November-December 2010

Weil

# Employer Update

## Holiday Party Liability Prevention Checklist

*By Jeffrey S. Klein and Nicholas J. Pappas*

***A Checklist to help employers avoid the legal risks presented by employer-sponsored holiday parties.***

The festive atmosphere combined with the consumption of alcohol at an employer-sponsored holiday party make it a potential venue for inappropriate behavior and may lead to employee or third-party claims based on injuries suffered during or after the event. While planning and having the event, employers should take steps to:

### Prevent Sexual Harassment

- *Ensure that human resources policies address employer-sponsored social functions.* Employers may want to amend their harassment policies to specifically address employer-sponsored social events. In particular, employers may want to provide specific examples of conduct at holiday parties that is unacceptable. For example, the policy may remind employees that risqué or adult-themed gifts should not be exchanged with co-workers.
- *Keep holiday customs appropriate to the workplace.* In planning an employer-sponsored holiday party, employers should avoid including customs that have the potential to create romantic or sexually-charged situations, such as hanging mistletoe.
- *Consider allowing guests to attend.* Although the addition of guests raises the cost of a holiday event, employees may be more reserved and less likely to engage in offensive behavior when accompanied by their significant others or surrounded by unfamiliar faces.

For a collection of resources on sexual harassment prevention and response, see *Sexual Harassment Toolkit* (www.practicallaw.com/3-502-7984).

### Avoid Harms Related to Alcohol Consumption

#### Understand Potential Liabilities Associated with Alcohol Consumption at Employer-Sponsored Events

While an employer's potential liability for injuries caused by employees who consume alcohol at company functions varies from state to state, possible theories of liability include:

- Common law theories of negligence.
- *Respondeat superior*, which holds employers responsible for the acts of employees undertaken in the course of their employment.
- Social host or Dram Shop liability, which holds the provider of

*This Checklist is published by Practical Law Company on its PLCLaw Department web service at http://us.practicallaw.com/8-503-9003.*

**In This Issue**

alcoholic beverages who served alcohol to visibly intoxicated individuals liable for injuries those individuals may cause while intoxicated. Social host and Dram Shop laws vary from state to state. Different state approaches include:

- providing clear statutory grounds on which employers may be liable;
- limiting Dram Shop liability to commercial vendors of alcohol; or
- limiting Dram Shop and social host liability to those who provide alcohol to minors.

**Reduce the Risk of Alcohol-related Accidents**

- Hold the event at a restaurant or other off-site location. Employers may want to hold holiday events at establishments with a liquor license and where alcohol is served by professional bartenders who know how to respond to guests who are consuming alcohol to excess.
- Hire a professional bartender or caterer for on-site events. If the event is held on the employer's premises, the employer should consider hiring a professional bartender or caterer to serve any alcoholic beverages. The employer may want to confirm that the caterer carries liability insurance and instruct bartenders or wait staff not to serve drinks to anyone who is visibly intoxicated. Employees should not be permitted to stand in as bartenders or otherwise serve drinks to co-workers.
- Limit the amount of alcohol that will be served. Employers may try to control alcohol consumption by:
  - providing a limited number of drink tickets or limiting the time during which alcohol will be served;
  - scheduling the party for earlier in the day, when it is more socially acceptable not to drink and employees may be less likely to drink to excess;
  - providing entertainment to shift the focus of the event away from alcohol to something else; and
  - making a variety of non-alcoholic beverages and food available as an alternative to alcoholic beverages.
- Provide alternative transportation. Employers should consider providing transportation for employees leaving employer-sponsored events at which alcohol is served.
- Encourage employees to look out for intoxicated co-workers. Employers should:
  - encourage employees to notify management if another employee appears overly intoxicated; and
  - consider designating certain employees as "spotters" to look out for colleagues who may have had too much to drink, but be sure not to designate employees who may be non-exempt from the Fair Labor Standards Act (www.practicallaw.com/5-501-9884) (FLSA) to avoid claims that they were required to work off the clock and therefore are entitled to additional compensation (see *Prevent Wage and Hour Claims by Non-exempt Employees*).
- Determine whether the company is insured. Employers may purchase insurance covering Dram Shop or liquor law liability in states that recognize those causes of action. Companies should review their existing coverage before purchasing a new policy because a comprehensive general liability policy may provide sufficient coverage.

## Minimize the Risk of Workers' Compensation Liability

Although the law varies from state to state, workers' compensation benefits may be available to employees who are injured during, or because of, an employer-sponsored event. To minimize this risk, employers should:

- Disassociate the holiday function from employee jobs. This can be done by:
  - letting employees know that there is no business purpose for the event and attendance is not mandatory; and
  - hosting the event off employer premises.
- Confirm that service or venue providers are properly licensed. Injuries associated with contaminants in food or drink may create legal exposure for employers if their providers are not properly licensed. Third-party licensing reduces risks because licensed establishments are subject to inspection and protected by additional insurance coverage.

### Prevent Wage and Hour Claims by Non-exempt Employees

- Inform employees that attendance at the party is voluntary.
- Hold the party outside normal business hours.
- Refrain from engaging in any business during the event, including:
  - speeches about business matters; and
  - distribution of bonuses or performance awards.
- Avoid asking employees to perform any specific functions at the party for the benefit of the employer to avoid claims that they were required to work off the clock.



# EEOC Issues Final Rule for GINA

*By Emily Friedman*

The Genetic Information Nondiscrimination Act ("GINA"), among other things, prohibits discrimination by employers, employment agencies, labor organizations and health insurers on the basis of genetic information. Title II of GINA, which took effect on November 21, 2009, governs employment discrimination and prohibits the use, acquisition and disclosure of genetic information in hiring, termination, compensation and other personnel practices. Since Title II took effect, many questions have arisen concerning its content and scope. Recently, the Equal Employment Opportunity Commission ("EEOC") issued a final rule implementing Title II in an attempt to clarify some of these questions. The final rule, which will become effective on January 10, 2011, provides employers with useful details regarding the provisions in Title II and their intent.[1] Although not exhaustive, this article will highlight some of the EEOC's clarifications that likely will be of interest to employers.

### Who Is Covered Under Title II?

The final rule clarified the open question of whether Title II applies to former employees. The EEOC's position is that GINA's Title II should be interpreted consistent with Title VII of the Civil Rights Act of 1964 ("Title VII"), protecting former employees, as well as job applicants, labor union members, apprentices and trainees.

### Other Definitions in Title II

Title II defines six terms not found in other employment discrimination statutes enforced by the EEOC. Of particular interest are the terms "family member," "genetic information" and "genetic test."

Under the EEOC's final rule, a "family member" means a person who is a dependent of the individual "as a result of marriage, birth, adoption, or placement for adoption." In concluding that Congress intended to include persons who become dependents by adoption within the definition, the EEOC explained that the acquisition of information about a particular disease or disorder in an adopted child could result in the type of discrimination that Title II was intended to prohibit. For example, an employer might use information about the health status of an employee's adopted child to discriminate against the employee because of concerns over potential health care costs.

"Genetic information" is defined to include information from genetic tests, the genetic tests of family members, family medical history, information about an individual's or family member's request for or receipt of genetic services, or genetic information of a fetus or embryo. The final rule reminds employers that information about age, sex, race and ethnicity that is not derived from a genetic test is not genetic information and therefore, may be disclosed by employers to comply with EEO obligations.

