Law Office of Edward E. Sharkey LLC

Unsubscribe | Update your profile | Forward to a friend

November 2013

BUSINESS LAW DEVELOPMENTS

Legal updates for entrepreneurs and business owners from the Law Office of Edward E. Sharkey LLC.

Dear Friends of the Firm,

This is the November issue of our firm's newsletter, featuring coverage of legal developments important to business owners and entrepreneurs. You are receiving it because you are a client or have previously solicited legal resources from the firm.

Please let us know what you think.

Very truly yours,

Ed

In This Issue

Is the EEOC Going Too Far to Stop Employers' Use of Background Checks in Hiring?

Last year, the Equal Employment Opportunity Commission (EEOC) published a new set of guidelines [1] regarding the use of criminal background checks in hiring. The publication warned businesses that excluding potential employees due to criminal histories may constitute discrimination. According to the guidelines, even if a policy regarding background checks is neutrally written and enforced, a business could nonetheless face “disparate impact liability” if its exclusion of convicted criminals is not “job related and consistent with business necessity.”

Business advocates and several state Attorneys General have criticized the EEOC for putting businesses in a difficult position: if they use background checks during the hiring process, they may be sued by the EEOC. If they do not, they risk hiring employees with a proven tendency to steal or engage in violence, which would open the door to lawsuits filed by affected customers.

Most recently, businesses won an important victory in a Maryland federal court when a judge ruled in favor of a company that had been sued by the EEOC for using background checks. After experiencing problems with employee drug use, theft, and violence, the company established a policy of running background and credit checks on prospective employees.

In the case [2], the judge recognized the dilemma businesses face with respect to background checks. He said that, to pursue the case, the EEOC had to provide "far more" evidence, including statistical disparities, in order to satisfy the "high standard of proof" required in disparate impact cases. Although the EEOC did call two expert witnesses in the case, the judge did not find their testimony or analysis reliable.

The court held that the EEOC's complaint about the company's use of criminal and credit checks was not specific enough. It did not "identify the particular policy, process, or rule" that created a disparate impact. For both of those reasons, the court held that the EEOC had not proven a disparate impact, and the company was entitled to summary judgment.

This case highlights the real challenges that businesses face in hiring. Our firm continues to monitor developments in the law concerning use of background checks and other employment-related risk. If you have a question about this or a related matter, please give us a call.

---

[1] Available at http://tinyurl.com/75tb3vg.
[2] Available at http://tinyurl.com/lfvu6tx.

Crowdfunding Update: SEC Issues Draft of Long-Overdue Crowdfunding Rules

In late October, the Securities Exchange Commission finally issued its long-awaited proposed rules to govern equity crowdfunding. Under the JOBS Act, the SEC was mandated to promulgate the rules – primarily meant to protect new and unsophisticated investors from fraud – by the end of 2012. The draft rules are a welcome development for small businesses nationwide, indicating that equity crowdfunding will soon be legalized.

Crowdfunding experts and small business advocates had previously voiced concerns that the long delay in the SEC's rulemaking process was a bad omen, signaling a potential for over-regulation and the possible neutering of the JOBS Act's titular goal: to "Jumpstart Our Business Startups." Luckily for small businesses, that concern was unwarranted: the SEC's proposed rules [1] align closely with the relevant provisions in the JOBS Act.

Among the most important provisions for those thinking about crowdfunding business operations are:

- Businesses may not sell directly to investors; they must use an intermediary, called a "funding portal," to sell shares;
- Businesses may not advertise directly to prospective investors, except to direct them to the correct funding portal;

- Businesses relying on the crowdfunding rules may raise a maximum of $1 million per year; and
- Businesses are required to disclose certified financial information to potential investors.

For some small businesses, the expenses associated with the aforementioned certified disclosures may prove to be a barrier to the use of equity crowdfunding. The draft rules left these JOBS Act requirements unchanged as well:

- If the business seeks to raise under $100,000, its financial statements must be certified by the CEO;
- Financial statements must be reviewed by an independent accountant if the business plans to raise between $100,000 and $500,000; and
- Financial statements must be independently audited for a business to raise $500,000 or more in funding.

For potential investors interested in the draft rules, it appears as though the SEC was satisfied with the caps on individual investment as imposed by the JOBS Act: individuals whose annual income exceeds $100,000 may invest up to 10% of their income or net worth per year, and others may invest up to 5%.

In addition to the crowdfunding rules, the SEC also recently finalized its rules allowing private companies looking for investment capital to advertise and market to the public. This section of the JOBS Act, usually referred to collectively as the "general solicitation" provisions [2], only permits "accredited investors" (essentially, an individual with an annual income of over $200,000 or a net worth of over $1,000,000) to buy equity in these companies. Under these new rules, businesses are required to verify purchasers' accredited investor status before completing the sales.

Businesses should be aware that, unlike the general solicitation provisions, the SEC's crowdfunding rules do not immediately go into effect. Instead, a public commentary period is now open, and we can expect the SEC to finalize the rules in early 2014. Our firm is monitoring developments in the law concerning crowdfunding. If you have a question about crowdfunding or are interested in feedback on pursuing a crowdfunding campaign, please give us a call.

---

[1] Available at http://www.sec.gov/rules/proposed/2013/33-9470.pdf.
[2] Available at http://www.sec.gov/rules/final/2013/33-9415.pdf.

Do I Have to Pay an Employee Overtime If I Did Not Approve It?

Disputes about overtime pay are a significant portion of all lawsuits filed against businesses every year. In addition to disputes about what classes of employees are entitled to overtime pay, parties sometimes fight over whether the overtime was authorized by the employer. The source of the conflict is obvious. Employees want to be compensated for doing extra work. Businesses that did not approve the extra work are reluctant to pay. A recent case gives businesses some guidance on the issue.

