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Ideas & Trends

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Wolters Kluwer

SOCIAL MEDIA

Ask yourself if it's really necessary to use that social media site to check up on a job applicant

A job applicant applied for a job in the hospitality industry, submitting her resume through LinkedIn. She was informed that she would be hired, but the employer changed its mind. When she asked why, she was told that the employer based its decision on her references, which she later learned may have been the results of the employer's use of LinkedIn's "Reference Search" function. Using Reference Search, employers can find people with whom an applicant may have worked previously.

The applicant joined with others who had similar experiences (though some went through recruiters) and, believing the use of Reference Search cost them jobs, sued LinkedIn under the Fair Credit Reporting Act (FCRA). In April, a federal district court in California explained why the search results did not constitute a "consumer report." Among other reasons, the information was derived solely from LinkedIn's transactions with the applicants and not from third parties, LinkedIn was not a "consumer reporting agency" under the Act, and the list of possible references was not, itself, used or intended to be used for an employment purpose (*Sweet v. LinkedIn Corp.*, April 14, 2015, Grewal, P.).

"Consumer report" defined. The court began by describing the purpose of the FCRA, explaining that it applies only when "consumer reporting agencies" have provided a "consumer report." Consumer reports include any "written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for … (B) employment purposes; or (C) any other purpose authorized under section 1681b of this title."

LinkedIn Reference Search. When a potential employer uses LinkedIn's Reference Search, it is provided the names of the subject's current and former employers, as well as a list of other LinkedIn members who are in the same network as the person or company doing the search and who may "have worked at the same company during the same time period" as the subject of the search. For each purported reference, LinkedIn provides the name of the employer in common between the reference and the job applicant, along with the reference's position and years employed at that common employer. LinkedIn markets Reference Search as a way for potential employers to find "trusted" references and to get the "real story on any candidate." LinkedIn does not inform the subjects when users run searches on them.

Not a "consumer report." Granting LinkedIn's motion to dismiss, the court concluded that the applicants failed to allege facts plausibly suggesting that Reference Searches fall within the FCRA's definition of a consumer report. Significantly, the information in the applicant's histories came solely from LinkedIn's transactions or experiences with the applicants, and the FCRA excludes any "report containing information solely as to transactions or experiences between the consumer and the person making the report." Indeed, the applicants' own allegations showed that, in creating their professional profiles on the network, they provided LinkedIn with the information about their employment histories so that LinkedIn could publish the information online.

LinkedIn is not a "consumer reporting agency." Moreover, wrote the court, "even if LinkedIn's publications of the employment histories of the consumer-subjects of the Reference Searches were not within the transaction or experience exception, they still would not be consumer reports because the applicant's allegations do not raise a plausible inference that LinkedIn acts as a consumer reporting agency when it publishes these histories." The job applicants alleged that the subjects of the searches voluntarily provided their names and employment histories to LinkedIn for the purpose of publication. Thus, their own allegations supported the inference that LinkedIn gathers the background information not to make consumer reports but to "carry out consumers' information-sharing objectives." As a result, their conclusory allegations that LinkedIn is in the business of furnishing consumer reports to third parties did not support a plausible inference that it acts as a consumer reporting agency.

Reference info not used to determine employment eligibility. Moreover, the job applicants did not state a claim that the Reference Search results were used or intended to be used as a factor in determining whether subjects of the searches were eligible for employment, as required for the results to be a "consumer report" under the FCRA. "LinkedIn markets the Reference Search results—and therefore expects them to be used—as a way for potential employers to locate people who can provide reliable feedback about job candidates and does not market the results themselves as a source of reliable feedback about job candidates," explained the court. Merely claiming that the LinkedIn search results "can contribute to hiring decisions made by employers" was not enough to show the results were used or intended to be used for employment purposes. "As LinkedIn notes, the fact that a potential employer could use a telephone directory for a job candidate's current employer to contact people who know the candidate does not make that directory a consumer report," the court averred.

Ultimately, the case against LinkedIn was dismissed, but not before the ears of employers and HR everywhere perked up. Many organizations utilize social media sites such as LinkedIn to look into a candidate's background, but just because they do doesn't mean they should. The question remains: Is the benefit worth the risk?

