



LAW JOURNAL  
NEWSLETTERS

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## U.S. High Court Recognizes Title VII Third-Party Retaliation Claim

By Sid Steinberg

In *Thompson v. North American Stainless LP*, the U.S. Supreme Court recognized, for the first time, a cause of action for “third-party retaliation” under Title VII of the Civil Rights Act of 1964.

### FIANCÉ FIRED

Eric Thompson and Miriam Regalado were both employees of North American Stainless (NAS), and were engaged to be married. NAS was aware of their relationship and their wedding plans.

In September 2002, Regalado filed an EEOC charge of sex discrimination under Title VII. NAS learned of the charge in February 2003 and, three weeks after it learned of the charge, the company terminated Thompson for what it stated were performance reasons. Thompson, who himself had never opposed any allegedly discriminatory practice or otherwise engaged in statutorily “protected activity,” brought suit against NAS in the U.S. District Court for the Eastern District of Kentucky, alleging that his termination was in retaliation for Regalado’s discrimination charge.

The district court granted summary judgment to NAS, finding that Thompson could only pursue a retaliation claim against his employer if he, himself, had engaged in “protected activity,” and that his failure to do so was

*continued on page 6*

## What’s Private in the Private Workplace?

*Social Networking Sites, Background Checks and Employee Rights*

By Wendi S. Lazar and Seth M. Marnin

Employees, employers and courts have long wrestled with concepts of privacy, protected speech, and personal history in the workplace. The debate continues as new technologies and social networking sites enable employers to easily access employees’ personal lives. Unlike their public sector counterparts, private-sector employees have historically enjoyed little protection against unreasonable property searches by their employers. Is the legal landscape changing? Employees and their counsel should review new federal and state laws and avenues of protection and enforcement when employers step over real and virtual boundaries.

### INTERNET SEARCHES OF APPLICANTS MAY VIOLATE EMPLOYMENT LAWS

In today’s job market, employers can easily screen job applicants through basic Internet searches and, increasingly, by viewing their social networking site profiles. A frequently cited 2009 survey by CareerBuilder.com found that 45% of the 2,600 hiring personnel surveyed screen job applicants by viewing their social networking site profiles. How is this information being used and is its use permissible? This survey also found that 35% percent of these individuals reported that content found on social networking sites caused them not to hire the candidate. Is the access and use of such information permissible? And if so, what are the limitations, if any?

One notable example of potential misuse involved the City of Bozeman, MT, which implemented a screening policy for job applicants that required applicants to disclose “personal or business Web sites, including pages or memberships on any Internet-based chat rooms, social clubs such as Facebook, Google, Yahoo, YouTube.com, MySpace, etc.” (Molly McDonough, *Town Requires Job Seekers to Reveal Social Media Passwords*, ABAJournal.com (Jun. 19, 2009)) Although the city rescinded this admittedly controversial and potentially unlawful hiring policy on June 22, 2009 after extensive publicity and criticism, its policy is indicative of a diverging perception of workplace privacy when it concerns new

*continued on page 2*

### *In This Issue*

What’s Private In the Private Workplace? .....	1
Title VII Third-Party Retaliation .....	1
Separation and Settlement Agreements.....	3
Non-Compete and Trade Secret Concerns .....	5

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## Private Workplace

continued from page 1

technologies. In fact, some employers believe that nothing transmitted via new technology is private, and they require prospective employees to provide access to their password-protected personal e-mail and social networking site profiles as part of the employer's screening process.

While an employer's basic Internet search may not be facially unlawful, employers may still violate employment laws where they reject applicants or take adverse employment actions against current employees based on information obtained during Internet searches. If a prospective employer obtains information about an applicant, such as her race, religion or sexual orientation, and subsequently declines to interview that candidate because of that information, the employer may be liable for discrimination under various federal and state laws, such as Title VII of Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e *et seq.*; the Sexual Orientation Non-Discrimination Act ("SONDA"), NY CLS Exec § 296 (2005); California Fair Employment and Housing Act ("FEHA"), Cal. Gov't Code § 12940(d); the Genetic Information Nondiscrimination Act of 2008 ("GINA"), 42 USCS § 2000ff (effective Nov. 21, 2010) (employers may not "request, require, or purchase genetic information with respect to an employee or a family member of the employee"). Additionally, certain anti-discrimination laws prohibit inquiries that are likely to elicit information about an employee's status within a protected class. (See *e.g.*, Americans with Disabilities Act ("ADA") Amendments Act of 2008, 42 U.S.C. § 12101, *et seq.* Section 12112(d)(4) (A) prohibits inquiries into employees' disabilities unless job-related and consistent with business necessity). Employers may not make inquiries that are "likely to elicit information about a disability." (Equal