The EEOC also explains more fully the term "genetic test," which is defined as the "analysis of human DNA, RNA, chromosomes,

proteins, or metabolites that detects genotypes, mutations, or chromosomal changes." The final rule provides non-exhaustive examples of genetic tests that fall under the definition, including tests to determine an individual's predisposition to breast cancer or colorectal cancer, paternity tests, and carrier screenings of adults to determine risks of conditions such as cystic fibrosis or sickle cell anemia. The final rule also clarifies the types of tests that do *not* constitute "genetic tests," including cholesterol tests, tests for the presence of drugs and alcohol, and tests for infectious or communicable diseases that may be transmitted through food handling.

## Clarification of Prohibited Conduct

In addition to Title II's general prohibition on the use of genetic information in making decisions related to any terms or conditions of employment, the final rule seeks to allow individuals to bring claims for harassment on the basis of genetic information. Although not specifically provided in Title II, the EEOC has interpreted Title II to prohibit harassment. Specifically, the EEOC has taken the position that because Congress adopted language in Title II similar to that used in Title VII, Title VII's wide range of prohibited practices, including harassment, is covered by Title II.[2] It remains an open question whether such an expansive interpretation by the EEOC will sustained by the courts.

The final rule also reiterates Title II's prohibition against retaliation where an individual opposes any act made unlawful by Title II, files a charge of discrimination or assists another in connection with the filing of a charge, or gives testimony in connection with a charge. The preamble to the final rule notes that the same standard for determining what constitutes retaliatory conduct under Title VII, "as announced by the Supreme Court in *Burlington Northern & Santa Fe Ry. v. White*, 548 U.S. 53 (2006)," applies to Title II.

The final rule clarifies that Title II does not apply to an action of a covered entity[3] that does not pertain to an individual's status as an employee, member of a labor organization, or participant in an apprenticeship program. To illustrate the point that the action must be related to an individual's employment, the final rule provides two examples. First, Title II would not apply to a medical examination of an individual conducted for the purpose of diagnosis and treatment, which is conducted by a health care professional where the individual is an employee. Second, Title II would not govern the actions of a covered entity carried out in its capacity as a law enforcement agency investigating criminal conduct, even where the subject of the investigation also is an employee of the covered entity.

Finally, the EEOC's proposed regulations previously suggested that a covered entity must have a specific intent to obtain genetic information to be in violation of the law prohibiting a covered entity's acquisition of genetic information. However, the final rule clarified that a covered entity may violate Title II *without* specific intent. Specifically, the EEOC removed from the final rule references to "deliberate acquisition," and the final rule now restricts a covered entity from requesting, requiring, or purchasing genetic information of an individual or family member of the individual unless it falls within certain enumerated exceptions, such as where the information is inadvertently acquired. The final rule further revised the description of a "request" for genetic information to include "conducting an Internet search on an individual in a way that is likely to result in a covered entity obtaining genetic information; actively listening to third-party conversations or searching an individual's personal effects for the purpose of obtaining genetic information; and making requests for information about an individual's current health status in a way that is likely to result in a covered entity obtaining genetic information." Although the EEOC may have intended these changes to clarify certain provisions of Title II, they have the practical effect of expanding Title II's reach and making compliance more difficult for employers.

**Although the EEOC may have intended these changes to clarify certain provisions of Title II, they have the practical effect of expanding Title II's reach and making compliance more difficult for employers.**

## Exceptions to Prohibition on Acquiring Genetic Information

The final rule expands Title II's exceptions to the general prohibition against requesting, requiring or purchasing genetic information, including the so-called "water-cooler" exception. Under Title II, the "water-cooler" exception protects employers who inadvertently come across "family medical history" about an individual or his/her family member, such as through casual conversations with an employee or by overhearing conversations among co-workers. The final rule specifically extends this exception to *any* genetic information that an employer inadvertently acquires. For example, the EEOC explained that Congress did not intend that an employer would be liable for the acquisition of genetic information because it overheard a conversation in which one employee tells another employee that her mother had a genetic test to determine whether she had an increased risk for breast cancer.

The EEOC also extended Title II's exceptions to apply in *any* situation where an employer might inadvertently acquire genetic information, not just to situations between co-workers that were overheard. For example, the EEOC clarified that the exception applies when a manager or supervisor receives information about an individual's family medical history directly from an individual following a general inquiry about the individual's health, such as "How are you?" or "Did they catch [the disease] early?" In similar fashion, information learned by a manager through a casual conversation concerning the well-being of a family member or an unsolicited email from an employee about the health of that employee's family member also would not violate Title II. Notwithstanding the above, the final rule makes clear that employers may *not* ask follow-up questions that are probing in nature, such as whether other family members also have a particular health condition, or whether the employee has been tested for the condition. Thus, employers must be mindful not to engage employees on these topics, as such interactions risk triggering Title II's restrictions and may be construed as unlawful acquisitions of genetic information.

**The EEOC extended Title II's exceptions to apply in any situation where an employer might inadvertently acquire genetic information, not just to situations between co-workers that were overheard.**

The EEOC noted that the inadvertent exception applies not only to interactions within the workplace, but also to situations where a representative of a covered entity unwittingly receives genetic information through the virtual world, such as "from a social media platform from which he or she was given permission to access by the creator of the profile at issue." For instance, if a manager were to learn of genetic information from a social networking site where the employee provides family medical history on the page, and the manager has been granted access to that page, there would be no Title II violation of the prohibition on acquisition of genetic information. Despite this seemingly straightforward hypothetical, there still remains a large gray area with respect to social media and the type of conduct that will constitute an employer's prohibited "active listening" under Title II. For example, it is unclear whether a court would view a manager's visit to an employee's social networking site as "inadvertent," even where that manager has been granted access to such site, if the manager somehow had reason to believe that the employee might post genetic information to such site.

Notably, in all of the above scenarios, Title II still prohibits a covered entity from using the inadvertently acquired genetic information to later discriminate against an individual with respect to hiring, termination, compensation, or any other term, condition or privilege of employment.

## "Safe Harbor" And Other Inadvertent Acquisition of Genetic Information

Significantly, the final rule provides that when a covered entity warns an individual from whom it requests health-related or medical information not to provide such information, the covered entity may take advantage of the safe harbor provision in Title II if the individual nonetheless provides the covered entity with the genetic information. Under these circumstances, if a covered entity were to acquire genetic information, receipt of such information would be considered "inadvertent." The final rule provides suggested language that covered entities should use

when providing the warning to individuals. The final rule also instructs that similar warning language should be used when an employer seeks health-related information from a health care provider.[4]

Moreover, the final rule clarifies that a covered entity also would not be in violation of Title II if that covered entity were to acquire genetic information inadvertently from medical documentation provided to the covered entity in response to an employee's request for a reasonable accommodation under the Americans with Disabilities Act ("ADA") or in response to a lawful request for medical information under the Family and Medical Leave Act ("FMLA").

Significantly however, acquisition of genetic information under these circumstances will be considered "inadvertent" only if the covered entity "directs the individual and/or health care provider from whom it requested medical information . . . not to provide genetic information," or, in the absence of such a warning, where the "request for medical information was not likely to result in a covered entity obtaining genetic information."