Labor and employment law attorney weighs in

In an interview with Wolters Kluwer Law & Business, Shannon S. Pierce, Of Counsel, Fennemore Craig was asked a number of questions about the idea of using social media sites to look into an applicant's background. This is what she had to say:

Question: In what ways should employers use LinkedIn during the application process?

Answer: Before a company begins accessing the LinkedIn profiles of prospective employees, the company should question why it is doing so. What information does the company hope to gain that is not available through the candidate's resume or employment application? Is that information directly related to the hiring process? If not, the company may be infusing unnecessary risk into the hiring process by checking up on prospective employees through LinkedIn.

There is no law that prohibits employers from viewing an applicant's LinkedIn profile during the hiring process. As a general rule, employers are free to assess publicly available information about potential candidates. That being said, where employers use any form of social media (*e.g.*, Facebook, LinkedIn) to gather intel concerning prospective employees, they run the risk of being accused of un-

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lawful discrimination if they learn information upon which they are prohibited from basing the employment decision. For example, if a prospective employer were to look up my LinkedIn profile, they would be able to learn about my professional experience, but they would also be able to see my photograph and would therefore learn my gender, race, and approximate age. Since LinkedIn allows users to post information about their interests and languages spoken, a LinkedIn user's profile could also contain information about their country of origin, interest groups with which they are associated, and so on. Thus, if a company accesses a candidate's LinkedIn profile and thereafter does not hire that candidate, the rejected candidate could assume that the company based its decision on a protected classification (such as race, sex, age, sexual orientation, or union activity) and thereafter file a claim of discrimination. While the rejected candidate bears the burden of proving that discrimination occurred, and while there are certainly defenses that companies can raise when accused of discrimination, the point is, a company who takes it upon itself to access the LinkedIn profiles of prospective employees may face additional hurdles in litigation than if it relied on the applicant's resume alone (in which case, the company may be able to deny having knowledge of the candidate's sex, race, age, sexual orientation, union affiliation, or other protected classification).

Further, under almost no circumstances should a company require candidates or employees to disclose the user names, passwords, or other log-in credentials associated with their personal LinkedIn or other social media accounts.

Question: Is LinkedIn in some way more professionally valuable than FaceBook or other sites?

Answer: It depends on the user, but more often than not, my experience is that LinkedIn users tend to tailor their profiles to include only information that is helpful to advancing their career in their chosen profession. In contrast, Facebook users and those who maintain personal blogs often include significant personal information on those sites, such as information about their family status, sexual orientation, and other information that companies generally should not consider in the hiring process. If a company is determined to use some form of social media to evaluate candidates, LinkedIn may be a less risky alternative to viewing a candidate's public Facebook profile or personal blog. Among other reasons, if a company is later accused of discrimination because it accessed a candidate's public LinkedIn profile during the hiring process, the company could argue that the fact that it researched the candidate through LinkedIn rather than other social media sites is indicative of an intent to obtain and consider only job-related information.

Question: Besides the FCRA, what are the federal laws employers need to keep in mind when conducting this type of research?

Answer: To the extent employers gather any information from candidates outside of the candidate's resume and cover letter, the company must make sure it complies with any obligations under FCRA or similar laws. While the Sweet v. LinkedIn case is helpful in establishing that information available through LinkedIn is not a "consumer report" to which FCRA obligations attach, companies should still exercise caution in this area, as another court, viewing the same or different facts, may reach a different result.

Beyond FCRA, companies should make sure that they are in compliance with all federal and state anti-discrimination statutes, such as Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, and other federal and state anti-discrimination statutes.

Question: Because the LinkedIn platform is so different from others (i.e., much less personal than social media sites such as FaceBook), would it be prudent of employers to have a policy specific to each or is a general social media policy sufficient?

Answer: Absolutely. If a company routinely uses LinkedIn to assess potential candidates for employment, it should develop a policy outlining which information can and cannot be considered within the LinkedIn user's profile. The company may even want to implement a double blind system, where one person retrieves the candidate's LinkedIn profile and then redacts all personal, non-job related information before disclosing the contents of the profile to the individual responsible for making the hiring decision. By removing photographs and any other information about the LinkedIn user's protected classifications before sharing the profile with the company decision maker, the company may be able to demonstrate that the decision maker did not know the candidate's sex, race, age, sexual orientation, or other protected classification when making the hiring decision and therefore could not have based the hiring decision on such protected classification.