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Employment Opportunity Commission, EEOC Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (July 27, 2000)). Thus, any of the 35% of respondents in Career Builder's survey who agreed that information found on social networking sites caused them not to hire a job applicant could face liability under the ADA for discrimination if, for example, they relied on outdated social networking site content depicting or describing a job applicant as a former alcoholic or illegal drug abuser.

### A CASE IN POINT

A recent case demonstrates a pitfall of taking an adverse action against an employee who has criticized her supervisor or company on an online social networking site. (See articles by Lewis and Hilfer on page 1 of the March 2011 Issue of *Employment Law Strategist*.) Connecticut's American Medical Response ambulance service fired an employee for criticizing her employer on her Facebook page. The company had a policy barring employees from blogging or posting disparaging remarks on the Internet when discussing the company or supervisors. Another policy prohibited employees from depicting the company in any way over the Internet without company permission. The NLRB took the position that this form of critique, made on an employee's own time, computer, and Facebook page, constitutes concerted activity, particularly since co-workers who were Facebook friends commented on the posts. The parties reached an agreement one day before a hearing by an administrative law judge was scheduled to begin. American Medical (AM) agreed to revise its "overly broad" social media policies. The employee, Dawnmarie Souza, settled privately with AM. The main issue of the case, *i.e.*, whether employee discussions on Facebook constitute concerted activity under labor laws, was not addressed in the settlement.

The case remains an important one as a cautionary warning to employers to tread carefully before firing employees for their social media activities. It raised many questions

continued on page 6

## Employment Law

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# Separation and Settlement Agreements

## Getting More Bang for Your Buck

By Bill Wortel

The payment of severance to terminated employees, and settlement payments to resolve pending litigation are, to some extent, a cost of doing business in the United States. In exchange for such payments, the employer typically receives a global release of all claims that the employee may have against the employer, as well as other promises by the employee to take certain steps (*e.g.*, voluntarily dismiss a pending lawsuit) or to refrain from engaging in certain conduct (*e.g.*, making disparaging remarks about the employer to third parties). Too often, employers blindly “copy and paste” language from old agreements that may contain outdated provisions that no longer comply with current law, or that were tailored to a factual setting different from the situation they are currently facing. This article contains tips for drafting effective separation and settlement agreements that maximize the employer’s return on its severance or settlement payments to departing or former employees.

### THE TIMING OF THE EMPLOYEE’S EXECUTION OF THE AGREEMENT

It is well settled that an employee may not release future claims (*i.e.*, claims that have not yet accrued/

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become actionable). Yet employers sometimes provide severance agreements to departing employees while they are still employed. If the employee signs the agreement while employed, thereby waiving any past claims against the employer that he or she may have, the waiver obtained from the employee would not apply to any claims that accrue after the employee’s execution of the agreement. Thus, if the employee is subjected to harassment after executing the agreement (but while still employed), or does not receive a bonus or some other benefit to which the employee believes he or she is entitled, the employee’s release contained in the previously signed agreement would not be a defense to such a claim.

Accordingly, the employer should present the separation agreement to the employee on his or her last day of employment or after the employee has been terminated. In the alternative, the employer may present the separation agreement to the employee while employed, but include language in the agreement that requires the employee to sign the agreement after he or she has separated from employment.

### DO NOT INCLUDE A COVENANT NOT TO SUE

The regulations interpreting the Age Discrimination in Employment Act (“ADEA”) prohibit employers from imposing any penalty against an individual for filing an ADEA claim. *See* 29 C.F.R. § 1625.23(b). Moreover, at least one court has held, and the U.S. Equal Employment Opportunity Commission (“EEOC”) has long maintained, that a separation agreement that could be interpreted as prohibiting the employee from filing an EEOC charge is facially retaliatory. *See EEOC v. Lockheed Martin Corp.*, No. 05CV0287 RWT, 2006 WL 2294540 (D. MD. Aug. 8, 2006). Thus, including a covenant not to file a discrimination charge risks invalidating the waiver contained in a separation or release agreement.