## Exception for Wellness Programs

The final rule makes clear that the EEOC does not want Title II to have a "chilling effect" on wellness programs. The final rule reiterates that a covered entity may seek genetic information in connection with a wellness program that offers health or genetic services, so long as certain conditions are met. First, the covered entity must obtain the proper written authorization from the individual (the details of which are set forth in the final rule). Second, the covered entity must provide the individually identifiable genetic information only to the individual (or family member, if applicable) and the health care professional involved in providing the wellness services. Third, the covered entity may not allow persons who make employment decisions or anyone else in the workplace to access such information. Finally, any identifiable genetic information may only be disclosed to the covered entity in *aggregate* terms so as not to disclose the identity of specific individuals.

A covered entity may offer certain financial inducements or prizes to encourage employee participation in a wellness program, but the covered entity may *not* offer a financial inducement for individuals to provide genetic information. The practical result of this rule is that a covered entity may ask an individual to complete a health risk assessment form that includes questions about family medical history or other genetic information, provided that the covered entity makes clear, in language "reasonably likely" to be understood by those completing the health risk assessment, that the individual need not answer such questions to receive the financial inducement or prize.

The final rule further explains that, to the extent a covered entity offers participation in a disease management program or other program that encourages healthy lifestyles to achieve particular health goals based on an individual's *voluntary* disclosure of genetic information, the covered entity also must offer such programs to individuals with "current health conditions and/or to individuals whose lifestyle choices put them at increased risk of developing a condition."

## Confidential Treatment of Genetic Information

Title II requires that covered entities maintain genetic information apart from other personnel files in separate medical files, in accordance with the same confidentiality rules as required by the ADA. In the final rule, the EEOC noted that, although genetic information placed in a personnel file prior to Title II's effective date need not be removed, and an employer "will not be liable under [Title II] for the mere existence of the information in the file," disclosure of such information to a third party is strictly prohibited, regardless of the date the genetic information was obtained. As a result, the final rule clarifies that covered entities must remove all genetic information from personnel files prior to disclosing such files.

The final rule also prohibits an employer's disclosure of genetic information in response to discovery requests or subpoenas, unless they are governed by a court order specifying that genetic information must be disclosed. Given the broad definition of "genetic information," an employer would be well advised to carefully review any information it intends to produce in response to discovery requests or subpoenas prior to disclosure, even if the requests do not specifically use language such as "genetic information."

## No Personal Liability

The preamble to the final rule notes that Title II's definition of "employer" includes employers as defined by Title VII, which has been interpreted by numerous courts as not permitting individual liability. Accordingly, while the regulation does not state this point explicitly, the preamble to the final rule makes clear the EEOC's position that there is no individual liability under Title II.

## Practice Pointers

Since Title II took effect last year, employers likely have already put into place certain safeguards to ensure compliance with the law's requirements. However, given the clarifications set forth in the final rule, employers would be well-advised to:

- Review and revise applicable policies, including employment applications and other documents containing EEO statements, to ensure that they clearly prohibit not only discrimination based on genetic information, but also harassment and retaliation.
- Include the EEOC's prescribed notices (i.e., the "safe harbor" language) on all relevant forms and documents that could be construed as requesting genetic information from either applicants or employees, including forms associated with a request for a reasonable accommodation under the ADA or forms associated with lawful requests for medical information under the FMLA.
- Create a standard acknowledgment form to utilize in connection with a wellness program's health risk assessment form, which clearly states that the employee has voluntarily provided genetic information and understands that he or she need not answer any questions eliciting genetic information in order to receive a financial inducement associated with a wellness program.
- Train those employees who have access to genetic information (including genetic information that was acquired by the employer before Title II took effect) on how to protect such information and segregate it from applicant or employee personnel files.
- Train management and other relevant personnel on Title II's boundaries, including the line between "actively listening" and inadvertently overhearing a conversation, as well as the line between being polite and asking too many follow-up or probing questions of an employee.

1 The EEOC's Regulations Under the Genetic Information Nondiscrimination Act of 2008 are published at 29 C.F.R. § 1635 (2010).

2 *See also* "Background Information for EEOC Final Rule on Title II of [GINA]," *available at*: http://www1.eeoc.gov//laws/regulations/gina-background.cfm?renderforprint=1.

3 The final rule and its preamble uses the term "covered entity" to refer collectively to all entities subject to GINA's Title II. Title II of GINA applies to private employers and state and local government employers with 15 or more employees, employment agencies, labor unions, and joint-labor management training programs. It also covers Congress, federal executive branch agencies, and the Executive Office of the President.

4 The final rule also provides that a covered entity may deliver such notice verbally if the request for medical information also is verbal.

# Defenses to Pay Discrimination Claims Under Section 703(h) of Title VII

*By Jeffrey Klein, Nicholas Pappas and Patricia Wencelblat*

Employers frequently design their compensation programs to provide increased compensation to employees based on differences in production or merit. For example, employers in the business of producing widgets quite appropriately will seek to maximize their profits by compensating employees who produce a higher number of widgets more generously than employees who produce fewer widgets. Similarly, employers in service businesses frequently will compensate employees who deliver higher quality service to customers more generously than employees who deliver service of lesser quality. In enacting Title VII, Congress recognized that such merit- or production-based compensation systems are socially desirable, and accordingly immunized such systems from discrimination claims under Title VII with only limited exceptions.

Section 703(h) of Title VII of the Civil Rights Act of 1964 embodies this Congressional intent by providing that "[i]t shall not be an unlawful employment practice . . . to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production [when] such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(h). Although this provision has been part of Title VII since its enactment in 1964, courts have infrequently addressed the scope of employers' defenses to claims of discrimination arising from the application of merit- or production-based compensation systems.

## Congressional Intent

Congress included Section 703(h) in Title VII in order to exempt merit- or production-based compensation systems from most discrimination claims otherwise available under Title VII. Legislative history reflects that Congress anticipated that legitimate "merit, or other incentive systems[s]," might result in less pay to members of particular protected classes. *See* 110 Congr. Rec. 10, 12723 (1964). Congress intended to protect these employment practices "unless it is shown that the employer was intending to discriminate for or against one of the [protected] groups." *Id.*

The legislative history for a similar provision in the Equal Pay Act ("EPA"), 29 U.S.C. § 206(d), on which Section 703(h) was modeled, confirms that Congress understood that merit- and production-based systems need not result in equal compensation amounts being paid to employees grouped by their respective sexes.[1] "[M]easur[ing] either the quantity or quality of production or performance can result in far greater gross earnings by one person compared to another, even though both are technically doing the same type of work." S. Rep. No. 88-176, at 4 (1963); *EEOC v. Aetna Ins. Co.*, 616 F.2d 719, 725 (4th Cir. 1980). The legislative history goes on to state that, "obviously, such systems which measure quantity or quality of production or performance will be valid exceptions to the equal-pay requirements." S. Rep. No. 88-176, at 4.

Unlike its counterpart in the EPA, Section 703(h) does not operate as an affirmative defense. *See Lorance v. AT&T Techs., Inc.*, 490 U.S. 900, 908-09 (1989). Accordingly, plaintiffs must affirmatively establish as part of their *prima facie* cases that the employer's practice falls outside the scope of Section 703(h), and an "actual intent to discriminate must be proved." *Id.* (quoting Am. *Tobacco Co. v. Patterson*, 456 U.S. 63, 65 (1982)). Otherwise, there is no claim for discrimination.