Question: I still can't help but question whether or not the ends justifies the means. Bottom line, in your opinion, should employers just stay away from applicant's social media profiles?

Answer: Having defended companies against claims of discrimination for more than a decade, my philosophy is "it's much simpler to prove that you never knew a fact about an employee's protected classification than to prove that that classification was known but did not factor into the hiring decision." While companies certainly should take the necessary steps to confirm that a candidate is qualified for the position sought, whenever possible, companies are well advised to avoid using in the hiring process social media or other information sources that could contain information the company may later regret obtaining. ■

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HIRING

State voluntary veterans' preference laws keep marching along

Flying somewhat under the radar is a plethora of new (and relatively new) state laws that authorize private employers to establish voluntary veterans' preference employment policies. These laws allow employers to implement a voluntary preference for hiring or retaining a veteran over another qualified applicant or employee. Some laws include promotion; others do not so specify. Some specify a veterans' preference for retention during a reduction in force. A few extend the preference to spouses under certain conditions. Almost all state in some fashion that granting a veterans' preference won't violate any local or state equal employment opportunity law or regulation, including antidiscrimination provisions.

These laws allow employers to implement a voluntary preference for hiring or retaining a veteran over another qualified applicant or employee.

Take, for example, California. California AB 1383 is working its way through the state assembly. It would amend Title 2 of the Government Code by adding an article that would allow private employers with one or more employees a voluntary preference for hiring or retaining a veteran over another qualified applicant or employee. Veteran is defined in the bill as an individual who served in the U.S. Armed Forces on active duty and who was discharged or released with an honorable discharge.

The bill also says employers may require that a veteran submit a Department of Defense Form 214 (relating to separation from military service) to be eligible for the preference. Granting a veterans' preference, in and of itself, would "be deemed not to violate any local or state equal employment opportunity law or regulation."

Other recent state laws. A little research reveals the following recent state activity: Alabama has a similar bill (S.B. 269) pending in both its House and Senate. Arizona enacted a law (H. 2094) April 6 of this year. Last year, California enacted legislation (Ch. 645 (A. 1397), L. 2013) to include the veterans' preference system among employment selection devices of the State Department of Human Resources.

Florida's law (H. 7015, L. 2014), enacted last year, extends further and allows preference in hiring to an honorably discharged veteran; the spouse of a veteran with a service-connected disability; the un-remarried widow or widower of a veteran who died of a service-connected disability; or the un-remarried widow or widower of a member of the U.S. Armed Forces who died in the line of duty under combat-related conditions.

Georgia sent its voluntary veterans' preference bill (HB 443) to the governor on April 6, 2015; Indiana has a bill pending (H. 1530); and Idaho's law, passed in 2014, says that private, nonpublic employers may give preference in the hiring and promotion of employees to those who are eligible for public employment preferences (S. 1316). Iowa's law is broader, like Florida's: It extends not only to veterans but also to the spouse of a veteran who has sustained a permanent, compensable, service-connected disability and the surviving spouse of a deceased member of the United States armed forces who died while serving on active duty during a time of military conflict or who died as a result of such service (S. 303, L. 2013).

Kentucky recently enacted a law allowing private employers to have a voluntary veterans' preference employment policy (H. 164, L. 2015); Maine did last year (Ch. 576 (S. 735)). Massachusetts' law, also enacted in 2014, includes a voluntary preference for spouses of disabled veterans and surviving spouses of veterans (Ch. 62 (S. 2052)). Michigan's 2014 law, Public Act 508 (H. 5418), does not extend to spouses.

Both Montana (S. 196) and Nebraska (L.B. 272) passed laws in 2015; only Nebraska's includes spouses of veterans under certain conditions. New Hampshire (S. 55) has a bill pending. Although New Jersey passed a law in 2014 providing a veterans' preference in appointments to the State Police (Ch. 51 (A. 1510)), the state has a handful of other veterans' preference bills pending, including for school districts and non-civil service positions. New York (S. 4326) also has legislation pending this year that has a strict definition of veteran and, if passed, would not apply to spouses.

Oklahoma's governor signed 2015 legislation (S. 195) on April 10. Oregon enacted its law last year to allow private employers to give preference in hiring and promotion to specified veterans (Ch. 86 (H. 4023). Also last year, South Carolina accomplished the same thing, essentially, by amending its fair employment practices law to provide that it is not an unlawful employment practice for a private employer to give hiring preferences to a veteran, and to extend the preference to the veteran's spouse if the veteran has a service-connected permanent and total disability (H. 4922).

