THOMPSON COE

LABOR & EMPLOYMENT NEWS

Volume 2013 No. 1

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THOMPSON COE OPENS CALIFORNIA OFFICES

We are pleased to announce that Thompson, Coe, Cousins & Irons, LLP has partnered with California attorney Frances O'Meara to form Thompson Coe & O'Meara, LLP, a new subsidiary of TCCI. Thompson Coe is proud to add Frances and her team of experienced litigators to open the firm's new Los Angeles and Northern California offices.

The nine trial attorneys who comprise the offices bring with them extensive experience in a wide range of practice areas, including professional liability, labor and employment, insurance coverage, bad faith, and business and commercial litigation, among others. Ms. O'Meara will be the managing partner of Thompson Coe & O'Meara, LLP. She, partner Wendell Hall, and associate attorneys Hao Nguyen and Jenny Burke, collectively, have over 50 years of experience representing both private and public sector management in labor and employment law matters. The California offices allow Thompson Coe to fully serve its clients' needs on the West Coast.

Since 1951, Thompson, Coe, Cousins & Irons, LLP has been recognized as a premier litigation firm and national authority on insurance law. With multiple offices throughout Texas, an office in Minnesota and now California, Thompson Coe is poised to continue its tradition of providing excellent legal services to the insurance industry, insureds, and its other diverse clients.

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Texas Restricts Employers' Right to Prohibit Employees from Keeping Guns in Their Vehicles in Company Parking Lots

Texas Gun Laws:

Texas is a concealed-carry state. Persons with a clean record who take and pass a mandated concealed weapons course and complete range firing qualification can obtain a license to carry a concealed handgun. Additionally, even without a license, citizens may lawfully carry a handgun inside a vehicle owned or under their control or on their own property.

However, Texas law also generally allows businesses to prohibit the possession of handguns on their property, so long as the business appropriately posts at its entrances "30.06 signs" — signs containing specific, statutorily-mandated prohibitory language contained in Section 30.06 of the Texas Penal Code. A person — even a licensed concealed-carry holder — who ignores the business owner's prohibition and carries a concealed weapon on the property is guilty of trespassing. But, prohibition signs which do not quote the *specific* language contained in §30.06 are legally ineffective to prohibit concealed weapons on the property.

Additionally, even without any posting of premises, both state and federal law prohibit the possession of a handgun — even by a concealed license holder — in certain designated places, such as schools, hospitals, sporting events, secured areas of airports, and polling places.

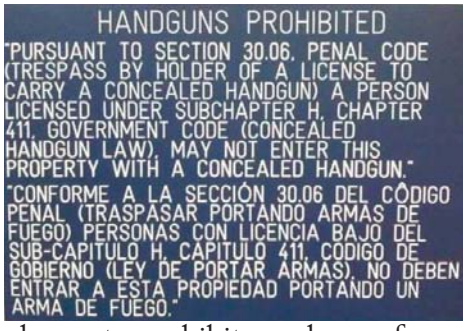
Guns Permitted in Employees' Locked Vehicles in Employer Parking Lots:

Late in 2011, however, the Texas Legislature passed, and Gov. Rick Perry signed, a bill purporting to limit the ability of employers to restrict employees, who have a concealed handgun license, from storing guns or ammunition in locked private vehicles in the employer's parking area.[1] Before the statute was adopted, it was generally believed employers could prohibit employees from having concealed weapons at work merely by adopting employment policies to that effect, such as by stating the prohibition in an employee handbook, even without posting "30.06 signs" applicable to the general public. The new statute adopted in 2011 created an apparent inconsistency with an employer's rights under Penal Code §30.06 to prohibit concealed weapons on the employer's property. Clearly, under the new statute an employer couldn't prohibit employee concealed weapons in parking lots merely by adopting such a prohibition in the employee handbook; but, could an employer still do so by posting "30.06 signs"?

