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INSIDE

EQUAL EMPLOYMENT

A fresh look at transgender issues at work

In addition to health care and same-sex marriage, both of which are discussed in this issue of *Ideas & Trends*, the national spotlight seems to be shining brightly on those who identify as transgender. According to an estimate by the Williams Institute at the University of California-Los Angeles, some 700,000 adults in the United States are transgender, meaning their internal gender identity is different from the sex they were assigned at birth.

Interview with an expert

John J. Balitis, Director and Chair of the Employment and Labor Relations Practice Group of Fennemore Craig, P.C. participated in an interview with Wolters Kluwer Law & Business on the subject of transgender in the workplace. Our questions and his responses follow.

WK: Let's start with the law. While some state laws offer employment-related protections for transgender individuals, others do not. How are multistate employers to grapple with the differences in state law in their various places of operation?

Balitis: This is a challenge that not only impacts multi-state employers from state-to-state but also single state employers from city-to-city. Some but not all local governments in a number of states have passed ordinances protecting workers against discrimination based on gender identity.

Employers with operations in and outside of these cities, just like employers with operations in multiple states where antidiscrimination laws may be different, have two options. First, consult with counsel to determine the extent of gender identity protection in the various cities or states where operations are located and formulate separate policies for each particular location. Second, employers can avoid the need to create jurisdiction specific policies by electing to protect transgender workers against discrimination across the board voluntarily, regardless of whether state or local law requires them to do so. This approach arguably is the better one given the trend among federal judges to expand protection for transgender workers under federal law.

WK: And what about dealing with employees' religious objections to their transgender coworkers? How should employers handle religious objections?

Balitis: Employers that face religious objections to transgender individuals should handle complaints or concerns in the same way they address religious accommodations generally. The employer must first determine whether the coworker's objection is based on a sincerely held religious belief. If so, the employer must then determine whether the accommodation the coworker is seeking in relation to the transgender worker is based

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on personal preference or involves a true tenet or practice of the religion at issue. Whether or not the employer ultimately must accommodate objections to transgender workers that allegedly are based on religious beliefs will be determined through this standard analysis.

WK: Do you think the recent turning of the tide of public opinion on transgender issues has been reflected in the workplace? Would you say so among employers as well as front-line employees?

Balitis: Changes in public opinion about transgender issues definitely are being reflected in the workplace. OSHA's new guidance on restroom reassignments for transgender workers is a good example. [Keep reading for more on the guide Mr. Balitis is referring to.] This type of guidance reflects the sense that coworkers must accept and accommodate transgender employees. Another example of changing public opinion being reflected in the workplace involves the fact that many employers have unilaterally implemented internal policies protecting workers who elect gender reassignment. That said, it is fair to say that front-line employees, as the individuals who are impacted the most by these developments, are finding transgender issues more challenging than employers generally.

WK: What about public policy? Do you see that shifting and if so, what will the impact be on employers?

Balitis: The shift in public policy toward protecting transgender workers is apparent on a number of levels. President Obama [in 2014] implemented an executive order protecting transgender workers employed by federal contractors. Many cities nationwide are implementing ordinances that protect transgender employees who work for local governments from discrimination based on their gender identity. OSHA's recent guidance on restroom reassignment is another example of this public policy shift, and, perhaps most importantly, many federal courts across the country now interpret the Civil Rights Act of 1964 as protecting transgender workers. This protection under federal antidiscrimination law did not previously exist until numerous judges analyzed the law more progressively to establish the protection. Employers can expect to see this protection continue evolving through the federal judicial system and, potentially, expect codification of the protection in federal statutory law passed by Congress. Congress has attempted in recent years to pass such legislation and, although unsuccessful to date, likely will continue to sponsor similar legislation until it ultimately becomes law.

WK: Moving on to the practical implications of employing a transgender individual, what is the first thing an employer should do when an employee provides notice that he or she is transitioning to the opposite gender?

Balitis: The first thing an employer should do in this situation is to initiate a dialogue with the worker regarding the worker's timeline for progressing through the gender reassignment process. Hormone therapy, wardrobe changes and, potentially, surgical procedures all mark various stages and milestones in the progression to a new gender identity. This dialog use is important because it will allow the employer and the employee to develop clear expectations about how and when the gender reassignment will impact the employee as well as others in the workplace. For example, the timing of the worker's transition from one gender specific restroom or changing facility to another will depend on the worker's appearance and general progress in the gender reassignment continuum.