Texas has a couple of identical bills (S. 1713 and H. 3547) pending in committee. Effective May 12, 2015, Utah pri-

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vate employers will be allowed to create voluntary, written veterans' employment preference programs (H. 232). Finally, Virginia's law relating to preference for veterans and spouses of certain veterans in private employment (Ch. 570 (S. 516)) was enacted last year.

Early adopters. It appears that Washington passed its voluntary veterans' preference law for private employers in 2011; Minnesota followed in 2012; and Arkansas passed a similar law in 2013.

What about Title VII? The Equal Employment Opportunity Commission Compliance Manual notes that federal, state, or local laws that confer special rights or privileges on veterans with respect to hiring are not affected by Title VII. However, if the veterans' preference is not required by a local, state, or federal law (and these private employer laws are voluntary), the situation is not quite as clear.

Veterans' preference statutes have, in the past, operated "overwhelmingly to the advantage of men," the EEOC noted in a 1990 Policy Guidance. Things have changed in the past 25 years, but that Guidance stated that "where an employment preference is conferred upon veterans on the employer's own initiative and is not mandated by statute, the discriminatory impact of the preference is not shielded from scrutiny under Title VII. As the language of Section 712 makes clear, the deference provided by that section applies only to veterans' preferences that are created by law and not to those that are voluntarily accorded to veterans by employers. Falling outside the terms of Section 712, voluntary preferences are subject to Title VII adverse impact analysis." ■

Source: *Written by Joy P. Waltemath, J.D. for the April 23, 2015 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

DIVERSITY

DiversityInc unveils the 2015 Top 50 Companies for Diversity

At a keynote event in the evening hours of April 23, DiversityInc. announced the 2015 Top 50 Companies for Diversity in front of more than 900 senior executives.

The Top 50 list outperformed the market on a short and long-term basis — which has been the case over the past several years. This shows evidence of the link between excellence in diversity management and superior corporate governance.

Novartis Pharmaceuticals Corporation remained at the top of the rankings for their second year, while Kaiser Permanente jumped two spots to come in second. PricewaterhouseCoopers, EY, Sodexo, MasterCard Worldwide, AT&T, Prudential Financial, Johnson & Johnson, and Procter & Gamble rounded out the top 10. MassMutual Financial Group and Hilton Worldwide were both newcomers to the list this year.

DiversityInc Top 50 companies have significantly more diversity than average American corporations. Compared with EEOC statistics, Top 50 companies have 20 percent more Blacks, Latinos, and Asians in management, and 13 percent more women. In the Top 10 the contrast is even sharper, with 41 percent more Blacks, Latinos, and Asians, and 46 percent more women than US corporate average. This year, for the first time, the National Organization on Disability tracker was required for the Top 10 Disabilities list.

CNBC covered the DiversityInc Top 50 event and provided the stock market econometric evaluation. "The Top 50 list outperformed the market on a short and long-term basis — which has been the case over the past several years. This shows evidence of the link between excellence in diversity management and superior corporate governance," said DiversityInc Founder and CEO Luke Visconti.

For the entire Top 50 list, visit http://www.diversityinc.com/top50

Participation. Any company with over one thousand U.S.-based employees is eligible to enter the top 50 race, and there is no cost to compete. Each company's rank is based on objective analysis of 183 separate factors, based on data from a 300-question survey. The four equally weighted areas of measurement include Talent Pipeline, Equitable Talent Development, CEO/Leadership Commitment, and Supplier Diversity. Additional information is available here. ■

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POLITICS

Time to dust off the 'political discussions in the workplace' rules

As new entrants in the 2016 presidential race seem to appear daily, one employment authority warns that divisive campaign politics could leak into the workplace and adversely impact productivity and morale.

"While the 2016 election is still more than a year-and-a-half away, hopefuls are announcing their candidacy and the political rhetoric already is getting heated. The campaign fervor can easily spill over into the workplace, as supporters share their political perspectives verbally and through social media," said John A. Challenger, chief executive officer of Challenger, Gray & Christmas, Inc. "Differing political viewpoints can co-exist in a workplace, but in hotly contested campaigns, as the 2016 race is expected to be, emotions can run high. What may have started as a civil discussion can quickly turn into a heated exchange. And, the once congenial workplace can easily become a toxic one."