Additionally, the new statute contained a number of exceptions. Specifically, it does not apply to the carrying of a concealed weapon in places where doing so "is prohibited by state or federal law," *e.g.*,schools, hospitals, sporting events, secured areas of airports, polling places, *etc.*

The Texas Attorney General Resolves the Conflict:

A recent Texas Attorney General opinion[2] resolved the apparent conflict. Under the Attorney General's opinion, employers may not prohibit employees from storing concealed weapons or lawfully-possessed ammunition in employees' locked vehicles in the employer's parking lot, *even through the use of "30.06 signs."* The Attorney General determined that the 2011 law expressly limits the authority of employers to prohibit employees from storing firearms or ammunition in locked private vehicles parked in the employer's parking lot, and Penal Code §30.06 was not a "state law" which otherwise prohibited the possession of concealed handguns within the meaning of the exceptions. The opinion also noted that Texas employers may not impose handgun bans, including such a ban in a mandated, federally-approved facility security plan, since this was not "federal law." Thus, employers in Texas cannot prohibit employees with concealed handgun licenses from keeping firearms or ammunition in their locked vehicles while at work.



Employers Cannot Prohibit Guns in the Parking Lot, Subject to Certain Exceptions:

So, what does this mean to Texas employers? Generally, unless there is a specific state or federal law pro-

[1] Tex. Lab.Code §52.061.

[2] Op. Tex. Att'y Gen. Op. No.GA-0972 (2012).

Texas Restricts Employers' Right to Prohibit Employees from Keeping Guns in Their Vehicles in Company Parking Lots, cont'd

hibiting guns on the employer's property, an employer cannot prohibit its employees from keeping guns or ammo in their locked vehicles. Note, however, that an employer is allowed to prohibit an employee from possessing a gun in an employer-owned or leased vehicle used by the employee in the course and scope of the employee's employment, unless the employee is required to transport or store a gun as part of their official duties. An employer is also allowed to prohibit employees from possessing firearms in the employer's buildings.[3]

There are also exceptions for certain employers, such as school districts, open-enrollment charter schools, and private schools, as well as non-employer-owned property that is subject to a valid, unexpired oil, gas, or other mineral lease which contains a provision prohibiting the possession of firearms on the property. The prohibition also does not apply to property owned or leased by certain chemical manufacturers or oil and gas refiners unless the parking lot is outside the plant's secured area.[4] Employers who fall within the exception can prohibit their employees from possessing guns or ammo in employer parking lots (or the property) even without posting "30.06 signs," merely by adopting work rules to that effect. Additionally, companies can still prohibit possession of concealed weapons in parking lots by the general public by posting appropriate "30.06 signs."

Finally, Section 52.061 only applies to employees who have a CHL. Thus, an employer can still prohibit employees who do not have a CHL from having a concealed weapon or ammo in their vehicle in the parking lot, either through the use of "30.06 signs" or through the adoption of workplace rules to that effect.

Employers Are Protected from Civil Liability:

The law provides protection from liability from claims arising from the use of the gun kept in an employee's vehicle. Except for cases of gross negligence, employers are not liable for personal injury, death, property damage or other damages arising out of an incident involving a firearm or ammunition that the law requires an employer to allow on the employer's property. The presence of a firearm or ammunition on an employer's property, as permitted by the statute, does not by itself constitute an employer's failure to afford a safe workplace; and employers do not have a duty to:

- patrol, inspect or secure parking lots, parking garages or other parking areas provided for employees or privately-owned vehicles located in such areas; or
- investigate, confirm or determine an employee's compliance with firearm or ammunition ownership, transportation or storage laws.[5]

During the legislative debate on this law, many employers had expressed concern about potential liability if the employee used the gun to harm other coworkers or customers on the employer's premises. The liability protections were included in order to address those concerns.

Can the Employee Bring an Action against the Employer for Restricting Guns in the Parking Lot?

The 2011 law did not specify what remedies an employee would have against an employer who attempts to prohibit licensed employees from keeping their guns in their vehicles in the employer's parking lot. The Texas Attorney General suggested an employee might be able to sue under the Texas Uniform Declaratory Judgment Act and ask a court to determine the parties' rights and obligations under the law. However, it is unclear whether a court would have any other remedial powers.

What Should Employers in Texas Do?

Given the Attorney General's affirmation of an employee's right to keep a firearm in his/her vehicle, if the employee is a concealed handgun licensee, employers in Texas should review their employment and security policies to ensure their policies comply with the law.

Albert Betts Jr.

[3] *See* Tex. Lab.Code §52.062(2).

[4] *See* Tex. Lab.Code §52.062(2).

[5] *See* Tex. Lab.Code §52.062(2).

