Highlights in this Edition

HOW INITIATIVE 502 AND REFERENDUM 74 MAY AFFECT EMPLOYERS

As you likely already know, Initiative 502 (recreational marijuana use) and Referendum 74 (the Marriage Equality Act) were both passed by Washington State voters on the November, 2012 general ballot. What follows is a short summary of these new laws' potential effect on employers and their workplaces.

Initiative 502 (Recreational Marijuana Use): Even with the new recreational marijuana use law, employers may still enforce a zero-tolerance drug policy in the workplace, as was made clear by the *Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC* case. 171 Wash. 2d 736, 257 P.3d 586 (2011). And, employers have important reasons for maintaining a drug-free workplace, such as ensuring workplace safety and productivity. Importantly, for purposes of this Update, Initiative 502 fails to include any workplace protection for employees using recreational or medicinal marijuana. Employers seeking to implement a zero-tolerance drug policy should maintain a written rule prohibiting any substances illegal under *state or federal law*. Although recreational marijuana use may now be legal under Washington law, it remains illegal federally. Additionally, an effective written policy should prohibit any amount of detectable marijuana, rather than an under the influence requirement. This type of zero-tolerance approach eliminates any gray area during enforcement or appeal.

The provisions of Initiative 502 can be found at: http://sos.wa.gov/_assets/elections/initiatives/i502.pdf.

Referendum 74 (Marriage Equality Act): Since 2009, employers have been required to treat spouses and state-registered domestic partners equally in regard to state-law benefits under the "Everything but Marriage" law, so many of our employer clients already have reference to spouses and state-registered domestic partners in their employee handbooks. With the recent enactment of Referendum 74, also known as the "Marriage Equality Act", employers' responsibilities have broadened in scope. In relevant part, employers must now treat couples in the following relationships equally for purposes of state-law benefits:

(1) Opposite-sex marriages;

(2) Same-sex marriages, either licensed under Washington law or authorized under the comparable laws of another jurisdiction;

(3) Relationships involving same-sex couples if the couple has a legal union other than marriage in another jurisdiction with substantially the same rights, benefits and responsibilities as a marriage; and

(4) State-registered domestic partnerships (whether same-sex or opposite sex) where one partner is at least 62 years old.

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Given the provisions of the Marriage Equality Act, employers should consider amending their employee handbooks or other policies to properly define the class of employees eligible to receive state-law benefits, especially when considering benefits that previously may have only referred to an employee's spouse, which was often read to include only opposite-sex spouses. Such state-law benefits include, but are not limited to: (a) an employee's legal ability to use paid time off or other leave to care for a spouse or domestic partner under the Washington Family Care Act, (b) pregnancy-related leave under the Washington Family Leave Act and (c) leave for victims of domestic violence, sexual assault and stalking as well as their family members. Under the Marriage Equality Act, employers must recognize and provide state-law benefits equally to the foregoing four relationships, but importantly (and similar to Initiative 502), federal law does not currently require equal treatment of same-sex couples for federal benefits (*e.g.*, Family and Medical Leave Act leave, etc.). See http://apps.leg.wa.gov/billinfo/summary.aspx?year=2011&bill=6239 for the detail and history of the Marriage Equality Act.

RECENT EEOC GUIDANCE ON USE OF CRIMINAL BACKGROUND CHECKS

The Equal Employment Opportunity Commission ("EEOC") recently issued updated Enforcement Guidance on employers' use of criminal background checks ("Guidance"). This Guidance is aimed at curbing employment discrimination. To that end, it automatically presumes that employment discrimination occurs when an employer conducts a criminal background check, unless the employer can prove that running the background check was: (a) a business necessity or "job-related" and (b) there were no other less restrictive means of obtaining the information contained in the background check. The Guidance also prohibits employers from having bright-line policies against hiring criminals. For example, under this Guidance, your business cannot have a policy that states "This company does not hire felons." Instead, it is best to develop a list of offenses you consider to be relevant, given the tasks and responsibilities of each position.

The new Guidance is not binding statutory authority, but it is indicative of what practices the EEOC considers suspect under federal employment discrimination laws, and therefore, it outlines what practices could potentially trigger a costly EEOC investigation. Thus, there is incentive for employers to be wary of and adhere to this Guidance.

If your business currently runs background checks or is considering conducting these checks, it is important that you review your process in light of this Guidance. At a minimum, you should have a clear business reason for conducting these checks and should avoid using bright-line policies targeting people with criminal records. It is also recommended that you avoid inquiring about criminal convictions in the initial employment application – only do so after extending a condition employment offer. If an applicant's background check does reveal a past criminal history, the Guidance has a suggested course of action involving an individualized assessment to further consider the job-relatedness of the offenses that should be followed before refusing to hire or terminating the employee based on these results. Finally, do not consider arrest records; rather, consider only criminal convictions when making employment decisions. While there is no way for an employer to completely eliminate the risk of an EEOC investigation, following the above practices may reduce your risk of employment discrimination claims based on a violation of the actions outlined in the Guidance.

In addition to this new Guidance, employers should be aware that there are several other federal and state laws that regulate the use of employment background checks, including, but not limited to, the Fair Credit Reporting Act. Let us know if you have any questions about your company's compliance with the Guidance or these other laws.

See http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm for the complete Guidance.

NEW FORM I-9; REQUIRED TO BE USED BY MAY 7, 2013

The US Citizenship and Immigration Service ("USCIS") has recently published a revised version of Form I-9, which employers should now be using for all new hires and reverifications. However, employers may continue to use the previously accepted version of the Form I-9 until May 7, 2013. At that point in time, the USCIS will only accept the newly revised Form I-9. The Form I-9 is used to verify the identity and employment authorization for individuals hired in the US. The new version of the Form I-9 includes fields for inclusion of additional contact information for the employee, with other changes being made to reduce errors and provide clearer instructions for completing the form. Let us know if you have questions about your company's use of the Form I-9. The new Form I-9 can be found at: http://www.uscis.gov/files/form/i-9.pdf.