Fenwick Employment Brief

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SAN FRANCISCO LIMITS INQUIRY INTO CRIMINAL HISTORY OF APPLICANTS AND EMPLOYEES

In February, the San Francisco Board of Supervisors passed the Fair Chance Ordinance, which limits when and to what extent employers can inquire into the criminal history of applicants and employees. The ordinance also applies in the fair housing arena. The aim of the ordinance is to delay when an employer can inquire about criminal history, but not to ban it entirely: employers cannot inquire into an individual's criminal history until after the employer has determined that the individual meets the requirements for the position. The main highlights of the ordinance are as follows:

- *Coverage:* It applies to employers located or doing business in San Francisco with twenty or more employees and certain government contractors. The employer must count all employees (inside and outside of San Francisco) to determine whether it is covered by the ordinance. It protects individuals who work (or would work) within San Francisco.
- *Job Advertisements and Applications:* Employers cannot state in job advertisements or solicitations that are "reasonably likely to reach persons who are reasonably likely to seek employment in San Francisco" that individuals with arrests or convictions are not eligible for employment and they must state that they will consider qualified applicants with criminal histories (consistent with the allowances of the ordinance) for employment. Employers cannot seek criminal conviction information on job applications.
- *Timing of Background Checks:* Employers cannot inquire into, or run background checks involving, criminal history until after the first live interview (*i.e.,* in person or via telephone, videoconferencing, or other technology) or a conditional offer of employment.
- *Posting Notice:* Employers must post a special notice (which the Office of Labor Standards Enforcement ("OLSE") will provide) in the workplace informing applicants and employees of their rights under the ordinance. Employers must also provide this notice to applicants and employees before conducting any criminal history inquiries (including background checks).
- *Recordkeeping:* Employers must maintain records of their employment decisions (including job applications and other data) for at least three years and allow the OLSE to access such records.

The ordinance mirrors many of the established requirements under the federal Fair Credit Reporting Act and the California Consumer Credit Reporting Agencies Act and Investigative Consumer Reporting Agencies Act (*e.g.,* the employer cannot consider convictions that are more than seven years old or arrests that do not result in conviction; it must notify the employee of any potential adverse action occasioned by discovery of a conviction in a background check, and the individual has a right to receive a copy of the background check and to provide information regarding an at-issue conviction, including evidence of rehabilitation or other mitigating factors; *etc.*).

In addition, it adopts much of the background check guidance issued by the Equal Employment Opportunity Commission in 2012 (*e.g.,* the employer should conduct an individualized assessment, taking into account the relationship of the conviction to the position, the time that has elapsed since the conviction, and other mitigating factors). It also protects applicants and employees from retaliation for exercising their rights under the ordinance.

The ordinance becomes effective in August 2014. For first-time violations, or any violation within the first year of the ordinance being effective, the OLSE will only issue warnings. However, for second violations, the OLSE may impose a penalty of $50 for each aggrieved individual and $100 for subsequent violations.

Employers with employees in San Francisco, or that expect to recruit for positions in San Francisco, should revisit their job applications and background check procedures in light of the ordinance. Click here for the full ordinance and legislative digest.

U.S. SUPREME COURT EXPANDS SOX WHISTLEBLOWER PROTECTION TO EMPLOYEES OF PRIVATE CONTRACTORS

In a landmark whistleblower decision by the United States Supreme Court, *Lawson, et al. v. FMR LLC, et al.,* the Court held that the whistleblower protections under the Sarbanes-Oxley Act of 2002 ("SOX") apply not only to employees of public companies, but also to employees of private contractors and subcontractors who contract with public companies.

Jackie Hosang Lawson and Jonathan M. Zang both worked for private companies (collectively, "FMR") that contracted with the Fidelity family of mutual funds to provide advisory and management services. Lawson alleged that she ultimately suffered a constructive discharge after raising concerns about cost accounting methods. Zang claimed he was fired in retaliation for raising concerns about inaccuracies in a draft SEC registration statement. Both filed separate lawsuits in federal district court in Massachusetts for whistleblower retaliation under SOX. FMR sought to have the cases dismissed claiming that neither Lawson nor Zang could assert such claims since they were not employees of public companies. The district court denied FMR's request for dismissal, and the First Circuit reversed the decision.

In deciding this case, the Supreme Court analyzed the language of the statute and its purported purpose. According to the Court, the broad language of the statute and its reference to "an employee," without further qualification, encompasses employees of both public companies and the private companies that contract with them. Further, the Court recognized that the purpose of the retaliation protections under SOX was to prevent Enron-like scandals and that private companies that worked with Enron had terminated employees who attempted to blow the whistle on illegal and unethical conduct. Thus, it held, such private contractor employees should also be protected. In her dissent, Justice Sotomayor stated that the Court's decision would give SOX's whistleblower protections a "stunning reach."

Privately held companies that contract with public companies should be aware of this new area of potential exposure and consider revising their policies in accordance with this decision.

EMPLOYEES MAY CHOOSE TO USE VACATION INSTEAD OF FMLA OR CFRA LEAVE FOR MEDICAL ABSENCES

The Ninth Circuit (California) held in *Escriba v. Foster Poultry Farms, Inc.* that an employee can choose to use vacation instead of leave under the Family and Medical Leave Act ("FMLA") or California Family Rights Act ("CFRA") for an otherwise FMLA or CFRA-qualifying event.

