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In this issue:

Indiana Prohibits Smoking in Places of Employment

*by Ami J. Patel**

After a five-year battle, Indiana became smoke-free on July 1, 2012 joining thirty-nine other states with similar smoking bans. The Indiana ban prohibits smoking in public places, places of employment, and government vehicles. The new law defines "place of employment" broadly as "an enclosed area of a structure that is a place of employment." In addition, the law prohibits smoking within eight feet of a public entrance to a "public place" or "place of employment." However, employers may designate smoking areas that are located outside the employment structure and eight feet from all public entrances.

While the vast majority of Indiana employers are required to comply with the new law, some exceptions include bars, gambling facilities, and private clubs. All other Indiana employers must remove all ashtrays and smoking paraphernalia from their premises, unless the employers are displaying the ashtrays or other smoking paraphernalia for retail sale. Employers and operators must also post signs at each public entrance informing entrants that "no smoking is permitted within eight feet of any public entrance." If a "place of employment" is also a "public place" – and many are – the owner, operator, manager, or official in charge must also: post conspicuous signs in the public place that read "Smoking is Prohibited by State Law" or other similar language; ask anyone smoking in violation of the Act to cease smoking; and cause anyone who refuses to cease smoking "to be removed from the public place."

Under the new law, employers must inform current employees and applicants of the prohibition. Therefore, Z&R recommends that Indiana employers add the smoking prohibition to their employment applications and handbooks. The state law specifically authorizes local governments to enact more restrictive ordinances. Thus, employers must also comply with any more restrictive local ordinances if they exist. Violations of the state smoking ban include fines up to $1,000.

**Ami J. Patel has experience representing employers in all types of labor and employment matters. Ami also has experience assisting employers with state-specific compliance issues. Please contact Ami (ajp@zrlaw.com) at 216.696.4441 for any questions on Indiana's smoking ban.*

The Equal Employment Opportunity Commission Issues Guidance on Criminal Background Checks and Suggests Focusing on Individualized Assessments

*by Patrick M. Watts**

The Equal Employment Opportunity Commission ("EEOC") issued new enforcement guidance regarding the use of arrests and convictions in employment decisions. The EEOC last issued guidance on this issue over twenty years ago.

The EEOC enforces Title VII of the Civil Rights Act of 1964 ("Title VII") which prohibits employment discrimination based on race, color, religion, sex, or national origin. Title VII does not list "criminal record" as a protected status against employment discrimination. Therefore, whether an employer's reliance on a criminal record violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin.

The guidance describes the circumstances under which the use of arrest and conviction records in hiring may violate Title VII. Similar to prior EEOC guidance, the new EEOC guidance encourages the use of the *Green* factors. *See Green v. Missouri Pacific Railroad Company*, 523 F.2d 1158, 1160 (8th Cir. 1975). In *Green*, the court outlines factors employers should consider when making employment decisions based on an employee's or applicant's criminal history. The *Green* factors are:

- The nature or gravity of the offense or conduct;
- The time elapsed since the offense, conviction, and/or completion of the sentence; and
- The nature of the job sought or held.

Employers should look at these factors to show that the exclusion of an applicant or employee for a criminal conviction is job-related and consistent with business necessity. A criminal background check resulting in a disparate impact (*i.e.*, a neutral policy that has an adverse impact on a particular group) violates Title VII, unless the employer can show the exclusion is job-related and consistent with business necessity.

The EEOC suggests employers should conduct an individualized assessment when making employment decisions on criminal history. The new guidance focuses on how an employer can show the exclusion is job-related and consistent with business necessity. The EEOC discusses two circumstances in which an employer's criminal conviction policy will "consistently meet" Title VII's "job-related and consistent with business necessity" defense. According to the EEOC, employers can validate their use of background screening policies and practices or develop a targeted screen using the *Green* factors. If the employer develops a targeted screen, the employer must provide employees with criminal records an opportunity for an "individualized assessment."

The guidance acknowledges that Title VII does not necessarily *require* an individualized assessment; however, the guidance strongly suggests that employers use an "individualized assessment" in these circumstances. The individualized assessment would consist of:

- notice to the individual that he or she has been screened out because of a criminal conviction;
- an opportunity for the individual to demonstrate that the exclusion should not be applied due to his or her particular circumstances; and
- consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job-related and consistent with business necessity.