WK: And, how do you recommend employers respond to employees who complain about not wanting to share a restroom with a transgender individual?

Balitis: Not all coworkers will be entirely comfortable with a transgender worker's reassignment to a new restroom. Employers facing objections from coworkers should first engage in a dialogue with them about the necessity to accommodate gender reassignment and, most importantly, provide clarity on how and when a worker progressing through reassignment will be transitioned from one gender specific facility to another. Furthermore, employers should consider working with counsel or outside vendors to provide training on the subject. More knowledge and clarity typically translates into more tolerance.

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WK: Is it necessary that employers develop a transgender in the workplace policy or can this topic be covered in an existing policy?

Balitis: In most instances, employers should develop specific policies relating to transgender issues, rather than trying to fall back on generic policies. The content of the policies will vary depending on whether an employer is voluntarily implementing protection for transgender workers or is attempting to comply with state or local law affording this protection. In any event, the most important component of such a policy will address how the employer intends to handle the worker's gender reassignment in the workplace as the reassignment progresses through various stages. Each situation should be handled on a case-by-case basis and take into account both the transgender worker's interests as well as the interests of coworkers who will be affected by the process.

OSHA publishes new restroom access guide

As referenced by Mr. Balitis, OSHA has published a guide intended to help employers deal with the sometimes tricky issue of providing appropriate restroom access to transgender workers. Among the practical information it includes is a link to a model employer policy. Although the guide includes best practices and discusses federal, state, and local laws pertaining to restroom access by transgender employees, OSHA made clear in a disclaimer that the Guide to Restroom Access for Transgender Workers "is not a standard or regulation, and it creates no new legal obligations."

However, as the new guide reminds, OSHA's sanitation standard requires that all employers under its jurisdiction provide employees with sanitary and available toilet facilities, so that employees will not suffer the adverse health effects that can result if toilets are not available when employees need them.

Best practices. The health and safety agency pointed out that many companies have implemented written policies to ensure that all employees, including transgender employees, have prompt access to appropriate sanitary facilities. The core belief underlying these policies is that all employees should be permitted to use facilities that correspond with their gender identity. That means that a person who identifies as a man should be permitted to use men's restrooms, and a person who identifies as a woman should be permitted to use women's restrooms.

"Regardless of the physical layout of a worksite, all employers need to find solutions that are safe and convenient and respect transgender employees," according to the guide. However, best practices also *do not* require employees to provide any medical or legal documentation of their gender identity in order to be permitted access to gender-appropriate facilities, or use a segregated facility apart from other employees because of their gender identity or transgender status.

In addition, the guide points out that under OSHA standards, employees generally may not be restricted to use of facilities that are an unreasonable distance or travel time from the employee's worksite.

Among the list of resources provided in the guide is a Model Transgender Employment Policy offered by the Transgender Law Center. ■

HR QUIZ

Must an employee's request to not cover his religious tattoos be accommodated?

Q **Issue:** *Edward practices the Kemetic religion, an ancient Egyptian faith, and affiliates himself with a tribe numbering fewer than 10 members. He states that he believes in various deities and follows the faith's concept of Ma'at, a guiding principle regarding truth and order that represents physical and moral balance in the universe. During a religious ceremony, Edward received small tattoos encircling his wrist, written in the Coptic language, which express his servitude to Ra, the Egyptian god of the sun. His supervisor believes all tattoos are indecent and ordered everyone in his department who had a tattoo to cover it. Edward asked to be an exception to this rule, explaining that it is a sin to cover his tattoos intentionally because doing so would signify a rejection of Ra. Must his accommodation request be granted?*

A **Answer:** Yes. While an employer may accommodate an employee's religious beliefs by offering to have the employee cover the religious attire or item while at work, that may only be done if the employee's religious beliefs permit covering the attire or item. Under Title VII, requiring an employee's religious garb, marking, or article of faith to be covered is not a reasonable accommodation if that would violate the employee's religious beliefs. In this instance, Edward has explained that covering his tattoos intentionally is a sin. Therefore, covering his tattoos is not a reasonable accommodation and he cannot be required to cover his tattoos absent undue hardship.

Source: *EEOC Publication: "Religious Garb and Grooming in the Workplace: Rights and Responsibilities."*

US SUPREME COURT

Supreme Court hands down two rulings impacting the workplace

On June 25 and 26, the United States Supreme Court ruled on cases that were expected to be both controversial and impactful. Both decisions—one regarding the Affordable Care Act and the other same-sex marriage—will have immediate workplace implications.