A CareerBuilder poll conducted during the 2012 mid-terms found that 42 percent of respondents said they avoid talking politics at the office, while 44 percent said they talk about it but shut down the conversation when it gets heated. Only 14 percent said they engage in lively political debates at work.

"Debating the issues at work can have its benefits, but there are a lot of pitfalls to avoid. Just as with other touchy subjects, such as religion, one must be careful about when and with whom to share political views," said Challenger. "One of the keys to political discussions at work is to keep them brief and light. The last thing you want is for conversation to become confrontational. Supervisors should also be particularly careful about engaging subordinates in political debate. In today's political arena, where political and religious views are often closely entwined, supervisors should avoid putting themselves in a position that could leave them vulnerable to discrimination lawsuits."

Challenger, Gray & Christmas suggested the following rules for political talk in the workplace:

1. Keep it civil: Do not let friendly banter deteriorate into the name-calling shouting match.
2. Know your colleague: Career-wise it is probably safer to converse with those who share your views. If unsure about a colleague's views, then avoid political conversations or carefully probe for his or her views.
3. Do not campaign: Give-and-take conversations are acceptable, but campaigning can be off- putting. If someone expresses discomfort with political discussions, respect his or her wishes.
4. Stick to politics: While politics are increasingly entwined with religion, consider that aspect of the debate off limits.
5. Do not evaluate based on politics: You may not agree with a coworker's political views, but, if you are a supervisor, do not let that influence your assessment of that person's work and/or value to the company. ■

HR QUIZ

Can an employee with a felony conviction work with an employee benefits plan

Q **Issue:** *Can an employee with a felony conviction work with an employee benefits plan? Issue: Tanya, an employee with extensive benefits knowledge, was recently convicted of a felony. Given her conviction, can she still play a role in your company's employee benefits plan?*

A **Answer:** Probably not. Under ERISA Sec. 411(a), a person is generally prohibited from serving in a fiduciary capacity for 13 years after the conviction. If Tanya was also imprisoned for her felony, the 13-year ban begins to toll after the end of her imprisonment.

This prohibition against felon involvement in employee benefit plans applies to anyone convicted of an assortment of crimes, not just financial crimes. The list is lengthy but includes such felonies as bribery, extortion, embezzlement, fraud, or any violation of ERISA, as well as crimes like murder, kidnapping, and arson, among others. A person who has been convicted of a felony is prohibited from serving a plan in such capacities as plan administrator, consultant, custodian, trustee, agent, employee, or in any capacity involving decision-making authority or custody or control of the plan's assets.

Ban can be lifted. If a court determines that the individual could serve as a fiduciary without violating the purposes of ERISA's provisions on the protection of employee benefit rights, the ban could be lifted. For a federal offense, the sentencing judge would make this determination and, for a state offense, a U.S. district court would make the determination.

Penalty for violation. It is important for plans and employers to note that the penalty for intentionally violating the ban is a fine of up to $10,000, and/or imprisonment for up to five years.

Source: *ERISA Sec. 411(a); Employee Benefits Management Newsletter, March 24, 2015.*

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SUBSTANCE ABUSE

Study updates highs and lows in workforce substance use

In a recent study, the Substance Abuse and Mental Health Services Administration (SAMHSA) found that 9.5 percent of full time workers had a substance use disorder in the past year. Levels of substance use varied by age and gender, but when analysts controlled for these demographics, they found that some differences remained. The investigators found that between 2008 and 2012, the annual average of heavy alcohol use among full time workers aged 18 to 64 was 8.7 percent, while an average of 8.6 percent had used illicit drugs and 9.5 percent reported that they were dependent on alcohol or illicit drugs during the previous year.

The investigators found that between 2008 and 2012, the annual average of heavy alcohol use among full time workers aged 18 to 64 was 8.7 percent, while an average of 8.6 percent had used illicit drugs and 9.5 percent reported that they were dependent on alcohol or illicit drugs during the previous year.

Demographics of substance use. Previous research has established that heavy alcohol use and illicit drug use are more prevalent among males and among younger workers, those between 18 and 25 and 26 to 34, compared to females and workers age 35 and older. Thus, the percentage of workers under age 25 or between 26 and 34 in certain industries may explain much of the prevalence of substance use and alcohol use.