## Merit- or Production-Based Systems

Section 703(h) defines a production-based system as a system that measures earnings by quantity or quality of production. The statute does not define merit-based systems, but courts have held that a compensation program is merit-based where it consists of an organized and structured procedure with systematic evaluations under predetermined criteria. For example, in *Aetna*, 616 F.2d at 725, the court held that a mathematical matrix for awarding compensation was a "merit system." *See also Scott v. Dallas County Hosp. Dist.*, 2003 U.S. Dist. LEXIS 6744, at *5-6 (N.D. Tex. Apr. 21, 2003). Similarly, in

*Gerbush v. Hunt Real Estate Corp.*, 79 F. Supp. 2d 260, 264 (W.D.N.Y. 1999), the court found that tying salaries to branch revenues and awarding bonuses for exceeding predicted revenue levels was a "merit system." Further, in *Urrutia v. Valero Energy Corp.*, 1988 U.S. Dist. LEXIS 16715 (W.D. Tex. Dec. 12, 1988), the court held that awarding compensation based on objective, job-related criteria and evaluations was a "merit pay system." *See also Goodman v. Merrill Lynch*, 2010 WL 1404155 (S.D.N.Y. Apr. 6, 2010).[2]

Likewise, courts have found that programs that do not meet the guidelines described above are not Section 703(h) merit systems. For example, in *Morgado v. Birmingham-Jefferson County Civil Def. Corps*, 706 F.2d 1184, 1188 (11th Cir. 1983), the court stated that "a written set of job descriptions, even if those descriptions are regularly evaluated, is not a 'merit system,' if the described set of positions present no means or order-"system"-of advancement or reward for merit." In that case the plaintiff-employee claimed that she had been paid less than men who were similarly situated, despite having different job titles. The defendant-employer sought to defend the wage differential based upon Section 703(h), and pointed to its use of written job descriptions, along with reviews of the descriptions by employees and by independent consulting firms. While the court did not infer from the descriptions any intent to discriminate, the court concluded that the mere existence of written job descriptions, which state the various jobs' pay, no matter how methodically compiled, did not constitute a merit system, and did not justify the pay differential between job titles. *See also Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986) (same). In *Grove v. Frostburg Nat. Bank*, 549 F. Supp. 922, 934 (D.C. Md. 1982), the court held that the system for evaluating employees for raises was not a merit system, because it was neither organized nor structured, and no systematic evaluation using predetermined criteria was made. The decision-maker could not recall whether he had consulted with department supervisors at the end of each year concerning individual employees, and his testimony indicated that the factors that influenced his pay decisions were not uniformly applied, and he admitted that the primary criterion was his "gut feeling" about each employee. *Id.*

### "Intent" Under Section 703(h)

If the application of a merit- or production-based compensation system results in a disparity between the compensation paid to employees in a protected category as compared to other employees, employees have argued that the disparity alone may provide the basis of a cause of action for employment discrimination under Title VII. Courts generally have rejected such claims, and have held that to sustain a claim under Title VII, a plaintiff must demonstrate that the employer adopted the system with an intent to discriminate.

Courts have routinely rejected at least two types of evidence offered by plaintiffs in assessing whether there exists a reasonable inference of intent to discriminate in the adoption of a merit-or production-based compensation system: (1) past discrimination or discrimination in other practices that the plaintiffs argue are "inputs" to the merit- or production-based system; and (2) alleged knowledge of a disparate impact caused by a bona fide merit- or production-based system.

**Congress included Section 703(h) in Title VII in order to exempt merit- or production-based compensation systems from most discrimination claims otherwise available under Title VII.**

### Allegedly Discriminatory Inputs

When examining whether a Section 703(h) system has a discriminatory purpose, courts distinguish between challenges to the system itself and "challenges to other discriminatory conduct that in turn manipulates the system to the detriment of" protected class members. *Larkin v. Pullman-Standard Div., Pullman, Inc.*, 854 F.2d 1549, 1576 (11th Cir. 1988), *vacated on other grounds by Pullman-Standard, Inc. v. Swint*, 493 U.S. 929 (1989). A Section 703(h) system cannot be attacked merely because it allegedly perpetuates discrimination in other employment practices. *Int'l Brotherhood of Teamsters v. United States*, 431 U.S. 324, 347-48 (1977). When other practices, such as "hiring, assignment, transfer and promotion policies," are allegedly discriminatory, plaintiffs may obtain "all appropriate relief as a direct remedy for [that] discrimination." *Id.*

To meet the requirements of Section 703(h), a plaintiff must establish "that the [§703(h)] *system itself* was negotiated or maintained with an actual intent to discriminate." *Larkin*, 854 F.2d at 1576. Any purported evidence regarding other practices does not relate "directly to [the employer's] intent regarding the *system*," but "tends to prove instead that [the employer] engaged in a number of other, separate discriminatory practices, and . . . the Supreme Court has required us to keep such distinctions in mind." *Id.* at 1577. For example, if an employer uses a commission-based system to compensate its employees, but discriminates on the basis of a protected category in terms of the customers it steers to its employees, the commission-based system itself is protected under Section 703(h), but the affected employees would have a claim for discrimination in the steering of customers, which lowered the commissions they could earn under the terms of the Section 703(h) protected system. The application of the Section 703(h) system may be a measure of damages for discrimination in terms of the alleged steering of customers, but existence and application of the commission-based system itself would not be grounds for liability.

Accordingly, allegations of past discrimination and the "inputs" into a merit- or production-based bonus program cannot serve as the basis for an attack against a Section 703(h) protected pay system.

## Knowledge of a Disparate Impact

Employees have sought to surmount the bar of Section 703(h) by arguing that an employer's mere awareness of a disparate result caused by a merit- or production-based system is sufficient to establish the necessary intent to discriminate in the adoption of the system itself that would meet the requirements of Section 703(h). The Supreme Court and several circuit courts have rejected the argument that knowledge of a disparity is tantamount to intentional discrimination. In *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979), the Supreme Court held that a veterans-preference program, which bestowed 97% of its benefits on men, did not constitute discrimination because knowledge that a program disfavors women is not akin to an intent to disfavor women. The Court further stated that "intent" means doing something because of, rather than in spite of or with indifference to the prohibited characteristic. Numerous courts have reached the same conclusion in scrutinizing plaintiffs' claims under Section 703(h). *See NAACP v. Detroit Police Officers Ass'n*, 900 F.2d at 909 (6th Cir. 1990) (holding that an employer who "knew that enforcement of the seniority plan would have a discriminatory impact on newly hired black officers" could not be liable under Title VII because application of the seniority plan was "congressionally immunized by §703(h) and by the decisions of the Supreme Court."); *Shelford v. N.Y. State Teachers Ret. Sys.*, 889 F. Supp. 81, 88 n.2 (E.D.N.Y. 1993) ("The only factual allegations offered by plaintiffs in their complaint deal with the system's purported disparate impact on women which, of course, is not sufficient to foreclose recourse to the protection afforded to facially neutral seniority systems afforded under § 703(h).").

**A Section 703(h) system cannot be attacked merely because it allegedly perpetuates discrimination in other employment practices.**

The Seventh Circuit has explained that "intent as awareness of consequences" cannot suffice, because demonstrating a discriminatory purpose requires more. *Am. Nurses' Ass'n v. Ill.*, 783 F.2d 716, 722 (7th Cir. 1986) (internal quotes and citation omitted). Instead, the "particular course of action" must have been "selected or reaffirmed . . .at least in part because of, not merely in spite of, its adverse effects on an identifiable group." *Id.* (internal quotation marks omitted); *see Day v. Patapsco & Back Rivers R.R. Co.*, 504 F. Supp. 1301, 1310 (D. Md. 1981) (applying this standard to §703(h)).

