WISCONSIN MAY "BAN THE BOX" ON EMPLOYMENT APPLICATIONS

A recent **Employment LawScene™ article** discussed the EEOC's recent heightened efforts to crack down on employers' use of criminal background checks in making hiring decisions. As part of its efforts, the EEOC issued guidance to employers in April 2012, in which the EEOC endorsed the policy of removing questions regarding criminal conviction history from job applications as a best practice for employers.

Following the EEOC's lead, in what can only be described as a nationwide movement that has recently gained considerable momentum, 53 local jurisdictions and 8 states (including Minnesota) have enacted "ban-the-box" legislation that would prohibit employers from considering a job applicant's criminal conviction record before the applicant has been selected for an interview. Two other states, California and Illinois, have adopted "ban-the-box" policies through administrative directives rather than legislation. (Statistics courtesy of the National Employment Law Project).

Wisconsin could become the next state to "ban the box" on employment applications. On August 27, 2013, a bill that would prohibit employers from asking for information regarding an applicant's criminal conviction record before the applicant has been selected for an interview, was introduced to the Wisconsin legislature and referred to Committee. Wisconsin Assembly Bill 342 provides that requesting an applicant for employment to supply information regarding his or her conviction record on an application form or otherwise inquiring into or considering an applicant's conviction record before the applicant has been selected for an interview, constitutes employment discrimination under Wisconsin law. The bill would not, however, prohibit an employer from notifying applicants for employment that individuals with certain conviction records may be disqualified by law or the employer's policies from employment in particular job positions.

Understandably, a number of employers use criminal background checks to identify job applicants who might present a risk to the employer's business, its employees, and its customers or clients. Wisconsin employers should pay close attention to Assembly Bill 342 as it makes its way through the State legislature, as passage of this bill could result in a number of employers having to make significant changes to their hiring processes and job applications.

KILLORAN NAMED FELLOW OF THE WISCONSIN LAW FOUNDATION

Grant Killoran, Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, recently was named a Fellow of the Wisconsin Law Foundation.

The Fellows organization was created in 1999 to honor members of the State Bar of Wisconsin who have achieved significant accomplishments in their careers and contributed leadership and service to their communities. Membership in the Fellows is limited to 2.5% of the State Bar of Wisconsin's members.

The Fellows aims to energize its members to continue their efforts in the promotion of justice, advancement of the legal profession and improvement of legal education. For more information on the Fellows click here.

WILL WISCONSIN BE NEXT TO BAN EMPLOYERS FROM ACCESSING EMPLOYEE SOCIAL MEDIA ACCOUNTS?

Wisconsin may soon join fourteen other states that have adopted laws prohibiting employers from requesting usernames and passwords to access an employee's or job applicant's social media accounts, including Facebook® and Twitter®.

On Tuesday, August 20, 2013, the Wisconsin Senate Committee on Judiciary and Labor held a public hearing to discuss a bipartisan bill that would prohibit employers from accessing and monitoring the personal internet accounts of employees and job applicants. The bill would make it unlawful for employers to ask employees and applicants for their personal social media account passwords and would permit employees and applicants to file a complaint against their employer for violations of this law with the Wisconsin Department of Workforce Development in the same manner as an employment discrimination complaint. Besides restricting access to employees' personal social media accounts, Senate Bill 223 would also make it unlawful for an employer to discharge or otherwise discriminate against any person for exercising the right to refuse a request for access to such accounts.

Although seen as a prohibition, Senate Bill 223 provides a number of protections for employers. The bill would not prohibit employers from accessing electronic communications

devices, accounts, or services that the employer provides to its employee by virtue of the employment relationship or that are paid for by the employer and used for business purposes. Senate Bill 223 would also permit employers to restrict employees' access to certain internet sites and monitor, review, or access electronic data stored on the employer's own network and on devices provided by the employer. The bill would also afford employers certain protections to permit discipline or discharge of employees who transfer the employer's proprietary or confidential information or financial data to the employee's personal internet account without the employer's authorization. Finally, Senate Bill 223 provides employers with a shield to legal liability against claims that an employer should have known, or should have monitored, an employee's social media account in relation to claims for negligent hiring or negligent retention.

According to the National Conference of State Legislatures, similar laws have been introduced or are pending in at least 36 states. Eight states, including Arkansas, Colorado, Nevada, New Mexico, Oregon, Utah, Vermont, and Washington, have enacted legislation so far in 2013.

A federal law prohibiting employers from requesting or requiring employees and applicants to provide usernames, passwords, or any other form of access to personal social media accounts, is also being pushed through Congress. The Social Networking Online Protection Act was initially introduced in April 2012, but never made it to the House or Senate. The Act was re-introduced and assigned to the Congressional committee on February 6, 2013. If the Act passes committee, it will be passed on and considered by Congress.

