



The Labouring Oar



From the Chair

October marks the beginning of a new year in the Federal Bar Association. I am thrilled and honored to serve as Chair of the Labor and Employment Law Section. Our section is extremely active, and the board is always looking for ways to provide more resources to you—our members.

Before I talk about the upcoming year, I would be remiss if I did not comment on the section’s participation at the Annual Meeting. The section was well-represented by numerous board and committee members. Our section presented a CLE entitled “Trends in Labor and Employment Law: A Panel Discussion” and held our regular board meeting, which was open to all section members. During the meeting, we presented Author of the Year awards. Congratulations again to Corie Tarara and the law firm of Miller Canfield (specifically, Leigh Schultz, Brian Schwartz, Scott Eldridge, and Saura Sahu) for their contributions to L&E section publications. Our section was also recognized for publishing “The Labouring Oar.” Thank you to Craig Cowart and all persons who contributed to the newsletter during the past year. As a sponsor of the Presidential Installation Banquet, our section attended this wonderful event to thank outgoing President Robert DeSousa and congratulate Judge Gustavo Gelpí. Finally, thank you to Danielle Brewer for her many years of dedicated service to this section, including serving as chair during 2004, 2005, and 2013. There are photos from the Annual Meeting included in this newsletter.

So what do we have planned for the new year? The board has already had its first meeting, and we are working hard to expand programming this year through collaboration. Collaboration is nothing new to our section. For the past few years, we have partnered with other sections for our Bi-Annual Conference. We are pleased to announce that our section will partner with the Civil Rights Section for the 2015 Bi-Annual Conference, which will be held in New Orleans. We are also looking forward to working with the Federal Litigation Section. In addition, we hope to partner with several chapters on events during the upcoming year. If your chapter is interested in partnering with our section to host a CLE or similar event, please contact me.

We recognize the importance of providing value to our members. Therefore, our goal is to distribute at least one more newsletter during the year and to host more webinars. In addition, we will continue to distribute monthly “Circuit Updates” so you can stay informed of significant decisions.

As our section membership continues to grow, we would like to have more of our members involved in committees to ensure representation of every federal circuit and every labor and employment practice. Please consider joining one of our committees (which are listed on the L&E webpage) or contributing to the section’s publications.

As you can see, we are off to a busy start, and I am looking forward to this year. If you would like to serve or have ideas on how the section may improve, please do not hesitate to contact me! ■

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Health Insurance Marketplaces Pose Risks for All Employers, Even Those Not Subject to the Employer Mandate

Erwin Kratz

As the health insurance marketplaces get up and running over the next few months, many employers will receive reports and inquiries from the marketplace in their state that, if not handled properly, could inadvertently lay the foundation for significant liability. The risks arise out of little known anti-retaliation provisions in the Affordable Care Act (ACA), and the return of the employer mandate in 2015. Fortunately, there are steps employers and their counsel can take now to mitigate those risks. Let's consider how this could happen and what to do about it.

Imagine that Employee A applies for coverage through the marketplace during the initial open enrollment period, now through March 31, 2014. Employee A receives a federal subsidy for his marketplace coverage based purely on his statements to the marketplace about his income and the availability of other coverage, such as through his employer's health plan.

After the open enrollment period ends, and every month thereafter, the marketplace sends the employer's human resources department a notice listing all of the company's employees who are receiving subsidized coverage through the marketplace, including Employee A. The purpose of this notice is to give the company the opportunity to inform the marketplace if it is offering the employee coverage that should disqualify him from receiving a subsidy.

In June 2014, the company determines it needs to conduct a reduction in force (RIF) due to a business slowdown. The human resources (HR) manager works with senior management to carefully select the RIF participants, based on their skills, length of service with the company, and the expected needs of the business. The HR manager makes sure the RIF does not disproportionately impact people based on any protected classifications (race, nationality, sex, age, disability, etc...) But, the HR manager does not consider whether any of the RIF participants is on that list she received from the marketplace each month. Employee A is laid off in the RIF in July 2014.

In August 2014, Employee A files a claim against the company with the Occupational Safety and Health Administration (OSHA), alleging that the company chose Employee A for the RIF because he received subsidized coverage through the marketplace.¹ Under interim final rules implementing provisions in the ACA prohibiting employers from retaliating against their employees for receiving subsidized coverage through the marketplace, Employee A will be able to establish a *prima facie* case of retaliation merely by providing evidence sufficient to raise the inference that his receipt of a subsidy was a "contributing factor" in the RIF decision.² And under the OSHA rules, Employee A will be able to meet this burden merely by showing that the HR manager knew he was receiving a subsidy at or near the time he was laid off.

The burden then shifts to the company to establish *by clear and convincing evidence* that it would have laid Employee A off even if he had not received the subsidy. This could be very dif-

ficult where the company cannot dispute that its HR manager had actual knowledge from the marketplace that Employee A was receiving a subsidy.