## Conclusion

Many employers use merit- or production based systems to evaluate and reward employees, and frequently are sued based on the application of such systems. In the past, employers may have

overlooked the possibility of relying on Section 703(h) in defending against claims of employment discrimination based upon the application of such systems. Employers should consider arguments for dismissal of such claims based on Section 703(h).

1 Section 206(d) precludes employers from paying wages at a rate less than is paid "to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." 29 U.S.C. §206(d)(1).

2 Weil, Gotshal & Manges LLP was one of two law firms representing Merrill Lynch in this matter.

# The National Labor Relations Board Issues Complaint for Firing Due to Facebook Posting by an Employee

*By Alex M. Solomon*

## Introduction

On October 27, 2010, the Region 34 office of the National Labor Relations Board (Hartford, CT) issued a complaint and notice of hearing ("Complaint") alleging that American Medical Response of Connecticut, Inc. ("Employer" or "AMR") engaged in unfair labor practices, *inter alia*, for terminating an employee who posted disparaging comments about her employer on her Facebook account in violation of the Employer's Blogging and Internet Posting Policy as well as its Standards of Conduct policy.[1]

Section 7 of the National Labor Relations Act ("NLRA" or "Act") protects certain forms of "concerted activity," which is that activity that is engaged in by employees for "mutual aid or protection."[2] Employers are prohibited under the NLRA from discriminating against those individuals who engage in concerted activity, or from taking action that "chills" the exercise of concerted activity. This case presents two significant issues for employers: (1) to what extent social media policies unlawfully "chill" the exercise of Section 7 rights; and (2) whether communications on one's Facebook account is concerted activity. A hearing on the Complaint is scheduled for January 25, 2011, and the outcome of the charge may change the landscape concerning the use by and scope of employer's social media policies, as well as the enforcement of those policies.

## Factual Background

According to the Complaint, AMR maintained a Blogging and Internet Posting Policy which, among other things, "prohibited [employees] from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors."[3] The Employer also maintained a Standards of Conduct policy prohibiting "[r]ude or discourteous behavior to a client or coworker" and "[u]se of language or action that is inappropriate in the workplace whether racial, sexual or of a general offensive nature."[4]

The Complaint concerns actions taken by Dawnmarie Souza, an employee at AMR. She allegedly was denied union representation at an investigatory interview unrelated to her Facebook posting, and purportedly was threatened for requesting such representation.[5] Subsequently, Ms. Souza purportedly criticized one of her supervisors on Ms. Souza's Facebook page, allegedly using vulgarities and stating, "love how the company allows a 17 [AMR's internal code for a psychiatric patient] to become a supervisor."[6] Ms. Souza's comments purportedly garnered the support of some of her colleagues, and spurred additional negative comments

about the supervisor.[7] According to the allegations in the Complaint, the Employer terminated Ms. Souza for the disparaging posting on her Facebook page.[8]

The Complaint alleges that by firing Ms. Souza, AMR "interfere[ed] with, restrain[ed] and coerce[ed] employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act," and "discriminate[ed] in regard to the hir[ing] or tenure or terms and conditions of employment of its employees, thereby discouraging membership in a labor organization in violation of Section 8(a)(1) and (3) of the Act."[9]

## Did AMR's Social Media Policy "Chill" Section 7 Rights?

The first issue presented by the Complaint is whether AMR's Blogging and Internet Media Policy violates Section 8(a)(1) by chilling the exercise of Section 7 activity. In determining whether a work rule chills Section 7 activity, the Board applies a two-step test: (1) "the Board examines whether the rule 'explicitly restricts' section 7 activity, . . . if it does, the rule violates the Act"; and (2) "if nothing in the rule explicitly restricts section 7 activity, then the Board moves to the inquiry's second step, under which the rule violates the Act if it satisfies any one of the following three conditions: '(1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights."[10]

In December 2009, the National Labor Relation Board's Office of the General Counsel issued an advice memorandum ("Advice Memorandum") concerning whether Sears Holdings ("Sears") violated Section 8(a)(1) by issuing its Social Medial Policy. Sears' Social Media Policy – like AMR's policy – stated, *inter alia*, that associates were prohibited from discussing the following subject: "Disparagement of company's or competitors' products, services, executive leadership, employees, strategy and business prospects."[11] In applying National Labor Relations Board ("Board") precedent, the Advice Memorandum found that the above provision "c[ould] not reasonably be construed to apply to Section 7 activity."[12] The Advice Memorandum recognized that when read in isolation, the cited provision could be seen as "chilling" Section 7 rights. However, the rule appears in a list also prohibiting employee's from posting about trade secrets, making disparaging racial or religious comments, or using obscenity or profanity.[13] Moreover, the Advice Memorandum also states that its conclusion is bolstered by the fact that associates continued to discuss a union campaign through a listserv[14] after Sears implemented the policy.

**[C]ommunications on Facebook may not fit nicely into traditional classifications of concerted activity.**

Notwithstanding the favorable conclusion for employers in the Advice Memorandum, the facts of AMR and the current political dynamics of the Board may lead to a different result in the instant case. The Board issued the Advice Memorandum on December 4, 2009 when Ronald Meisburg, an appointee of former President George W. Bush was General Counsel of the Board. Moreover, the Board currently is comprised of three Democratic members and one Republican member, and has shown a willingness to reconsider prior positions taken by the Board.[15] Thus, if this issue reaches the Board, it flatly may reject the position taken in the Advice Memorandum.

Alternatively, the Board might distinguish the facts of AMR from those of Sears. A significant distinguishing fact is that in AMR, Ms. Souza allegedly was fired for her Facebook postings, but in Sears, the policy was not used to discipline any associate and the Advice Memorandum relied on this fact to bolster its conclusion that there was no Section 8(a)(1) violation.[16]

## Is Ms. Souza's Activity Protected Under Section 7?

The second issue presented by the Complaint is whether an employee's Facebook posting is protected under Section 7 of the NLRA. Whether Ms. Souza's activity is protected under Section 7 may hinge on the type of Facebook communication at issue.

There are many possible ways that an individual may "post" on Facebook. For instance, "The Wall is a space on each user's profile page that allows friends to post messages for the user to see while displaying the time and date the message was written."[17] A "status update" "allows users to post messages, [on their own profile page] for all their friends to read. In turn, friends can respond

with their own comments, and also press the 'Like' button to show that they enjoyed reading it."[18] Facebook users also can send "messages" to an individual or multiple individuals, and only those individuals who are the recipient of the "message" will be able to view what is written.[19]

The facts alleged in the Complaint do not identify the method of posting that Ms. Souza used to disseminate her comments on Facebook about the supervisor. In addition, the Complaint is silent as to Ms. Souza's Facebook "privacy settings," which impact the extent to which other people can view her Facebook posts. The type of "post" and a Facebook user's privacy settings are relevant to determining the nature of the communications.