For example, the overall rate of heavy alcohol use among miners was the highest at 17.2 percent, but the workers in this industry are overwhelmingly young and male. There were not enough female workers or workers aged 50 or older to measure their alcohol use precisely. When analysts controlled for age and gender, the rate of alcohol use among miners was no longer higher than average. In contrast, workers in the construction industry, which had a rate of alcohol use in the past month of 16.5 percent for alcohol and 11.6 for illicit drugs, continued to use alcohol at higher-than-average rates through their working lives; 14.6 percent of 35 to 49-year-olds and 14.3 percent of workers over 50 were heavy alcohol users. Use of illicit drugs dropped much more significantly among this group, however.

The accommodation and food services industry had usage rates that reflected the concentration of younger workers, but demographics did not fully explain the elevated rate. Overall, the percentage of workers in that industry who used alcohol heavily in the past month was 11.5, the third highest, while the percentage of workers who reported illicit drug use in the past month was 19.1 percent, and 16.9 percent reported substance use disorder diagnosed within the previous year. Of about 1.1 million workers, 313,000 were between 18 and 25, and 229,000 were between 26 and 34. Fewer than 200,000 were 35 or older. The percentage who used illicit drugs was 22.9 percent among males and15.2 percent among females. Analysis by age reveals striking differences. Among workers up to age 25, 29.9 percent had used illicit drugs in the previous month, compared to 22.3 percent of those age 26 to 34, 11.3 percent of those 35 to 49, and 4.5 percent of workers between 50 and 64.

The health care work force. Workers in health care and social assistance fields tended not use alcohol as heavily as workers in most other groups. In the 18 to 25 age bracket, 8.6 percent reported heavy alcohol use; of workers 50 and over, 1.7 percent did so. They were a bit more likely to use illicit drugs, at a rate of 12.3 percent for those 18 to 25 and 2.8 percent for those 50 and older.

Mixed trends. The investigators compared the results of this study with their earlier study of use from 2003 to 2007. There was no consistent trend of increase or decrease in alcohol or drug use. Alcohol use among miners increased, while their use of drugs decreased. Workers in the accommodations and food service industry used alcohol less and drugs more in 2008 to 2012 than they did from 2003 to 2007. ■

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WORKER STATUS

Agencies double-team on H-2B interim final rule

After facing challenges to the DOL's authority to promulgate H-2B regulations, the Departments of Homeland Security and Labor have jointly issued an interim final rule governing certification of the employment of nonimmigrant workers in temporary or seasonal non-agricultural employment and the enforcement of applicable employer obligations. An interim final rule, which is slated for publication in the Federal Register on Wednesday, April 29, establishes the process by which employers may obtain a temporary labor certification from the DOL for use in petitioning the DHS to employ a nonimmigrant worker in H-2B status. The regulations also add increased worker protections for both United States and foreign workers. The agencies are seeking comments on the final interim rule.

By proceeding together, the Departments affirm that this rulemaking "is fully consistent with the INA and implementing DHS regulations and is vital to DHS's ability to faithfully implement the statutory labor protections attendant to the program," according to the rulemaking notice.

In addition, the DHS and DOL are simultaneously issuing a companion final rule governing the methodology to set the prevailing wage in the H-2B program.

H-2B program. The Immigration and Nationality Act (INA) establishes the H-2B nonimmigrant classification for a non-agricultural temporary worker "having a residence in a foreign country which he has no intention of abandoning who is coming temporarily to the United States to perform . . . temporary [non-agricultural] service or labor if unemployed persons capable of performing such service or labor cannot be found in this country," the DHS and DOL noted in their rulemaking notices. In accordance with the INA, the DHS consults with the DOL with respect to the H-2B program, and DOL provides advice on whether U.S. workers capable of performing the temporary services or labor are available. Under the DHS regulations, an H-2B petition for temporary employment must be accompanied by an approved temporary labor certification from the DOL—the DOL's advice to the DHS as to whether a qualified U.S. worker is available to fill the petitioning H-2B employer's job opportunity and whether a foreign worker's employment in the job opportunity will adversely affect the wages or working conditions of similarly employed U.S. workers.