In our example, OSHA completes its investigation in November 2014 and requires the company to re-instate Employee A, with back pay to his layoff date in July.³ The company complies after concluding that the costs of trying to reverse OSHA's decision in court are too high.

Worse, consider what would happen if the company undertook a RIF such as this in the middle of 2014 *for the express purpose* of avoiding or reducing its costs of complying with the employer mandate in 2015, much as many employers did in 2013 before the employer mandate was delayed a year. Employers can do this in 2013 without fear of a retaliation claim because nobody is receiving a federal subsidy for coverage through the marketplace in 2013. In 2014, however this dynamic turns on its head. If our hypothetical employer conducts a RIF in 2014 for the express purpose of avoiding the mandate, any of its employees who receive subsidized coverage through the marketplace in 2014, and whose hours are reduced or who are laid off in 2014 will be able to file a very powerful claim with OSHA under the ACA anti-retaliation provisions.

Next, let's consider what happens in 2015, when the employer mandate kicks in. Let's assume that our hypothetical employer offered Employee A minimum essential coverage, both in 2014 and in 2015, that satisfies the "affordability" and the "minimum value" requirements of the ACA. Under the law, the employer should not incur an employer mandate penalty in 2015, and Employee A should not be eligible for subsidized coverage through the marketplace in 2014 or in 2015. However, as stated above, Employee A did receive subsidized coverage in 2014 and the employer did not object in 2014 because the HR manager figured she did not have to do anything with the marketplace notices she received because the employer mandate was delayed until 2015.

In January 2015, the HR manager realizes that Employee A should not be receiving a subsidy and, more significantly, that if he does, the IRS might use that information to attempt to assess an employer mandate penalty against the company for 2015. So she disputes the subsidy with the marketplace. This is likely to be fraught with difficulties, including explaining to the marketplace representatives that even though nothing has changed, the employee now should not get a subsidy. Moreover, Employee A is likely to view this as another act of retaliation.

There are several steps employers should take now to reduce the risk of the above nightmare scenario happening to them.

First, ensure that all communication with the marketplace is conducted by someone in the benefits department who has no role in evaluating, disciplining, promoting, terminating or determining the compensation of employees. Do not route these notices and communications to anyone with human resources responsibilities. Instead, treat it much like employers treat HIPAA protected health information that they receive from their health plans—segregate it from HR personnel and from employee's general personnel files.

Second, when the designated benefits people receive an inquiry or a notice from the marketplace indicating that an

employee is receiving subsidized coverage through the marketplace, they should review the notice carefully. If the benefits people know that the employee should not be eligible for the subsidy (because of the coverage the company is offering), they should dispute the marketplace information right away. Failure to dispute incorrect information when the company first learns of it could make it much more difficult to correct the error in the future (for example, in 2015, when employees receiving a subsidy for marketplace coverage could trigger employer mandate penalties for the company).

Third, if an employer is planning a reduction in force, reduction in hours or similar adverse employment action in the future, it should carefully consider whether the decision-maker for the company knows that any of the affected employees is or has received subsidized coverage through the marketplace. If any of the decision-makers has such knowledge, the employer should address it like it would for other protected classifications by documenting the legitimate reasons for the decision before taking the action in a way that demonstrates unlawful discrimination or retaliation was not a part of the equation. If none of the decision makers knows whether any of the affected employees is receiving subsidized coverage through the marketplace, consider including that fact in the documentation the employer creates before taking the adverse employment action. ■

Endnotes

¹Section 1558 of the Affordable Care Act added 29 U.S.C. 218C (section 18C) to the Fair Labor Standards Act (FLSA). Under section 18C, an employer may not retaliate against an employee for receiving a tax credit under section 36B of the Internal Revenue Code of 1986 or a cost-sharing reduction (referred to as a “subsidy” in section 18C) under section 1402 of

the Affordable Care Act.

²OSHA issued interim final rules at 29 CFR Part 1984 implementing Section 18C on February 27, 2013. See Federal Register Volume 78, Number 39 (Wednesday, February 27, 2013).

³OSHA can order all of the following remedies, where appropriate: “Affirmative action to abate the violation; reinstatement of the complainant to his or her former position, together with the compensation (including back pay and interest), terms, conditions and privileges of the complainant’s employment; and payment of compensatory damages, including, at the request of the complainant, the aggregate amount of all costs and expenses (including attorney’s and expert witness fees) reasonably incurred.” Interim final rules at 29 CFR 1984.105(a)(1).



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Report on FBA Annual Meeting and Convention



Left to right: Jose R. González-Nogueras, Whitney S. Meister, Donna P. Currault, Karleen Green, Craig A. Cowart, Danielle Brewer, James R. Hammerschmidt, Chris E. Parker, Nancy Bloogood and Corie J. Tarara

The Federal Bar Association hosted its Annual Meeting and Convention on September 26-28 in San Juan Puerto Rico. Over 480 members were registered for the event, including many judges, government attorneys and private practitioners.