Texas Public Sector Employees not Entitled to Union Representation in Interviews

Texas public-sector employers scored a big win in April from the Texas Supreme Court in *City of Round Rock v. Rodriguez* on the topic of union participation in employee interviews.[1] In 2010, the Austin Court of Appeals had held that — like private-sector employees and federal public-sector employees — Texas public-sector employees could, upon request, have union representation during an internal investigatory interview if the employee reasonably believed the interview could result in disciplinary action. This holding from the Austin court was based on Texas Labor Code § 101.001, captioned "Right to Organize," which states:

> All persons engaged in any kind of labor may associate and form trade unions and other organizations to protect themselves in their personal labor in their respective employment.

According to the Texas Supreme Court, this language differs "significantly" from the language of Section 7 of the National Labor Relations Act (NLRA), which applies to private-sector employees nationally. Section 7 provides all private-sector employees:

> [T]he right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

The National Labor Relations Board (NLRB) held years ago that Section 7 confers on private employees the right to representation during employee interviews. The U.S. Supreme Court's 1975 decision in *NLRB v. Weingarten* upheld the NLRB's decision on point. Then, shortly after the *Weingarten* opinion, Congress extended the union-representation right to federal public-sector employees by statute. In *Rodriguez*, the Texas Supreme Court held the Texas statute did not have a similarly broad reach to encompass public sector employees.

In *Rodriguez*, in July 2008, Round Rock Fire Chief Larry Hodge called fire fighter Jamie Rodriguez into a meeting in his office. Also in attendance for the meeting were the assistant fire chief and Rodriguez's battalion chief. Chief Hodge told Rodriguez that the purpose of the meeting was to conduct an internal review of a personnel complaint which Chief Hodge had filed against Rodriguez for allegedly misusing his sick leave to get a physical examination so he could seek employment with the Austin Fire Department. The complaint stated, "Since this is an Internal Interview you may not be represented during our meeting; however, if a pre-disciplinary meeting is set following our meeting you would be eligible for representation at that time." The complaint also instructed Rodriguez that he was not to discuss the complaint with anyone other than his personal attorney and specifically restricted him from discussing it with union leadership and union members. Nevertheless, Rodriguez asserted the right to union representation before the interview began.

Several months later, in October 2008, Chief Hodge met with Rodriguez to discuss potential discipline, again relating to his alleged misuse of his sick leave. Rodriguez did not request union representation at that meeting. Chief Hodge presented Rodriguez with disciplinary options at that meeting and allowed him to choose between being terminated and accepting a 5-day suspension without the right to appeal. Rodriguez accepted the suspension a few days later. Three months after Rodriguez accepted the suspension, he and the Round Rock Fire Fighters Association filed a lawsuit alleging that the City and Chief Hodge had violated Rodriguez's right to union representation during the interviews.

The district court and the Austin Court of Appeals had held in favor of Rodriguez; but, the Texas Supreme Court concluded that the Texas Legislature has not

[1] *City of Round Rock v. Rodriguez*, 2013 WL 1365906 (Tex. April 5, 2013) (not yet released for publication).

Texas Public Sector Employees not Entitled to Union Representation in Interviews, cont'd

granted public-sector employees in Texas the right to representation in interviews which could lead to disciplinary action. Among other things, the Court noted the difference in statutory language between the Texas Labor Code and Section 7 of the NLRA, as well as the fact that in the 38 years since *Weingarten* was decided, the Texas Legislature had never passed legislation similar to that which Congress put in place for federal employees. As a result, Texas public-sector employees are not entitled to the same rights as Texas private-sector employees or as federal public-sector employees to union representation in interviews which could reasonably be believed to result in discipline.

Stephanie S. Rojo

"Tip Credit" Trap – Watch Out!

The Fair Labor Standards Act ("FLSA") is arguably best known for its regulation of minimum wage and overtime compensation. Covered, non-exempt employees must be paid a federally-mandated minimum wage of no less than $7.25 an hour.[1]

However, the FLSA carves out an exception for those employees who customarily receive more than $30.00 per month in tips (*e.g.*, servers, delivery drivers, *etc.*). In such instances an employer may credit tips (*i.e.*, exercise the "Tip Credit") against the minimum wage, provided: (1) the employer pays no less than $2.13 per hour; (2) if the tips plus the $2.13 per hour do not equal the minimum wage, the employer pays the difference; and (3) before crediting tips against the minimum wage, the employer communicated this to the affected employee(s).[2]

While the FLSA does not permit required uniforms, or other items which are considered to be primarily for the benefit or convenience of the employer (*e.g.*, tools), to be credited as wages, the value of such items may be deducted from an employee's wages. Generally speaking, deductions made from wages for items such as required uniforms are illegal, if the deduction reduces the employee's wages below minimum wage or cuts into overtime compensation.

