SHAWE ROSENTHAL LLP

E-UPDATE

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RECENT DEVELOPMENTS

FTC Provides Advice on Complying with FCRA in Background Checks

The Federal Trade Commission recently issued a blog post reviewing the requirements under the Fair Credit Reporting Act when conducting background checks, and offering suggestions on how to comply with those FCRA requirements.

Employers using a third party to conduct background checks of prospective or current employees must comply with the requirements of FCRA (which refers to such background checks as "consumer reports"). In Background checks on prospective employees: Keep required disclosures simple, the FTC notes that these requirements include the following:

1. Before you get a background screening report about a prospective employee, disclose to the person that you intend to get the report and then get their written authorization allowing you to do that.
2. If the background screening report reveals something that may cause you to decide not to hire the person, you must notify him of the results of the report and provide him with a copy. Next, you have to give the person sufficient time to review the report so he can challenge any elements that might be incorrect.
3. If you ultimately decide not to hire someone based in whole or in part on the contents of a background screening report, you must provide a notice to that person that states he wasn't hired due at least in part to the result of the background screening report.

The FTC then goes on to provide additional guidance about the disclosure and authorization requirement, stating that these two may be combined into a single document. The FTC cautions that, in that document, employers should "use clear wording that the prospective employee will understand."

Moreover, the document must consist of only the disclosure and authorization. The FTC notes that the following information should not be included in the document, as doing so could constitute a FCRA violation:

- Don't include language that claims to release you from liability for conducting, obtaining, or using the background screening report.
- Don't include a certification by the prospective employee that all information in his or her job application is accurate.

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- Delete any wording that purports to require the prospective employee to acknowledge that your hiring decisions are based on legitimate non-discriminatory reasons.
- Get rid of overly broad authorizations that permit the release of information that the FCRA doesn't allow to be included in a background screening report – for example, bankruptcies that are more than 10 years old.

As we have previously discussed in our January 2016 E-Update's Top Tip, it is critically important to eliminate this type of additional information from the disclosure/authorization document. Employers should also be careful about using forms provided by their third-party consumer reporting agencies, as we have found that they often do not comply with this restriction. And this issue is an increasingly hot target for litigation.

TAKE NOTE

No Electronic Submission of OSHA Records for Now. The Occupational Safety and Health Administration has announced that it is not accepting electronic submissions of injury and illness logs at this time.

In May 2016, OSHA issued a revised rule providing that employers with 250 or more employees would be required to submit electronically information from Forms 300 (Log of Work-Related Injuries and Illnesses), 300A (Summary of Work-Related Injuries and Illnesses) and 301 (Injury and Illness Incident Report). In addition, employers with 20-249 employees in specifically-identified industries with historically high rates of workplace injuries and illnesses would be required to submit electronically information from Form 300A. The initial submissions under the revised rule were to have been submitted by July 1, 2017. OSHA has now stated that it intends to propose extending the July 1, 2017 date. OSHA will update employers on when such electronic reporting will be required.

OSHA Withdraws Controversial Expansion of "Walk-Around" Rule. The Occupational Safety and Health Administration has withdrawn a rule that effectively permitted union organizers to accompany OSHA compliance safety and health officers during a workplace inspection of a non-union workplace.

For decades, OSHA had interpreted the Occupational Safety and Health Act to permit an employee representative, who was in fact an employee, to "walk-around" with an OSHA officer. In addition, third-party specialists such as industrial hygienists or safety engineers were also permitted to participate when "reasonably necessary." In 2013, however, OSHA issued the so-called "Fairfax Memo," in which it asserted that the employee representative need not be an employee, and that the third-party specialist need only "make a positive contribution." This, in effect, facilitated union access to non-union workplaces. This memo, however, has now been withdrawn in the context of a National Federation of Independent Business lawsuit challenging the rule.

Retiree Health Benefits Are Not Presumed to Be Vested. Applying the U.S. Supreme Court's decision in *M&G Polymers USA, LLC v. Tackett*, the U.S. Court of Appeals for the 4th Circuit held that retiree health benefits did not vest under the language of the applicable collective bargaining agreements and summary plan descriptions, meaning that the employees were not entitled to the continuation of the same benefits after expiration of the CBAs.

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In *Tackett*, which we discussed in our January 2015 E-Update, the Supreme Court held that ordinary principles of contract law govern the interpretation of collective bargaining agreements, including provisions about retiree health benefits, as long as such principles are not inconsistent with federal labor policy. The 4th Circuit applied *Tackett* in *Barton v. Constellium Rolled Products – Ravenswood, LLC* to find that the CBAs and SPDs each provided retiree health benefits for the term of the operative CBA, and further that these CBAs and SPDs contained durational language limiting the benefits to the term of the agreement. This clear contract language established that the benefits did not vest and could therefore be unilaterally altered by the employer once the CBAs had expired.

