



# Labor & Employment Executive Breakfast Meeting

## WELCOME

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## **Assessing EEOC's Enforcement Guidance Regarding Use of Criminal Background Information in Employment Decisions**

*Brett E. Coburn*  
*August 29, 2012*

# Background on Recent EEOC Guidance

- “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000e *et seq.*”
- Issued by EEOC on April 25, 2012
- Intended to update and consolidate EEOC’s previous guidance on use of criminal background information in making employment decisions

# Types of Discrimination Risks

- Title VII does not prohibit employers from requiring applicants or employees to provide information about criminal background
- But employers must take steps to minimize risks of two different types of discrimination claims under Title VII:
  - Disparate Treatment
  - Disparate Impact

# Disparate Treatment

- Disparate Treatment: Employers must evaluate criminal conviction history in a consistent, non-discriminatory manner, regardless of race, color, national origin, sex, age, religion, genetic information, disability or veteran status
  - Avoid biased statements during hiring/decision-making process
  - Avoid different treatment of similarly situated comparators

# Disparate Impact

- Disparate Impact: Facially neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group
  - First recognized by Supreme Court case in 1971
  - Now formally codified as part of Title VII
  - Mainly focused on race and national origin
  - For investigation purposes, EEOC assumes that the criminal conviction data had an adverse impact on minorities due to higher conviction rates for minority employees
  - EEOC does not care if workforce is racially balanced
  - Employers must demonstrate that consideration of an applicant's criminal conviction history is "job-related and consistent with business necessity"

# EEOC Guidance re: Disparate Impact

- EEOC recommends that employers not ask about convictions on job applications
  - If employers do seek such information, limit to convictions for which exclusion would be job-related for position in question and consistent with business necessity
- Make decisions based on conviction records, not arrest records
  - EEOC's position is that use of arrest history is not job-related and consistent with business necessity
  - But employer may consider the conduct underlying the arrest if such conduct is otherwise known to the company (e.g., through media reports) and renders the individual unfit for a particular position

# EEOC Guidance re: Disparate Impact

- Avoid blanket disqualification or exclusion
- Main focus of EEOC's guidance is how employers may legally make employment decisions based on criminal convictions
  - Two circumstances under which employers will “consistently” meet the job-related-and-consistent-with-business-necessity defense:
    - Validation of criminal conduct screen for the position in question in accordance with the Uniform Guidelines on Employee Selection Procedures
    - Development of a “targeted screen” combined with opportunity for individualized assessment for people excluded by the screen



# EEOC Guidance re: Disparate Impact

- Targeted Screen
  - Required Considerations
    - Nature of the crime
      - Potential aggravating factors: violence, sex, dishonesty, theft, drug distribution
      - Potential mitigating factors: coercion, guilt by association, wrong place at wrong time
    - Time elapsed since the crime was committed
    - Nature of the job sought
      - Amount of contact with customers or public
      - Amount of supervision or oversight
      - Responsibility/oversight of other employees
      - Access to cash, property, accounts

# EEOC Guidance re: Disparate Impact

- Targeted Screen (*cont'd*)
  - Additional Potential Considerations
    - Number of offenses for which convicted
      - Pattern of criminal activity or one-time issue
    - Age of individual at time of offense
      - Consider potential youthful indiscretion
      - Adults more accountable for actions
    - Employment history before/after the offense
      - Pattern of successful employment since the offense?
      - Prior employment in same type of business?
      - Employment history with company

# EEOC Guidance re: Disparate Impact

- Targeted Screen (*cont'd*)
  - Additional Potential Considerations (*cont'd*)
    - Rehabilitation efforts and other good conduct
      - Drug treatment/rehabilitation
      - Community service activities
    - Employment/character references
      - Job references
      - Endorsement by religious or civic leaders
      - Focus on post-conviction references and statements
  - Whether the individual is bonded under a bonding program

# EEOC Guidance re: Disparate Impact

- Individualized Assessment
  - Required Components
    - Notice to individual of potential exclusion
    - Opportunity to be heard and explain
    - Consideration of additional information provided by applicant or employee
  - Individualized assessment not required in all circumstances
    - Less necessary where targeted screen is narrowly tailored to conduct that has “tight nexus” to the job in question

# Other Legal Considerations

- State and Local Laws re: Use of Criminal Background Information
  - Some jurisdictions “Ban the Box” (i.e., prohibit employers from asking about convictions on job application)
  - Substantive limits (e.g., # of years to be searched; consideration of misdemeanor offenses)
- Compliance with Other Laws as Defense
  - Compliance with federal laws is defense to Title VII claim (e.g., banking, transportation, security)
  - But compliance with state or local laws is not – preempted by Title VII

# Other Legal Considerations

- Fair Credit Reporting Act
  - Notify applicants/employees of intent to conduct background check and obtain consent to do
  - Provide written notification to applicants or employees before taking adverse action based on results of background check
  - Provide written notification after the adverse action is taken
- Negligent Hiring / Retention Liability
  - Tension with disparate impact concerns
  - Striking appropriate balance of risks

# Best Practices

- Avoid blanket exclusions or disqualifications
- Develop targeted screening process that allows for individualized assessment but also allows for flexibility in decision-making
- Ensure compliance with other laws relating to criminal background information
- Ensure appropriate training for HR and decision-makers
- Build in oversight from legal and/or HR



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## **Social Media - The NLRB's Regulation of Union and Non-Union Employers**

*Clare Draper*

*August 29, 2012*



# BACKGROUND

- Over the past 2 years, the NLRB has decided several cases in which it has taken the position that it has the authority to regulate employer policies on the use of social media.
- On May 30, 2012, the NLRB General Counsel issued a report giving guidance on the NLRB's view of what is acceptable in employer policies governing use of social media.



