Legislation and Compliance Update

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Monthly Compliance Review

California
Delaware
Other August Updates You May Need to Be Aware Of

Adjudicating Employment Qualifications

The Northern District of California recently decided another noteworthy case. The case is a reminder to employers that, when they consider the criminal history of employment applicants, they **must consider how the nature of the offense and how long ago it was committed relate to the duties of the position**.

FACTS
Plaintiff is a Latino born in Mexico who was brought to the United States by his parents when he was 11 years old. He began using a social security number that he "invented" to obtain employment at the age of 15.

In 1997, at the age of 17, Plaintiff applied to change his immigration status in part so he could obtain a valid social security number. While waiting for his application to be approved, he applied to the Internal Revenue Service to receive an Individual Taxpayer Identification Number (ITIN). The ITIN was issued that same year, although the plaintiff continued to use the invalid social security number that he had given his employer at an earlier date.

Ten years after making application, Plaintiff became a lawful permanent resident and received his own valid social security number in 2007. He became a United States citizen in 2011, at the approximate age of 34 years.

Plaintiff applied to be a corrections officer with California Department of Corrections and Rehabilitation (CDCR) in the summer of 2011. The CDCR operates the state prison system. Applicants are required to undergo a thorough background investigation to determine that candidates have good moral character, i.e., to evaluate applicants' integrity, honesty, and good judgment. As part of this evaluation, applicants must answer many questions, including Question 75 which asks: "Have you ever had or used a social security number other than the one you used on this questionnaire?" Plaintiff answered "Yes" to this question and provided a supplemental answer explaining the circumstances surrounding his

use of the invented social security number. Plaintiff's record contained no blemishes other than the previous use of an invalid social security number.

In January 2012, the CDCR sent Plaintiff a rejection letter, stating:

"The fact that you committed identity theft for eight years but [sic] utilizing a social security number of a United States citizen causing unknown ramifications for that person by having income reported under their number that they were unaware of reflects that you are not suitable to assume the duties and responsibilities of a peace officer. The result of the background investigation revealed that you fail to possess these qualifications. You chose to use an unauthorized social security number even though had [sic] taxpayers [sic] ID number, shows a willful disregard for the law. This 8 year act of unlawfulness shows a lack of honesty, integrity, and good judgment."

Plaintiff appealed the decision to the State Personnel Board (SPB) stating that he believed he was discriminated against because he was a naturalized US citizen and not a US-born citizen. The SPB reaffirmed CDCR's decision to reject Plaintiff based on the fact that he knowingly and willfully disregarded the law by his continued use of the invented social security number even after obtaining a ITIN in 1997, thereby demonstrating a lack of honesty, integrity, and good judgment. The SPB did not schedule an evidentiary hearing before an administrative law judge to determine the merits of Plaintiff's discrimination claim. Nor did the CDCR take any action at all regarding Plaintiff's claim that CDCR had discriminated against him.

Plaintiff applied again with CDCR to be a corrections officer in 2013, and was again rejected. His appeal of that rejection is still pending.

The court record shows there were 23,292 candidates for the position of corrections officer from 2009 to 2014. From that pool of candidates, 42 individuals answered "Yes" to Question 75; 33 were Latino and 9 were non-Latino. Of the 33 Latinos, CDCR cleared 14 and rejected 19. Of the 19 rejected Latino candidates, CDCR rejected 9 in part because of their prior use of an invalid social security number; 2 of which the use of the invalid social security number was the only reason mentioned in the rejection letter. Of the non-Latino candidates, none were rejected because of prior use of an invalid social security number.

COURT'S ANALYSIS

The court ruled CDCR's use of Question 75 had a disparate impact on Latinos. Even though Question 75 was asked of all candidates and was a "facially neutral employment practice," it had a significant disparate impact on a protected class, i.e. race, color, religion, sex, or national origin.

The fact that some Latinos who answered "Yes" to Question 75 were hired was not enough to sway the court. **Showing that others within a protected class are not subject to adverse action is not a defense to a disparate-impact claim.** The Supreme Court has held that focusing on the number of minorities that were hired or promoted would inappropriately ignore the disparate effect of a specific requirement or practice. So in this case, the fact that other Latinos who answered "Yes" to Question 75 were hired did not absolve CDCR from the practice that ultimately had a disparate impact on Latinos.

In defense of a disparate-impact claim, an employer must show a "business necessity" for its practice. To do this, an employer has to show that its employment practice is "significantly

job-related" and serves a legitimate business interest. Although the Plaintiff was never arrested for, charged with, or convicted of any crime involving the use of an invented social security number, that use probably was a crime and the Plaintiff had admitted to the conduct, so the court analyzed the situation under precedent related to the use of conviction records in making employment decisions. Case law establishes that even where criminal convictions are concerned, an employer cannot implement "a sweeping disqualification for employment resting solely on past behavior . . . where that employment practice has a disproportionate racial impact and rests upon a tenuous or insubstantial basis." *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1296 (8th Cir. 1975). According to *Green,* employers cannot disqualify applicants based on a single criterion. Instead, employers must consider the following to prove business necessity: (1) the time elapsing since the conviction; (2) the degree of the criminal's rehabilitation; and (3) the circumstances under which the crime was committed.