Stay Tuned . . .

Employers should stay tuned to both the state and federal legislation that could potentially change the way employers conduct background checks for prospective employees and investigate allegations of misconduct regarding current employees. Please continue to check the Employment LawScene® for updates on these important anticipated changes in state and federal law.

SUPREME COURT ADOPTS NARROW DEFINITION OF "SUPERVISOR" IN CONTEXT OF WORKPLACE HARASSMENT CASES

On June 24, 2013 the Supreme Court of the United States issued a decision in *Vance v. Ball State University*, in which it defined narrowly what it means to be a "supervisor" in the

context of workplace harassment claims. The Court's decision in *Vance* has been a long time coming and offers long-awaited guidance to employers as to who constitutes a "supervisor" for purposes of imposing strict liability under Title VII for workplace harassment.

Whether an employee is considered a "supervisor" for purposes of Title VII is of critical importance because an employer's exposure to liability is significantly different depending on whether that employee is a "supervisor" or simply a co-worker. An employer is liable for harassment by a co-worker only if the employer was negligent in controlling working conditions. Different rules apply, however, where the alleged harasser is a "supervisor." In those situations, an employer may be strictly or automatically liable for the supervisor's creation of a hostile work environment where the supervisor's alleged harassment results in a tangible employment action such as hiring, firing, or failure to promote. Where the harassing conduct is committed by a "supervisor," an employer can only avoid liability in the absence of a tangible employment action if: (1) the employer exercised reasonable care to prevent and correct the harassing conduct (*i.e.*, having a written anti-harassment policy, conducting regular supervisory training, *etc.*); and (2) the employee failed to take advantage of the employer's preventive and corrective measures available to the employee. So, whether an alleged harasser is a "supervisor" or merely a co-worker is important.

In *Vance v. Ball State University*, the Supreme Court defined "supervisor" narrowly to mean only those individuals who have authority to take tangible employment actions including a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. In adopting this narrow definition of supervisor, the Court rejected the EEOC's attempt to broaden the definition of "supervisor." The EEOC attempted to argue that individuals who simply direct the work of another employee should be sufficient to caste the title of "supervisor" upon an individual for the purpose of imposing strict vicarious liability upon the employer, which would include anyone who directs another employee's work tasks.

The Supreme Court's adoption of the more narrow definition of "supervisor" means that not every employee with the authority to direct work will be considered a supervisor for the purpose of imposing strict liability upon an employer for workplace harassment. The Court's holding may result in employers facing less strict liability harassment claims in the future and at the same time provide employers a better opportunity to defend themselves against such claims under the less stringent negligence theory of liability.

What Steps Should You Take to Protect Your Business in Light of the Vance *Decision?*

Be sure to review and update your anti-harassment policies and procedures and communicate those policies and procedures to your employees. You should always be sure to act quickly in conducting a thorough investigation of any complaint or allegation of

harassment by one of your employees and take appropriate corrective or disciplinary actions as necessary.

Also, clearly establishing the status of each of your employees will continue to be of critical importance. You should create or review and clarify job descriptions for those employees who you intend to have authority to take tangible employment actions.

Please contact Sarah Matt for more information or to provide you advice regarding your anti-harassment policies and procedures and employee job descriptions.

O'NEIL, CANNON, HOLLMAN, DEJONG AND LAING S.C.'S MILWAUKEE JUSTICE CENTER ATTORNEY VOLUNTEERS AMONG THOSE NAMED MILWAUKEE BAR ASSOCIATION'S "LAWYERS OF THE YEAR"

At its Annual Meeting on June 11, 2013, the Milwaukee Bar Association collectively honored as its 2013 "Attorneys of the Year" those area attorneys, including the attorneys of O'Neil, Cannon, Hollman, DeJong and Laing S.C., who serve as volunteers at the Milwaukee Justice Center.

The MBA, in conjunction with the Marquette University Law School, the Milwaukee County Circuit Courts and other organizations, established the Milwaukee Justice Center in 2009. The Milwaukee Justice Center is a free limited legal advice clinic held at the Milwaukee County Courthouse. It uses transformative collaborative partnerships to provide free legal assistance to Milwaukee County's unrepresented litigants through court-based self help desks and legal resources.

Recognizing the importance of this project, O'Neil, Cannon, Hollman, DeJong and Laing became a founding member of the consortium of area law firms that agreed to provide attorney volunteers to the staff the Milwaukee Justice Center. O'Neil, Cannon, Hollman, DeJong and Laing's attorneys have been volunteering at the Milwaukee Justice Center since the inception of its formal program in 2009. Grant Killoran, the Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, also serves as a member of the MBA Steering Committee overseeing the Milwaukee Justice Center program.