Challenges to rulemaking authority. The interim final rule is virtually identical to the 2012 final rule that the DOL developed following public notice and comment, but it improves the DOL's ability to determine whether or not it is appropriate to grant a temporary employment certification, according to the agencies' interim rule notice. The DOL never implemented the 2012 final rule, however, because of challenges to the agency's rulemaking authority. In April 2013, the Eleventh Circuit upheld a preliminary injunction against implementation of the rule, and the district court vacated the rule on remand. The appeal of the district court ruling is now pending in the Eleventh Circuit, while the DOL continued to operate under the prior 2008 rule. Notably, however, the Third Circuit in February 2014 ruled that DOL does have authority to promulgate rules on the temporary labor certification process in the context of the H-2B program, and that the 2011 Wage Rule was validly promulgated pursuant to that authority.

In an effort to ensure that there can be no question about the authority for and validity of the regulations in this area, the DHS and the DOL together are issuing the interim final rule. By proceeding together, the Departments affirm that this rulemaking "is fully consistent with the INA and implementing DHS regulations and is vital to DHS's ability to faithfully implement the statutory labor protections attendant to the program," according to the rulemaking notice.

Improvements to certification process. The DHS and DOL said that this new rulemaking includes a number of improvements to the temporary employment certification process in place on March 4, 2015. The final interim rule expands U.S. workers' ability to become aware of the job opportunities in question and to apply for opportunities in which they are interested. For example, it includes new recruitment and other requirements to broaden the dissemination of job offer information, such as through the electronic job registry and the possibility of additional required contact with community-based organizations.

The interim final rule also requires the job offer to remain open to U.S. workers until 21 days before the employer's start date of need, which creates a longer application period that ends closer to the date of need than previously required. The agencies also noted that the interim final rule

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reverts back to the compliance-based certification model that was in use prior to the 2008 final rule, rather than continuing to use the attestation model. The interim final rule also adopts an employer registration process that requires employers to demonstrate their temporary need for labor or services before they apply for a temporary labor certification, which expedites the certification process—the resulting registration may remain valid for up to three years, thereby also shortening the employer's certification process in future years.

Worker protections added. The interim final rule also provides a number of additional worker protections, according to the rulemaking notice, such as increasing the number of hours a week required for full-time employment and requiring that U.S. workers in corresponding employment receive the same wages and benefits as the H-2B workers. Employers also must guarantee employment for a total number of work hours equal to at least three-fourths of the workdays in specific periods for both H-2B workers and workers in corresponding employment. Employers are required to pay visa and related fees of H-2B workers, as well as the inbound transportation and subsistence costs of workers who complete 50 percent of the job order period, and the outbound transportation and subsistence expenses of employees who complete the entire job order period. Finally, the interim final rule prohibits employers from retaliating against employees for exercising rights under the H-2B program.

Increased transparency. The DHS and the DOL also pointed out that the interim final rule includes a number of provisions that will lead to increased transparency. It requires employers to disclose their use of foreign labor recruiters in the solicitation of workers; to provide workers with earnings statements, with hours worked and offered and deductions clearly specified; to provide workers with copies of the job order; and to display a poster describing employee rights and protections. The agencies believe these procedures and additional worker protections will lead to an improved temporary employment certification process.

The interim final rule is effective on the date of its publication in the *Federal Register*. Written comments must be submitted on or before 60 after the date of publication.

Prevailing wage methodology. The simultaneously issued final rule sets forth how the DOL provides consultation that the DHS has determined is necessary to adjudicate H-2B visa petitions by setting the methodology by which the DOL calculates the prevailing wages to be paid to H-2B workers and U.S. workers recruited in connection with applications for temporary labor certification.

For purposes of an H-2B temporary labor certification, the final rule establishes that, in the absence of a wage set in a valid and controlling collective bargaining agreement, the prevailing wage will be the mean wage for the occupation in the pertinent geographic area derived from the Bureau of Labor Statistics Occupational Employment Statistics survey, unless the H-2B employer meets the conditions for requesting that the prevailing wage be based on an employer-provided survey. Any such survey must meet the new methodological criteria established in the final rule in order to be used to establish the prevailing wage, according to the rulemaking notice. The agencies noted that the final rule does not permit use of the wage determinations issued under the Service Contract Act or the Davis Bacon Act as sources to set the prevailing wage in the H-2B temporary labor certification context.