There is little to be gained, and much to be lost, by including a covenant not to sue/not to file a charge in a separation or settlement agreement. True, the employer would be able to assert a counterclaim for breach of contract if the separation or settlement agreement contained

a covenant not to sue, but the odds of collecting on such a claim from the garden-variety plaintiff are slim. Indeed, the value of such a counterclaim is dubious at best, given that a valid waiver is a complete defense to any charge or lawsuit that the employee may attempt to file, and an employer could pursue statutory sanctions under 28 U.S.C. § 1927 and/or Fed. R. Civ. P. 11 if the employee has no good-faith argument for invalidating the release that bars the employee’s claim. In sum, ensuring the validity of the waiver is the most important goal when drafting a separation or settlement agreement, and the inclusion of a covenant not to sue is not worth risking the validity of the waiver.

### NON-DISPARAGEMENT AND CONFIDENTIALITY PROVISIONS

A non-disparagement provision should prohibit the former employee from making negative remarks regarding the employer or its employees, except with respect to truthful testimony or information provided pursuant to subpoena, court order, or similar legal process. A confidentiality clause bars the employee from disclosing the monetary terms of the separation or settlement agreement to anyone other than the former employee’s immediate family members, attorneys, and financial advisers. The disclosure of such monetary terms to other employees, especially the amount of a settlement payment made to resolve pending litigation, can have the effect of encouraging other employees to bring frivolous claims against the employer in an attempt to secure a similar monetary settlement.

Given the importance of maintaining the confidentiality of such information, as well as the difficulty of proving the amount of damages in the event that the former does not comply with the confidentiality provision, the employer should include a liquidated damages clause providing that the employee shall become immediately liable to the employer for an agreed-upon amount of money,

*continued on page 4*

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## Settlement Agreements

continued from page 3

as well as any costs, including attorneys' fees, reasonably incurred by the employer in collecting that amount from the employee. The agreed-upon amount should be specified in the agreement and should not be punitive, since punitive liquidated damages provisions are invalid and unenforceable. Setting the amount of liquidated damages at 50% of the total amount of the severance or settlement payment made to the employee provides a strong deterrent to that employee while maintaining a low risk of a court invalidating the liquidated damages provision as punitive.

Former employees often ask that non-disparagement and confidentiality provisions be mutual, binding the employer as well as the employee. Employers should not agree to make such provisions mutual because doing so would contractually bind all management-level employees of the company to provisions of which only a handful of those familiar with the agreement would even be aware. If the mutuality of the one of these provisions becomes a stumbling block in the negotiations, the employer may agree that a specified management-level employee (the employee often is concerned about only a particular supervisor making negative remarks) will be bound by such provisions, in which case such person will have to become a signatory to the agreement.

### WAIVER OF FUTURE EMPLOYMENT WITH THE EMPLOYER

When terminating a problem employee, or settling with a former employee who has sued the employer, it is critical to obtain a waiver from the employee of the employee's right to apply for employment, or seek reinstatement, with the employer in the future. In the absence of such a contractual waiver, the former employee can accept the severance or settlement payment, reapply for employment with the employer, and sue for retaliation (as well as on other bases) when the employer rejects the former employee's application. Including a waiver of future employment

with the employer is the only way to ensure that the employee will not bring more claims against the employer in the future.