ATTORNEY DIZARD QUOTED IN MILWAUKEE JOURNAL SENTINEL

Judge clears way for Falls Radisson sale

Milwaukee Journal Sentinel – August 26, 2013

The eventual sale of the publicly financed Menomonee Falls Radisson Hotel took an initial step forward Monday. Waukesha County Circuit Judge James Kieffer granted a request by the Village of Menomonee Falls to expand the powers of a court-appointed **...**

See Related Story:

For Sale: The Menomonee Falls Radisson Hotel

Menomonee Falls Patch – August 26, 2013

A Waukesha County Circuit court judge on Monday granted a receivership attorney expanded powers to market and sell the Radisson Hotel property, which has been in foreclosure. Receivership attorney Seth Dizard has overseen operations at the hotel **...**

THE SUMMER 2013 EDITION OF THE ABA SECTION OF LITIGATION'S HEALTH LAW LITIGATION NEWSLETTER IS PUBLISHED BY CO-EDITOR GRANT KILLORAN

The American Bar Association Section of Litigation has published its Summer 2013 Edition of the *Health Law Litigation Newsletter*. This edition contains articles on a number of topics, including recent developments of interest to practitioners who handle health care disputes, including articles on the False Claims Act, HIPAA, life sciences training and health care compliance issues. An electronic version of this edition of the *Health Law Litigation Newsletter* can be found at https://www.americanbar.org/groups/litigation.

Grant Killoran, the Chair of O'Neil, Cannon, Hollman, DeJong and Laing's Litigation Practice Group, is a former Co-Chair of the American Bar Association Section of Litigation's Health Law

Litigation Committee and currently serves as the Co-Editor of its *Health Law Litigation Newslett*er.

EEOC CRACKS DOWN ON EMPLOYERS' USE OF CRIMINAL BACKGROUND CHECKS

Although having a criminal record in itself does not afford individuals protection under Title VII, it is the EEOC's position that the use of criminal records in making employment decisions has a disproportionate effect on certain racial and ethnic groups, which may have a discriminatory effect on those racial or ethnic groups who *are* afforded protections under Title VII.

In April of last year, the EEOC issued guidance to employers regarding the use of arrest or conviction records in making employment decisions. The EEOC makes clear in its guidelines that the law does not expressly prohibit the use of criminal background checks, however, urges employers to conduct an individualized assessment when utilizing criminal background information to consider the nature and gravity of the crime, the time elapsed since the conviction, and whether the circumstances of the arrest or conviction are substantially related to the nature or requirements of the particular job. Employers that disproportionately reject minority employment candidates as a result of criminal background checks may be subject to a discrimination claim based upon a disparate impact theory of discrimination.

Since the issuance of its criminal background check guidelines, the EEOC has stepped up its enforcement efforts and has begun to systematically crack-down on employers, alleging that employers' blanket policies regarding criminal background checks and arrest or conviction records constitute discriminatory hiring practices. In June 2013, the EEOC filed lawsuits against two large employers for their use of criminal background checks in making hiring decisions. The EEOC's district office in Charlotte, South Carolina filed suit against a large auto manufacturer alleging that it disproportionately screened out African Americans from jobs by implementing and utilizing a criminal conviction policy that denies facility access to employees and employees of contractors who have certain criminal convictions on their record. The EEOC's Chicago, Illinois office also filed a separate suit against a retailer alleging that its policy of conditioning all job offers on criminal background checks has a disproportionate impact on African-American applicants, and, therefore, is unlawful under Title VII.

The EEOC is not the only agency stepping up its enforcement efforts regarding employers' use of arrest and conviction records. A growing number of states and cities have recently

enacted “Ban the Box” legislation that regulates the use of criminal background checks in employment decisions. The purpose of the “Ban the Box” laws is to prohibit covered employers from inquiring about a job applicant’s criminal background and conviction record on a job application and delay background checks until later in the hiring process. Wisconsin has not yet enacted Ban the Box legislation.

So, what does this all mean for you?

The EEOC’s guidance and the Ban the Box legislation trend can present challenges for employers who want to protect clients/customers and other employees from individuals with violent backgrounds or avoid placing people convicted of certain financial crimes in accounting positions or other positions where they are handling money. Certain employers, such as schools or health care providers, should also keep in mind the potential conflict between these laws and other legal requirements that prohibit the employer from employing individuals who have certain criminal convictions in these sensitive positions.