Maria Escriba worked for Foster Farms' Turlock processing plant for eighteen years (during which she took multiple FMLA/CFRA leaves). When her father fell ill, she asked her supervisor if she could take two weeks of vacation to go to Guatemala to help care for him. Her supervisor approved the time off; followed up with Escriba to confirm that she did not need more time off to care for her father; and told her that if she needed more time off, she should contact Human Resources. Escriba then asked a facility superintendent for one or two more weeks of leave, in addition to her two weeks of vacation. He replied that he could not grant such leave, but told her to obtain a doctor's note or consult with Human Resources. She did not do so.

No one notified Escriba of her right to take FMLA/CFRA leave. Escriba then left for Guatemala to care for her father. She was ultimately terminated for violating the company's "three day no-show, no-call rule" when she failed to return from Guatemala at the end of two weeks without communicating a need for additional time off.

Escriba sued Foster Farms for interference with her rights under the FMLA/CFRA, and the jury found in the company's favor. After a series of post-trial motions, both sides appealed. The court found in Foster Farms' favor and held that (1) employees can decline to use FMLA/CFRA leave even if the underlying reason for the leave is FMLA/CFRA-qualifying and protected by those laws, and (2) if they elect to use vacation instead of FMLA/CFRA leave, they cannot seek protection under those statutes. The court noted that although the FMLA does not state whether an employee may decline to exercise his or her FMLA rights, the interpretive Department of Labor regulations suggest that there are "circumstances in which an employee might seek time off but intend not to exercise his or her rights under the FMLA." The court pointed out that if employers were required to designate leave under FMLA/CFRA regardless of the wishes of the employee, employers could be exposed to legal risk for forcing such leave on the employees in the form of an interference claim.

News Bites

Presidential Memorandum Calls for Updates to Federal Wage and Hour Laws

On March 13, 2014, President Obama signed a Presidential Memorandum directing the Secretary of Labor to "propose revisions to modernize and streamline the existing overtime regulations," specifically, the federal Fair Labor Standards Act ("FLSA"). The President suggested that, in doing so, the Secretary of Labor consider "how the regulations could be revised to update existing protections consistent with the intent of the Act; address the changing nature of the workplace; and simplify the regulations to make them easier for both workers and businesses to understand and apply."

Although there are no concrete directives in the Memorandum, in an accompanying Fact Sheet, the White House raises concerns that many salaried workers are being required to work more than forty hours in a week, but are not entitled to overtime because they are characterized as exempt under one of the "white collar" exemptions of the FLSA. In that Fact Sheet, the White House states that the minimum salary requirement for the white collar exemptions (now $455 per week) is low and has not been updated since 2004, leading many to believe that the Secretary of Labor may raise this requirement. We will watch as this develops over the next year.

Daughter Boasts on Facebook About Father's Settlement – Breaches Settlement Agreement

In *Gulliver Schools, Inc., et al. v. Snay,* the Third Circuit Court of Appeal (Florida) held that an employee's disclosure to his daughter of the existence of his settlement with his former employer constituted a breach of the confidentiality clause of the settlement agreement.

Patrick Snay sued Gulliver for age discrimination and retaliation. Thereafter, the parties entered into a settlement agreement, which had a confidentiality clause specifically prohibiting Snay from discussing with any entity or person (except his attorneys, other professional advisors, or his spouse) any information regarding the "existence or terms" of the agreement. The penalty for breach of this provision was disgorgement of Snay's portion of the settlement payments.

After signing the settlement agreement, Snay and his wife told their college-age daughter that the case was settled and that they were happy with the result. Snay's daughter then posted the following message on her Facebook page: "Mama and Papa Snay won the case against Gulliver. Gulliver is now officially paying for my vacation to Europe this summer. SUCK IT." At the time, she had around 1,200 Facebook friends. Many of them were current or former Gulliver students.

Upon discovering this message, Gulliver refused to pay Snay $80,000 under the settlement agreement, claiming that he had breached the confidentiality clause by disclosing the existence of the settlement to his daughter. The appellate court found in Gulliver's favor. It held that Snay violated the confidentiality clause based on the plain language of the settlement agreement and it pointed out that he could have negotiated the confidentiality clause to allow him to disclose the settlement to his daughter, but did not.

Employers should be mindful of their own discussions with and disclosures to others surrounding settlement agreements since even minor disclosures can violate confidentiality provisions.

Staffing Agency Not Liable for Employee Poisoning

In *Montague, et al. v. AMN Healthcare, Inc.,* a California appellate court held that a staffing agency was not liable when one of its employees poisoned another employee at a customer's facility.

AMN Healthcare, Inc. *dba* Nursefinders ("AMN"), a medical professional staffing agency, hired Theresa Drummond as a medical assistant and placed her at a

Kaiser facility. Drummond got into a minor argument with a co-worker, Sara Montague. Shortly thereafter, she poured carbolic acid into Montague's water bottle, which caused her tongue and throat to burn and eventually made her vomit. When confronted, Drummond admitted to the conduct.

Montague sued Drummond and AMN for various causes of action. The lower court granted AMN's motion for summary judgment, which argued that it was not liable since (1) Drummond was a "special employee" of Kaiser and/or (2) she acted outside the course and scope of her employment when she poisoned a co-worker.

The appellate court agreed with the lower court, although it sidestepped the issue of whether Drummond was a special employee of Kaiser since it found that she acted outside the course and scope of her employment, thus absolving either employer of vicarious liability. However, the court noted that although staffing agencies often have a co-employer relationship with the company they provide workers to, the general employer (*i.e.,* the staffing agency) is "absolved" of vicarious liability when "it has relinquished total control" to the special employer (*i.e.,* Kaiser). In addition, it held that while the general employer relinquishes control to the special employer, the special employer becomes "solely liable" for vicarious liability for the employee's job-related torts.

This case is a good reminder that staffing agencies, although useful, do not totally insulate employers from liability.

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