Cognizant of this, many employers — including those in the restaurant industry — have mistakenly assumed that deductions for uniforms are legal so long as the deductions do not reduce an employee's pay below the minimum wage (*i.e.*, $7.25 an hour). Yet, utilization of the "Tip Credit" indirectly restricts an employer's ability to make such deductions, because the cost of uniforms may not be deducted from a tipped employee's wages, regardless of whether the employee's tips cause his/her pay to significantly exceed the minimum wage.

Regardless of how much an employee receives in tips, an employer who utilizes the "Tip Credit" may not pay the tipped employee less than $2.13 per hour in direct wages.[3] Likewise, if an employer avails itself of the

[1] 29 U.S.C. § 206(a)(1)(C).

[2] 29 U.S.C. §§ 203(m) & (t).

[3] 29 U.S.C. § 203(m); *see also* U.S. Dep't of Labor, Fact Sheet #2: *Restaurants and Fast Food Establishments under the Fair Labor Standards Act* (FLSA); U.S. Dep't of Labor, Fact Sheet #15: *Tipped Employees Under the Fair Labor Standards Act* (FSLA).

"Tip Credit" Trap – Watch Out! cont'd

"Tip Credit," it is prohibited from retaining/collecting any portion of the tips of its employees.[4] In turn, *even if any employee's tipped wages significantly exceed the minimum wage, the employer (who avails itself of the full "Tip Credit") cannot deduct the cost of uniforms, because to do so would unlawfully retain a portion of the employee's (1) direct wages (i.e., $2.13 per hour); or (2) "free and clear" tips.*

In a similar scenario, the U.S. Department of Labor ("DOL") issued an advisory opinion on whether a restaurant may lawfully use its employees' tips to pay for the cleaning of their uniforms. Addressing this issue, the DOL explained that, even if the tipped employee's earnings — including both direct wages and tips — exceed the minimum wage after the deduction, the deduction still violates the FLSA; because excess tips may not be construed as wages for purposes of the FLSA.[5]

Only in instances in which the employer pays a tipped employee more than $2.13 per hour in direct wages may the employer deduct the cost of a tipped employee's uniform. For example, if an employer paid a tipped employee $2.63 per hour in direct wages, and the tipped employee worked 40 hours in a workweek, the employer could deduct $20.00 in that workweek for said employee's uniform ($2.63 – $2.13 = $0.50; $0.50 x 40 = $20.00).

Accordingly, for those employers who utilize the "Tip Credit," it is imperative that they ensure their tipped employees receive at least $2.13 an hour in direct wages. Failure to abide by this precept may lead to potential civil penalties if a DOL audit is conducted or may even give rise to an FLSA claim.

Jason T. Weber

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[4] 29 U.S.C. § 203(m) (stating that the tip credit rules "shall not apply [other than a valid tip pool] with respect to any tipped employee unless . . . all tips received by such employee have been retained by the employee"); Opinion Letter Fair Labor Standards Act (FLSA), FLSA2006-21, 2006 WL 1910966, at *2 (June 9, 2006) (when an employer utilizes the Tip Credit, "tips must become the free and clear property of the em-ployee who receives them").

[5] Opinion Letter Fair Labor Standards Act (FLSA), FLSA2006-21, 2006 WL 1910966, at *2–3 (June 9, 2006) ("[E]ven if the tips actually received exceed the maximum tip credit the employer needs to claim toward payment of the minimum wage, these excess tips are not deemed wages for purposes of the FLSA. Therefore, the server paid $2.13 per hour in direct wages would still be considered to be paid no more than the minimum wage.").