King v. Burwell: All eligible Americans receive premium subsidies under ACA

The U.S. Supreme Court upheld an Internal Revenue Service (IRS) ruling to extend health plan premium tax credits to individuals enrolled in the Patient Protection and Affordable Care Act (ACA) coverage through a federal Health Insurance Exchange (Exchange). The Court ruled that the ACA phrase "an Exchange established by the state" did not expressly limit tax credits to state Exchanges, but was properly viewed as ambiguous and that several other provisions in the ACA would make little sense if tax credits were not available to federal Exchange enrollees (*King v. Burwell*, June 25, 2015, Roberts, J.).

Background. At issue in the case is the legality of an IRS regulation extending tax credits to people who purchased health insurance plans from the federal Exchanges set up in the 34 states that refused to set up state Exchanges authorized by the ACA. The ACA's subsidy provisions are the key instrument through which the Act makes coverage affordable to individuals who purchase insurance on an Exchange. The ACA provides for advance payment of premium tax credits for people with incomes between 100 and 400 percent of the federal poverty level.

Section 1311 of the ACA allows states to set up Health Insurance Exchanges, and section 1321 requires the HHS Secretary to set up federal Exchanges in states that fail to set up Exchanges. Under section 1401 of the ACA, individuals are offered premium assistance through tax credits if they meet certain requirements, including enrollment "through an Exchange established by the State under section 1311."

The IRS began issuing tax credits through both federal and state Exchanges in January 2014 (the "IRS Rule"). The IRS Rule provides that the credits shall be available to anyone "enrolled in one or more qualified health plans through an Exchange," and then adopts by cross-reference an HHS definition of "Exchange" that includes any Exchange, "regardless of whether the Exchange is established and operated by a State…or by HHS."

The petitioners in *King v. Burwell* are residents of Virginia—which declined to establish a state Exchange—who do not want to purchase comprehensive health insurance.

Supreme Court analysis. In its analysis, the U.S. Supreme Court recognized that the ACA involves three interlocking reforms in the individual health insurance market:

1. it bars preexisting conditions in determining whether to provide coverage (the guaranteed issue requirement) and in setting the premium (the community rating requirement);
2. it requires each person to maintain insurance coverage or make a payment to the IRS; and
3. it gives tax credits to certain people to make insurance more affordable.

In addition to the three interlocking reforms, the ACA required the creation of Exchanges by the states or by federal government if the states declined to do so. If the states declined, the ACA ordered HHS to establish "such Exchange." According to the majority, the use of the words "such Exchange" indicated that the state and federal Exchanges should be treated the same and that would include the availability of premium tax credits. To rule otherwise would fly in the face of several other ACA provisions, such as the requirement that all Exchanges "distribute fair and impartial information concerning…the availability of premium tax credits." This provision would not make sense, according to the Court, "if tax credits were not available on Federal Exchanges."

The Supreme Court ultimately decided that the phrase "an Exchange established by the state" was ambiguous. They attributed the ambiguity to Congress (1) writing key parts of the ACA behind closed doors; and (2) passing much of the ACA through the reconciliation process, which limited opportunities for debate and amendment and bypassed the Senate's normal 60-vote filibuster requirement.

Bearing in mind that statutes must be read in their context and with a view toward the overall statutory scheme, the Court rejected the petitioners' plain meaning construct because it would destabilize the individual market and likely create "death spirals." The majority determined that under the petitioners' reading, the ACA's three interlocking reforms, particularly the tax credit and coverage reforms, would not work in a meaningful way. The majority noted several studies, including one that predicted that premiums could increase 47 percent and enrollment could decrease by 70 percent. "It is implausible that Congress meant the Act to operate in this manner," the Court decided.

Chief Justice Roberts concluded by reminding us that "[i]n a democracy, the power to make the law rests with those chosen by the people…A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the [ACA] to improve health insurance mar-

kets, not to destroy them. If at all possible, we must interpret the Act in a way that is consistent with the former, and avoids the latter."

Moving forward. Now that *King v. Burwell* has been decided, health care experts at Aon Hewitt say organizations are turning their focus to three key areas: reporting compliance, the excise tax and pre-65 retiree health care strategies.