Longevity Pay Raises Survived Expiration of Contract . A hospital unlawfully withheld longevity pay increases to its unionized nurses, according to the U.S. Court of Appeals for the D.C. Circuit, as the collective bargaining agreement did not sufficiently specify that such increases ended with the expiration of the CBA.

In *Wilkes-Barre Hospital Co. v. NLRB*, the CBA included both across-the-board raises that were tied to three specific dates and longevity increases that were based on a nurse's length of service tied to the nurse's anniversary date. After the expiration of the CBA, the hospital did not pay any further longevity wage increases. But the court found that, under the unilateral change doctrine, wage increases "established in a collective bargaining agreement continue in effect even after an employer is released from any contractual obligations" (internal quotation omitted) unless a clear waiver of that right to continued wage increases exists. Such waiver may be established through "a contract duration clause that expressly authorizes the employer to terminate its statutory obligations upon expiration" of the contract. This language, however, did not exist in the CBA in question with regard to the longevity pay increases and, consequently, the hospital was bound to pay those increases.

Non-Compete Agreement Is Subject of Mandatory Bargaining. The U.S. Court of Appeals for the D.C. Circuit held that a unionized company's unilateral implementation of a mandatory non-compete agreement for new employees violated the National Labor Relations Act, because it was a mandatory subject of bargaining with the union.

The court in *Minteq Int'l, Inc. and Specialty Minerals, Inc. v. NLRB* noted that non-competes are a subject of mandatory bargaining because they have a direct economic impact on employees, by imposing a cost in the form of lost employment opportunities and "restricting their ability to benefit from their discoveries, inventions, and acquired knowledge." Nonetheless, the employer argued that it had no bargaining duty because its broadly-worded management rights clause, contained in the Collective Bargaining Agreement (CBA), constituted the parties' resolution of the matter. The court disagreed, noting that there was nothing in the language that specifically addressed management's ability to effectuate post-employment restrictions.

In addition, the court deferred to the National Labor Relations Board's determination that a provision barring the employee from soliciting a customer or supplier to terminate or otherwise alter its relationship with the company violated the NLRA (a standard provision found in many non-compete agreements). The Board had stated that such provision could be construed to interfere with employees' rights to appeal to customers to boycott the company in support of a labor dispute.

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One Racial Slur May Be Sufficient to Create Hostile Work Environment. The U.S. Court of Appeals for the 2nd Circuit found that a single sufficiently severe racial epithet might be enough to create a hostile work environment in violation of Title VII.

A viable hostile work environment harassment claim requires conduct that is sufficiently severe or pervasive to alter the work environment and interfere with the employee's performance. As a general matter, courts have found that isolated racial epithets do not meet that standard. In *Daniel v. T&M Protection Resources LLC*, however, the 2nd Circuit, without deciding, recognized the possibility that a single use of the "N" word by a supervisor might be enough to support a hostile work environment claim. This ruling potentially makes it easier for employees to establish a claim of a racially hostile work environment.

Update to MOSH Reporting Requirements. Maryland has incorporated the federal standards for reporting of work-related injuries and deaths. Thus, as under federal OSHA, state law now requires reporting within eight hours of the death of an employee or 24 hours of the in-patient hospitalization, amputation or loss of an eye by an employee, as a result of a work-related incident. Maryland law specifically qualifies that such "amputation" must involve "bone or cartilage loss." These reports can be made by telephone to MOSH at 410-527-4447.

NEWS AND EVENTS

Honor – Firm and Attorneys Recognized by Chambers USA: America's Leading Lawyers for Business. Shawe Rosenthal has been ranked in the top tier of Maryland labor and employment firms for the fourteenth consecutive year by Chambers USA: America's Leading Lawyers for Business – one of only two firms to receive this ranking in Maryland. Seven Shawe Rosenthal partners received recognition as top individual labor and employment law practitioners: co-managing partners Gary L. Simpler and Stephen D. Shawe, as well as Bruce S. Harrison, J. Michael McGuire, Elizabeth Torphy-Donzella, Mark J. Swerdlin, and Fiona W. Ong. Chambers & Partners is a prominent London-based research and publishing organization that ranks law firms and lawyers based upon their reputation among peers and clients.