Assuming that Ms. Souza posted a "status update" and had limited privacy settings (i.e., anyone could read her Facebook profile), then the Adminstrative Law Judge ("ALJ") may construe her posting as a third-party communication. Where the concerted activity is communication to a third-party, the Board applies a two-part test to determine whether it is covered under the NLRA: The communication (1) must relate to an ongoing labor dispute, and (2) must "not be so disloyal, reckless or maliciously untrue as to lose the Act's protection."[20] In *Endicott Interconnect Technologies, Inc. v. NLRB*, both the Board and the Court of Appeals for the District of Columbia Circuit applied this two-part test to a comment posted by an employee on a newspaper's website's public forum.[21]

Alternatively, if Ms. Souza posted a "status update," but limited the viewing of her posting to just colleagues (or only had colleagues as "friends"), then the ALJ may construe Ms. Souza's communication as a private conversation. Indeed, Lafe Solomon, the Board's General Counsel, implied that the Facebook posting should be construed as a conversation, stating, "This is a fairly straightforward case under the National Labor Relations Act – whether it takes place on Facebook or at the water cooler, it was employees talking jointly about working conditions, in this case about their supervisor, and they have a right to do that."[22]

**Employers, even those with non-unionized workforces, are advised to analyze any social media policies to ensure that such policies do not chill Section 7 rights, since the protection afforded by Section 7 applies to both unionized and non-unionized employers.**

Indeed, "The Board has long held that, for conversations between employees to be found protected concerted activity, they must look toward group action and that mere 'griping' is not protected."[23] Thus, if viewed as a conversation then the analysis likely will focus on whether the comment was made "looking" toward group action, or whether it merely was just Ms. Souza's personal griping.

However, communications on Facebook may not fit nicely into traditional classifications of concerted activity. Assuming that an individual has some sort of privacy settings then a "status update" or "wall posting" may not be seen by the general public, but will be viewable, depending on the setting, by all or some subset of the user's "friends."[24] Thus, a Facebook posting may be different from the public posting at issue in *Endicott*, which was viewable by the public at large.[25] However, a "wall posting" or "status update" again depending on user's privacy settings, is not as private as a traditional conversation between employees. Accordingly, the Board may seek to craft a new test applicable to communications through Facebook. However, any such rule may not be able to cover the specific factual circumstances that each case presents, based on the method of posting as well as a user's privacy settings.

Employers, even those with non-unionized workforces, are advised to analyze any social media policies to ensure that such policies do not chill Section 7 rights, since the protection afforded by Section 7 applies to both unionized and non-unionized employers. Furthermore, employers should seek legal counsel before taking disciplinary action based on employees' Facebook postings. Moreover, employers subject to the New York Labor Law should be aware that this case presents the issue of whether disciplining employees for similar Facebook postings may be prohibited under New York Labor Law Section 201-d. This law prohibits discrimination against employees for, *inter alia* (1) their "legal recreational activities outside work hours, off of the employer's premises and without use of the employer's equipment or other property";

and (2) "membership in a union or any exercise of rights granted under Title 29, USCA, Chapter 7 [which includes the National Labor Relations Act]."[26] Additionally, multinational employers should also be advised that such issues involving employee communications on Facebook are not confined to the United States.[27]

Although the AMR Complaint has garnered significant media attention, the extent of its impact will not be known until the case is resolved. Please watch for updates in future issues of this publication.

1 Complaint & Notice of Hearing, *Am. Med. Response of Conn., Inc. v. Int'l Bhd. of Teamsters*, Local 443 (Oct. 27, 2010) (No. 34-CA-12576).

2 29 U.S.C. § 157 (2006).

3 Complaint, *supra* note 1, at ¶ 7(a).

4 *Id.* at ¶ 7(b).

5 *Id.* at ¶ 8-10. *See* Jeff Casale, *Facebook Suit Highlights Policies on Social Media*, Bus. Ins., Nov. 15, 2010, *available at* http://www.businessinsurance.com/article/20101114/ISSUE01/311149983.

6 Steven Greenhouse, *Company Accused of Firing Over Facebook Post*, N.Y. Times, Nov. 8, 2010, at B1, *available at* http://www.nytimes.com/2010/11/09/business/09facebook.html.

7 *See id.*

8 Complaint, *supra* note 1, at ¶ 13.

9 *Id.* at ¶¶ 16-17.

10 *Guardmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007) (quoting *Martin Luther Mem'l Home*, 343 N.L.R.B. 646, 646-47 (2004)) (emphasis in original).

11 Adv. Mem. at 3, *Sears Holdings* (Roebucks) (Dec. 4, 2009) (No. 18-A-19081).

12 *Id.* at 6.

13 *See id.* at 3, 6.

14 "A listserver is a system designed to simplify the process of sending the same message to a group of people via e-mail." What is a Listserv Mailing List?, http://8help.osu.edu/33056.html (last visited Dec. 2, 2010).

15 *See, e.g.*, Philip F. Repash, *Newly-Constituted NLRB Poised to Overrule Major Union Recognition Decisions of Bush-Era Board*, Employer Update, Sept./Oct. 2010, at 14 *available at* http://www.weil.com/files/Publication/541b0099-3008-40f5-b5f6-50633bdb1d80/Presentation/PublicationAttachment/34946221-efcd-49e4-9f02-51d068c638c8/Employer_Update_Sept_Oct_2010.pdf.

16 *See* Adv. Mem., *supra* note 11, at 7 ("In the absence of any evidence that the Policy has been utilized to discipline Section 7 activity, there is no Section 8(a)(1) violation and the case should be dismissed, absent withdrawal.").

17 Facebook Features, http://en.wikipedia.org/wiki/Facebook_features#Wall (last visited Nov. 26, 2010).

18 Facebook Features, http://en.wikipedia.org/wiki/Facebook_features#Status_Updates (last visited Nov. 26, 2010).

19 Help Center, http://www.facebook.com/help/?faq=13027&ref_query=mes (last visited Nov. 26, 2010).

20 *Endicott Interconnect Techs., Inc. v. NLRB*, 453 F.3d 532 (D.C. Cir. 2006) (citing *Am. Golf Corp.*, 330 N.L.R.B. 1238, 1240 (2000)).

21 *Endicott Interconnect*, at 537-38. *See also Konop v. Hawaiian Airlines, Inc.*, 302 F.3d 868, 882 (9th Cir. 2002) ("There is no dispute that [employee's] website publication would ordinarily constitute protected union organizing activity under the [Railway Labor Act].").

22 *Greenhouse*, *supra* note 6 (internal quotation marks omitted).

23 *Ellison Media Co.*, 344 NLRB 1112, 1123 (2005).

24 In the case of a "wall posting," the exposure of ones post also depends on the privacy settings of the user's whose "wall" upon which the post was made.

25 *See Endicott Interconnect*, 453 F.3d at 534.

26 N.Y. Lab. Law § 201-d (McKinney 2009).

27 *See French Labor Tribunal Upholds Firings Over Facebook Comments*, Daily Lab. Rep. Nov. 23, 2010, 225 DLR A-4.