In addition to the numerous social events, section meetings, and committee meetings, the program included 16 different CLE sessions covering diverse topics from the status and future of re-entry courts, class and collective action decisions, and social media. One highlight of the convention was the L&E Section’s “Trends in Labor and Employment Law: A Panel Discussion” presentation, which included a discussion of the Affordable Care Act by Karleen Green of the Phelps Dunbar Firm; an NLRB update by Celeste J. Mattina, regional director of the National Labor Relations Board; and a review of recent employment decisions by Hon. Daniel Dominguez, U.S. district judge for the District of Puerto Rico.

On Friday afternoon of the convention, the L&E Section Board held its monthly meeting. All section members were invited to participate in that meeting, after which the L&E Board and all section members enjoyed a small reception. ■

Proposed Regulatory Change Could Fundamentally Change the Practice of Labor Relations Law

Jon S. Olson

Introduction

In June 2011, the Department of Labor published proposed changes to the Labor Management Reporting and Disclosure Act regulations, now expected to be implemented in November 2013, which will likely have a dramatic impact on management-side labor relations attorneys and their clients. These proposed changes, if fully implemented, would require certain labor relations consultants, including attorneys, and employers who engage them, to report substantial amounts of client information to the federal government for public disclosure. For such labor relations attorneys, this reporting obligation will potentially conflict with the rules of professional conduct of their respective states, which prohibit the disclosure of confidential client information.

The Labor Management Reporting and Disclosure Act (LMRDA)¹ primarily requires the reporting of financial information by labor unions, and restricts certain financial transactions between employers and unions. A lesser known provision of the LMRDA also requires the disclosure of payments to, and agreements with, so-called “persuader consultants” used by employers. Such “persuader consultants,” who may frequently include labor relations attorneys, include anyone who, in an agreement or arrangement with an employer, seeks to “directly or indirectly” influence or persuade employees on behalf of an employer about exercising their organizing or collective bargaining rights under the National Labor Relations Act.² For example, employers confronting union organizing drives frequently consult with labor relations attorneys to formulate legally effective response strategies, including development of legal and effective communications with their employees.

The statute includes exemptions from this disclosure requirement for information protected by attorney-client privilege, and also for consultants who provide “advice” to, or represent employers in collective bargaining or before courts or other administrative or judicial bodies. That latter “advice” exemption has, for most of the last fifty years, been interpreted to mean that attorneys or other consultants who work with employers in responding to union organizing campaigns, strikes and other labor disputes are not required to disclose their client agreements and fee transactions so long as they do not engage in direct contact or communication with employees.

The Department of Labor’s proposed changes to this longstanding regulatory interpretation of this “advice exemption” would require such “persuader consultants” to disclose substantial client information to the government even if they never engage in direct contact with employees.

The Statute

In 1959, Congress passed the LMRDA into law primarily to guard against that era’s widespread financial corruption within organized labor. Relying largely on the axiom that “sunshine

is the best disinfectant,” Congress imposed certain financial reporting and public disclosure obligations on unions. Congress relied on the same rationale in requiring the disclosure of information pertaining to “consultant persuader” activity, which refers to efforts of third-party consultants hired or retained by employers to engage in union avoidance campaigns to dissuade workers from joining or supporting union or union related activities.

An Employer’s Obligations.

The statute provides that employers must report certain information to the Secretary of Labor if they make:

(4) **any agreement** or arrangement with a labor relations consultant or other independent contractor or organization **pursuant to which such person undertakes activities where an object thereof, directly or indirectly, is to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively** through representatives of their own choosing, or undertakes to supply such employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding.³

Employers must also file such a report if they make:

(5) any payment (including reimbursed expenses) pursuant to an agreement or arrangement described in subdivision (4);⁴

Under the statute, the information which employers must report includes:

the date and amount of each such payment, loan, promise, agreement, or arrangement and the name, address, and position, if any, in any firm or labor organization of the person to whom it was made and a full explanation of the circumstances of all such payments, including the terms of any agreement or understanding pursuant to which they were made.⁵

A Consultant’s Obligations

With respect to “persuader consultants” themselves (which include labor lawyers, labor consultants and, at least arguably, certain trade associations and employer associations) the statute requires the reporting of information by:

Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—

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Photo by Nicholas Miller

(1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;⁶

The information which “persuader consultants” must report includes, within thirty days after entering into such agreement or arrangement:

the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement . . .,⁷

Such “persuader consultants” must also, on an annual basis, file a statement:

of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof.⁸

The Exemptions

The statute also provides exemptions from these reporting obligations for both employers and consultants, where the consultants are “agreeing to give advice to such employer or representative or agreeing to represent such employer before any court, administrative agency, or tribunal or arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer . . .”⁹

The statute also provides that attorneys “in good standing of the bar of any State” are not required to report “any information which was lawfully communicated to such attorney by any of his clients in the course of a legitimate attorney-client relationship.”¹⁰