"This case was the last major judicial hurdle that the Affordable Care Act had to clear before full implementation," said J.D. Piro, senior vice president at Aon and leader of Aon's Health Law Group. "Now employers have to focus on reporting on compliance with the individual and employer mandates for 2016, along with determining the projected impact of the ACA's health plan excise tax in 2018. They will need to find the right combination of strategies to ensure compliance and reduce their exposure."

Reporting compliance. Under the ACA reporting rules, companies must file annual returns beginning in 2016 reporting what health insurance they offered employees. If self-insured, they also need to report certain information for each employee they cover. According to Aon Hewitt research, 64 percent of companies said complying with these government regulations would be one of their most significant challenges in 2016.

Excise tax. Due to the expectation that future medical costs will rise more rapidly than the excise tax thresholds, a recent Aon Hewitt survey found that 68 percent of the employers expect the excise tax to affect at least one or more of their current health plans by 2023. When asked about future actions they are likely to consider to minimize their exposure to the tax, the vast majority (79 percent) expect to reduce plan design richness through higher out-of-pocket member cost sharing. More than 40 percent of employers say they are likely or highly likely to adopt cost control strategies, such as reference-based pricing and narrow provider networks.

Pre-65 retiree strategies. Aon Hewitt research also shows two-thirds of companies are considering altering their pre-65 retiree health strategies over the next few years. Of those, 35 percent favor sourcing health coverage through the public exchanges under a defined contribution approach. Twenty-eight percent are considering eliminating pre-65 retiree coverage and subsidies altogether.

"Many employers are planning to transition pre-65 retirees from group-based insurance to the individual public exchange to take full advantage of the choice, competition, favorable premiums and federal subsidies, but they have hesitated to do so given the uncertainly of King v. Burwell," said John Grosso, actuary and leader of the Aon Hewitt Retiree Task Force. "Now with the case decided, it's likely we could see aggressive movement from companies in the 2016 to 2018 timeframe, which enables them to avoid the excise tax risk on this high cost retiree population."

Obergefell v. Hodges: Fundamental right to marry cannot be denied to same-sex couples

Saying the right to marry is a fundamental right inherent in the liberty of the person, the Supreme Court held that under the Due Process and Equal Protection Clauses of the Fourteenth Amendment, couples of the same sex "may not be deprived of that right and that liberty." Same-sex couples may exercise the fundamental right to marry, and there is no lawful basis for states to refuse to recognize a lawful same-sex marriage performed in another state based on its same-sex character. The Court invalidated the state laws challenged by the petitioners in these cases—in Michigan, Kentucky, Ohio, and Tennessee—to the extent they exclude same-sex couples from civil marriage on the same terms and conditions as opposite-sex couples (*Obergefell v. Hodges*, June 26, 2015, Kennedy, A.).

Fundamental right. The Court began by tracing the history of marriage and historical treatment of homosexuality in society, including the Court's consideration of the legal status of homosexuals, as well as how courts overall have looked at the institution of marriage. This analysis compelled the Court's conclusion that same-sex couples may exercise the right to marry. It discussed "four principles and traditions" that demonstrate that the reasons marriage is fundamental under the Constitution apply with equal force to same-sex couples.

Personal choice in marriage. The right to personal choice regarding marriage is inherent in the concept of individual autonomy, noted the Court. Comparing choice in marriage to choices concerning contraception, family relationships, procreation, and childrearing—all of which are protected by the Constitution—decisions concerning marriage are among the most intimate that an individual can make.

Right to intimate association. The right to marry is fundamental, continued the Supreme Court, because it supports a two-person union unlike any other in its importance to the committed individuals. As the Court held in *Lawrence v. Texas*, same-sex couples have the same right as opposite-sex couples to enjoy intimate association.

Childrearing and procreation. A third basis for protecting the right to marry is that "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education." Excluding same-sex couples from marriage conflicts with a central premise of the right to marry, reasoned the Court, because without the "recognition, stability, and predictability marriage offers,"

their children suffer the stigma of knowing "their families are somehow lesser." The majority was quick to note that the right to marry is no less meaningful for those who do not or cannot have children. "An ability, desire, or promise to procreate is not and has not been a prerequisite for a valid marriage in any State."