### THE OLDER WORKERS BENEFIT PROTECTION ACT

No publication dealing with separation and settlement agreements would be complete without some discussion of the Older Workers Benefit Protection Act of 1990 ("OWBPA"), which amended the ADEA. Generally speaking, in order to obtain a valid release of an age discrimination claim from an individual 40 years of age or older, the release agreement must comply with the following requirements: 1) The waiver must be part of an agreement between the individual and the employer that is written in a manner calculated to be understood by the employee or by the average person eligible to participate; 2) The waiver must specifically refer to rights or claims arising under the ADEA; 3) The waiver must state that the individual does not waive rights or claims that may arise after the date the waiver is executed; 4) The waiver must provide that the individual waives rights or claims only in exchange for consideration that is in addition to anything of value to which the individual is already entitled; 5) The waiver must state that the individual has been advised in writing to consult an attorney prior to executing the agreement; 6)(a) If the waiver is requested in the context of the settlement of a pending claim, or in the context of a resignation, termination, or job elimination involving only one individual, the waiver must give the individual a period of at least 21 days within which to consider the agreement; (b) On the other hand, if the waiver is requested in the context of an exit incentive or other employment termination program offered to more than one employee, it must give the individual a period of at least 45 days within which to consider the agreement; 7) The waiver must provide that, for a period of at least seven days following the execution of the agreement, the individual may revoke the agreement, and the agreement shall not become effective or enforceable until the revocation period has expired. See 29 U.S.C. § 626(f). Keep

in mind that the 21/45-day period may be waived by the individual (*i.e.*, the individual may sign the release agreement upon receipt if he/she so desires), but the seven-day period may not be waived. Thus, the release agreement should provide that the severance or settlement payment will not become payable until the agreement becomes effective following the expiration of the revocation period.

If the waiver is requested in connection with an exit incentive or other employment termination program offered to more than one employee, the employer also must provide each employee in the group or class the following information: 1) The group, class or unit of individuals covered by the program; 2) Any eligibility factors for the program; 3) Any time limits applicable to the program; 4) The job title and ages of all individuals eligible for or selected for the program; and 5) The ages of all individuals in the same job classification or organizational unit who are not eligible or selected for the program. See 29 U.S.C. § 626(f)(2)(H). The accompanying regulations provide the following additional guidance:

When identifying the scope of the "class, unit, or group," and "job classification or organizational unit," an employer should consider its organizational structure and decision-making process. A "decisional unit" is that portion of the employer's organizational structure from which the employer chose the persons who would be offered consideration for the signing of a waiver and those who would not be offered consideration for the signing of a waiver. The term "decisional unit" has been developed to reflect the process by which an employer chose certain employees for a program and ruled out others from that program. 29 C.F.R. § (f)(3)(i)(B).

In practice, determining the "decisional unit" can be difficult and requires a close examination of the decision-making process used to select the individuals to be terminated. The courts have invalidated releases where the employer's OWBPA-related disclosures were under-inclusive, as well as where they have been over-inclusive. See, *e.g.*, *Pagliolo v.*

continued on page 8

# Non-Compete and Trade Secret Concerns For In-house Lawyers

## The Top Ten

By Michael Greco

Here is a Top Ten list of concerns for in-house lawyers and the companies they represent.

### 1. IMPLEMENTING A TRADE SECRETS PROTECTION PROGRAM

Protecting your trade secrets cannot be left to afterthought. Companies are well advised to implement a trade secrets protection program. If you do not know where to start, consider conducting an audit of your company's confidential information.

### 2. DRAFTING NON-COMPETITION AGREEMENTS

Many employers with offices or employees located in multiple states use the same non-compete/confidentiality agreement in each state in which they do business. Typically, the form of the agreement originated in the employer's home state, and the employer went on to use this same agreement wherever it does business. However, these employers may find out too late that a non-compete/confidentiality agreement enforceable in their home state may not be enforceable in another.

### 3. ONLINE SOCIAL NETWORKING POLICIES

Chances are that one-quarter to perhaps as much as one-half of your workforce (or more if your workforce is younger) are regular users of social networking Web sites. Any business that does not have a social networking policy or does not train its employees on the do's and don'ts of social networking may have a critical security gap in the protection of its

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trade secrets. A recent case suggests that employee use of LinkedIn can present a threat to your trade secrets. If you have expectations concerning the manner in which your employees may or may not use LinkedIn, it is wise to address these concerns upfront through contracts and written policies.

### 4. CAN YOUR LAWYER KEEP A (TRADE) SECRET?

Ensuring that your trade secrets are kept secret is not a new requirement. Internal controls on use and dissemination of confidential information may not be entirely sufficient. Businesses need to recognize that risks sometimes involve the handling of their data by third parties specifically entrusted for that purpose, such as their attorneys. Remote storage of client data presents several concerns including unauthorized access to confidential client information by a vendor's employees or by hackers, a failure to back up data adequately, or insufficient data encryption.