# THE NLRB'S POSITION

- Section 7 of the NLRA grants employees the right “to self-organization, to form, join, or assist labor organizations .... and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”
- The NLRB’s position is that certain restrictions on communication through social media unlawfully restrict those rights.
- Section 7 and the NLRB’s position apply to both non-union and union employers.



# THE NLRB'S POSITION

- The theme of the May 30 NLRB Report is that employer policies that restrict whether or how employees talk about work on Facebook and other social media often will be construed as restricting protected concerted activity.
- The Report finds restrictions on disclosing confidential information, addressing controversial topics and using company trademarks and logos to be “overbroad” and “vague” and therefore because they could be read to restrict Section 7 discussions about work.
- The Report recommends using specific examples and disclaimers to ensure restrictions can't be misconstrued.

# Do's and Don't's

- Do review your social media and electronic communication policies.
- Do feel free to have reasonable restrictions regarding confidential information, inappropriate language and content, and speaking on behalf of company
- Do consider limiting and clarifying language in confidentiality provisions.
- Do consider including examples that indicate focus on non-Section 7 conduct.
- Don't use broad vague restrictions on communication.

# FINAL THOUGHTS

- Penalties for violation generally not egregious
  - No fines or civil money penalties
  - Generally, required revision and posting
- The Report contains a policy that the NLRB has approved.
- If you don't have a social media or electronic communications policy, don't be afraid to adopt one.

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## **Whistleblower Protections in the Private Sector: An Expanding Risk for Employers**

*Lisa Cassilly*

*August 29, 2012*

# Growing Exposure Under SOX and Dodd-Frank

- Recent ARB decisions are expanding the definition of protected activity under SOX
  - *Sylvester v. Paralex Int'l*
  - *Funke v. Fed Express*
  - *Menendez v. Halliburton, Inc.*

# Growing Exposure Under SOX and Dodd-Frank

## Section 922 of Dodd-Frank

- Invalidates any “agreement...or predispute arbitration agreement” that has the effect of waiving rights or remedies under SOX.
- Explicitly provides for a jury trial of a SOX claim.
- Clarifies that SOX applies to private subsidiaries of public companies.



# Growing Exposure Under SOX and Dodd-Frank

## Dodd-Frank Whistleblower Incentive Programs

- CFTC and SEC – “We are open for business”
- Financial Services Employees
- New Retaliation Cause of Action for Whistleblowers who report to SEC may be expanded to include internal reports for individuals whose disclosures are “required or protected” under SOX.

# FALSE CLAIMS ACT WHISTLEBLOWER PROTECTIONS

- Law intended to provide an incentive to private citizens to file claims on behalf of the Federal Government for making fraudulent claims against government
- Dodd-Frank amended the Anti-Retaliation provisions of the FCA by expanding both the concept of protected activity and the class of protected whistleblowers



# FALSE CLAIMS ACT WHISTLEBLOWER PROTECTIONS

- 33 states and DC have State False Claims Statutes
- Georgia's New "Taxpayer Protection False Claims Act" went into effect on July 1 and includes an anti-retaliation provision.
- Workplace anti-retaliation provisions protect contractors and agents, in addition to employees.



# Other Statutory Whistleblowers

- Section 11(c) of the Occupational Safety and Health Act of 1970 (OSHA), 29 U.S.C. § 660(c)
- The Surface Transportation Assistance Act of 1982 (STAA), 49 U.S.C. § 31105
- The Asbestos Hazard Emergency Response Act of 1986 (AHERA), 15 U.S.C. § 2651
- The International Safe Container Act of 1977 (ISCA), 46 U.S.C. § 80507
- The Safe Drinking Water Act of 1974 (SDWA), 42 U.S.C. § 300j-9(i)
- The Federal Water Pollution Control Act of 1972 (FWPCA), 33 U.S.C. § 1367
- The Toxic Substances Control Act of 1976 (TSCA), 15 U.S.C. § 2622
- The Solid Waste Disposal Act of 1976 (SWDA), 42 U.S.C. § 7001
- The Clean Air Act of 1977 (CAA), 42 U.S.C. § 7622
- The Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA), 42 U.S.C. § 9610
- The Energy Reorganization Act of 1974 (ERA), 42 U.S.C. § 5851
- The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21), 49 U.S.C. § 42121
- The Pipeline Safety Improvement Act of 2002 (PSIA), 49 U.S.C. § 60129
- The Federal Rail Safety Act of 1970 (FRSA), 49 U.S.C. § 20109
- The National Transit Systems Security Act of 2007 (NTSSA), 6 U.S.C. § 1142