The agencies said they are issuing this final rule together because the DHS, as the Executive Branch agency charged with administering the H–2B program, has determined that the most effective implementation of the statutory H-2B labor protections requires that the DHS consult with the DOL for its advice about matters with which the DOL has expertise, including questions about the methodology for setting the prevailing wage in the H–2B program. The DHS (and its predecessor program administrators) has long recognized that the DOL is the appropriate agency with which to consult regarding the availability of U.S. workers and for assuring that wages and working conditions of U.S. workers are not adversely affected by the use of H-2B workers.

Accordingly, the final rule also adopts, without change, certain revisions made to DHS's H-2B regulations, to clarify that the DHS is the Executive Branch agency charged with making determinations regarding eligibility for H-2B classifications, after consulting with the DOL for its advice about matters with which the DOL has expertise, including questions related to the methodology for setting the prevailing wage in the H-2B program.

The final rule is effective on the date of its publication in the Federal Register. ■

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HR NOTEBOOK

Payroll employment increases by 126,000 in March; unemployment rate unchanged

Total nonfarm payroll employment increased by 126,000 in March, and the unemployment rate was unchanged at 5.5 percent, the BLS reported April 3. Employment continued to trend up in professional and business services (+40,000), health care (+22,000), and retail trade (+26,000), while mining lost jobs (-11,000). Over the prior 12 months, employment growth had averaged 269,000 per month.

The number of long-term unemployed (those jobless for 27 weeks or more) was little changed at 2.6 million in March. These individuals accounted for 29.8 percent of the unemployed. Over the past 12 months, the number of long-term unemployed has declined by 1.1 million.

CPI for all items rises 0.2% as gasoline and shelter prices rise

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.2 percent in March on a seasonally adjusted basis, the U.S. Bureau of Labor Statistics (BLS) reported April 17. Over the last 12 months, the all items index declined 0.1 percent before seasonal adjustment.

Increases in the energy and shelter indexes more than offset a decline in the food index and were the main factors in the rise of the seasonally adjusted all items index. The energy index rose 1.1 percent as advances in the gasoline and fuel oil indexes outweighed declines in the electricity and natural gas indexes. In contrast, the food index declined 0.2 percent, with the food at home index posting its largest decline since April 2009.

The index for all items less food and energy rose 0.2 percent in March, the same increase as in January and February. Along with the shelter index, a broad array of indexes rose in March, including medical care, used cars and trucks, apparel, new vehicles, household furnishings and operations, and recreation. The index for airline fares, in contrast, declined for the fourth time in the last 5 months.

Real average hourly earnings increase by 0.1 percent in March

Real average hourly earnings for all employees increased 0.1 percent from February to March, seasonally adjusted, the BLS reported April 17. This result stems from a 0.3-percent increase in average hourly earnings being partially offset by a 0.2-percent increase in the Consumer Price Index for All Urban Consumers (CPI-U).

Real average weekly earnings decreased by 0.2 percent over the month due to the increase in real average hourly earnings being more than offset by a 0.3-percent decrease in the average workweek.

SHRM survey shows jump in employees' job satisfaction

U.S. workers are feeling good about their jobs again, the Society for Human Resource Management (SHRM) discovered in its latest *Employee Job Satisfaction and Engagement Survey*. SHRM recorded the largest increase in the number of employees satisfied with their jobs since the survey was first conducted in 2002. The survey shows that 86 percent of U.S. employees report overall satisfaction with their job in 2014, an improvement of five percentage points over the year before. At 86 percent, the percentage of employees happy in their work matches the highest level of satisfaction during the last 10 years.

As for what makes employees happy in their work, the top contributor to job satisfaction was "respectful treatment of all employees at all levels," rated as very important by 72 percent of employees. "Trust between employees and senior management" came in at second at 64 percent. Benefits are rated as the third most important contributor to job satisfaction, with 63 percent of employees indicating that they are very important. With the exception of 2012, benefits have been among the top five contributors to job satisfaction since the survey began in 2002.

Among the other top contributors to job satisfaction are job security, relationship with immediate supervisor, opportunities to uses skills and abilities, and immediate supervisor's respect for ideas.

The annual SHRM survey also measures employee engagement — employees' connection and commitment to their work and organization. It found that 79 percent of employees are satisfied with their relationships with co-workers, and 76 percent are satisfied with the contribution their work makes to the employer's business goals. ■

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