In the case, an emergency room nurse sued the hospital where she worked. She claimed that she had been underpaid for two years because she was not compensated for missing some of her meal breaks.

At issue in the case were the hospital's policies regarding meal breaks. One of the policies was

described in the employee handbook, which was given to the employee during training. It dictated that employees would be given an unpaid meal break which would be deducted from their paychecks. When an employee skipped a break, she was required to fill out an “exception log” to be compensated for the additional time. The hospital also had a policy that all payroll errors must be reported to the nurse manager in order to be corrected.

The nurse was aware of the hospital’s policies but filed suit despite her own admission that she only occasionally completed the exception log. Furthermore, she admitted that when she had filled out the log, she was properly compensated for her missed break time.

The trial court granted the hospital’s motion for summary judgment, and in a published opinion [1], the Sixth Circuit Court of Appeals affirmed the trial court’s decision. The court stated that, because the case was “analytically similar to an unpaid overtime claim,” it would use the same rules in rendering its decision.

Even though the nurse reported her missed meals to her supervisors and the human resources department, her complaint was legally insufficient because she neither reported the missing payments to them nor filled out the exception log. Thus, the hospital did not know or have reason to know that she was not being paid for the overtime, and it could not be held liable. The appeals court held that the hospital was entitled to judgment on the case without a trial.

The most important takeaway for businesses was articulated in the appellate court’s opinion: “if an employer establishes a reasonable process for an employee to report uncompensated work time, the employer is not liable for non-payment if the employee fails to follow the established process.” Businesses should be mindful of this rule and can make use of it by creating and disseminating a workplace policy about overtime.

---

[1] Available at http://tinyurl.com/bwk6kvl.

How Far Must Employers Go to Accommodate Employees' Religious Practices?

Title VII of the Civil Rights Act prohibits discrimination in employment. In some circumstances, it requires employers to reasonably accommodate an employee’s religious practices. One issue employees and employers wrestle with is whether an employer has done enough to accommodate an employee. Must an employer provide an accommodation that completely eliminates the employee’s work-religion conflict? Or, is it sufficient to ameliorate the conflict?

Like employees and employers, the courts do not agree on the answer. Some courts, like the U.S. Courts of Appeals for the 2nd and 3rd Circuits, hold that Title VII requires, as a matter of law, that accommodations completely eliminate work-religion conflicts [1]. The U.S. Courts of Appeals sitting in the 4th and 8th Circuits, on the other hand, have held that an accommodation may satisfy Title VII even if it does not totally eliminate the work-religion conflict [2]. Maryland is within the 4th Circuit.

In *EEOC, et al. v. Firestone Fibers & Textiles Co., et al.*, the 4th Circuit Court of Appeals affirmed that an employer was entitled to summary judgment because, even though it did not completely eliminate an employee’s conflict, it did reasonably accommodate it. The employee’s position required him to work Friday evenings and Saturday afternoons. These times conflicted with the employee’s religion, which prohibits working during the weekly Sabbath from sundown on Friday until sundown on

Saturday.

The employee requested an accommodation that would permit him to observe the weekly Sabbath. Rather than provide a special accommodation, the employer relied on the attendance accommodations that were provided to all employees, including vacation days, floating holidays, shift swaps, and unpaid leave. The employee eventually exceeded the leave permitted by the employer and was fired.

The Equal Employment Opportunity Commission (EEOC) sued, claiming that the employer failed to reasonably accommodate the employee's religion. The EEOC contended that Title VII requires employers to completely eliminate employees' work-religion conflicts. The trial court summarily rejected the claim, and the EEOC appealed. The appellate court affirmed the lower court, holding that a duty to reasonably accommodate does not always equate to a duty to totally accommodate. By its plain language, Title VII requires only reasonable accommodations.

Until the Supreme Court renders an opinion, the law concerning religious accommodations will remain unsettled. Employers should be mindful that, whenever an accommodation does not entirely resolve an employee's work-religion conflict, a court may deem the accommodation to be insufficient.

Our firm continues to monitor the law concerning religious accommodations. If you have a question about this or a related issue, please contact our office.

---

[1] See, for example, *Baker v. The Home Depot* (2nd Cir.), available at http://tinyurl.com/mdle8vb and *Shelton v. Univ. of Medicine & Dentistry of New Jersey* (3rd Cir.), available at http://tinyurl.com/knrerqf.
[2] See, for example, *EEOC, et al. v. Firestone Fibers & Textiles Co., et al.* (4th Cir.), available at http://tinyurl.com/k3l3ej8 and *Sturgill v. United Parcel Serv., Inc.* (8th Cir.), available at http://tinyurl.com/lkkwu3q.

ABOUT US

The Law Office of Edward E. Sharkey LLC is a firm of dedicated business and trial lawyers in Bethesda, Maryland, concentrating on business law and commercial litigation. Other areas of practice include pension, securities, negligence/professional liability, and construction law.

In This Issue

Law Office of Edward E. Sharkey LLC
4641 Montgomery Avenue
Suite 500
Bethesda, MD 20814
www.sharkeylaw.com

Tel. (301) 657-8184
Fax (301) 657-8017
Business Hours:
9 a.m. - 5 p.m.
Monday - Friday

ATTORNEYS

Edward E. Sharkey
Admitted to Practice in
Maryland and Washington, DC

Jeanine Gagliardi
Admitted to Practice in
Maryland and Washington, DC

Attorney Bios

Publications

Resources