Employers must appropriately balance the EEOC’s guiding principles with these practical considerations. Employers should carefully review their policies and practices regarding criminal background checks and the use of arrest and conviction records in making employment decisions to be sure that these policies do not contradict the EEOC’s guidance or violate Title VII’s prohibition against discrimination.

SUPREME COURT ADOPTS HEIGHTENED STANDARD FOR EMPLOYEE RETALIATION CLAIMS

Recently, the Supreme Court of the United States issued its decision in ***University of Texas Southwestern Medical Center v. Nassar***, which raises the bar for employees who file Title VII retaliation claims against their employers.

Title VII protects employees from discrimination based on race, sex or gender, religion, or national origin. Title VII also protects employees against certain forms of retaliation. Specifically, Title VII prohibits an employer from retaliating against an individual who has opposed, complained of, or participated in any complaint of unlawful employment practices by the employer. Retaliation can take many forms, including actions relating to terms and conditions of employment (*i.e.* hiring, firing, promotions, *etc.*), disciplinary actions and even discriminatory acts that occur outside the workplace.

For an employee to prevail under Title VII for a claim of retaliation, the employee must show some causal link between an adverse employment action and the employee's protected activity. Although federal district courts have been divided on just what type of proof an employee must establish in order to succeed on a Title VII retaliation claim, the key inquiry has always been the employer's motivation. Some courts have allowed employees to prove retaliation claims by establishing that the employer's action or decision was motivated by the employee's complaint or other protected activity, even if the employer also had other lawful motives that caused the employer's action or decision. Other courts, however, have applied a more stringent standard that requires employees to prove that the employer would not have taken the challenged employment action "but for" the employee's complaint or engagement in other protected activity.

In *Nassar*, the Supreme Court clarified that in order to prove retaliation under Title VII, an employee must prove "but-for" causation – that the employee's complaint of unlawful employment practices was the "but-for" reason for the challenged employment action rather than just one of many reasons. Proving that a challenged employment action was motivated by discriminatory reasons, even if the employer's action was also motivated by other lawful reasons, is no longer sufficient to succeed with a retaliation claim.

What does the Court's decision mean for employers?

The Court's decision in *Nassar* is of particular significance because the number of retaliation claims filed by employees has significantly increased in recent years and has nearly doubled from 1997 to 2012, according to EEOC statistics. Requiring employees to prove "but-for" causation in a Title VII retaliation claim should make it easier for employers to succeed at the early stages of litigation and will hopefully curb the filing of frivolous claims that cost employers time and money to defend. That is not to say that employers no longer need to apply or enforce anti-retaliation policies. Documenting performance problems and adhering to consistent disciplinary and termination practices continues to be of critical importance for employers as evidence of legitimate and non-discriminatory reasons for any challenged employment action.

BEWARE POTENTIAL EMPLOYMENT SUCCESSOR LIABILITY IN ASSET TRANSACTIONS

With Labor Day in the rearview mirror and the fall M&A deal season now upon us it is important to remember that, while most liabilities can be extinguished in an Asset Purchase Transaction, there are a few liabilities that cannot. This post will focus on one such liability –

Federal Employment Liability.

Last spring, the Seventh Circuit, in *Teed v. Thomas and Betts Power Solutions, L.L.C.,* held that certain federal employment liabilities (e.g. ongoing Fair Labor Standards Act (FLSA) litigation) may flow from the seller through the asset purchase to the buyer despite language to the contrary in the purchase agreement.

In *Teed*, the seller was in receivership and embroiled in various FLSA litigation stemming from pre-sale activity. The buyer negotiated a clause in the asset purchase agreement absolving it of liability in this pending litigation and the state court approved the sale of the assets "free and clear of all liens, claims, encumbrances, and other interests of any kind."

After the acquisition, the plaintiffs moved to substitute the seller for the buyer in their ongoing FLSA cases. The Seventh Circuit determined that because a federal law was at issue, federal common law applied. The federal common law regarding successor liability is not as limited as most state's successor liability laws and, in *Teed*, the court held that the seller was liable under the doctrine of successor liability.

Successor liability is a complicated doctrine, particularly when federal laws are involved or the parties to a transaction are from more than one state. Not only do the successor liability laws vary from state to state, the Federal Circuits all have their own interpretations of it as well. Therefore, it is important to perform thorough due diligence of a target company and hire transactional attorneys who have employment law experience and are able to evaluate whether or not the liabilities can be contracted around or have the potential to attach to the buyer after the transaction is complete so that the proper indemnifications, escrow, or holdbacks can be negotiated into the purchase agreement.

As always, if you have any questions on this topic or employment law in general, please do not hesitate to contact us.