The Long-Standing Interpretation of the Advice Exemption

The Department of Labor’s long-standing interpretation of the LMRDA’s reporting obligations originated from a 1962 memorandum of then-Solicitor of Labor, Charles Donahue, to the then-Commissioner of the Bureau of Labor-Management Reports, John L. Holcombe.¹¹ In that memorandum, Donahue concluded that the preparation and delivery of persuasive material by a lawyer or consultant is reportable. In contrast, the review of persuasive materials prepared by the employer, by a lawyer or consultant to the employer, which offers only oral or

written opinion about its legality, was obviously not reportable. Similarly, the preparation of persuasive material (such as an entire speech or document) by a lawyer or consultant is not reportable **so long as the employer is free to accept or reject the material.**

Donahue’s interpretation was subsequently incorporated into the LMRDA Interpretative Manual, which provides:

The question of application of the ‘advice’ exemption requires an examination of the intrinsic nature and purpose of the arrangement to ascertain whether it essentially calls exclusively for advice or other services in whole or in part. Such a test cannot be mechanically or perfunctorily applied . . .

As to specific kinds of activity, it is plain that the preparation of written material by a lawyer, consultant, or other independent contractor which he directly delivers or disseminates to employees for the purpose of persuading them with respect to their organizational or bargaining rights is reportable . . .

However, it is equally plain that where an employer drafts a speech, letter or document which he intends to deliver or disseminate to his employees for the purpose of persuading them in the exercise of their rights, and asks a lawyer or other person for advice concerning its legality, the giving of such advice, whether in written or oral form, is not in itself sufficient to require a report. Furthermore, we are now of the opinion that the revision of the material by the lawyer or other person is a form of written advice given the employer which would not necessitate a report.

A more difficult problem is presented where the lawyer or middleman prepares an entire speech or document for the employer. We have concluded that such an activity can reasonably be regarded as a form of written advice where it is carried out as part of a bona fide undertaking which contemplates the furnishing of advice to an employer. Consequently, such activity in itself will not ordinarily require reporting . . . In a situation where the employer is free to accept or reject the written material prepared for him and there is no indication that the middleman is operating under a deceptive arrangement with the employer, the fact that the middleman drafts the material in its entirety will not in itself generally be sufficient to require a report.¹²

The Department’s Proposed Changes to the Interpretation

In June 2011, the Department of Labor unveiled a new

proposed interpretation of the advice exemption that would dramatically expand the kinds of activities and trigger reporting obligations. In contrast to the long-standing interpretation that considers whether a consultant engages in direct or indirect contact with employees, and whether an employer is “free to accept or reject” materials provided by the consultant, the department’s proposed new interpretation broadly defines reportable persuader activity simply as “all actions, conduct, or communications that have a direct or indirect object to persuade employees.”¹³

The department’s proposed change would further redefine the distinction between “advice” and “persuader activity” as follows:

With respect to persuader agreements or arrangements, “advice” means an oral or written recommendation regarding a decision or a course of conduct. In contrast to advice, “persuader activity” refers to a consultant’s providing material or communications to, or engaging in other actions, conduct, or communications on behalf of an employer that, **in whole or in part, have the object directly or indirectly to persuade employees concerning their rights to organize or bargain collectively.**¹⁴

The proposed change then limits the advice exemption only to “agreements or arrangements to **exclusively** provide advice to an employer, such as when a consultant exclusively counsels employer representatives on what they may lawfully say.”¹⁵

The Federal Register notice of the proposed changes also included substantial changes to the reporting forms themselves, including the LM-10 Form for employers, and the LM-20 Form for consultants. The proposed revised forms both emphasize that the advice exemption is limited, and does not apply to activities including “drafting, revising, or providing a persuader speech, written material, website content, audiovisual or multimedia presentation, or other material or communication of any sort, to an employer for presentation, dissemination or distribution to employees . . .”¹⁶

The proposed changes to the forms also require employers and consultants to identify the persuader, or information providing activity performed by the consultant, from a checklist of 16 specific activities. This includes the training of supervisors to conduct employee meetings, coordinating or directing the activities of supervisors, developing personnel policies or practices, conducting seminars for supervisors, preparing or revising written material or speeches for presentation or distribution to employees and supplying information about a union to an employer involved in a labor dispute.¹⁷ As before, the LM-10 and LM-20 Forms require disclosure of the terms of the “agreement or arrangement” between the consultant and the employer.¹⁸

The department proposed no revisions to the LM-21 Form, which a consultant, who is a party to an agreement/arrangement with an employer to perform persuader activities, must file annually within 90 days of the end of a fiscal year. However, in its existing form, LM-21 requires a consultant to disclose,

among other things, the name and address of each employer from whom payments were received, and the amount of receipts from each employer for all “labor relations advice and services.”¹⁹

Therefore, upon receipt of payments under an agreement/arrangement to perform persuader activities, the department requires a consultant to disclose not only the receipts for those activities, but also the receipts for all “labor relations advice and services” for all employers for whom the consultant works . . . even those for whom no “persuader activity” was performed.

