

“HOT BUTTON” EMPLOYMENT ISSUES



TROY T. SEIBEL
COMMISSIONER OF LABOR
NORTH DAKOTA DEPARTMENT OF LABOR AND HUMAN RIGHTS

DEPARTMENT OF LABOR AND HUMAN RIGHTS

- ✘ Responsible for enforcing state and federal labor and human rights laws, as well as educating the public about these laws
- ✘ Two Divisions
 - Wage and Hour Division
 - Human Rights Division

WAGE AND HOUR DIVISION

- ✘ Responsible for enforcing state wage and hour laws
- ✘ Minimum Wage
- ✘ Overtime
- ✘ Breaks
- ✘ Youth Employment, working conditions, etc.

HUMAN RIGHTS DIVISION

- ✘ Responsible for enforcing state and federal discrimination laws
- ✘ North Dakota Human Rights Act (N.D.C.C. ch. 14-02.4)
- ✘ North Dakota Housing Discrimination Act (N.D.C.C. ch. 14-02.5)
- ✘ Federal discrimination laws (Title VII, ADA, ADEA, Fair Housing Act, etc.)

“HOT BUTTON” EMPLOYMENT ISSUES

- ✘ Overtime (exemptions, new rules)
- ✘ Sexual Orientation/Gender Identity Discrimination and Legalization of Same-Sex Marriage
- ✘ Criminal Background Checks
- ✘ Retaliation Claims
- ✘ EEOC Enforcement Priorities

OVERTIME

✘ Who is exempt from overtime?

- 4 primary exemptions
- “Administrative” employees
- “Executive” employees
- “Professional” employees
- “Highly compensated” employees

Additional exemptions can be found in N.D.A.C. § 46-02-07-02(4)

OVERTIME (CONT.)

- ✘ “Administrative” employees are those whose primary duties consist of:
 - Performance of office or non-manual work directly related to management policies or general business operations of the employer, AND
 - Customarily and regularly exercise discretion and independent judgment

Possible examples include: a project manager, finance manager, marketing manager, etc.

N.D.A.C. § 46-02-07-01(1)

OVERTIME (CONT.)

- ✘ “Executive” employees are those whose primary duties consist of:
 - Management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision,
 - Directs the work of two or more employees, AND
 - Authority to hire, fire, promote other employees (or ability to influence those decisions)

Possible examples include president, CEO, vice president of international affairs, etc.

N.D.A.C. § 46-02-07-01(6)

OVERTIME (CONT.)

- ✘ “Professional” employees are those whose primary duties consist of:
 - Work requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized instruction and study,
 - Work requiring consistent exercise of discretion and judgment, AND
 - Work that is predominantly intellectual and varied in character and is of such character that the output produced or the result accomplished cannot be standardized in relation to a given period of time

Possible examples include attorneys, physicians, etc.

N.D.A.C. § 46-02-07-01(10)

OVERTIME (CONT.)

- ✘ A “highly compensated” employee is one who:
 - Paid total annualized compensation of \$100,000 or more,
 - Receives at least \$455/week, AND
 - Primary duties consist of office or non-manual work

N.D.A.C. § 46-02-07-01(7)

***Remember New USDOL Rule!! \$134,004

OVERTIME (CONT.)

- ✘ New overtime rules issued by USDOL
 - Current federal regulations require “administrative”, “executive”, and “professional” employees receive at least \$455 per week (\$23,660 per year)
 - New rule increases this floor to \$913 per week (\$47,476 per year)
 - Automatically updated every 3 years, beginning January 1, 2020
 - Effective December 1, 2016

OVERTIME (CONT.)

- ✘ Employers frequently misclassify employees as exempt from overtime.
- ✘ Costly – employees can recover up to two years of overtime pay (possibly three)
- ✘ An employee cannot be both exempt and non-exempt (what are the employee's primary duties?)
- ✘ Enforcement priority for USDOL

SAME-SEX MARRIAGE

- ✘ Obergefell v. Hodges, 576 U.S. ____ (2015).
- ✘ Fundamental right to marry is guaranteed to same-sex couples by the 14th Amendment
- ✘ Employer ramifications
 - FMLA
 - Employee benefits
 - Employer policies, procedures, handbooks

Decision does not create a new, protected category under the North Dakota Human Rights Act – guarantees right to marry, does not protect against sexual orientation/gender identity discrimination

SEXUAL ORIENTATION/GENDER IDENTITY

- ✘ N.D. Legislature defeated a bill that would have amended the North Dakota Human Rights Act, adding sexual orientation/gender identity as protected categories (SB 2279)
- ✘ EEOC takes position discrimination on the basis of sexual orientation or gender identity is already covered by Title VII's prohibition of discrimination on the basis of sex.
- ✘ Current Department policy is to refer complaints made on the basis of sexual orientation/gender identity to the EEOC for investigation. However, Title VII only covers employers of 15 or more employees.

CRIMINAL BACKGROUND CHECKS

- ✘ - A recent survey indicates 92% of employers subjected all of some of their job candidates to criminal background checks
- ✘ - State or federal laws may require criminal background checks
- ✘ - Employers want to avoid theft, fraud, negligent hiring claims, and workplace violence
- ✘ - Screen a large number of applications for one position
- ✘ - Seek ways to streamline the “winnowing” process

IS IT LEGAL?

