Sills Cummis & Gross P.C.

Client Alert Employment & Labor

Recent Developments Under Federal, New York, and New Jersey Law Will Impact Employment Relationships; Employers Must Plan Accordingly

New Jersey Bans Pre-Employment Criminal Record Inquiries During Initial Application Process

Beginning on March 1, 2015, New Jersey employers with 15 or more employees will be prohibited from inquiring into a job applicant's criminal history until after they have conducted an initial interview of the applicant. Employers will also be banned from stating in any employment advertisement that they will not consider applicants who have been arrested or convicted of a crime. These "ban the box" protections are set forth in the New Jersey Opportunity to Compete Act (the "Act"), which Governor Christie signed into law on August 11, 2014. In passing the Act, New Jersey became the thirteenth state to enact statewide ban the box legislation.

The prohibition on asking about an applicant's criminal history before his or her initial interview is not absolute. For one thing, it is waived if the applicant voluntarily discloses information about his or her criminal record. For another, it does not apply if the applicant seeks a position: (a) in law enforcement, corrections, the judiciary, homeland security, or emergency management; (b) where a criminal record background check is required by law, rule, or regulation, and where an arrest or conviction may preclude the applicant from holding the applied-for position; or (c) designated by the employer to be part of a program or systematic effort designed predominately or exclusively to encourage the employment of persons who have been arrested for or convicted of a crime. Additionally, the protections

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provided under the Act do not extend to persons employed in domestic service, to independent contractors, or to directors or trustees.

Following the initial interview, which need not be conducted in person, the prohibition on asking about an applicant's criminal history is lifted. At that point in the application process, therefore, an employer may require an applicant to disclose information regarding his or her criminal history, and may refuse to hire an applicant on the basis of the information disclosed. A refusal to hire may not, however, be predicated upon a criminal record that has been erased or expunged.

An employer who violates the Act will be liable for civil penalties of up to $1,000 for its first offense, $5,000 for its second offense, and $10,000 for every offense thereafter.

To limit their exposure to liability under the Act, employers should: (a) review their New Jersey job application forms to determine whether they seek information regarding an applicant's criminal history, and revise them if they do; (b) withdraw any employment advertisements that indicate that the employer will not consider applicants who have been arrested for or convicted of a crime; and (c) train internal recruitment personnel, and external employment agency contacts, to avoid inquiry into an applicant's criminal history until after they have conducted an initial interview of the applicant.

EEOC Signals Intent to Tighten Enforcement of Laws Prohibiting Pregnancy-Related Discrimination

Noting that it continues to see "a significant number of charges alleging pregnancy discrimination," and that its "investigations have revealed the persistence of overt pregnancy discrimination, as well as the emergence of more subtle discriminatory practices," the U.S. Equal Employment Opportunity Commission ("EEOC") recently issued Enforcement Guidance on Pregnancy Discrimination and Related Issues ("Enforcement Guidance"). The full text of the Enforcement Guidance is available at http://www.eeoc.gov/laws/guidance/enforcement_guidance.cfm.

The EEOC's issuance of the Enforcement Guidance, which focuses primarily on the fundamental requirements of the Pregnancy Discrimination Act ("PDA"), while also touching on the pregnancy-related protections provided under the Americans with Disabilities Act ("ADA"), sends a strong signal to employers that their employment

decisions and policies will now be more intently scrutinized for actionable pregnancy discrimination.[1]

The Enforcement Guidance focuses on the issue of equal access to benefits – in particular, to light duty, leave, and health insurance. With regard to light duty, employers may not treat employees whose capacity is limited by pregnancy, or a pregnancy-related condition, any differently than they do employees who are similarly limited, but for reasons unrelated to pregnancy.

As for leave, employers should be cognizant of the following. First, they may not force an employee to take leave because she is or has been pregnant, so long as she is able to perform her job. Second, the PDA mandates that employers permit women with pregnancy-related physical limitations to take leave on the same terms and conditions as employees who are similarly limited for other reasons. Finally, while leave related to pregnancy-related medical conditions will, necessarily, be limited to female employees, leave to bond with or care for a newborn must be extended to male and female employees on an equal basis.

With regard to health insurance, employers should note that an employer-provided health insurance benefit plan must cover pregnancy-related costs to the same extent it covers medical costs unrelated to pregnancy. This required symmetry of coverage must extend to costs stemming from an insured employee's pre-existing pregnancy. Additionally, an employer may be in violation of the PDA if the health insurance it provides does not cover prescription contraceptives, regardless of whether the contraceptives are prescribed for birth control or for medical purposes. The Enforcement Guidance does not address whether, in the wake of the U.S. Supreme Court's *Hobby Lobby* decision, certain employers may be exempt from providing insurance coverage for contraceptives.