The individual may show that he or she was not correctly identified in the criminal record or that the record is not accurate. Other relevant individualized evidence could include:

- the facts and circumstances surrounding the offense or conduct;

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- the number of offenses for which the individual was convicted;
- the age of the individual at the time of conviction or release, as evidence suggests that recidivism rates tend to decline as ex-offenders' ages increase;
- any evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- the length and consistency of employment history before and after the offense or conduct;
- rehabilitation efforts, including education or training;
- employment or character references and any information regarding fitness for the particular position; and
- whether the individual is bonded.

If an individual does not respond to the employer's attempt to gather additional background information, the employer may make its employment decision without the information. Importantly, the EEOC does not mandate how much effort an employer must exert in order to meet its obligations under this guidance.

The EEOC offers best practice tips for employers that include:

- Eliminating policies that impose an absolute bar to employment based on any conviction;
- Training hiring managers about appropriate use of conviction history in hiring and promotion and separation;
- Tailoring screening procedures to ensure that they are job-related and consistent with business necessity;
- Prohibiting asking applicants for disclosure of convictions that are not job-related and consistent with business necessity; and
- Keeping information about applicants' and employees' conviction history confidential.

The new guidance is not legally binding. However, new guidance comes on the heels of heightened attention in this area on several fronts, including an employer's recent settlement with the EEOC for over $3 million on a claim of disparate impact discrimination resulting from blanket exclusion of applicants with criminal records. With many employers conducting background checks and inquiring about conviction records, employers should take note of the new guidance. To that end, employers should review all policies and procedures which pertain to criminal background checks and make adjustments if inquiries into certain arrests and/or convictions are not job-related and consistent with business necessity. Employers must remain vigilant in training managers and recruiters on what types of criminal background inquiries are permissible. Employers also must remember to comply with various state and local laws that limit what an employer may ask and how it may consider criminal history.

**Patrick M. Watts, an OSBA Certified Specialist in Labor and Employment Law, has extensive experience representing employers in all types of labor and employment matters. Patrick has helped employers develop policies and procedures that comport with EEOC guidance on using arrest and conviction data in employment decisions. Please contact Patrick (pmw@zrlaw.com) at 216.696.4441 for any questions on updating your criminal background policies & procedures.*

Massachusetts Criminal Background Check Law Adds to the "Ban the Box" Requirement

*by Stephen S. Zashin**

The Massachusetts Criminal Offender Record Information ("CORI") law created a new method and database for employers to access criminal records. CORI imposes a host of new obligations for employers. As previously reported by Z&R, part of the "ban the box" law became effective in 2010. The "ban the box" provision mandates employers remove all questions seeking information about an applicant's criminal record or criminal history on "initial written employment applications."

In addition to the "ban the box" requirement, Massachusetts employers must also maintain several CORI records and policies. The significant changes include:

- **Employer Access**
  CORI data soon will be available to all employers via a new Web-based criminal background database, known as "iCORI."
- **Notification Requirements**
  Employers must provide applicants and current employees with a copy of their criminal history reports before either questioning them about the reports or making adverse employment decisions based on the information therein. This requirement applies to all criminal background information, regardless of whether it is obtained through iCORI.
- **Record-Keeping Requirements**
  Employers that receive CORI data must obtain signed acknowledgment forms before conducting a search, and employers must keep the record for one year from the date of the request for information.
- **Dissemination Restrictions**
  Employers may share CORI data only with employees that have a need to know the information. Employers also must keep a log of all persons with whom they share CORI data for a year after the date of dissemination.
- **Data Storage**
  Employers are required to store hard copies of CORI data in locked and secured locations. Electronically stored data must be password-protected and properly encrypted.
- **Written Policy Requirements**
  Employers that annually conduct five or more criminal background investigations must maintain a written CORI policy. This policy must indicate that the employer will notify applicants of any potential adverse decision based on CORI information, provide applicants with their CORI report and the employer policy, and provide information concerning the process for correcting a criminal record.

The law also provides for periodic audits of employers that request and receive CORI data and allows for fines of up to $5,000 for knowing violations of the law.