- ✘ - Yes, it is legal for an employer to ask questions about an applicant's background or require a background check
- ✘ - However, any time an employer makes an employment decision based on an applicant's background information, the employer must comply with state and federal discrimination laws

STATE AND FEDERAL DISCRIMINATION LAWS

- ✘ - Both state and federal law prohibit discrimination in employment on the basis of race, color, national origin, sex, disability, religion, or age (North Dakota Human Rights Act, Title VII, ADA, ADEA)

SO, HOW DOES MAKING AN EMPLOYMENT DECISION BASED ON A CRIMINAL BACKGROUND CHECK DISCRIMINATE?

✘ - Disparate Treatment

- + Treating a particular individual differently in how you deal with the criminal background check because of he or she is in a protected category
- + Example 1: You ask an African American applicant for a background check but you do not ask the same of a Caucasian applicant.
- + Example 2: You hire an African American applicant who has a single conviction for driving under the influence 10 years ago but reject a Caucasian applicant for a single conviction of driving under the influence 10 years ago.
- + Example 3: You ask Native American applicants to submit to a background check but not Hispanic applicants

SO, HOW DOES MAKING AN EMPLOYMENT DECISION BASED ON A CRIMINAL BACKGROUND CHECK DISCRIMINATE? (CONT.)

- ✘ - Disparate Impact
 - + An employer's decision-making or selection process is neutral on its face, but has an adverse impact on a protected class under state or federal law.
 - + Main area where criminal background checks are being challenged
 - + A particularly important strategic enforcement area for the EEOC
 - + An applicant must show the challenged practice or selection criteria has a substantial adverse impact on a protected group.
 - + Employer's defense is to show the practice is job-related for the position in question and consistent with business necessity
 - + Applicant may still prevail if he or she can show the employer has refused to adopt an alternative employment practice which would satisfy the employer's legitimate interests without having a disparate impact on a protected class

WHY IS THE EEOC BRINGING DISPARATE IMPACT CLAIMS?

- ✘ - African Americans make up 28.3% of total arrests in the United States, yet only make up 12.9% of the population
- ✘ - The disparate impact claim is based on the theory that policies which limit employment based upon arrests or other criminal history may disproportionately impact African Americans and Hispanics because these groups are over-represented in the criminal justice system

SO, WHAT AM I SUPPOSED TO DO?

- ✘ - EEOC guidance
- ✘ - Case-by-case basis (not unlike ADA cases)
- ✘ - Across-the-board “blanket” exclusions are scrutinized the most
- ✘ - *Green* factors:
 - + Nature and gravity of the offense or offenses
 - + Amount of time that has passed since the conviction or completion of the sentence
 - + Nature of the job held or sought

SO, WHAT AM I SUPPOSED TO DO? (CONT.)

- ✘ - In 2012, EEOC began making criminal background checks an enforcement priority
- ✘ - Issued new guidance
- ✘ - *Green* factors still apply
- ✘ - Now a “de facto presumption” that use of a criminal history has a discriminatory effect
- ✘ - Employer must now develop a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the *Green* factors); **AND**
- ✘ - Employer’s policy then must provide an opportunity for an **individualized assessment** for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity

INDIVIDUALIZED ASSESSMENT

- ✘ - **Individualized assessment** generally means that an employer
- ✘ informs the individual that he may be excluded because of past
- ✘ criminal conduct; provides an opportunity to the individual to
- ✘ demonstrate that the exclusion does not properly apply to him; and
- ✘ considers whether the individual's additional information shows that
- ✘ the policy as applied is not job related and consistent with business
- ✘ necessity
- ✘ - The individual's showing may include information that he was not
- ✘ correctly identified in the criminal record, or that the record is
- ✘ otherwise inaccurate.

EEOC RECOMMENDATIONS

- ✘ - Best Practices Identified by the EEOC in the Guidance:
- ✘ • Defer inquiries about convictions until after the application phase. (“Ban the Box”)
- ✘ • Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.
- ✘ • The policy should identify essential job requirements and the actual circumstances under which the jobs are performed.
- ✘ • The policy should determine the specific offenses that may demonstrate unfitness for performing such jobs, and the duration of exclusions for criminal conduct.
- ✘ • Record the justification for the policy, procedures, and exclusions, including a record of consultations and research considered in crafting the policy and procedures.
- ✘ • Train managers, hiring officials, and decision makers on how to implement the policy and procedures consistent with Title VII.

RETALIATION

- ✘ #1 basis for employment discrimination claims, both at the state and federal levels, ahead of claims of discrimination on the basis of sex, race, or disability, over the past 12 months
- ✘ Was #5 five years ago, behind disability, sex, age, and race
- ✘ The Department received 151.85% more retaliation claims in the past twelve months compared to five years ago - filing rate has nearly doubled
- ✘ Enforcement priority for the EEOC

RETALIATION (CONT.)

- ✘ So, what is retaliation?
- ✘ Retaliation occurs when an employee participates in a “protected activity” and, based upon the employee’s participation, the employer takes an adverse action against the employee
- ✘ “Protected activity” may include opposing discrimination, participating in an employment discrimination proceeding, or requesting an accommodation
- ✘ Employee’s underlying “protected activity” may be without merit, but the employee may still make out a viable retaliation claim
- ✘ Not to be confused with a “whistleblower” claim

EEOC'S CURRENT ENFORCEMENT PRIORITIES

- ✘ “Ban-the-box” movement
- ✘ Failure to hire women in “traditionally male” jobs
- ✘ Reasonable accommodations for pregnant workers
- ✘ Protecting immigrant, migrant, and other vulnerable workers (human trafficking). EEOC v. Global Horizons, Inc., 7 F.Supp.3d 1053 (D. Haw. 2014)
- ✘ Coverage of gay, lesbian, bisexual, and transgender individuals under Title VII’s sex discrimination provisions
- ✘ Enforcing Equal Pay laws

QUESTIONS? CONTACT US:

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