogus, forged diplomas and transcripts from what had been accredited schools to aspiring nurses in order to help candidates bypass the qualifying requirements necessary to sit for the national nursing board exam. Although they still had to take the exam, the bogus credentials allowed them to skip vital steps of the competency and licensure process, officials said — and once licensed, those individuals were able to find a job in the health care field.

Overall, the conspiracy involved the distribution of over 7,600 fake nursing diplomas and certificates issued by Florida-based nursing programs, according to officials.

The action by federal law enforcement comes at a crucial moment in the healthcare industry, where an existing nurse shortage, exacerbated by the COVID-19 pandemic, has left many nursing staffs spread thin and burnt out.

In addition to the charges filed against those accused of selling the fraudulent materials, Omar Perez Aybar, Special Agent in Charge, U.S. Department of Health and Human Services, told ABC News that the investigation will continue, with additional action possible against applicants who allegedly purchased the bogus credentials. Federal law enforcement has been "in lockstep" with the National Council of State Boards of Nursing from the beginning, he said.

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Employers: The Clock is Ticking to Update Marijuana Policies

With an increasing number of states passing laws protecting employees who utilize marijuana, employers throughout the country are presently tasked with redesigning their marijuana-related policies and practices to avoid the (significantly increased) risk of suffering discrimination, retaliation, and other costly claims. With many relevant state laws going into effect throughout the next twelve months, the clock is ticking.

For many companies in the United States, this will be their first direct interaction with state-specific marijuana laws. Employers are confused by conflicts among applicable state and federal laws – as well as the patchwork of state-specific laws which govern marijuana-related conduct in states with regulated markets – and are often unsure how to proceed. Indeed, the task of overhauling a company's marijuana-related policies and practices is no small task. Decades-old wisdom and standard operations regarding adverse actions must be reevaluated in light of these new laws, or employers risk being held liable for discrimination or retaliation, which can result in the award of substantial damages to a victim in the form of future wages, emotional distress, statutory penalties, attorney's fees, and more.

Regardless of a company's individual stance regarding employee off-duty marijuana use, well-advised employers are wise to proceed cautiously when taking adverse actions against employees based on their off-duty conduct in states where relevant laws have recently gone into effect and which will go into effect throughout the coming months (see, California, New York, Washington D.C., New Jersey, Louisiana, Puerto Rico, and more).

Changing Landscape: Marijuana-Related Employment Laws & Policies

Historically, the use of medical marijuana (which has been permitted for decades in some states) is not protected under the Americans with Disabilities Act (ADA). As a result, even in states which permit marijuana for medical use, employers may, without fear of violating federal discrimination laws, terminate – or take other adverse employment actions against – employees who use medical marijuana as prescribed by their doctor. In response to this lack of federal protection from discrimination, some states have passed laws protecting medical cannabis patients from the consequences of failing employment drug screenings. For example, last June (2022), Louisiana Governor John Bel Edwards signed into law a prohibition on state employers from "subject[ing] an employee or prospective employee to negative employment consequences" if the state employee (with certain job-safety-related exceptions) tests positive for THC as long as they are a registered medical cannabis patient who utilizes marijuana consistent with a marijuana prescription from a licensed physician.

Naturally, both employers and lawmakers in states with legal recreational marijuana markets began considering expanding these workplace protections to employees who legally utilize marijuana outside of the medical patient context. (Indeed, Louisiana is also currently discussing and drafting legislation that expands these protections to private-sector workers who use medical marijuana.)

As of January 2023, several states have passed, and many states are considering passing relevant laws which expand protections available to employees who would otherwise face adverse employment actions based on their off-duty medical and recreational use of marijuana. At least two of these laws have already gone into effect, and still, more will go into effect over the coming months. The relevant laws vary widely – ranging from amendments to protected classes in existing laws (New York, Puerto Rico) to entirely new laws (California, Washington D.C.) and present new challenges to companies and lawmakers which have the potential to remain unresolved without additional research and technological developments.

In line with the changes noted above, a trend that is currently gaining momentum throughout the country is the passing of "ban-the-box" laws, which generally prohibit an employer from asking about a prospective employee's marijuana-related criminal history on an employment application. For example, Virginia passed a law that became effective on July 1, 2020, that prohibits employers from requiring job applicants to disclose information concerning any arrest, criminal charge, or conviction for simple possession of marijuana.

However, to date, a majority of states have not yet passed such "ban the box" laws, and still other states maintain contradictory policies in this regard; for example, Michigan, which has a robust legal recreational marijuana market, still permits employers to refuse to hire employees based on their marijuana-related criminal history (and despite the fact that certain marijuana-related misdemeanors are expungable in Michigan).

It should also be noted that while off-duty medical and recreational use of marijuana by employees is not protected under the ADA, federal courts will still enforce other federal discrimination statutes related to the employment of employees in the cannabis industry, including Title VII of the Civil Rights Act of 1964, which protects employees against discrimination based on specific characteristics, and the Fair Labor Standards Act. The Occupational Safety and Health Administration (OSHA) has also recently taken an active role in regulating workplace safety in the cannabis industry.