Although this case did not involve an arrest or criminal conviction, the court ruled CDCR failed to establish a business necessity by applying the *Green* factors because there was no evidence that it individually assessed Plaintiff's application based on the *Green* factors. The court reviewed and explicitly approved of, and deferred to the Equal Employment Opportunity Commission's (EEOC) 2012 guidance on the use of criminal records in employment. Specifically, it adopted the EEOC's approach of asking whether the employer individually assessed the three *Green* factors. In doing so, the court performed its own individual assessment and found that the Plaintiff's prior use of an invalid social security number was not linked to the ability to maintain honesty, integrity, and good judgment as a corrections officer.

The court ruled that because Question 75 had a disparate impact on Latinos, CDCR can use it only if it also considers the *Green* factors under the EEOC guidelines. And, because it failed to consider the *Green* factors, CDCR made an adverse employment action based on a single-issue which amounted to an "arbitrary . . . barrier of employment."

SUMMARY

Plaintiff won his disparate-impact claim because CDCR failed to (1) prove a business necessity for its practice of considering information that, although facially neutral, had an adverse impact on a protected class; and (2) consider mitigating factors when applying qualification criteria. CDCR denied Plaintiff employment based on conduct he engaged in as long as 14 years prior to his application for a position with CDCR, starting when he was a teenager.

Effective employment policies and processes involving the use of criminal history are essential. Employers must ensure that their hiring policies measure the person for the job and not the person in the abstract.

Some best practices based on this subject are:

1. **When adjudicating employment qualifications based on criminal history, employers must consider (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the conduct; and (3) the nature of the job held or sought.**
2. **If an employer asks questions in an application form that allows it a deeper look at the applicant than the criminal history does by itself, the employer must actually consider any response and would be well advised to document its decision-making process.**

Delaware Restricts Employer Access to Social Media

Delaware is the newest state to restrict employer's access to and use of social media accounts of employees and applicants. **Delaware House Bill 109 became effective when the Governor approved it on August 7, 2015.**

Delaware's new law applies to all employers in the State, except the United States government. It defines "employer" as any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee or applicant, including the State and any political subdivision or board, department, commission, or school district.

The law makes it unlawful for employers, subject to certain exceptions, to require or request an employee or applicant to:

1. Disclose a username or password for the purpose of enabling the employer to access personal social media;
2. Access personal social media in the presence of the employer;
3. Use personal social media as a condition of employment;
4. Divulge any personal social media;
5. Add a person, including the employer, to the list of contacts associated with the employee's or applicant's personal social media, or invite or accept an invitation from any person, including the employer, to join a group associated with the employee's or applicant's personal social media; and
6. Alter the settings on the employee's or applicant's personal social media that affect a third party's ability to view the content of the personal social media.

Exceptions to Delaware's restrictions are very similar to what we have seen other states enact. The restrictions do not apply for the purpose of accessing electronic devices or accounts and services provided by the employer for work-related purposes. Employers are also permitted to monitor, review, access, and block electronic data stored on an employer's network or electronic device that it supplies or pays for in whole or in part. Employers are permitted to conduct investigations into allegations of workplace misconduct or employee violations of applicable laws and regulations. The law does not impede an employer from complying with a duty to screen employees or applicants before hiring, or to monitor or retain employee communications when required by law or in relation to law enforcement employment. Finally, information that is in the public domain is also exempt from the law.

The law specifies that employers must not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for failing to comply with a request or demand by the employer that violates the law. However, the law does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

You may access Delaware's House Bill 109 here: http://legis.delaware.gov/LIS/lis148.nsf/vwLegislation/HB+109/$file/legis.html?open

What This Means for You:

- **Delaware has made it illegal for employers to require employees and applicants to disclose user name and passwords that would allow the employer to access personal social media accounts.**
- **You should determine whether you have employees in the state of Delaware.**
- **If you do, review your workplace policies and procedures with your lawyer to ensure compliance with the new law.**

Other August Updates You May Need to Be Aware Of

California Assembly Bill 1017, regarding Salary Information

This bill would prohibit an employer from seeking salary history information from an applicant for employment and from releasing the salary history of any current or former employee without written authorization from the current or former employee. It was read a second time and ordered to third reading on 8/25/2015.

California Assembly Bill 676, regarding Employment Status

The bill would prohibit an employer or employment agency from asking an applicant for employment to disclose, orally or in writing, information concerning the applicant's current employment status. The bill does not provide for a private right of action for violations. It was referred to appropriations suspense file on 8/17/2015.

California Assembly Bill 883, regarding Status as a Former Public Employee

This bill would prohibit private and public employers from publishing or posting a job advertisement or announcement that states or indicates that the applicant for employment must not be a current or former public employee. The bill would also prohibit employers from communicating that an applicant's status as a current or former public employee disqualifies an individual from eligibility for employment or from basing an adverse employment decision on an applicant's current or former employment as a public employee. It was referred to appropriations suspense file on 8/17/2015.

Florida Senate Bill 186, regarding Social Media

This bill would prohibit employers from requesting or requiring access to a social media account of an employee or an applicant. It would also make it unlawful for an employer to take adverse employment action based on social media and an unwillingness to provide access. It provides for civil action and penalties including costs and attorney fees. It was prefiled on 8/26/2015.

North Carolina House Bill 267, regarding Respiratory Care Practitioners

This bill amends the licensure requirements, including requiring fingerprints and criminal background checks be conducted. It will be effective 10/5/2015. It was passed by both the House and Senate on 8/5/2015.