### 5. CAN LITIGATION PLACE TRADE SECRETS AT RISK?

The last place you might expect your trade secrets to be at risk of disclosure is in a court action intended to protect them, but courts around the country have held that plaintiffs alleging trade secret misappropriation must identify the secrets at issue with specificity. So what is a plaintiff to do if it wishes to minimize disclosure of its trade secrets during litigation while maximizing its ability to discover what information may have been taken by the defendants?

- Narrowly identify the trade secrets at issue.
- Make sure claims are based on fact, not speculation.
- Avail yourself of procedural protections. Statutes and court rules provide ways in which plaintiffs can be protected against further misappropriation. For example, the vast majority of states across the country have enacted a version of the Uniform Trade Secrets Act.
- Assert credible non-trade secret claims that focus on defendants' conduct.
- Demonstrate that information was the subject of efforts that

are reasonable under the circumstances to maintain its secrecy. Ironically, if a company takes reasonable steps to ensure the secrecy of its information, it may actually prevent misappropriation from occurring in the first place.

### 6. OPEN SOURCE — HIDDEN EXPOSURE

Open-source code is computer code that is publicly available on the Internet for use by anyone. Typically, in order to copy open-source code from the Internet, a party must agree to the terms of a "click" or similar pop-up license. Although there are hundreds of different open-source code licenses, many require that the user of the code must make publicly available any subsequent use of the code. In other words, if your software programs are built using open-source code, it may be more difficult to claim trade secrecy for such programs.

### 7. TAKING CONTROL OF LITIGATION BUDGETS IN NON-COMPETE CASES

Litigation budgets can be difficult to prepare under the best of circumstances. Budgeting for non-compete litigation, with its unpredictable nature and often front-loaded cost structure, is even more difficult. Although many factors are outside the control of parties and their counsel when it comes to litigation costs, the litigation strategy you choose can have a particularly significant impact on your budget in a non-compete case. Moreover, given the fast pace of non-compete litigation, there is an increased need to reassess your budget continually as developments unfold.

### 8. HANDLING EMPLOYEE DEFECTIONS

When your employees leave to join a competitor, you can often be taken by surprise. In order to secure your confidential information and customer relationships, rapid action may be required. Consider these 10 tips for responding to employee defections.

### 9. ADVISING RECRUITS

Just as employers must be prepared to respond to employee

*continued on page 6*

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## Trade Secrets

continued from page 5

defections, they must be prepared to advise their incoming recruits on

## Third-Party Retaliation

continued from page 1

fatal to his suit. The Sixth U.S. Circuit Court of Appeals affirmed, and noted that no other circuit court of appeals had recognized a claim for third-party retaliation where the plaintiff had not himself engaged in protected activity. To the contrary, the court noted, the Third, Fifth and Eighth circuits had all rejected such claims.

### BURLINGTON NORTHERN CITED

On appeal, the Supreme Court made two principal rulings. First, the justices held that Thompson's termination could constitute actionable retaliation against Regalado. Applying the standard announced in *Burlington Northern & Santa Fe R.Co. v. White*, the Court found that terminating a complaining employee's fiancé could dissuade her from engaging in protected activity, and that, therefore, Thompson's firing gave rise to a retaliation claim by Regalado.

As it did in the *Burlington Northern* case, the Court contrasted the discrimination prohibition in Title VII

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## Private Workplace

continued from page 2

regarding how an employer may restrict employees' personal electronic communications and the appropriate use of information culled from social media.

### BACKGROUND CHECKS

While employers may conduct background checks on prospective and current employees, these background checks must comply with various state and federal laws. For example, most states have a cause of

what not to do when resigning from a former employer.

### 10. MERGERS AND ACQUISITIONS

Good mergers can turn bad without attention to employee retention.

with the statutory language prohibiting retaliation, and cited *Burlington Northern* in finding that "the antiretaliation provision, unlike the substantive provision, is not limited to discriminatory actions that affect the terms and conditions of employment. Rather, Title VII's antiretaliation provision prohibits any employer action that well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

The Supreme Court rejected NAS's argument that, while terminating an employee's fiancé would meet the *Burlington* standard, prohibiting reprisals against third parties could lead to difficult line-drawing problems concerning the types of relationships protected. For example, could terminating a close friend of an employee or a girlfriend create a cause of action? The Court responded with a firm "maybe," finding that the "significance of any given act of retaliation will often depend upon the particular circumstances."