Webinar – "Managing Cancer and Other Chronic Diseases in the Workplace." On June 28, 2017, Lindsey A. White and Shelby Skeabeck will be presenting a webinar on behalf of the Center for Competitive Management (C4CM), which provides consulting and training services to businesses, including in the human resources area. Lindsey and Shelby will be discussing the legal issues and offering practical advice on:

- Practical ways in which the Americans with Disabilities Act and the Family and Medical Leave Act may intersect concerning cancer and other chronic disease diagnoses
- Workplace accommodations, intermittent leave under the FMLA, and the enforcement of workplace policies
- Privacy and other issues to consider before revealing information to the employee's managers and colleagues

Presentation – Baltimore ACC Meeting. Lindsey A. White and Teresa D. Teare will be speaking to the Baltimore Chapter of the Association of Corporate Counsel about recently enacted

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employment legislation in Maryland and surrounding jurisdictions. This event, which is open to Baltimore ACC members, will be held at noon at Morton's Steak House on June 13, 2017.

Article – "Best Practices for Preventing and Defending Against Negligent Hiring, Retention, and Supervision Claims." Darryl McCallum authored this article featured in the latest issue of *Lexis Practice Notes*. The practice note addresses the potential liability that employers face when they hire and/or retain employees who end up causing injury to third parties or other employees.

Media Appearance. Fiona W. Ong was interviewed by the CBS Baltimore station WJZ-13 on May 26, 2017 to discuss Governor Hogan's veto of the paid sick leave bill that was passed by the Maryland General Assembly during the 2017 legislative session.

News – Update on Persuader Lawsuit. A federal case filed by our firm and Seaton, Peters & Revnew, P.A., on behalf of Worklaw Network, challenging the Department of Labor's new interpretation of the advice exemption from the persuader rule, was featured in a May 3, 2017 Law 360 article, "Trump DOL Asks For More Time In Persuader Rule Cases." Eric Hemmendinger, Mark Swerdlin, and Parker Thoeni are the Shawe Rosenthal attorneys working on this case. Worklaw is a nationwide alliance of labor and employment firms representing management.

Victory. Bruce S. Harrison, Mark J. Swerdlin and Parker E. Thoeni won a motion for summary judgment on behalf of a non-profit organization by an individual who asserted that she was jointly employed by the organization and another entity. The Circuit Court for Baltimore City found that the organization established that it was not, in fact, her employer.

Victory. The U.S. Court of Appeals for the 4th Circuit affirmed a summary judgment victory that Parker E. Thoeni won on behalf of a casket company. The trial court had dismissed the plaintiff's claims of discrimination as being outside the scope of the plaintiff's charge of discrimination filed with the Equal Employment Opportunity Commission. (The filing of an EEOC charge on a specific discrimination issue is a prerequisite for filing suit about that same issue).

Victory. Teresa D. Teare and Parker E. Thoeni were successful in defending an FLSA wage and hour and wrongful discharge case in the U.S. District Court for the District of Maryland. The case, brought by a former employee against a for-profit education institute, was dismissed after the employee failed to pay monetary sanctions ordered by the Court for her destruction of evidence.

TOP TIP: Be Vigilant About Communicating with Employees on FMLA Leave

Sometimes when an employee is on an extended Family and Medical Leave Act leave, it can be a case of "out-of-sight, out-of-mind." But a recent federal court opinion reminds employers of the importance of communicating with employees on FMLA leave.

Under the FMLA regulations, an employer is required to notify an employee of the amount of leave that will be counted against his FMLA entitlement. In *Dusik v. Lutheran Child & Family Servs. of Ill.*, the employee requested three to six months off for knee surgery and recovery. She also asked that, while she was on leave, her manager update her as to her hours and how much leave she had left. She was told that her leave would be designated as FMLA beginning on March 31, but was never given any further information about how much leave was left or that she could be terminated if

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she failed to return by a certain date. The employee was then terminated when her FMLA leave was exhausted.

The federal court found that the employee had requested updates about her leave but the employer had failed to provide them, and that this failure could have interfered with her FMLA rights. The employee claimed that, had she known that her FMLA leave was running out, she could potentially have returned to work with accommodations or requested an extension under the Americans with Disabilities Act.

This case emphasizes the need for employers to be vigilant about complying with the obligation to keep employees informed about their FMLA leave status and when the leave will expire – prior to the expiration date. It also reminds employers that it is never wise to terminate an employee automatically at the end of FMLA leave. Instead, the employer should engage in the reasonable accommodation interactive process to determine if additional leave should be provided under the ADA or if some other accommodation could be provided to enable the employee to return to work.

RECENT BLOG POSTS

Please take a moment to enjoy our recent blog posts at laboremploymentreport.com:

- "Go Back to Your Country" Is Not Evidence of National Origin Discrimination? by Fiona W. Ong (Selected as a "noteworthy" blog post by the Employment Law Daily)
- HR Lessons from the Comey Termination by Mark J. Swerdlin (Selected as a "noteworthy" blog post by the Employment Law Daily)
- Is Setting Pay Based on Prior Salary the Same as Setting Pay Based on Sex? by Parker E. Thoeni and Lindsey A. White
- FMLA Is Not A "Get Out Of Jail Free" Card! by Fiona W. Ong

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