Effect of the Changes

The proposed changes to the regulatory interpretation of the reporting requirements both expand the basic meaning of reportable “persuader activity,” and drastically narrow the scope of the advice exemption. The result is that substantial portions of what labor relations attorneys have traditionally viewed as confidential attorney-client advice to employers, particularly advice about legally influencing employees with respect to union organizing and other related activities protected under the National Labor Relations Act, would become reportable “persuader” activity.

This expanded reporting obligation is embodied in the proposed changes to the LM-10 and LM-20 Forms, which would extend reporting obligations to “developing personnel policies or practices,” conducting seminars for supervisors, or coordinating the activities of supervisors, when those activities have the purpose of persuading employees. Such activities are largely inseparable from “normal” human resources activity related to policy and practice development, supervisory training and supervisory direction. Furthermore, an attorney who provides employee communications “advice” to an employer, and who wishes to avoid the disclosure obligations, would apparently be limited to offering an opinion on the legality of an employer’s intended communication . . . essentially giving merely a “thumbs up” or “thumbs down” to the communication. Should the attorney even offer revisions to an employee communication to make it legally compliant, such revisions would qualify as reportable persuader activity.

Importantly, the requirement that exempted advice activity must be exclusive, means that even pure “advice,” as narrowly defined, would be reportable if it is mixed with “persuader activity.” Furthermore, the changes would also require an attorney who engages in any of the expanded “persuader” activities for a client, to also disclose the identity of, and receipts from, **all** clients to whom labor relations advice and services are provided . . . including those for whom no persuader activities were performed.

As a result, the proposed regulatory changes would require significant disclosure of what is commonly considered confidential client information.

While the statute recognizes a reporting exemption for attorney-client privileged communications, that exemption is narrowly tailored to protect only communications from a client to an attorney.²⁰ However an attorney’s professional obligations also require the protection of other client information. Rule 1.6 of the ABA Model Rules of Professional Conduct states, “A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure

is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b).”²¹ This rule is broader than the attorney-client privilege and commonly interpreted as covering all information relating to the representation of a client.

The Comments to Rule 1.6 observe, among other things, that:

[T]he disclosure of any information is prohibited if it would . . . prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced . . . or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge.). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent.”²²

Many, if not all, State Rules of Professional Conduct, have adopted the language and intent of ABA Model Rule 1.6.

The American Bar Association, in comments filed with the Department of Labor on the proposed rule change, expressed concern that disclosures required by the proposed rule would require attorneys to violate Rule 1.6 of the ABA Model Rules of Professional Conduct, as well as undermine both the confidential client-lawyer relationship and an employer’s fundamental right to counsel. The ABA specifically noted that the information protected by Rule 1.6 includes:

. . . the identity of the client as well as other information related to the legal representation, including, for example, the nature of the representation and the amount of legal fees paid by the client to the lawyer. Because the Department’s Proposed Rule would require every lawyer who directly or indirectly engages in any persuader-related activities in the course of representing an employer client to disclose the identity of their clients, the nature of the representation, the fees received from the clients and other confidential client information, the proposal is clearly inconsistent with lawyers’ existing ethical duties outlined in Model Rule 1.6 and the binding state rules of professional conduct that mirror the ABA Model Rule.²³

In addition to the issues of conflict between the proposed new disclosure requirements and attorneys’ professional conduct obligations, the changes also potentially undermine the fundamental relationship between clients and their attorneys. By requiring such disclosures of confidential client information, the proposed rule changes will likely discourage many employers from seeking legal counsel when confronted with a union organizing drive or a labor dispute. Given the particular complexities of labor relations law, such interference with what is commonly considered a fundamental right to counsel could have the perverse result of causing more unfair labor practice

violations by employers who attempt to navigate through this legal labyrinth without expert guidance.

Conclusion

The government’s most recently published regulatory agenda indicates that the rule changes will be implemented in November 2013. Upon that implementation, labor relations attorneys will need to be mindful that the changes will likely require a fundamental change in their attorney-client relationships with employers, and their legal practices. Particularly given the apparent conflict between the proposed reinterpretation of the Advice Exemption and the Rules of Professional Conduct, a legal challenge to the reinterpretation (if implemented) appears likely. The outcome of such a challenge will substantially affect the future practice, and direction, of labor relations law in the United States. ■



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Endnotes

¹29 USC §§ 401-531.

²29 USC § 157.

³29 USC § 433(a)(4) (Emphasis added).

⁴29 USC § 433(a)(5).

⁵29 USC § 433.

⁶29 USC § 433(b).

⁷Id.

⁸Id.

⁹29 USC § 433(c).

¹⁰29 USC § 434.

¹¹Labor-Management Reporting and Disclosure Act; Interpretation of the “Advice” Exemption; Proposed Rule, Lab. Rel. Rep. (CCH) ¶ 9303 (June 22, 2011).

¹²Id.

¹³76 Fed. Reg. 36182.

¹⁴76 Fed. Reg. 36182 (emphasis added).

¹⁵Id. (emphasis added).

¹⁶76 Fed. Reg. 36211-12, 36224-25.

