PAUL, PLEVIN, SULLIVAN & CONNAUGHTON LLP

E-UPDATE EMPLOYMENT LAW

NEW LAW LIMITING USE OF SOCIAL SECURITY NUMBERS TAKES EFFECT TODAY

BLANKET POLICY AGAINST REHIRE OF *ALL* FORMER EMPLOYEES WHO VIOLATED "COMPANY POLICY" MAY BE DISCRIMINATORY UNDER ADA

FURTHER UNCERTAINTY IN CASE LAW REGARDING PRE-EMPLOYMENT ARBITRATION AGREEMENTS

CALIFORNIA LAW DOES NOT PROHIBIT AGE DISCRIMINATION IN REGARD TO THE FURNISHING OF EMPLOYEE BENEFITS

(July 1, 2002)

New Law Limiting Use of Social Security Numbers

A new law, SB 168, which goes into effect today, is intended to address the growing identity theft problem by imposing significant additional prohibitions upon companies in order to attempt to safeguard the use of social security numbers as identifiers.

Prohibitions

Codified as Civil Code section 1798.85, the new law will limit the use of social security numbers by forbidding the following:

- Publicly posting or displaying an individual's social security number;
- Printing an individual's social security number on any card required to access products or services;
- Requiring an individual to transmit his or her social security number over the Internet unless the connection is secure or the social security number is encrypted;
- Requiring an individual to use his or her social security number to access a web site unless a password or unique personal identification number is also required for access; and
- Printing an individual's social security number on any materials that are mailed to the individual, unless applicable state or federal law requires the

social security number to be on the document being mailed.

Grandfather Clause

SB 168 contains an exemption, or "grandfather" clause, for companies with pre-existing policies or practices that conflict with these new prohibitions if the following conditions are met: First, the practice must be continuous and uninterrupted. If the practice ceases for any reason in the future, then the prohibitions of SB 168 will automatically apply. Second, if the company attempts to have a practice "grandfathered," its employees must be provided with an annual disclosure advising them of their right to request that their social security numbers not be used in a manner prohibited by SB 168. Within 30 days of receiving such a written request, the company must, free of charge, stop using the individual's social security number.

Beyond the "grandfather" clause, several exceptions also exist. Most significantly for employers, SB 168 does not affect the collection, use, or release of a social security number as required by state or federal law. For example, California Labor Code section 226(a)(7) expressly mandates that social security numbers be placed on paycheck stubs and, therefore, would be unaffected by SB 168's prohibitions. A similar rule would apply to certain IRS reporting forms that also require the use of social security numbers.

SB 168 likewise does not apply to the use of a social security number for internal verification or administrative purposes. For example, social security information contained in employment applications or employee benefit forms kept in personnel files may still be maintained as long as employers take necessary precautions to ensure that such information is not disclosed to the public and is accessible only to a limited number of authorized individuals.

Finally, SB 168 exempts applications and forms sent by mail to employees. No definition of what constitutes "applications" or "forms" exists in the statute.

What This Means

In light of the new prohibitions enacted under SB 168, companies should conduct thorough and immediate audits of their employment and client mailing policies concerning the collection, use, and disclosure of social security numbers. Initially, a company should determine whether a practice falls under the administrative or internal verification exemptions set forth above. Where a social security number is being used for internal purposes and its dissemination is restricted, such a practice poses minimal danger of identity theft.

Employers who choose to continue the use of social security numbers where not required by state or federal law, must make certain that they meet the conditions under the safe harbor "grandfather" provision that authorizes continued use.

Blanket Policy May Be Discriminatory

On June 11, 2002, the Ninth Circuit Court of Appeals held that an employer had violated the ADA by refusing to re-employ a former employee who had previously "quit in lieu of discharge" after testing positive for cocaine. The Court held that the employee was protected by the ADA because he demonstrated that he had successfully completed drug rehabilitation.

Details

In, Hernandez v. Hughes Missile Systems, the plaintiff, a twenty-five year employee, resigned in lieu of termination after he tested positive for cocaine. Two years later, plaintiff re-applied for employment and submitted two reference letters with his application stating that he regularly attended AA meetings and was committed to his sobriety. Hughes rejected his application based on its "unwritten" policy of not rehiring former employees whose employment ended due to termination or resignation in lieu of termination. Hughes argued that this policy was not discriminatory because it applied to *all* former employees and it did not single out employees with a drug problem.

The Court rejected Hughes' argument because, while the policy did not look unlawful on its face, it violated the ADA as applied to former drug addicts. If plaintiff was in fact no longer using drugs and had been successfully rehabilitated, then he could not be denied employment simply because of his past record of drug use, which is considered a "disability" under state and federal law.