### 'ZONE OF INTERESTS' APPLIED TO TITLE VII

Second, the Court answered the "more difficult question" of whether Thompson could sue NAS for retaliation, despite the fact that he did not engage in "protected activity."

In addressing this question, the Court noted the extremes of statutory interpretation advocated by each party. That is, Thompson argued that the statute's requirement that suit be brought by "the person claiming to

action for "public disclosure of private facts" or "false-light" invasion of privacy. Improper reference and background checks may trigger liability under these causes of actions. (See *Machleder v. Diaz*, 801 F.2d 46, 52 (2d Cir. 1986), cert. denied 479 U.S. 1088 (1987) (holding that false-light invasion of privacy claims are governed by the law of the state in which plaintiff resided and in which defendant conducted and disseminated information that formed the subject of the lawsuit)). The federal Fair Credit and Reporting Act

Be sure to analyze carefully the existence and enforceability of non-competes signed by key employees early in the process.

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be aggrieved" should be read broadly, such that any person who is allegedly injured by the retaliation could bring suit. On the other hand, NAS contended that "person aggrieved" refers "only to the employee who engaged in the protected activity." This was too narrow a reading.

Rather, the Court held that Thompson was a person "claiming to be aggrieved" under the applicable law by adopting the "zone of interests" test first articulated in the *Lujan v. Wildlife Federation* case. The Court applied the "zone of interests" test to Thompson and found that, assuming the facts alleged to be true, he is "not an accidental victim of the retaliation — collateral damage, so to speak, of the employer's act. To the contrary, injuring him was the employer's intended means of harming Regalado." As such, under the circumstances, Thompson fell "within the zone of interests protected by Title VII."

### CONCLUSION

Retaliation claims, as has often been noted, are the most dangerous and powerful of allegations under Title VII. The *Thompson* decision has the potential to dramatically expand the scope of such claims and it is certain that courts will be wrestling with the boundaries of the decision in the coming years — both with respect to the relationships covered by the "circumstances" and whether the plaintiff is within the "zone of interests" covered by the act.

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("FCRA") (15 U.S.C. §§ 1681 *et seq.*) regulates employers' use of various consumer reports, including those created by for-profit credit reporting agencies ("CRAs"), such as Experian, Trans Union, and Equifax. Anyone or any entity that, for a fee or on a

continued on page 7

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## Private Workplace

continued from page 6

nonprofit basis, regularly engages in assembling or evaluating information about a consumer is considered to be a CRA, including outside investigators, auditors, and outside counsel. FCRA does not, however, apply to information an employer obtains through means other than a CRA.

Background check reports regulated by FCRA include, but are not limited to, those concerning an individual's employment history, educational history, driving record, credit history, credit worthiness and criminal background. Background reports fall into two categories: 1) "consumer reports," covering any information that bears on an applicant or employee's "credit worthiness, character, general reputation, personal characteristics or mode of living"; and 2) "investigative consumer reports," which include information obtained by interviews with neighbors, friends, or associates of the applicant or employee. (15 U.S.C. § 1681a(d) - (e)).

An employer may not obtain either type of report from a CRA for a random purpose, nor may it hide the fact that it has requested it. Also, an employer may not obtain a background check unless it is for an "employment purpose," such as employment, promotion, reassignment or retention. Even where an employer adopts procedures for ensuring compliance with FCRA's disclosure and authorization requirements, as required by the statute (see 15 U.S.C. § 1681m(c)) the employer may violate FCRA if it obtains a consumer report or investigative consumer report for a reason that does not fall within one of the "permissible purposes" specified by the Statute. (See *Russell v. Shelter Financial Services*, 604 F. Supp. 201 (W.D. Mo 1984) (employer improperly requested report summarizing employee's credit history after employee had resigned)). The employee must receive notice that a report has been requested, the disclosures should provide the applicant or employee information about the agency providing the report and the individual's rights under FCRA, and consent in writing before it is run. (15 U.S.C. §§ 1681b(b)2,

1681d(a)). For consumer reports, the employer must also provide the applicant or employee with a clear and conspicuous written disclosure, in a separate stand-alone document, stating that the employer may obtain a consumer report for employment purposes. For investigative consumer reports, the employer must also certify that it provided the applicant or employee a written statement notifying her of her rights under FCRA, including her right to request disclosure of additional information, and that the employer will provide this if the person requests it. (See 15 U.S.C. § 1681d(c)). If a CRA relies on information obtained through a search of a social networking site, the report should reflect that.