¹⁷76 Fed. Reg. 36208, 36218.

¹⁸Id.

¹⁹Form LM-21 (2003), p. 2.

²⁰29 USC § 434.

²¹ABA Model Rule of Prof’l Conduct, 1.6.

²²Id., Comments Paragraph 13.

²³Robinson, Wm. T., President, American Bar Ass’n, Comment Letter Re Department of Labor Proposed Rule on the Labor-Management Reporting & Disclosure Act; Interpretation of the “Advice” Exemption; RIN 1215-AB79 and 1245-AA03, DOL Comment Tracking No. 80f25f63 (September 21, 2011).

Background Check Battleground: The EEOC Loses Ground While States Turn Up the Heat

Jessica N. Hofrichter

On Oct. 7, 2013, the Sixth Circuit Court of Appeals in *EEOC v. Peoplemark, Inc.* upheld a sizeable \$751,942.48 fee award against the Equal Employment Opportunity Commission (EEOC) after the court determined that the EEOC continued to pursue disparate impact claims against the employer after it should have been clear from the evidence that the employer did not have a company-wide policy of rejecting applicants with felony records.¹ The *Peoplemark, Inc.* decision is the latest in a string of 2013 decisions that have come down on the side of employers in the background check skirmishes with the EEOC. On Aug. 9, 2013, just one month before the *Peoplemark, Inc.* decision, a federal district court in Maryland dismissed the EEOC's disparate impact claims in *EEOC v. Freeman*. The *Freeman* court based the dismissal on the use of flawed statistical evidence and the EEOC's failure to identify a specific policy causing the alleged disparate impact.² In a similar case earlier this year, *EEOC v. Kaplan Higher Learning Education Corporation*, a federal district court in Ohio dismissed the EEOC's claims for failing to prove that the employer's policy of using credit checks caused a disparate impact on applicants based on the EEOC's flawed statistical evidence.³ While the courts are becoming increasingly intolerant of the EEOC's expansive litigation tactics, many states and local governments are starting to take a hard look at the use of background check information during the hiring process. In fact, many state and local governments have stepped in to limit an employer's ability to conduct background checks on job applicants.

The EEOC first issued guidance on the use of criminal background information by employers in 1987 and again in 1990, stating that certain uses of criminal background information on job applicants may violate Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (*Title VII*). Citing increased numbers of job applicants with criminal records, as well as an increased ability by employers to access criminal history information due to technology, the EEOC began the process to revamp its enforcement guidance in 2008, eventually issuing its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.* ("2012 EEOC Enforcement Guidance") on April 25, 2012.⁴ The updated guidance provides that employers may run afoul of Title VII by implementing a policy that "treats criminal history information differently for different applicants or employees, based on their race or national origin" (disparate treatment),⁵ or by implementing a neutral policy that "may disproportionately impact some individuals protected under Title VII, and may violate the law if not job related and consistent with business necessity" (disparate impact).⁶ According to the EEOC, in order for a criminal background check policy to be consistent with business necessity, the employer must consider the nature and gravity of the offense, the time that has passed since the offense, and the nature of the position being sought or held.⁷ The 2012 EEOC Enforcement Guidance warns employers that an arrest record

alone should not be used to deny employment because an arrest does not establish that criminal conduct occurred.⁸

The EEOC has aggressively pursued employers such as Peoplemark, Inc., for alleged violations of Title VII based on background check policies. In *Peoplemark, Inc.*, the EEOC brought suit against the temporary employment agency following an investigation into allegations by a job applicant who claimed she was denied employment based on her race and criminal history following a background check. The EEOC brought the action on behalf of the rejected applicant and 286 other individual class members. The EEOC claimed that Peoplemark, Inc. had a blanket, company-wide policy of rejecting felon applicants which disparately impacted African Americans. The EEOC based its disparate impact claim in large part on statements made by Peoplemark, Inc.'s general counsel during the initial underlying investigation that Peoplemark, Inc. had a "company-wide policy of rejecting felon applicants."⁹ As part of the investigation, however, Peoplemark, Inc. provided the EEOC with over 18,000 documents that showed that Peoplemark, Inc. did in fact refer felon applicants for employment. Additional documents produced by Peoplemark, Inc. during the litigation revealed that some of the class members did not even have felony convictions and that some of the class members had been employed by Peoplemark, Inc. despite their felony convictions. In all, Peoplemark, Inc. produced approximately 180,000 documents to the EEOC.

Despite the fact that Peoplemark, Inc. produced large volumes of documents, the EEOC failed to timely produce expert information within the initial court deadlines, and requested three extensions to deadlines to name and produce experts. After the third request, the court ordered argument about whether an expert was even necessary to determine the issue of whether Peoplemark, Inc. maintained a company-wide policy of rejecting felon applicants. Ultimately, the parties agreed to dismiss the case with prejudice in March 2010, and the EEOC never filed its expert report. As part of the dismissal, the parties agreed that Peoplemark, Inc. would be the prevailing party for purposes of determining fees under Title VII.