A community building block. Fourth, the Court pointed out that "marriage is a keystone of our social order" and "a building block of our national community." Society offers both symbolic recognition and material benefits to married couples. In fact, marriage is the "basis for an expanding list of governmental rights, benefits, and responsibilities," noted the Court, including taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decisionmaking authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules. Plus, "[v]alid marriage under state law is also a significant status for over a thousand provisions of federal law."

The Court explicitly found that the "right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws."

Fourteenth Amendment. The Court explicitly found that the "right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws." Each concept—liberty and equal protection—leads to a stronger understanding of the other.

Accordingly, the Court said that the challenged laws burden the liberty of same-sex couples and abridge central precepts of equality. They deny same-sex couples all the benefits afforded to opposite-sex couples and bar those couples from exercising a fundamental right. This denial to same-sex couples of the right to marry works a grave and continuing harm. And the Equal Protection Clause, like the Due Process Clause, prohibits this unjustified infringement of the fundamental right to marry.

Moving forward. "With today's ruling, employers will need to consider how best to design their employee benefits plans to attract and retain the best talent," said J.D. Piro, senior vice president and national practice leader in the Aon Hewitt Health Law Group. "Some employers may move toward offering spousal benefits under one common umbrella. Others will continue to offer benefits coverage to both same-sex and opposite-sex domestic partnerships, while also recognizing the broader definition of marriage endorsed by the Supreme Court. As companies decide on a strategy, they will also want to consider the impact of state and local laws requiring employers to offer domestic partner benefits."

According to Aon Hewitt, allowing same-sex marriage across the country will also likely ease the administrative burden on employers by providing administrative consistency across states. Prior to the ruling, same-sex spousal benefits coverage largely varied state-by-state depending on the legality of same-sex marriage in that state.

Changes for employers. In addition, employers may need to make administrative changes to cover same-sex spouses in states where they were not previously covered. For example, employers will need to modify enrollment processes and create or modify consent and eligibility forms. Further, employers will want to review the state income tax treatment of employer-provided benefits, which could change for individuals with same-sex spouses. While further guidance is still needed, it will eventually be unnecessary for employers to continue to calculate imputed income.

Changes for workers. And for workers, the Supreme Court decision could change the eligibility rules for employer-provided benefits, due to opening up eligibility to same-sex spouses in all states. Or, employers might discontinue same-sex domestic partner benefits, if all employees are able to marry in their state. Employees should be encouraged to check with their employer about any possible changes to their benefits or necessary administrative steps they may need to take to ensure coverage. In addition, with anticipated changes to the state income tax treatment, workers with same-sex spouses covered by employer plans will no longer need to pay imputed income on those benefits.

Note: sexual orientation not protected. Employment law experts at Fisher & Phillips LLP noted that the *Obergefell* decision does not change the fact that sexual orientation is still not a protected class under federal law for employment law purposes. "Although many states and municipalities protect against discrimination on the basis of sexual orientation, the proposed amendment to Title VII of the Civil Rights Act of 1964 remains in limbo," the law firm noted. ■

GENETIC INFORMATION

Use of DNA test at work gets employees $2.2M GINA jury verdict

A federal jury in Georgia awarded a $2.2 million verdict in favor of two employees who were required to take DNA tests to determine whether they were the culprits who had defecated in their employer's grocery warehouse. The great bulk of the jury's award was attributed to punitive damages—a whopping $1.75 million. The verdict is a big deal because the employees brought their lawsuit under the Genetic Information Nondiscrimination Act (GINA), a statute that many attorneys, pundits, and employers saw as fairly benign among all the laws that populate the labor and employment landscape. (*Lowe v Atlas Logistics Group Retail Services (Atlanta), LLC*, NDGa, verdict issued June 22, 2015)

Atlas Logistics Group Retail Services, which provides long-haul transportation services for the grocery industry, subjected the two employees to DNA tests because an unknown number of employees had begun defecating in one of its grocery warehouses, necessitating the destruction of grocery products on at least one occasion. Naturally, the company was on a quest to find out who was doing the dirty deed. A loss prevention manager narrowed down the list of possible culprits, which included the two employees, and retained an outside lab to take buccal swab DNA collections from everyone on the list and compare it to the fecal material. But the lab found no DNA matches.

Unfortunately for the employer, GINA makes it an "unlawful employment practice for an employer to request, require, or purchase genetic information with respect to an employee." The two employees filed an EEOC charge and followed up with a lawsuit. Atlas tried without success to convince the court that its DNA collection in this case fell outside GINA's definition of "genetic information." In May 2015, the court rejected the employer's argument that, despite the clear language of the Act, "genetic test" should be construed to mean information that pertains only to an individual's propensity for a disease, and granted partial summary judgment to the employees.