In response to this lack of federal protection from discrimination, some states have passed laws protecting medical cannabis patients from the consequences of failing employment drug screenings. For example, last June (2022), Louisiana Governor John Bel Edwards signed into law a prohibition on state employers from "subject[ing] an employee or prospective employee to negative employment consequences" if the state employee (with certain job-safety-related exceptions) tests positive for THC as long as they are a registered medical cannabis patient who utilizes marijuana consistent with a marijuana prescription from a licensed physician.

Changing Landscape: Private Marijuana-Related Employment Practices

The majority of relevant corporate policy reform in this space is driven by compliance with these new state laws. However, some major employers in the U.S. have recently found their previous policies prohibiting previous or off-duty marijuana use inappropriately or disproportionately barred qualified applicants from employment and have reformed their employment practices related to off-duty marijuana use voluntarily and without any arm-twisting resulting from the threat of enforcement action.

Indeed, June 2021 brought a major policy change to Amazon's hiring and firing policies and practices. The company, which is the second largest employer in the Fortune 500 as of 2022 with more than 1.6 million employees, announced it will exclude marijuana from its pre-employment drug screening program for unregulated positions (that is, positions not regulated by the Department of Transportation.) Amazon also announced it would reinstate employment eligibility for former employees and applicants who were previously terminated or deferred during random or pre-employment marijuana screenings, respectively. However, Amazon was clear that the company's zero-tolerance policy for impairment while working had not changed, including that the company will continue to test for all drugs and alcohol after any accidents or other incidents.

Amazon's home state of Washington was among the first in the country to legalize marijuana for recreational use in 2012, and the company's east coast headquarters is located in Virginia, where marijuana-permissive laws were set to take effect just one month after Amazon's announcement. Amazon's statement cited equity-based reasoning for the dramatic change:

"Pre-employment marijuana testing has disproportionately affected communities of color by stalling job placement and, by extension, economic growth."

Outside of the private employment context, the Air Force, Air Force Reserve, National Guard, and Space Force followed suit in September 2022, announcing a temporary policy change allowing a second chance to applicants who previously tested positive for (delta-9) THC during their entrance physical and were excluded from enlisting on this basis. Previously, a positive result on the initial test meant a permanent bar from entry. The new temporary program offers prospective applicants the opportunity to retake the drug screening test after 90 days if they are granted a waiver. Being granted a waiver requires applicants to meet all other qualification standards, including but not limited to possessing a high school diploma, scoring at least 50 points on the Armed Forces Qualification Test, having no felony or misdemeanor convictions, and being otherwise physically, psychologically, and medically qualified for service. Once admitted, however, the enlistee must adhere to the military's total ban on drug use. Indeed, even medical use is not permitted by active military members. This temporary policy change will be effective for two years and, without any extension, will end in September 2024.

The policy's about-face marks an attempt to rethink an aspect of the Air Force's stringent ban on marijuana use as the service struggles to meet its recruiting goals. This shift mirrors policy changes implemented by other branches of the military in the recent past, which aim to counter the fact that more than half of all new military recruits between 2021 and 2022 came from states where medical marijuana is legal. The increased availability of legal marijuana has resulted in a steady rise in the number of applicants with (delta-9) THC in their system in recent years, from 165 THC-positive applicants in 2020 to 226 in 2021 and 290 in 2022.

As of January 2023, several states have passed, and many states are considering passing relevant laws which expand protections available to employees who would otherwise face adverse employment actions based on their off-duty medical and recreational use of marijuana. At least two of these laws have already gone into effect, and still, more will go into effect over the coming months. The relevant laws vary widely – ranging from amendments to protected classes in existing laws (NY, Puerto Rico) to entirely new laws (California, Washington D.C.) and present new challenges to companies and lawmakers which have the potential to remain unresolved without additional research and technological developments.

Complex Compliance Considerations & Call to Action

Regardless of an employer's preferences with respect to their employees' off-duty marijuana use, these new relevant laws present novel questions and challenges for all employers; employers throughout the country should already be reevaluating their policies and practices surrounding their employee's off-duty marijuana use and be prepared to make rapid and significant changes.

Complying with these new laws is no small feat: the task requires not only an appreciation for the interaction of relevant state and federal laws but also a comprehensive understanding of the patchwork of state-specific laws governing marijuana-related conduct in states with regulated markets, both medical and recreational. Further, those advising companies on these complex issues must also be equipped to extrapolate policies and guidance applicable to other employment issues to these interactions with marijuana. Examples include whether or not an employee's home office constitutes a "workplace" where an employer can dictate an employee's marijuana use and what "specific and articulable symptoms of impairment" an employer is legally required to observe or demonstrate related to job performance prior to taking adverse action against an employee based on his or her marijuana use.

Expanded Workplace Protections are Expected

There is no dispute that the commercial cannabis industry is still in its infancy. This fact, combined with the ever-present conflict between state and federal laws, the historical stigma associated with marijuana, and the current market competition for workers, means that there will likely be continued changes and developments affecting the methods by which employers may address employees' off-duty marijuana use, if the employer desires to do so, in the future. While such uncertainty will likely persist for years to come, what is clear is that off-duty and off-site marijuana use by employees must now be acknowledged by employers to enable them to reevaluate their existing policies regarding this conduct and amend them to comply with these new laws.

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