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Independent Contractors — Avoiding the Common Trap of Misclassifying Employees as Contractors

- Understanding the important distinctions between "employee" and "contractors"
- Common misclassification errors companies make and how to avoid them
- Risks of misclassifying employees as contractors

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Non-Compete Agreements — Making Them Worth the Paper They Are Printed on

- Understanding different types of restrictions on employment
- Deciding why you should and shouldn't have non-competes
- Best methods for administering and enforcing restrictive agreements

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- Understanding "work authority" in the U.S.
- What to do when you find out an employee is "undocumented"
- Understanding employer responsibilities with illegal workers - fact *vs.* fiction

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- Can you ask that? Common answers employers want to know but should not ask
- Understanding the purpose of the interview

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- Review of several states' drug testing laws
- Analyzing who should and shouldn't be tested
- Pro's and con's of testing employees and applicants

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Workplace Investigations

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- What to ask (and not to ask) when interviewing
- How to document the investigation

December 19

Disciplining & Firing Employees without Fear

- The purpose of disciplining employees
- Documenting performance and misconduct
- Conducting the termination meeting - 10 to do's
- Beyond documentation — what managers need to really understand

Is Same-Sex "Sexual Stereotyping" a Violation of Title VII?

What is "sexual stereotyping" in employment? It is taking an adverse action against an employee or otherwise treating an employee differently based on the employee's nonconformance with gender stereotypes. For example, more than twenty years ago the Supreme Court held it would be evidence of sex discrimination for an employer to deny a woman partnership in an accounting firm because she was too "macho," "needed a course in charm school," and should walk, talk, and dress "more femininely."[1] Is same-sex "sexual stereotyping" by itself — that is, harassment based on sexual stereotyping, unaccompanied by an adverse action, like discharge, discipline, *etc.* — a violation of Title VII? This is a question the Fifth Circuit has recently agreed to hear "*en banc*;" that is, by all fifteen judges of the Court.

Title VII does not prohibit discrimination on the basis of sexual orientation, *per se*. However, the Supreme Court has held that same-sex harassment can constitute a violation of Title VII "based on sex" in three different instances.

- First, a plaintiff can show the alleged harasser made "explicit or implicit proposals of sexual activity" and provided "credible evidence that the harasser was homosexual." In other words, it is just as much of a violation of Title VII for a homosexual male supervisor to proposition or make other unwelcomed sexual advances towards a male subordinate as it is for a heterosexual male supervisor to do so towards a female subordinate.

- Second, the plaintiff can demonstrate the harasser was "motivated by general hostility to the presence of [members of the same sex] in the workplace."

- Third, he may "offer direct, comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."[2] That is, a plaintiff can offer evidence the alleged harasser generally treated employees of the same sex worse than employees of the opposite sex.

In *EEOC v. Boh Brothers Construction Company, LLC*,[3] the U.S. Equal Employment Opportunity Commission ("EEOC") attempted to go a step further, arguing that it was a violation of Title VII for a supervisor to harass an employee because the supervisor subjectively believed the employee acted effeminately, even though the employee was not homosexual. Specifically, the EEOC sued the employer arguing that the supervisor, Wolfe, had regularly harassed and taunted an employee, Woods, who worked for the company as an ironworker, by engaging in verbal abuse and taunting gestures of a sexual nature. After a three-day trial, the EEOC obtained a $450,000 jury verdict, including $200,000 in compensatory damages and $250,000 in punitive damages.

On appeal, a three-judge panel of the Fifth Circuit vacated the judgment and remanded the case for entry of a judgment of dismissal. The Court held there was insufficient evidence Woods was targeted because he was effeminate or not stereotypically masculine. Wolfe allegedly called Woods names such as "faggot" and "princess" and would approach him from behind to simulate having sexual intercourse while Woods was bent over to perform job duties. Wolfe also allegedly exposed himself to Woods numerous times. But, there was no evidence either the supervisor or the employee was homosexual. Additionally, Wolfe testified that he did not view Woods as feminine. Moreover, the evidence showed that, although Woods was Wolfe's primary target, he was not Wolfe's only target. Further, Wolfe was not the only person who harassed Woods. The evidence showed

[1] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

[2] *Oncale v. Sundownder Offshore Svcs., Inc.*, 523 U.S. 75 (1998).

[3] *Id.*

Is Same-Sex "Sexual Stereotyping" a Violation of Title VII? cont'd

that misogynistic and homophobic epithets were used routinely among the employees on the all-male construction site.

Accordingly, the Fifth Circuit panel held there was insufficient evidence the supervisor's actions were based on Woods' sex, and the Court declined to reach the issue of whether same-sex harassment based on sexual stereotyping violates Title VII. However, the panel suggested that, if such a claim is viable, it rests on whether the plaintiff objectively failed to act in conformity with the gender norm, not whether the harasser subjectively perceived that the plaintiff failed to conform to a gender norm and, unless a plaintiff can prove he does not conform to gender stereotypes, *e.g.*, that he is, in fact, effeminate, he cannot succeed on the theory that he was treated differently because of that nonconformance.