The case went to trial before a jury, which on June 22 ruled in favor of the two employees. Atlas has filed a motion to have the jury awards reduced. Regardless of what happens with their motion, the case should serve as a reminder to employers that GINA is far from benign. ■

Source: *Written by Pamela Wolf, J.D. for the June 26, 2015 edition of Employment Law Daily, a Wolters Kluwer Law & Business publication.*

EMPLOYEE HEALTH

Focus shifting toward wellness to counter increased health care costs

With health care costs rising, employers are turning toward wellness programs to counter some of the financial strain, according to the *2015 SHRM Employee Benefits Survey* report released June 29 by the Society for Human Resource Management (SHRM). The top wellness benefits offered to manage chronic diseases and other health-related issues include wellness resources and information (80 percent of respondents) and wellness programs (70 percent). Additionally, wellness benefits such as health and lifestyle coaching, smoking cessation programs, and premium discounts for getting an annual risk assessment have risen in the past five years.

Five-year trends also show a slow shift of health care costs to employees. For example, consumer-directed health plans such as health savings accounts (HSAs) have risen by 8 percentage points, and employer contributions to HSAs have also increased by 10 percentage points. The report also shows five-year trend increases in the percentage of organizations offering mental health coverage, contraception coverage, vision insurance, short-term disability insurance, critical illness insurance and coverage for laser-based vision surgery.

Among other findings:

- The most common benefits were paid holidays (offered by 98 percent of respondents), dental insurance and prescription drug programs (both 96 percent), mental health coverage and professional memberships (both 91 percent), and organization-provided break room/kitchenette and traditional 401(k) or similar defined contribution retirement savings plan (both 90 percent).
- The shift to defined contribution retirement savings plans and Roth 401(k) savings plans continues, with only 26 percent of organizations reporting that they now offer defined benefit pension plans that are open to all employees.
- The most commonly offered women's health benefit is contraceptive coverage (83 percent).
- Three out of five (60 percent) organizations offered some form of telecommuting: 56 percent of respondents reported that their organizations offered telecommuting on an ad-hoc basis, 36 percent part of the time, and 22 percent on a full-time basis.
- The three family-friendly benefits that have decreased over the last five years were bringing children into work

in an emergency (22 percent), child care referral services (9 percent) and on-site parenting seminars (1 percent).
- The percentage of organizations paying for certification/recertification fees in 2015 (78 percent) increased, compared to 71 percent in 2011.

New benefits added to this year's report include egg freezing for nonmedical reasons (2 percent), paid surrogacy leave (5 percent), company-provided fitness bands/activity trackers (13 percent), company-organized fitness competitions (34 percent), and company-provided student loan repayment (3 percent).

About the survey. The survey of 463 randomly selected HR professionals examines more than 300 benefits. ■

BAN-THE-BOX

States banning the box to remove barriers for ex-offenders

Raymond Daughton has been out of prison for 36 days. When he got out he was homeless, had no clothes and no money.

All his belongings from his old apartment have disappeared. Daughton, 31, doesn't want to get into trouble again, so he is staying out of his old neighborhood—one of the roughest parts of Baltimore—and distancing himself from some friends.

The past month has been a struggle of moving from couch to couch, scrounging some cash for a suit and tie, and applying for as many jobs as he can. Getting a job consumes him. He doesn't care what he does; he just wants to earn enough money to gain custody of his two boys and support them.

But he's worried no one will want to hire someone with a conviction for handgun possession who also served a previous prison sentence.

An estimated 70 million people are trying to navigate the world with a criminal record, according to the National Employment Law Project. Some states, concerned with the high costs of keeping people locked up, are reevaluating and removing some of the roadblocks that ex-offenders face when they are released. The goal: to increase the chances they'll succeed in society and lessen the chances they'll return to prison.

According to the American Bar Association, there are over 45,000 laws on the books restricting people with criminal records, ranging from about 300 in Vermont to over 1,800 in California. These "collateral consequences" can bar people with certain convictions from public housing, from voting and from certain jobs, such as veterinarians, real estate agents or other occupations that require state licenses.

In Daughton's case, Maryland can deny public housing to those convicted of violent crimes within the last three years. The barber's license he hopes to get also could be denied because of his felony conviction.