Following the dismissal, Peoplemark, Inc. moved for attorney's fees and costs, including expert fees. The district court awarded \$751,942.48 in fees, including \$219,350.70 in attorney's fees, \$526,172.00 in expert witness fees, and \$6,419.78 in other expenses. The Sixth Circuit upheld the district court's fee award concluding that, although the EEOC may have initially had a basis to bring its disparate impact claims based on the statements made by Peoplemark, Inc.'s general counsel, the EEOC should have reevaluated its claims once the discovery clearly showed that no company-wide policy existed to reject felon applicants. Further, the Sixth Circuit determined that the amount of fees awarded was appropriate because the EEOC should have known by October 1, 2009 that no blanket policy existed, and that Peoplemark, Inc.'s expert fees were necessary to rebut the testimony of the EEOC's expert testimony.

While the decisions in *Peoplemark, Inc.*, *Freeman* and *Kaplan* appear to demonstrate a growing impatience with the EEOC's method of bringing and litigating background check claims without sufficient evidence, other players have entered

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the scene and changed the background check game on a state and local level. Over the past few years, advocacy groups have increased their efforts to promote “ban the box” legislation to limit the ability of employers to ask about a job applicant’s criminal background information on the job application form. These advocacy groups cite similar statistics to those cited by the EEOC, namely that an increased number of individuals seeking jobs today have a criminal record, and that criminal history checks disproportionately affect minority applicants.¹⁰

Ten states currently limit an employer’s ability to request information about an applicant’s criminal history, including California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Mexico and Rhode Island.¹¹ Many city, county and local governments nationwide have also limited the ability of employers to obtain criminal background checks on applicants.¹² Many of these requirements apply only to public employers, but a number of these restrictions apply to government vendors, contractors, and in some cases, private employers. For example, in September 2012, the city of Newark enacted one of the most comprehensive city ordinances limiting the ability of private employers to conduct criminal background checks on applicants.¹³ Several other local governments have put restrictions in place covering private employers, such as in California, Connecticut, Massachusetts, New York, Pennsylvania, and Washington.¹⁴ Minnesota recently enacted legislation to extend its existing “ban the box” statute covering public employers to private employers starting in 2014.¹⁵

As a result of the attention the background check issue has attracted over recent years, many state and local governments that have not already passed “ban the box” legislation are now considering whether to restrict criminal background checks on applicants. States such as North Carolina, Michigan and New Jersey have recently considered “ban the box” legislation for public and private employers.¹⁶

The background check issue is shaping up to be a minefield for employers who are trying to navigate the 2012 EEOC *Enforcement Guidance and the rapidly changing “ban the box” restrictions. Even though the EEOC may have suffered recent setbacks, the surge in state and local attention to restricting the employer’s ability to request criminal history information makes it clear that the background issue is here to stay. In this ever-changing landscape, employers will need to be even more diligent about striking a balance between using background check information to evaluate job applicants, while at the same time complying with any applicable “ban the box” legislation of the jurisdiction and the 2012 EEOC Enforcement Guidelines. This balance ultimately leaves employers with a “Hobson’s choice” – a choice between ignoring credit and criminal background check information and incurring liability for the fraudulent and criminal acts committed by employees, or incurring the “wrath of the EEOC for having utilized information deemed fundamental by most employers.”¹⁷ ■*



Jessica N. Hofrichter is an associate attorney with Seaton, Peters & Revnew P.A. located in Minneapolis, Minn. Hofrichter counsels employers on a broad range of labor and employment matters, including hiring, discipline and termination issues, as well as policy development and compliance issues. She also litigates claims on behalf of employers related to discrimination, retaliation, non-competition agreements, trade secrets, and shareholder disputes.

Endnotes

¹*EEOC v. Peoplemark, Inc.*, 11-2582 (6th Cir. Oct. 7, 2013).

²*EEOC v. Freeman*, RWT 09CV2573 (D. Md. Aug. 9, 2013).

³*EEOC v. Kaplan Higher Learning Edu. Corp.*, 1:10 CV 2882, (N.D. Ohio Jan. 28, 2013) *reconsideration denied*, 1:10 CV 2882, (N.D. Ohio May 6, 2013).

⁴EEOC, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e et seq., (Apr. 25, 2012), available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm (“2012 EEOC Enforcement Guidance”).

⁵*Id.* at Sections IV and V.

⁶*Id.*

⁷*Id.* at Section V(B)(1).

⁸*Id.* at Section (V)(B)(2).

⁹*Peoplemark, Inc.*, 11-2582, p. 3 (6th Cir. Oct. 7, 2013).

¹⁰See National Employment Law Project, *Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records*, April 2013, available at http://nelp.3cdn.net/495bf1d813caddb030d_qxm6b9zbt.pdf (“NELP Ban the Box Report”).