# Discrimination Implications of Employers' Use of Credit Histories in Hiring

*By Jonathan Sokotch*

Among several recent enforcement initiatives of the Equal Employment Opportunity Commission ("EEOC") is the issue of private employers using credit history information to make hiring decisions. At a public meeting of the EEOC on October 20, 2010, devoted to exploring the use of credit history in hiring and employment, EEOC Chairman Jacqueline A. Berrian stated that the EEOC is "becoming increasingly aware of the practice's potential discriminatory impact on workers and job applicants" and of the potential for the use of credit reports in hiring to "adversely affect employment opportunities for a wide range of applicants and workers." The EEOC has a longstanding practice of policing employers who use otherwise lawful pre-employment screening devices in their hiring to determine whether the practices have a disparate impact on minorities or other protected classifications. The EEOC's specific current focus on the use of credit checks in hiring arises from its concern that the recession has left many individuals, and particularly Blacks, Latinos and women, in troubled financial condition, and that, as a result, the use of credit checks by employers might deprive them of equal employment opportunities. Also fueling the EEOC's interest is the increasing popularity of using credit checks in hiring. Whereas only 35% of employers used credit checks in connection with hiring in 2001, now approximately 60% utilize such credit checks.[1]

The EEOC has, however, provided little meaningful guidance concerning how employers can utilize credit checks without violating the discrimination laws, and the courts have not filled the void with any significant decisional authority since the 1970s. However, the EEOC has signaled a recent interest in suing private employers over their use of credit histories in making hiring decisions, as evidenced by, among other actions, a class action that it recently brought claiming, *inter alia*, that the employer's practice of using credit history as a hiring criterion had a disparate impact on Blacks.[2] With so little meaningful guidance, employers are left to make difficult judgments regarding whether to use credit history as a hiring criterion at all, or how to do so in a way that minimizes liability under the discrimination laws.

## Sparse EEOC Guidance

The written guidance provided by the EEOC on the use of credit checks has been short on detail. The EEOC, however, has made clear that it believes an employer's facially neutral policy or practice of using credit history as a hiring criterion will violate the federal discrimination laws if it results in a disparate impact on any protected groups, unless the employer can demonstrate a business necessity for the practice. Significantly, the EEOC has further stated that it believes that the use of credit checks in hiring *will* typically have a disparate impact on minorities and females. Furthermore, the EEOC has expressed skepticism as to whether use of pre-employment credit checks can be permissible in any industry, although it acknowledges that some courts have found that credit checks are appropriate with respect to certain bank employees involved in handling money.[3]

In a March 9, 2010 opinion letter, the EEOC stated that if an employer's use of credit information "disproportionately excludes African-American and Hispanic candidates" from employment, the practice would violate the discrimination laws "unless the employer could establish that the practice is needed for it to operate safely or efficiently."[4] In that opinion letter, the EEOC stated that testimony given at a May 2007 EEOC meeting indicated that credit checks have not been shown to be a "valid measure of job performance." By highlighting such testimony, the EEOC appears to be signaling that it endorses the view that credit history may not be predictive of job performance, and that, therefore, employers might have difficulty demonstrating a legitimate business necessity for using credit checks in making hiring decisions. The EEOC, however, in the next sentence of the opinion letter, acknowledges that some courts have held that credit checks are appropriate for certain positions, including where an employee handles large amounts of cash.

The EEOC, in another short guidance titled "Pre-Employment Inquiries and Credit Rating or Economic Status," states broadly that any inquiry by

an employer into any aspect of a job applicant's current or past finances "generally should be avoided" because such inquiries tend to impact more adversely on minorities and females.[5] The EEOC then states that a narrow exception exists where the employer can show "that such information is essential to the particular job in question." This view articulates a challenging standard for employers seeking to use credit checks, as the EEOC here contends that use of credit checks for hiring will tend to cause a disparate impact on protected groups, and, further, that the employer can then only evade liability if it shows that the information reviewed is "essential" to determine fitness for the job in question.[6] Tellingly, this guidance provides no examples of jobs or industries in which use of credit checks in connection with hiring is appropriate.

Many have called for a more detailed guidance from the EEOC on the use of credit checks by employers, but the EEOC is in a phase in which it is evaluating and investigating the issue of employer use of credit checks, as is clear from the statements of the EEOC Commissioners at the October 20, 2010 EEOC meeting, and is not anticipated to issue a detailed guidance in the near term.

## EEOC Enforcement

The EEOC has indicated that it has recently seen a sharp increase in the number of discrimination charges referencing the use of credit checks in the hiring process.[7] Moreover, the EEOC, on September 30, 2009, filed a nationwide class action against Freeman, a convention, exhibition and corporate events marketing company, asserting that Freeman rejected job applicants because of their credit history and that this practice had a disparate impact on Black job applicants.[8] In that lawsuit, the EEOC alleged that Freeman's use of employee credit history was neither job-related nor consistent with business necessity, and that there were more appropriate, less discriminatory alternative selection procedures. The EEOC is seeking back pay for Black job applicants rejected because of credit checks or other specified selection criteria, and is also requesting that Freeman either rehire or give front pay to those denied applicants. The case is still pending, and there has not been a ruling on the merits of the credit check claim, although Freeman has successfully sought to narrow the class size via a procedural argument.[9]

**...the EEOC has expressed skepticism as to whether use of pre-employment credit checks can be permissible in any industry, although it acknowledges that some courts have found that credit checks are appropriate with respect to certain bank employees involved in handling money.**

Despite the EEOC's enforcement focus on use of credit histories by employers, the EEOC's view has not yet been meaningfully tested on the merits in the courts in the last several decades. Nevertheless, in connection with several disparate impact suits brought by the EEOC in the 1970s, several courts found that credit checks were appropriate and consistent with business necessity for bank employees who handled money.[10]

## Discussion About "Business Necessity" at October 2010 EEOC Meeting

The October 20, 2010 EEOC meeting was attended by all five EEOC Commissioners, and the discussion between the Commissioners and the presenters provided further insight into the EEOC's views regarding whether and how an employer can establish a "business necessity" for conducting a pre-employment credit check.[11] A representative from the Society for Human Resource Management ("SHRM") presented a study which found that the top reasons why employers conduct employee/applicant credit checks are to limit theft and embezzlement in the workplace, to reduce liability for negligent hiring, to assess the overall trustworthiness of the job candidate, and to comply with applicable state laws requiring a background check for particular positions. As another rationale for reviewing applicant credit history, the panelists stated that many employers believe if a position will require the handling of other peoples' money then the employer needs to know whether an applicant can competently handle his own money. There was extensive discussion on whether these rationales could establish a "business necessity" with which to justify using a pre-employment credit check. The

Commissioners were particularly focused on the question of whether credit history is actually predictive of the likelihood of committing embezzlement, fraud or theft. While presenters introduced data both for and against that proposition, the EEOC Commissioners were ultimately of the view that not enough data existed to establish that credit histories either are or are not predictive of an employee's likelihood of embezzling or stealing.[12]

The attendees also expressed concern that credit reports might mislead the employer because employers might draw a potentially erroneous inference that poor credit is the result of poor decision making, poor organizational skills or some other personal failing. Rather, the panelists argued, the poor credit histories might be the result of the applicant's misfortune, such as having had an uninsured medical condition, having gone through a divorce, or having been the victim of a non-performance driven reduction in force. Before making an adverse employment decision based on a credit report, various panelists and the Commissioners suggested that employers allow the applicant/employee to explain the stated credit problem so that the employer then has accurate credit information, which the employer would need to demonstrate that the review of a credit report was a business necessity.