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Tread Lightly When Inquiring Into Employee Absences – Asking for a Doctor's Note May Violate the ADA

*by B. Jason Rossiter**

In *U.S. Equal Employment Opportunity Commission v. Dillard's, Inc., et al.,* the Southern District of California held that a company's attendance policy which required an employee to submit a doctor's note stating "the nature of the absence" and "the condition being treated" was an impermissible disability-related inquiry under the Americans with Disabilities Act, 42 U.S.C. § 12112(d)(4)(A) ("ADA").

The ADA prohibits an employer from "making inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity." However, an employer "may make inquiries into the ability of an employee to perform job-related functions." *See* 42 U.S.C. § 12112(d)(4)(B).

Dillard's, Inc. El Centro Store ("Dillard's") had an attendance policy that would not excuse an employee's health-related absence unless the employee submitted a doctor's note stating "the nature of the absence (such as a migraine, high blood pressure, etc…)" and "the condition being treated." Dillard's terminated any employee who accumulated four unexcused absences of any kind. Three separate employees experienced difficulty in getting health-related absences approved because the doctor's notes they submitted did not state the medical conditions that led to their absences. After bringing their concerns to the Equal Employment Opportunity Commission ("EEOC"), the EEOC brought a suit against Dillard's on behalf of 60 individuals, claiming these individuals also were subjected to Dillard's allegedly unlawful attendance policy. Dillard's rescinded the attendance policy in July 2007. However, the EEOC still pursued this case on behalf of the individuals affected under the policy from 2005-2007.

The EEOC defines a "disability-related inquiry" as a question that is likely to elicit information about a disability. For example, the EEOC allows an employer to ask questions about an employee's general well-being, whether they can perform job functions, and about current illegal drug use. Here, however, the EEOC argued that requiring the employee to disclose the health condition was a "disability-related inquiry." Dillard's argued that the attendance policy did not violate the plain language of the statute.

The court relied on two court decisions to find that the attendance policy made impermissible inquiries into medical conditions. First, the court relied on *Conroy v. New York Department of Correctional Services*, 333 F.3d 88 (2d Cir. 2003). In *Conroy*, the court found that an inquiry regarding a "general diagnosis" may tend to reveal a disability violating § 12112(d)(4)(A). Likewise, in *Indergard v. Georgia-Pacific Corporation*, 582 F.3d 1049 (9th Cir. 2009) the court found a policy impermissible which required employees to submit to a physical capacity evaluation prior to returning to work from medical leave. The *Indergard* court stated that an employer could inquire "into the ability of an employee to perform job-related functions," but that it could not require a medical examination unless such examination was job-related and consistent with business necessity. Based on *Conroy* and *Indergard*, the Court concluded that Dillard's attendance policy, on its face, permitted supervisors to conduct impermissible disability-related inquiries under the ADA. In response, Dillard's failed to show both job-relatedness and business necessity to know the nature of the employee's medical condition.

Employers must remain vigilant, especially in light of recent amendments that make it easier for employees to be "disabled" under the law, that their absence policies do not make impermissible inquiries into health conditions. Employers must also train managers and human resources professionals on what types of questions constitute impermissible inquiries.

**B. Jason Rossiter practices in all areas of labor & employment law and has extensive experience representing employers in disability discrimination matters. If you have any questions about your attendance policy or whether an inquiry will be permissible, contact Jason (bjr@zrlaw.com) at 216.696.4441.*

Equal Employment Opportunity Commission Clarifies that Title VII Protects Transgendered Individuals from Employment Discrimination

*by Stefanie L. Baker**

Earlier this year, the Equal Employment Opportunity Commission ("EEOC") released a decision stating that Title VII sex discrimination claims include discrimination against transgender individuals. By definition, transgender individuals self-identify as a different gender from their biological sex at birth.

The Bureau of Alcohol, Tobacco, Firearms ("ATF") denied Mia Macy, a transgender woman, a position as a ballistics technician after she announced she was transitioning from male to female. Ms. Macy had several conversations with the lab director who allegedly told her that the position was hers, subject to a background check. During the process, she informed the lab director of her transition. A few days later, she received an email stating that the job was no longer available due to budget restrictions. However, Ms. Macy later learned that the ATF hired someone else.

Ms. Macy filed a formal internal complaint with the ATF claiming "sex stereotyping" and "gender identity" discrimination. However, the ATF only accepted her claim "based on sex (female)" under Title VII as part of its complaint process. Ms. Macy then appealed to the EEOC, which serves as an appellate tribunal for final ATF decisions and the EEOC reversed the ATF's final decision.