The Court also held that the company could not hide behind a policy that shielded its employees from the knowledge that an employment decision may be illegal. The Court reasoned that Hughes had a duty to ascertain the reason behind the plaintiff's termination and, if it was due to prior drug use, then it had an obligation to consider him for employment as long as he met the other job-related requirements for the position.

What This Means

Maintaining a blanket policy against rehire of all former employees who violated company policy is not illegal per se. However, if the policy discriminates on account of past disability against persons with a record of addiction who have successfully rehabilitated, then it may result in liability, as it did for Hughes. Employers need to be careful in evaluating applications from former employees. The argument that the company was unaware of a "disability" when making a hiring decision is not going to serve as a defense, because the Court is likely to hold that the employer had knowledge of the employee's prior drug addiction if that was the reason for the prior termination.

Pre-Employment Arbitration Agreements

On June 24, 2002, the Ninth Circuit Court of Appeals weighed in once again on the issue of mandatory arbitration agreements. In *Circuit City Stores, Inc. v. Najd*, a former Circuit City employee sued for racial discrimination in violation of California's Fair Employment and Housing Act ("FEHA"). Circuit City asked the court to require Najd to arbitrate his claims because he previously agreed to use an arbitration program as a condition of employment. Najd opposed arbitration based upon a prior Ninth Circuit case called *Duffield v. Robertson Stephens & Co.*, which held that employers may not compel arbitration of federal discrimination claims under Title VII. The court, however, would not apply the *Duffield* rule in Najd's case because he failed to allege a federal discrimination claim under Title VII – his complaint was limited to his state FEHA claim. Thus, Najd was required to go to arbitration.

What this means

Once again, the Ninth Circuit has expressed its general hostility toward mandatory arbitration agreements. Although Circuit City prevailed, the outcome of this case may have been different if the employee's attorney had been savvy enough to allege both a FEHA and Title VII discrimination claim. Until the court provides some clarification on how it will rule in such instances, employers utilizing mandatory arbitration agreements should be aware that their agreements may not cover even state law discrimination claims if they are accompanied by a claim under Title VII.

Age Discrimination and Employee Benefits

On June 24, 2002, the California Supreme Court ruled that California's Fair Employment and Housing Act ("FEHA") does not prohibit employment age discrimination in the furnishing of employee benefits, such as educational aid programs. (*Esberg v. Union Oil Co. of California*.)

Details

Dan Esberg went to work for Union Oil in 1980, when he was already over 40 years old. With Union Oil's approval, Esberg enrolled in a bachelor's degree program in 1991. Pursuant to its educational aid program, Union Oil reimbursed Esberg for all of his undergraduate educational expenses. However, when he asked for financial assistance in obtaining a master's degree, a supervisor turned him down, stating: "You are too old to invest in." The Court held that Union Oil's refusal to provide financial assistance did not violate FEHA.

The Court relied upon FEHA's language limiting age discrimination to an employer's refusal to hire or employ, or to discharge, dismiss, reduce, suspend, or demote, any individual over the age of 40 on the ground of age. Notably, unlike other FEHA provisions, Section 12941 does not prohibit discrimination on the basis of age in regard to the "terms, conditions, or privileges of employment." Thus, the Court held that FEHA does not prohibit age discrimination in regard to the furnishing of employee benefits, such as educational aid programs. As a result, Union Oil's denial of educational benefits based on age did not give rise to a cause of action based on FEHA.

What this means

Employers should be aware that the Court's ruling is limited to claims based on FEHA. Unlike FEHA, the federal age discrimination statute, the Age Discrimination in Employment Act ("ADEA"), specifically prohibits discrimination on the basis of age in regard to the "terms, conditions, or privileges of employment." Accordingly, although discriminating against employees on the basis of age in the furnishing of employee benefits does not give rise to a FEHA cause of action, it may give rise to a valid age discrimination claim under the ADEA.

Moreover, although the Court held that educational aid programs fit into the category of "terms, conditions, or privileges of employment," the Court did not provide any guidance as to what other types of employee benefits fit into this category. Thus, the application of this ruling to employee benefits other than educational aid programs is uncertain.

This E-Update was authored by Fred Plevin, Lonny Zilberman, Denise Brucker and Mike Minguet. If you have any questions about this E-Update, please

contact the author or any PPS&C attorney.

ANNOUNCEMENT

Paul, Plevin, Sullivan & Connaughton LLP is pleased to announce that Michael R. Minguet, Matthew J. Schenck and Kari Searles have joined the firm as associate attorneys. The firm now has 14 attorneys specializing in the representation of California employers.

Send comments to info@paulplevin.com. Last modified 7/1/2002