¹¹California A.B. 218; Colo. Rev. Stat. Ann. § 8-2-126; Conn. Gen. Stat. Ann. § 46a-80; Haw. Rev. Stat. § 378-2.5; Illinois Governor Pat Quinn Administrative Order No. 1 (Oct. 3, 2013) available at <http://www.illinois.gov/Government/ExecOrders/Documents/2013/adminorder-2013-1.pdf>; Maryland S.B. 4; Mass. Gen. Laws Ann. ch. 151B, § 4(9½); Minnesota S.F. 523; N.M. Stat. Ann. § 28-2-3; Rhode Island H.B. 5442.

¹²See NELP Ban the Box Report.

¹³Newark, NJ Ordinance 12-1630 available at <https://newark.legistar.com/LegislationDetail.aspx?ID=+1159554&GUID=6E9D1D83-C8D7-4671-931F-EE7C8B2F33FD&Options=&Search>.

¹⁴See NELP Ban the Box Report.

¹⁵Minnesota S.F. 523.

¹⁶North Carolina H.B. 208, available at <http://www.ncleg.net/Sessions/2013/Bills/House/PDF/H208v1.pdf>; Michigan H.B. 4366, available at <http://www.legislature.mi.gov/documents/2013-2014/billintroduced/House/pdf/2013-HIB-4366.pdf>; and New Jersey S.B. 25886, available at http://www.njleg.state.nj.us/2012/Bills/S3000/2586_11.PDF.

¹⁷*Freeman*, RWT 09CV2573, pp. 31-32 (D. Md. Aug. 9, 2013)

Congressional Update

James D. Noel III

The Senate passed the Employment Non-Discrimination Act (ENDA). Several attempts to amend Title VII to include sexual orientation have failed² and prior versions of ENDA have not been signed into law.³

ENDA defines the term “employee” to include the definitions of employee or under sections 701(f) and 717(a) of the Civil Rights Act of 1964, Section 302(a)(1) of the Government Employee Rights Act of 1991 and Section 101 of the Congressional Accountability Act of 1995.

ENDA includes definitions of gender identity and sexual orientation, this later covers homosexuality, heterosexuality and bisexuality. It also prohibits discrimination because of an individual’s actual or perceived sexual orientation or gender identity. On the other hand, ENDA makes various concessions to those who have in the past objected to this civil rights legislation.

This version of ENDA has attempted to conciliate the views of proponents of equal rights for persons of all types of

sexual preferences and opponents to this and other civil rights laws. President Obama spent much of his career fighting to strengthen civil rights, as a community organizer, civil rights lawyer, Illinois state senator, U.S. senator, and now as president. Moreover, the approval of ENDA was one of his campaign promises. ■

Endnotes

²For example: H.R. 8269, 95th Cong. (1977); H.R. 8268, 95th Cong. (1977); H.R. 7775, 95th Cong. (1977); H.R. 4794, 95th Cong. (1977); H.R. 2998, 95th Cong. (1977); H.R. 14752, 93rd Cong. (1974); H.R. 655, 101st Cong. (1989); S. 464, 100th Cong. (1987); H.R. 230, 99th Cong. (1985).

³S.1284, 107th Cong. (2000); H.R. 2692, 107th Cong. (2000); S. 1276, 106th Cong. (1999); H.R. 2355, 106th Cong. (1999); S. 869, 105th Cong. (1997); H.R. 1858, 105th Cong. (1997); S. 2056, 104th Cong. (1996); S. 932, 104th Cong. (1995); H.R. 1863, 104th Cong. (1995); H.R. 4636, 103rd Cong. (1994); S. 2238, 103rd Cong. (1994).

L&E Section Bestows Annual Awards



Karleen Green (pictured left) and Danielle Brewer (pictured right)

At the L&E Section meeting held on Thursday, Sept. 26, 2013, Section Chair Danielle Brewer presented the Chair’s Award to Karleen Green in recognition of her outstanding contributions to the section, demonstrated distinguished leadership and participation in section activities throughout the year.

Author of the Year awards were presented to Corrie Tarara of the Seaton Firm and to Leigh Schultz, Brian Schwartz, Scott

Eldridge, and Saura Sahu from the firm of Miller Canfield. This award is presented to section members who have made outstanding contributions to the section’s publications, including the newsletter, monthly circuit updates and publications on behalf of the section in *The Federal Lawyer*.

Previously, at the L&E Section’s Bi-Annual Conference held in New Orleans on May 2-3, 2013, the L&E Board presented Al Latham and the Paul Hastings firm and Danuta Bembenista Panich of Ogletree Deakins with the Outstanding Speaker Award. This award is presented to section members who have made outstanding contributions through speaking engagements to the section’s CLE events, including the bi-annual conferences, CLE presentations at the FBA’s national conventions, webinars and other events on behalf of the section. ■

L&E Section’s “Labouring Oar” Receives Meritorious Newsletter Award

At the FBA’s Annual Meeting and Convention in San Juan, Puerto Rico held on September 26-28, 2013, the FBA presented the L&E Section with the Meritorious Newsletter Award. This award is presented in recognition of the newsletter’s content, creativity, design and overall sustained quality as well as its service to its section’s membership. ■

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