The guidance also addresses the obligations under the ADA to provide pregnant employees with reasonable accommodations to address pregnancy-related limitations. Such accommodations may include:

- redistributing marginal or nonessential functions – such as occasional lifting – that a pregnant worker cannot perform;
- modifying workplace policies, such as to afford a pregnant employee more frequent breaks;

[1] Although beyond the scope of this Alert, employers should note that, in addition to the PDA and ADA, both of which are federal statutes, New York City, New York State, and the State of New Jersey, have each passed laws banning discrimination on the basis of pregnancy.

- allowing a pregnant employee placed on bed rest to work remotely (where feasible); or
- granting leave to a pregnant employee in excess of what the employer typically provides under its sick leave policy.

The final section of the Enforcement Guidance provides "best practices" that employers can utilize to reduce their exposure to pregnancy-related liability under the PDA and ADA. The EEOC suggests, as a general matter, that employers should:

- develop, disseminate and enforce a strong policy based on the requirements of the PDA and ADA;
- train managers and employees regularly about their rights and responsibilities related to pregnancy, childbirth, and related medical conditions;
- conduct employee surveys and review employment policies to identify and correct any policies or practices that may disadvantage women affected by pregnancy, childbirth, or related medical conditions, or that may perpetuate the effects of historical discrimination in the organization;
- respond to pregnancy discrimination complaints efficiently and effectively; and
- protect applicants and employees from retaliation.

In light of the EEOC's heightened emphasis on PDA and ADA enforcement, employers should consult counsel before undertaking employment actions that may implicate pregnancy-related protections under the PDA or ADA, and to evaluate whether revisions to existing employment policies are needed to limit exposure to pregnancy-related liability.

Interns in New York Gain Greater Legal Protection Against Employment Discrimination

On July 22, 2014, the New York State Human Rights Law ("NYSHRL") was amended, effective immediately, to afford protections to interns against employment discrimination. The amendment to the NYSHRL, which closely tracks an amendment to the New York City Human Rights Law (the "NYCHRL") that took effect on June 14th of this year, extends to interns certain anti-discrimination protections. Both statutes apply to employers, including employment agencies, with at least four employees.

The newly amended NYSHRL prohibits discrimination against interns in, among other things, hiring, firing, and terms and conditions of employment, on the basis of age, race, creed, color, national origin, sexual orientation, military status, sex, disability, predisposing genetic characteristics, marital status, and domestic violence victim status. The amended NYCHRL, meanwhile, bars discrimination on similar, although not identical, bases. Specifically, the NYCHRL does not explicitly ban discrimination on the basis of military status or predisposing genetic characteristics, as the NYSHRL does, but enumerates several protected categories that are not identified in the NYSHRL: partnership status; any lawful source of income or lawful occupation; status as a victim of sex offenses or stalking; and whether children are, may be, or would be residing with the person.

The NYSHRL defines "intern" to mean a person who performs work for an employer for the purpose of training under the following circumstances:

1. The employer is not committed to hire the person performing the work at the conclusion of the training period;
2. The employer and the person performing the work agree that the person performing the work is not entitled to wages for the work performed; and
3. The work performed:
    a. provides or supplements training that may enhance the employability of the intern;
    b. provides experience for the benefit of the person performing the work;
    c. does not displace regular employees; and
    d. is performed under the close supervision of existing staff.

The NYCHRL defines "intern" in much the same way, albeit with one key distinction: under the NYCHRL, an individual need not be unpaid in order to be considered an intern.

Of significance to employers, while the NYSHRL, as amended, now provides the same employment discrimination protections to interns that it does to employees, it explicitly declines to create an employment relationship between employers and interns in other areas governed by the New York Labor Law. Specifically, the amended NYSHRL does not create an employment relationship for purposes of Article 6 (payment of wages), Article 7 (general provisions), Article 18 (unemployment insurance), or Article 19 (minimum wage).

In response to the amendments to the NYSHRL and NYCHRL, New York employers should expand the scope of the protections provided under their existing anti-discrimination policies to include interns. In addition, they should provide training to their managers and supervisors that will increase awareness of the fact that it is unlawful in New York State and New York City for an employee to harass, discriminate against, or retaliate against an intern.

If you have any questions regarding whether or how to revise your handbook or policies based on the information in this alert, or if you need more information, please contact one of the following Sills Cummis & Gross attorneys:

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