But many states are now re-examining the consequences of the laws and taking other steps to reduce the collateral damage of having a criminal record.

Seventeen states, including Maryland, have adopted so-called "ban the box" statutes that bar public employers from asking about criminal history on their job applications. Six of those states— Hawaii, Illinois, Massachusetts, Minnesota, New Jersey and Rhode Island—have extended the requirements to private employers.

Since 2009, nine states and the District of Columbia have begun to give ex-offenders so-called certificates of rehabilitation that say the person has completed prison time, played by the rules since being released or would be suitable for employment. The goal is to help ex-offenders get a job.

In many states, the certificates are coupled with employer liability statutes that say businesses cannot be held liable for negligence in knowingly hiring a person with a criminal record.

In some states, judges are allowed to remove some collateral consequences during sentencing by reducing or removing a bar to licensing, housing or other roadblocks offenders would face when they get out of prison.

Forgiving vs. forgetting

Many states have relied on expunging or sealing the records of those convicted of some misdemeanors and minor felonies to help give them a fresh start.

But Richard Cassidy, who helped write a model law that many states are adopting in removing hurdles to re-entry, said many people are unsure whether they need to disclose an expunged record when applying for jobs, and they fear the consequences if the information is discovered later.

"Expunging statues, I'm not a fan," said Cassidy, a Vermont lawyer. "I don't think they work well this day and age be-

cause if you get convicted today, that will be all over the Web tomorrow. No one can make that go away."

Sharon Dietrich, litigation director for Community Legal Services of Philadelphia, favors the clean slate approach, saying many employers are not willing to look past a criminal record. She said most ex-offenders would rather have their records expunged, not reveal their convictions on job applications and risk an employer finding out later.

The federal government has been encouraging employers to be more forgiving. The U.S. Equal Employment Opportunity Commission in 2012 issued guidance to employers that they should not have a blanket ban on hiring people with criminal records, since they could possibly run afoul of laws prohibiting racial discrimination. Instead, employers should consider how old the conviction is and whether the crime would be substantially related to the job duties.

Despite the guidance, people with criminal records often struggle to find work. And that's prompted some states to begin issuing the certificates of rehabilitation.

The certificates come with a variety of names (some are called "certificates of employability") and different qualifications for getting them. Some states issue them on completion of sentence. Others require ex-offenders to spend several years proving good conduct.

Cassidy prefers to allow judges to decide whether to remove some re-entry barriers so that people can find work, not be banned from getting financial aid for an education or kept out of some schools. Then, he said, ex-offenders should have to prove over five years they deserve a certificate.

Exactly how long ex-offenders should have to prove they deserve certificates is a point of debate.

State Sen. Bill Seitz, a Republican, who sponsored Ohio's 2012 law granting certificates of employability, said the certificates can help reduce recidivism and shouldn't take more than a year to earn. Ohio corrections officials grant certificates to well-behaving prisoners upon their release. But ex-offenders who were released before 2012, have to petition judges for the certificates and demonstrate for a year that they are worthy of them.

Stephen Johnson Grove, the deputy director of Ohio's Justice and Policy Center who helped write the Ohio certificate law, said that 300 people have now successfully gotten certificates from the courts.

Finally, there are ban the box laws, which prevent businesses from asking about criminal records on the application. But the laws don't bar employers from doing a background check, or asking potential hires about their records in follow-up interviews or when a job offer is pending.

"The idea is that you can at least get a face-to-face interview and be considered on merit, not on your record," said Alison Lawrence, a senior policy specialist on criminal justice for the National Conference of State Legislatures.

When Durham, North Carolina, banned the box in 2011, the city's hiring of people with a criminal record increased from 2 percent to 15 percent by 2014, according to a report from the Southern Coalition for Social Justice, which advocates for criminal justice reform.

Getting out of trouble

Rick Jones of the Neighborhood Defender Service of Harlem in New York City said his organization is one of the few nationally that tries to help people with convictions deal with the ramifications their records have on their lives.

That means representing people in family court and housing court. In New York City, even misdemeanors can bar someone from public housing for up to three years, Jones said.

"It's the everyday stuff. It's the mother convicted of shoplifting or possession of a controlled substance that 10 years later can't go on a field trip with her daughter's class," he said.

A similar situation has played out for Diamonté Brown of Baltimore. After getting caught with marijuana, she was convicted in 2009 of a misdemeanor shortly before starting a master's degree in education.