On March 27, 2013, the Fifth Circuit granted *en banc* review. If a majority of the Court concludes the EEOC's evidence was sufficient to raise a fact question regarding whether Wolfe's actions were, in fact, motivated by his perceptions of Woods' non-conformity with heterosexual male stereotypes — and, thereby, support the jury's verdict — the Court will then decide whether to recognize the EEOC's same-sex sexual harassment stereotyping theory as a valid *legal* theory of recovery under Title VII.

Rachael Chong Walters

Circuit Highlights

From the Fifth Circuit (Texas). . .

Volunteers not "employees" for purposes of Title VII. As a matter of first impression, the Fifth Circuit held that a volunteer firefighter was not an "employee" within the meaning of Title VII and upheld the district court's dismissal of the plaintiff's sex harassment and retaliation claims. *Juino v. Livingston Parish Fire Dist. No. 5*, 2013 WL 2360116 (5th Cir. May 30, 2013).

Discharging female employee because she is lactating or expressing breast milk constitutes sex discrimination under Title VII. In another case of first impression, the Fifth Circuit reversed a summary judgment for the employer on an employee's claim she was discharged when she returned to work following childbirth and twice inquired of the employer whether she could use a back room in which to pump her breast milk. "An adverse employment action motivated by these factors clearly imposes upon women a burden that male employees need not — indeed, could not — suffer." *E.E.O.C. v. Houston Funding II, Ltd.*, 2013 WL 2360114 (5th Cir. May 30, 2013).

From the Eighth Circuit (Minnesota). . .

Trending: Nationwide "ban the box" (on employment applications) lobby seeks to force employers to adjust hiring practices: a comparison between Minnesota's new ban the box law and California's restrictions on employer inquiries into applicants' arrest and conviction histories.

Minnesota –

On June 5, Minnesota became only the third state in the country to pass a law restricting private employers' inquiries into an applicant's criminal history. Employers will now have to wait to ask applicants about their criminal history until one of two events has occurred: either the company has offered the employee the job, or it has selected the applicant for an interview. The offer of employment could still be conditioned on the employee passing a criminal background check and withdrawn if there is something troubling discovered, but Minnesota employers will be prohibited from asking about criminal arrest and conviction history on the application before either of these two events occur.

Circuit Highlights, cont'd

There are limited exceptions to this ban where state or federal law requires the background check; but, for the vast majority of employers in Minnesota, asking about an applicant's criminal history early in the process will be prohibited. For most employers it will mean revising their job applications, at least.

The law applies to all businesses in Minnesota (and businesses hiring employees in Minnesota) regardless of size and is set to take effect beginning January 1, 2014. Fines may be assessed for non-compliance, up to $500 per violation and up to $2,000 per month; but they will not begin to be assessed until January 1, 2015. Companies violating this law will receive a warning from the state before 2015.

The EEOC has long taken the position that automatic exclusion of applicants based on arrest or conviction records can constitute "disparate impact" discrimination against African-American applicants because such a policy can have statistically disproportionate adverse impact on African-Americans. The EEOC's position is that such a policy must be justified by business necessity. Recently, the EEOC has sued BMW and Dollar General over just such policies.

California –

California's "ban the box" law is not as broad as the new Minnesota law. For decades California has prohibited most employers from asking for certain information about an applicant's criminal record. Employers in the state are not permitted to ask about arrests that did not lead to convictions, with limited exceptions for law enforcement and certain drug arrests for positions in healthcare facilities or pharmacies. Employers are also prohibited from seeking information about an applicant's arrest record from any source. But, the law allows an employer to ask an employee or applicant about an arrest for which the individual is out on bail or on his own recognizance pending trial. California employers may not ask about arrests for which a diversion program was completed.

Likewise, questions regarding certain marijuana-related convictions, if the conviction is more than two years old, are prohibited. California law also prevents an employer from inquiring about misdemeanor convictions that have been dismissed or any conviction that has been sealed or expunged. Unlike Minnesota's new law, California permits an employer to ask if an applicant has ever been convicted of a felony if the inquiry is accompanied by a statement that such a conviction will not necessarily disqualify the applicant from employment. Public employers and law enforcement are permitted to request more information from applicants regarding their criminal history than private employers.