### Obsolete Information

CRAs may not include certain types of obsolete information. Such information includes bankruptcies antedating a report by more than 10 years; civil lawsuits and judgments with dates of entry antedating a report by more than seven years (or until the statute of limitations has expired, whichever is longer), paid tax liens (seven years), and accounts placed for collection or charged to profit and loss (seven years); arrests and indictments which antedate a report by more than seven years; any "other adverse item of information," other than records of convictions which antedates a report by more than seven years. (15 U.S.C. § 1681c).

### Disclosure Obligation

Where an employer intends to take an adverse action based in whole or in part on the report, that employer must comply with FCRA's two-step disclosure obligation. An adverse action is defined as "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." (15 U.S.C. § 1681a(k)(1)(B)(ii)). First, the employer must provide the applicant or employee with a copy of the report and description of the individual's rights under FCRA. (15 U.S.C. § 1681b(b)(3)(A)). This advance notice requirement provides the applicant or employee an opportunity to clarify or correct any inaccurate information. Second, after the adverse action, the employer must provide the employee with: 1) notice of the adverse action; 2)

the name, address, and phone number of the agency that provided the report; 3) notice that the CRA did not make the decision to take the adverse action and cannot provide the person specific reasons why the employer took the adverse action; and 4) notice of the person's right to obtain a free copy of the consumer or investigative report on which the employer based its decision and to dispute the accuracy or completeness of the information. (15 U.S.C. § 1681m(a)). Failure to follow these requirements may result in liability. (See, e.g., *Woodell v. United Way*, 357 F. Supp. 2d 761 (S.D.N.Y. 2005)).

### Prior Criminal Records

In addition, employers may obtain reports concerning employees' or applicants' prior criminal records, but do so at their own peril. An employer may not obtain a report from a CRA reflecting an arrest or indictment that antedates the report by more than seven years for an employee or prospective employee whose annual salary is or is reasonably expected to be less than \$75,000 a year. (15 U.S.C. §§ 1681c(a)(2), c(a)(5), c(b)(3)). See also *Serrano v. Sterling Testing Sys.*, 557 F. Supp. 2d 688 (E.D. Pa 2008)). State laws may also prohibit employers from inquiring into arrests that do not lead to convictions. (See, e.g., N.Y. Exec. Law § 296(16) (employers may not inquire into "any arrest or criminal accusation ... not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual."); Cal. Lab. Code § 432.7(a) (employers may not ask for "information concerning an arrest or detention that did not result in conviction, or information concerning a ... pre-trial or post-trial diversion program.")).

Employers that base adverse employment decisions on an applicant or employee's prior arrest or conviction record may court liability under Title VII, as such a policy may adversely impact a protected group of employees. (See, e.g., *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 403 (C.D. Cal. 1970) modified on other grounds, 472 F.2d 631 (1972) (The policy of Defendant under which Plaintiff was denied employment,

continued on page 8

## Private Workplace

continued from page 7

*i.e.*, the policy of excluding from employment persons who have suffered a number of arrests without any convictions, is unlawful under Title VII. It is unlawful because it has the foreseeable effect of denying black applicants an equal opportunity for employment). If an employer or prospective employer considers arrest records in making adverse employment decisions, the employer may face liability if there is no relationship between the charges and the position sought and a likelihood that the applicant actually committed the alleged conduct. Moreover, since business justification rests on issues of job relatedness and credibility, a blanket exclusion of people with arrest records will almost never withstand scrutiny. (See, *e.g.*, *Gregory v. Litton Systems*, 316 F. Supp. 401; *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1971), cert. denied, 406 U.S. 950 (1972); *Reynolds v. Sheet Metal Workers Local 102*, 498 F. Supp. 952; *Dozier v. Chupka*, 395 F. Supp. 836 (D.C. Ohio 1975); *U.S. v. City of Chicago*, 411 F. Supp. 218 (N.D. Ill. 1974), aff'd. in rel. part, 549 F.2d 415 (7th Cir. 1977). It is the conduct, not the arrest or conviction per se, which the employer may consider in relation to the position sought.