The EEOC determined that the term "sex" encompasses both the biological differences between men and woman, as well as gender differences. Title VII thus bars not just discrimination on the basis of biological sex, but also on the basis of gender stereotyping – targeting someone for failing to act and appear according to expectations defined by gender. The EEOC found that if an employer intentionally discriminates against an applicant or employee because he or she is transgender, such discrimination is by definition unlawful sex discrimination.

Employers should review their employment policies and practices and consider revising them to conform to the EEOC's decision. In some instances, employers may have to create new policies. Some policies and/or procedures that may need to be updated include:

- Equal Employment Opportunity non-discrimination and harassment policies;
- Pre-employment screening policies;
- Employee codes of conduct;
- Dress codes and appearance policies;
- Use of pronouns;
- Procedures to change information, e.g., personnel records to reflect gender change identity; and
- Policies regarding use of restrooms, locker rooms, and other gender-specific facilities.

As a result of the EEOC's decision, transgender individuals who believe that they are victims of workplace discrimination may now file claims with the EEOC. While the EEOC's decision is not binding on the courts, courts may give deference to the EEOC's decision. Z&R recommends employers update any and all of the above-mentioned policies and procedures to ensure compliance.

**Stefanie L. Baker practices in all areas of labor & employment and has extensive experience dealing with administrative agencies, particularly the EEOC. If you have any questions on how this decision may affect your policies or procedures, please contact Stefanie (slb@zrlaw.com) at 216.696.4441.*

Z&R Shorts

Soon To Be Expired Form I-9 To Remain Valid

The current Form I-9 is set to expire on August 31, 2012. The expiration date is on the upper right hand corner of the form. However, the U.S. Citizenship and Immigration Services ("USCIS") announced earlier this month that the form would remain valid beyond this expiration date. As such, employers should continue to use the current Form I-9, until further notice from the USCIS.

American Arbitration Association University

George Crisci will be part of the panel presenting "Grievance Processing" on September 13, 2012, at the Cleveland Metropolitan Bar Association, 1301 East Ninth Street, Second Level, Cleveland, Ohio.

To register go to **www.aaau.org**

2012 Masters Series: Employment Law CLE seminar

Stephen Zashin will co-present "Wage/Hour Litigation" on September 18, 2012 at the Columbus Bar Association, 175 South Third Street, Suite 1100, Columbus, Ohio. To register go to **www.cbalaw.org**.

ACI's 16th National Forum on Wage & Hour Claims and Class Actions

Stephen Zashin will be part of the panel presenting "Arbitrating Wage & Hour in the Wake of AT&T Mobility and D.R. Horton on September 28, 2012 at the Hilton San Francisco Financial District in San Francisco, California.

Register: **AmericanConference.com/WageHourSNF**

49th Annual Midwest Labor and Employment Law Seminar

Stephen Zashin will be part of the panel presenting "Managing Cost of E-Discovery" on October 12, 2012 at the Hilton, Easton Town Center in Columbus, Ohio.

To register go to **www.ohiobar.org**

Health Care Reform... How Will It Affect You?

Pat Hoban is the keynote speaker for the FREE seminar and breakfast presented by Cedar Brook Financial Partners on Tuesday, October 16th, 2012 at 9:00am at Cedar Brook Financial Partners, 5885 Landerbrook Drive, Mayfield Heights, Ohio 44124. Seminar will take place in the Garage Level Conference Room.

If you are interested in attending, please RSVP to Cassandra by Thursday October 11th at **cflanigan@cedarbrookfinancial.com** or 440.683.9240.

Labor Law Seminar presented by Faulkner, Hoffman & Phillips, LLC

Jon Dileno will co-present "Grievance/Arbitration Processing Strategy" on October 29, 2012 at the FOP 67 Lodge Hall.

American Bar Association Section of Labor and Employment Law

6th Annual Labor and Employment Law Conference

George Crisci will be part of the panel presenting "One Year After Wisconsin and Ohio – The State of the Public Sector" on November 2, 2012, at the Westin Peachtree Plaza, 210 Peachtree St SW. Atlanta, GA.

To register go to **www.americanbar.org**

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