## Advice For Employers

Although the EEOC's guidance on how employers should handle pre-employment credit checks is relatively sparse, there are measures that employers can take to minimize their potential liability from disparate impact or disparate treatment litigation relating to the use of credit reports. Several of those measures are as follows:

- If an employer is hiring for a particular position and determines that an applicant's credit history is an essential criterion for that position, it may be prudent for the employer to forbear from obtaining credit histories for all of the candidates for that position. Rather, the employer should consider requesting a credit report only with respect to the applicant(s) who is extended a conditional offer (i.e., an offer conditioned on successful completion of the background and credit check). In this way, the employer would eliminate any potential claims by job applicants not extended a conditional offer that they were discriminatorily rejected on the basis of their credit histories.
- The employer should use credit reports judiciously and should consider limiting them to only those positions where there is a clear "business necessity." In determining whether reviewing the credit history of an applicant for a particular position is a "business necessity," the employer should focus on the *function and responsibilities* of the position rather than the job title; such as using the latter (e.g., running credit histories for non-exempt employees only or for employees below the level of vice president) may result in precisely the type of disparate impact result that is prohibited under the federal anti-discrimination laws. For example, employers might choose to check the credit history of applicants for positions with substantial fiduciary and financial responsibility. For specified senior executive positions, or positions with access to highly confidential employee information, the employer might also choose to review credit reports prior to hiring, although there may be some risk that the EEOC or a court might disagree and find that the employer did not have the requisite "business necessity" to use a credit check.
- If the employer utilizes credit reports for applicants or employees, the employer must comply fully with the Fair Credit Reporting Act ("FCRA") and concurrent state laws, which require, among other things, that the employer obtain consents from employees or applicants prior to obtaining their credit information, and requires that the employer provide notification, including a copy of the credit report, to the individual if the employer plans to take an adverse

**If an employer decides not to hire an applicant because of information in his/her credit history, the employer should carefully review the credit report to make sure they understand it, and should give the applicant an opportunity to explain his/her unfavorable credit history.**

employment action based on that credit report. There are detailed reporting and notice requirements under the FCRA that employers need to review carefully.

- If an employer decides not to hire an applicant because of information in his/her credit history, the employer should carefully review the credit report to make sure they understand it, and should give the applicant an opportunity to explain his/her unfavorable credit history. Be mindful, however, that by having those discussions, the employer may open itself up to difficult subjective decisions regarding which explanations should excuse poor credit, and those decisions could lead to potential disparate treatment liability. For example, if the employer does not hire an Hispanic applicant who blamed his poor credit on his having misjudged the housing market, while the employer hires a white applicant who blamed his poor credit on his having made poor investment decisions in the stock market, the Hispanic applicant may then try to claim that he suffered disparate treatment because of his race. Employers need to remain cognizant of this risk. If, after such a discussion with the applicant regarding his/her credit history, the employer still seeks to take an adverse action based on the credit report and the applicant is within a protected class, the employer should document the basis for its decision as well as the clear "business necessity" for using the credit information. The employer might also consider contacting its employment counsel before making the final employment decision.

1 There has also been recent legislative activity on the federal and state level regarding whether to further restrict the use of credit checks by employers. A recent bill proposed in the House of Representatives, the Equal Employment for All Act (H.R. 3149), if passed, would prohibit the use of credit checks by employers of job applicants or employees, unless the job requires specified financial responsibilities or is one of several classes of government jobs. There has also been additional legislation that recently passed in Washington, Hawaii, Oregon and Illinois, that similarly curb employers' use of credit checks.

2 *See EEOC v. Freeman*, 2010 WL 1728847, at *1 (D.Md. 2010).

3 The EEOC does not dispute that an employer may check an employee's or applicant's credit history if otherwise required to do so by law. For example, employers that employ FINRA registered representatives are required by FINRA to review an applicant's credit history, a review that the EEOC would view as permissible.

4 *See* Letter from Dianna B. Johnston, Assistant Legal Counsel, EEOC, "Title VII: Employer Use of Credit Checks" (March 9, 2010), http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html.

5 EEOC Guidance, *available at* http://www.eeoc.gov/laws/practices/inquiries_credit.cfm.

6 While EEOC guidances are not binding law, they are often viewed by the courts as helpful and, sometimes, persuasive authority on discrimination issues.

7 EEOC Public Meeting of October 20, 2010, *transcript available at* http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm.

8 *See* Complaint, *EEOC v. Freeman*, No. 8:09-CV-02573-RWT (D.Md. 2010); Press Release, EEOC, EEOC Files Nationwide Hiring Discrimination Lawsuit Against Freeman (Oct. 1, 2009) *available at* http://www.eeoc.gov/eeoc/newsroom/release/10-1-09b.cfm.

9 *See EEOC v. Freeman*, 2010 WL 1728847, at *1 (D. Md. 2010).

10 *See EEOC v. American Nat'l Bank*, 1979 WL 25, 12, 33 (E.D. Va. 1979), *rev'd in part on other grounds* (use of credit checks for bank employees not a violation of Title VII, because individuals with credit problems might be more likely to steal, and persons who could not manage their own money would not inspire the confidence from customers); *EEOC v. United Virginia Bank/Seaboard Nat'l*, 1977 WL 15340 (E.D. Va. 1977) (finding that because bank employees are fiduciaries of other people's money, and because access to that money is a great temptation, a bank may check the financial background of job applicants).

11 *See* EEOC Public Meeting of October 20, 2010, *transcript available at* http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm.

12 At the meeting, Commissioner Stuart J. Ishimaru said: "[t]o say that those people [who have poor credit] are more inclined to steal money, to misuse information, versus people who are not in that situation; I'm having a hard time getting that causal connection there." (*transcript available at* http://www.eeoc.gov/eeoc/meetings/10-20-10/index.cfm.)

**Employer Update** is published by the Employment Litigation Practice Group and the Executive Compensation and Employee Benefits Group of Weil, Gotshal & Manges LLP, 767 Fifth Avenue, New York, NY 10153, +1 212 310 8000, http://www.weil.com.

## Editors


| | | |
|---|---|---|
| Allan Dinkoff | (allan.dinkoff@weil.com) | + 1 212 310 6771 |
| Lawrence J. Baer | (lawrence.baer@weil.com) | + 1 212 310 8334 |


## Practice Group Contacts


Jeffrey S. Klein
Practice Group Leader
New York
+1 212 310 8790
jeffrey.klein@weil.com

**Boston**
Thomas Frongillo
+1 617 772 8335
thomas.frongillo@weil.com

**Dallas**
Yvette Ostolaza
+1 214 746 7805
yvette.ostolaza@weil.com

**Frankfurt**
Stephan Grauke
+49 69 21659 651
stephan.grauke@weil.com

**Houston**
Melanie Gray
+1 713 546 5045
melanie.gray@weil.com

**London**
Joanne Etherton
+44 20 7903 1307
joanne.etherton@weil.com

Peter van Keulen
+44 20 7903 1095
peter.vankeulen@weil.com

**Miami**
Edward Soto
+1 305 577 3177
edward.soto@weil.com

**New York**
Lawrence J. Baer
+1 212 310 8334
lawrence.baer@weil.com

Allan Dinkoff
+1 212 310 6771
allan.dinkoff@weil.com

Gary D. Friedman
+1 212 310 8963
gary.friedman@weil.com

Andrew L. Gaines
+1 212 310 8804
andrew.gaines@weil.com

Mark A. Jacoby
+1 212 310 8620
mark.jacoby@weil.com

Michael K. Kam
+1 212 310 8240
michael.kam@weil.com

Steven M. Margolis
+1 212 310 8124
steven.margolis@weil.com

Michael Nissan
+1 212 310 8169
michael.nissan@weil.com

Nicholas J. Pappas
+1 212 310 8669
nicholas.pappas@weil.com

**Shanghai**
Helen Jiang
+86 21 3217 9511
helen.jiang@weil.com

**Washington, DC**
Michael Lyle
+1 202 682 7157
michael.lyle@weil.com