



**September 2015**

## 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 September 2015 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.



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Very truly yours,

Ed

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### [EEOC Priorities Highlight What Employers Should Be Most Careful About](#)

The EEOC periodically gives guidance on the areas where the organization expects to direct its focus going forward. This guidance provides helpful insight for employers. At the conclusion of 2012, the EEOC published their [Strategic Enforcement Plan](#) for the fiscal years 2013-2016. The plan set out broad organizational goals including eliminating discrimination in recruitment and hiring, protecting immigrant, migrant and other vulnerable workers, addressing disability discrimination, pregnancy discrimination, and LGBT discrimination, preserving access to the legal system, and combatting harassment.

A few of the goals described above have [emerged](#) as clear priorities for the EEOC going forward. These enforcement priorities include:

- 1) Preventing discrimination against pregnant women;
- 2) Preventing discrimination against employees with sincerely held religious beliefs;
- 3) Addressing claims under the Americans with Disabilities Act;
- 4) Preventing discrimination against LGBT individuals; and
- 5) Limiting how employers can use background checks during the hiring process.

The EEOC establishes their priorities based on several criteria, including the number of employees and employers affected by each issue. Each of the priorities listed above include a unique set of potential sub issues and require a balancing of employee and employer interests. For example, the priority of preventing religious discrimination in the workplace has resulted in EEOC litigation centered on the following questions:

- Does requiring a factory employer to allow religious employees to take additional breaks for prayer throughout the workday place an undue burden on the employer and other workers? (*EEOC v. JBS USA*)
  
- Does a company appearance policy trump an employee's sincerely held religious beliefs if the complaining employee does not give the employer explicit notice of the dress requirements of their religious practice during the hiring process? (*EEOC v. Abercrombie & Fitch*)

These questions are only a sampling of the types of issues pursued by the EEOC each year. The Commission uses several strategies to address their priorities including outreach, education, and litigation. Employers should always stay tuned for developments, as the EEOC's priorities offer insight into the conduct which would most likely expose employers to EEOC attention.

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### [EEOC Continues to Assail Businesses That Use Background Checks](#)

The EEOC's campaign targeting employers who use criminal background checks when hiring should concern all employers, particularly small business owners. The EEOC's aggressive pursuit of employers is arguably hypocritical considering the EEOC uses background checks in its own hiring process. The EEOC explains that the use of background checks is permissible if their use satisfies a "stated business necessity."

In the most recent case against car manufacturer BMW, one issue is whether the EEOC should be forced to produce its own hiring policy as a part of discovery. BMW contends that what the EEOC does in hiring should be evidence of what is reasonable. Originally, the magistrate judge overseeing discovery rejected BMW's motion to compel. She explained that, "BMW has failed to explain how the production of the EEOC's conviction policy contributes to its ability to prove that BMW's criminal conviction policy at issue is job-related and/or is consistent with a stated business necessity." BMW objected to the magistrate judge's ruling, resulting in a review by the U.S. District Court. The District Court reversed the magistrate judge's decision and entered an order forcing the EEOC to produce materials concerning its use of criminal background checks.

In the reversal [order](#), the reviewing judge criticized the EEOC for trying to withhold the information. The EEOC argued that the positions for which it used criminal background checks were dissimilar from the positions for which BMW used criminal background checks. However, the EEOC failed to disclose how the employment positions differ or why its use of background checks constitutes a business necessity. The District Court held that BMW is entitled to take discovery on the issue to see for itself.

This is a victory for employers, but not a dispositive one. Just because the EEOC must produce information concerning its use of background checks in discovery does not mean the information will be admissible at trial, or if it is, that it will be sufficient for BMW to succeed on the merits. Although the EEOC has published some [guidance](#) on the issue, the subjective standard of “business necessity” leaves every business vulnerable to second guessing by the EEOC. While a business may reasonably conclude that a business necessity precludes it from hiring violent felons, the EEOC may look at the nature of the business and disagree. The hope is that the EEOC will begin to reconsider its aggressive stance toward employers who use background checks for legitimate reasons. For now, any employer who uses background checks when hiring new employees should remain cautious.

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### [EEOC Comes Down on Workplace Wellness Programs](#)

Workplace wellness programs encouraging healthier habits are becoming increasingly common among employers. Approximately 94 percent of employers with at least 200 workers and 63 percent of smaller employers have adopted employee [wellness programs](#). The programs usually involve biometric testing or physical examinations to determine health status and potential risks. Employees are often screened for blood pressure, cholesterol, blood-sugar levels, waist circumference, and nicotine use. Some wellness programs offer enticing incentives for participation, while others impose penalties if employees fail to comply. Employee wellness programs have been proven to improve productivity, decrease absenteeism, and reduce employer medical costs.

Recently, the EEOC has targeted employers that impose penalties as a part of their employee wellness programs. The EEOC claims that penalizing an employee for failure to participate violates the Americans with Disabilities Act and the Genetic Information Nondiscrimination Act. The EEOC explains that while employee wellness programs are legal, they must remain voluntary. The choice to participate must remain with the employee. Lack of participation cannot result in penalties such as decreased contributions to health plans, complete loss of health coverage, or termination of employment.

Emerging cases filed by the EEOC demonstrate the ambiguity of the voluntariness requirement for wellness programs. There is a fine line between what constitutes an incentive and what constitutes a penalty. In a case filed against Honeywell International, Inc., the EEOC alleged that employees of Honeywell could be penalized up to \$4,000 through surcharges and decreased health plan contributions if they or their covered spouses did not participate in required biometric testing. Honeywell [responded](#) by explaining that the goal of its wellness program is twofold: to encourage employees to stay informed about their health status and to decrease the subsidization of health coverage for unhealthy employees by employees choosing to live a healthy lifestyle.

The EEOC has filed similar [lawsuits](#) against Orion Energy Systems and Flambeau, Inc. The Orion case involved an employee who failed to participate in a wellness program that required a medical

examination and forced employees to disclose information related to disabilities. The employee first had her insurance premium coverage eliminated and was later terminated from employment. The EEOC filed suit against Flambeau after the company made its wellness program mandatory for employees. If an employee failed to participate, they could face cancellation of medical insurance and potential disciplinary action.

Due to the increasing popularity of employee wellness programs, employers need guidance from the EEOC on tailoring the programs to satisfy federal laws against discrimination. Until further guidance is given, employers have little direction for crafting programs that adequately incentivize employees to participate while still maintaining the element of voluntariness.

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## 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](#).

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