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Workplace News *Employment Law Litigation and Proactive Conflict Resolution Services for the Workplace* **Winter 2012**

Controversial Employment Selection Practices

"Must be currently employed" hiring policies

Millions of Americans are out of work. The national unemployment rate is over 8.5%. This number does not include the millions of unemployed workers who have simply given up looking for work.

Adding insult to jobseekers, is a growing trend among employers to refuse to hire unemployed workers. Advertisements seeking positions as varied as electrical engineers, restaurant managers, and mortgage underwriters have contained caveats that only currently employed candidates will be considered. Employers use this requirement as a way to distinguish among the many applicants in this economy. Employers theorize that individuals who kept their jobs during the economic recession must be good employees and anyone who did not must be bad. Employers worry that people who are out of the workforce have outdated skills or are poor performers. However, such reasoning does not take into account the myriad of reasons someone may be out of work. During the recession, companies let employees go for reasons that had nothing to do with their skills or work quality. They may have been victims of cost-costing measures, poor management choices, or their company simply failed.

On February 16, 2011, the EEOC (Equal Employment Opportunity Commission) held a public meeting to examine the impact of employers considering only those currently employed for job vacancies. While the unemployed are not a protected class under anti-discrimination laws, an employer's policy of not hiring anyone that is not currently employed, can have a *disparate impact* on racial minorities, individuals with disabilities, women, and older persons. That is, this seemingly non-discriminatory process of selecting job candidates can have an unintentional, discriminatory effect on protected classes of persons.

Employers should be cautious if using such a policy. If it is shown that the facially neutral policy has a disparate impact on a protected class of persons, the employer must prove the policy is job related and consistent with business necessity. That is, the employer must show that being employed is a necessary qualification for the job. Even if the employer can prove that this is true, the employer may still be liable for using such a policy if the employer refuses to adopt an alternative employment practice that has a less disparate impact and serves the employer's legitimate business needs.■

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"No criminal background" hiring policies

As with an employer's facially neutral policies of checking a job applicant's credit or hiring only currently employed individuals, employers who reject job applicants with a past criminal history, can face disparate impact claims. Statistics show that automatic exclusion of all applicants with criminal backgrounds disproportionately affects racial minorities and men.

Should legal claims arise, employers who use a blanket rejection policy for all applicants with criminal backgrounds would need to show that using such a policy is job related and consistent with business necessity. As with credit checks, the EEOC has closely scrutinized employers' uses of criminal background checks when hiring. As part of showing a business necessity for the use of such a policy when making employment decisions, the EEOC requires employers making an employment decision based on a criminal conviction to consider the nature of the offense(s), the severity of the offense, the length of time since the offense, and the nature of the job being sought. Some recent lawsuits filed include:

Arroyo v. Accenture – challenging Accenture's practice of rejecting applicants and terminating employees with criminal records, even where the criminal history has no bearing on the fitness or ability to perform the job;

Hudson v. First Transit, Inc. – challenging First Transit's blanket policy of rejecting applicants if they have been convicted of a felony or served a day in jail;

Mays v. Burlington Northern Santa Fe Railroad Co., - challenging BNSF's blanket policy of prohibiting any person from working for the company who had a felony conviction within the past seven years;

Johnson v. Locke – challenging the U.S. Census Bureau's policy of excluding any job applicant for a temporary position with a criminal record.

In addition to considering possible discrimination claims when using criminal background checks, employers need to also be aware of current Minnesota state laws related to criminal background inquiries. Minnesota statute, § 364.021, prohibits most public employers from inquiring into an applicant's criminal history until the applicant has been selected for an interview. Minnesota statute § 181.986, is designed to encourage the hiring of ex-offenders by limiting the parties ability in negligent hiring and retention cases to introduce evidence relating to an employee's past criminal history where the job duties of the position did not expose co-workers or the public to any heightened harm of risk.■

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"Good credit only" hiring policies

Employer's use of credit checks to screen job applicants is wide spread. A 2010 survey by the Society for Human Resource Management found that 60% of employers now check the credit of at least some applicants. Those candidates receiving poor credit scores are not hired. Employers who use credit checks maintain that how a person has handled his financial responsibilities is relevant to how they will perform in the job. They believe that someone having financial difficulties is more inclined to engage in risky behavior, such as stealing from the company.

Consumer advocates and others opposed to employers using credit checks to screen applicants, argue it leaves those who desperately need a job in dire circumstances. Once someone loses their job and is unable to pay their bills, their credit score plummets. This poor credit leaves them unable to find new work. As they slide deeper into debt, employers find them even less desirable and they are entrenched in circumstances from which they may never escape. Those opposed to using credit scores as a hiring screening tool, say it unfairly penalizes minorities; arguing there is no correlation between an individual's credit score and their character or any job performance, and that credit reports are unreliable.

While using credit scores in making hiring decisions is not necessarily illegal, employers need to be careful. In some cases, credits checks can be found to be illegal if they have a disproportionate affect on minorities and other protected classes of workers.

As with a "no hire of those unemployed" policy, if an employer's practice of using credit checks to select job hires is shown to have a disproportionate impact on race or another protected class, the employer must prove that using credit checks is job related and justified by business necessity. And then, even after showing a business necessity, the

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Good Credit Only, continued

employer could be required to show that there was no alternative, non-discriminatory way of obtaining the same information.

A recent example of a lawsuit involving credit checks occurred in December 2010. The EEOC sued Kaplan Higher Education Corp., alleging that its use of credit history to screen job applicants discriminates against African Americans. The lawsuit alleged that Kaplan has routinely rejected job applicants because of bad credit and that this practice has an unlawful, discriminatory impact because of race, in violation of Title VII of the Civil Rights Act of 1964. The EEOC maintained the job practice is "neither job related nor justified by business necessity." ■

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Bertelson Law Office Offers Mediation Services

For many, early intervention in a legal conflict protects both a client's dignity and pocketbook. As a mediator, Beth Bertelson can help parties resolve disputes, providing control and closure on a difficult situation by avoiding the time and expense of a trial. As legal advocates practicing exclusively in employment law, we understand that employment conflicts can impact people physically, emotionally and financially. We also understand that for companies, unresolved disputes generally fester into costly litigation, affecting employee morale and profits.

In addition to representing individual clients in employment law matters and providing mediation services, Beth has trained businesses on employment law issues and investigated internal reports.

For over 20 years, Beth Bertelson has practiced in the area of employment law. She is a certified Labor and Employment Law Specialist by the Minnesota State Bar Association. She has been recognized in *Law & Politics* and *Minneapolis St. Paul Magazine* as a "Super Lawyer." She is a qualified neutral under Minnesota Rule 114. She has served as a section council member of the Labor and Employment Law Section of the Minnesota State Bar Association and a board member for the Minnesota Chapter of the National Employment Lawyers Association and several other non-profit organizations. ■

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