Brown said the conviction barred her from getting a job with the Baltimore school system and left her with few job opportunities after she got her degree.

"I couldn't do anything I was trained to do," said Brown, who has since gotten her record expunged and now is the director of Out For Justice in Baltimore, an offender-led organization promoting changes to policies that can stand in the way of ex-offenders returning to society.

Out For Justice is where Raymond Daughton turned for help when he first got out of prison. The group has helped him with his resume and in looking for jobs. He is still looking for work, for a permanent place to live and a way to go to trade school.

"I'm basically trying to raise my kids and stay out of prison. I'm 31, and it's sad I'm just figuring that out," he said. "It's so easy to get into trouble but so hard to get out of." ■

Source: *Rebecca Beitsch, Staff Writer, Stateline (http://www.pewstates.org), June 18, 2015. Stateline is a nonpartisan, nonprofit news service of the Pew Center on the States that provides daily reporting and analysis on trends in state policy.*

HR NOTEBOOK

CPI rises as gas prices rebound

The Consumer Price Index for All Urban Consumers (CPI-U) increased 0.4 percent in May on a seasonally adjusted basis, the U.S. Bureau of Labor Statistics (BLS) reported June 18. Over the last 12 months, the all items index was unchanged before seasonal adjustment. The gasoline index increased sharply in May, rising 10.4 percent and accounting for most of the seasonally adjusted all items increase. The food index was unchanged for the second month in a row, as a decline in the food at home index offset an increase in the index for food away from home.

The index for all items less food and energy rose 0.1 percent in May, its smallest increase since December. The indexes for shelter, airline fares, and medical care all increased, as did the indexes for personal care, recreation, new vehicles, alcoholic beverages, and tobacco. In contrast, the indexes for apparel, for household furnishings and operations, and for used cars and trucks all declined in May.

Real average hourly earnings decrease in May

Real average hourly earnings for all employees decreased 0.1 percent from April to May, seasonally adjusted, the BLS reported June 18. This result stems from a 0.3-percent increase in average hourly earnings being more than offset by a 0.4-percent increase in the Consumer Price Index for All Urban Consumers (CPI-U). Real average hourly earnings increased by 2.2 percent, seasonally adjusted, from May 2014 to May 2015. This increase in real average hourly earnings, combined with no change in the average workweek, resulted in a 2.3-percent increase in real average weekly earnings over this period.

Unemployment rate unchanged in May

Total nonfarm payroll employment increased by 280,000 in May, and the unemployment rate was essentially unchanged at 5.5 percent, the BLS reported June 5. In May, both the unemployment rate and the number of unemployed persons (8.7 million) were essentially unchanged. These measures have shown little movement since February.

May job gains occurred in professional and business services (+63,000), leisure and hospitality (+57,000), and health care (+47,000). Gains were also reported in retail trade (+31,000), construction (+17,000), and transportation and warehousing (+13,000). Mining employment continued to decline (-17,000). Employment in other major industries, including manufacturing, wholesale trade, information, and government, showed little change over the month. the average workweek.

HR isn't as quick to use Smartphone apps as expected

While the majority of human resource professionals say they perceive benefits from Smartphone use in HR, they also indicate reluctance to embrace the use of mobile applications in their organizations, according to new research from Bersin by Deloitte, Deloitte Consulting LLP. The research shows that a majority of HR professionals surveyed say they believe that increased use of HR applications on smartphones likely would result in increased benefits, including workforce productivity (60 percent), more timely responses from users (50 percent), improved real-time decision-making (53 percent), and even increased employee engagement (52 percent). However, those surveyed indicate that their plan for future use of mobile HR applications is negligible.

While HR leaders may be reluctant to embrace mobile HR applications, several trends are converging in the market to support the adoption of such applications:

- Mobile devices—especially smart phones—are increasing in use in both the consumer and work environments.
- The computing power required to run even large HR applications is increasingly available in smaller and more economical devices.
- HCM software providers increasingly develop software for mobile devices as they move to the cloud. "The cloud" refers to sharing application and computing resources and paying for them as they are used, versus buying and using dedicated on-premises systems.
- The increased use of HR applications for management of hourly workers – especially in the hospitality and retail industries – likely is a harbinger of accelerating adoption. In manufacturing and other industries with an hourly workforce, the use of clock-ins and clock-outs via smartphones is growing. ■