From the Minnesota Court of Appeals. . .

Firing an employee because of the actions of her husband may violate the Minnesota Human Rights Act (MHRA). In one of the few instances of adjudication of the issue of marital discrimination, a Minnesota court has determined that a former employee is entitled to a trial on the issue of whether her employer discriminated against her because of her marriage. In the case, the former employee was fired after her husband failed to turn down an appointment to the board of directors for a competitor. The company cited its conflict-of-interest policy and the former employee's lack of cooperation with the investigation as the reasons for firing her. The Court of Appeals, however, agreed the reasons for terminating her could have been discriminatory, given the surrounding events were caused by the former employee's husband and Minnesota law prohibits taking adverse employment actions against people because of the "identity, situation, actions or beliefs of a spouse." *Aase v. Wapiti Meadows Community Technologies & Services, Inc.*, 2013 WL 2149970 (Minn. App. May 20, 2013).

From the Ninth Circuit (California). . .

Evidentiary hearing required to determine enforceability of forum selection clause in employment agreement. An employee brought suit against his employer alleging breach of contract, along with other claims. At issue was the enforceability of a forum selection clause which the employee was forced to sign mandating that

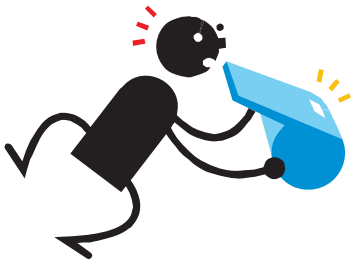
Circuit Highlights, cont'd

any contractual disputes be resolved in the Labor Courts of Saudi Arabia. The court held that the evidence submitted by the employee and the claims made by the employee were more than sufficient to create a triable issue of fact as to whether the particular forum selection clause was enforceable under *M/S Bremen v. Zapata Off-Shores Co.*, 407 U.S. 1 (1972). The Ninth Circuit held that the district court abused its discretion by granting the employer's motion to dismiss without convening an evidentiary hearing. It also ruled that the district court abused its discretion in denying plaintiff leave to amend. *Petersen v. Boeing Co.*, 715 F.3d 276 (2013).

Employees' ERISA class action is revived. In another case, the Ninth Circuit reversed the district court's dismissal of an ERISA class action lawsuit. The employee plaintiffs participated in an employer-sponsored pension plan. The employee plaintiffs brought a class action against the plan fiduciaries under Employee Retirement Income Security Act (ERISA), claiming that they breached their fiduciary duties by allowing participants' defined contribution pension plans to purchase and hold employer's stock despite knowing that its price was artificially inflated because of material omissions and misrepresentations. The Ninth Circuit held that the plaintiffs sufficiently alleged that defendants breached their duties of loyalty and care by not providing material information about the investment in the fund. *Harris v. Amgen,Inc.* 2013 WL 2397404 (9th Cir. June 4, 2013).

And from the Texas Supreme Court . . .

Reporting alleged law violations internally to a public employee's supervisor or superior held not sufficient to constitute a claim under the Whistleblower Act. The Texas Whistleblower Act permits a public employee to bring a "whistleblower" claim if the employee is subjected to an adverse action after reporting an alleged violation of law to an "appropriate law enforcement authority" or to someone who the whistleblower reasonably and in good faith believed was an "appropriate law enforcement authority." In two recent cases, the Texas Supreme Court held making internal reports to one's supervisor or superior was not sufficient. *University of Texas Southwestern Medical Center v. Gentilello*, 2013 WL 781598 (Tex. Feb. 22, 2013) (medical school department chair reported alleged Medicare/Medicaid rules violations to his superior); *Texas A&M University–Kingsville v. Moreno*, 2013 WL 646380 (Tex. Feb. 22, 2013) (comptroller reported to campus president that the comptroller's supervisor's daughter had illegally received an in-state tuition break). Neither employee had a reasonable basis for believing the person to whom their reports were made had the power to regulate or enforce the laws allegedly violated.



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The Attorneys in the Labor & Employment Section of Thompson Coe counsel public and private sector management in connection with all federal, state and local laws regulating employment. Our experienced attorneys can help clients by simplifying the employment law maze, resolving sensitive employment-related issues and reducing the risk of costly lawsuits.

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