Although courts have found that inquiries into criminal convictions may be more probative of job-related characteristics than arrest records, using them as a per se bar to employment may be unlawful. (See, *e.g.*, *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975)). However, a conviction with a demonstrable job nexus may be valid in circumstances involving a recent conviction, a repeated history

of convictions, or where additional evidence suggests that rehabilitation has not occurred. (See, *e.g.*, *EEOC v. Carolina Freight Carriers Corp.*, 723 F. Supp. 734, 752 (S.D. Fla. 1989)).

State laws also prohibit employers from making adverse employment decisions based on an employee or applicant's criminal record that might otherwise survive scrutiny under federal law. For example, Article 23-A of New York's Correction Law prohibits employers from taking adverse employment decisions based on a person's criminal conviction record unless it can show a direct relationship between the person's criminal conviction record "and the specific license or employment sought or held by the individual" or that the position "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public." (NY CLS Correc § 752. See, *e.g.*, *Matter of City of New York v. New York City Civ. Serv. Commn.*, 2006 NY Slip Op 4920, 1 (N.Y. App. Div. 1st Dep't 2006) (disqualifying of employee where there was no direct relationship between past offenses and position failed to comply with N.Y. Correct. Law § 752); *Black v. New York State Off. of Mental Retardation & Dev. Disabilities*, 2008 NY Slip Op 28205 (N.Y. Sup. Ct. 2008) (agency's determination was arbitrary and capricious as the specific employment duties in the position applied for were not set out and the agency failed to specify the bearing, if any, that the applicant's convictions would have on her fitness or ability to perform such duties or responsibilities; the determination also failed to articulate in any meaningful way the positive factors, such as the applicant's graduation from community college with distinction)).

## 'Ban the Box' Laws

Recent legislation passed in several states prohibits employers from asking for an applicant's criminal background on an initial job application. (See, *e.g.*, Massachusetts (G.L. c. 151B, § 4(91 2)); New Mexico (S.B. 254, 49 Leg., 2d Sess. (N.M. 2010)); and Connecticut (Conn. Gen. Stat. § 46a-80)). Massachusetts, for example, passed "Ban the Box" legislation that prohibits both public and private employers from seeking disclosure of job applicants' criminal record information, including felony and misdemeanor convictions, prior to the interview stage of the hiring process. (G.L. c. 151B, § 4(91 2)). "Ban the Box" laws reflect the idea that ex-offenders stand a better chance of being hired if they are able to reach a stage in the selection process that permits them to explain the circumstances surrounding a conviction in person.

## CONCLUSION

The ever-changing landscape of technology creates challenges for both employers and employees and the laws are developing quickly in this burgeoning area of practice. Employees need to be cognizant of limitations to employers' unfettered discretion to use employees' and applicants' past acts to limit employment opportunities. At the same time, employers need to take great caution to avoid inappropriate use of or access to background and private Internet information that has the potential to intrude on an employee's private life and moreover, to result in an illegal discriminatory hiring or firing. Ultimately, how the courts and our state and federal governments treat these issues will likely reframe all of our expectations of privacy in the future.

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## Settlement Agreements

continued from page 4

*Guidant Corp.*, 483 F.Supp.2d 847 (D. Minn. 2007). The invalidation of releases in the context of a large Reduction in Force (RIF) can be catastrophic for an employer. Under these circum-

stances, the terminated employees may not only file their age discrimination claims against the employer (most likely as a class action), but may retain the severance benefits that they received in exchange for providing an invalid and useless waiver of claims. See *Oubre v. Entergy Operations, Inc.*,

522 U.S. 422 (1998). Thus, employers should consult with their employment counsel to assist them in determining the proper decisional unit any time they offer severance benefits to more than one individual in connection with the same termination program.

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