



October 17, 2007

This is Utah SHRM Legal-mail no. 2007-23 prepared for Salt Lake SHRM, the Human Resources Association of Central Utah (HRACU), the Northern Utah Human Resources Association (NUHRA), the Color Country Human Resources Association (CCHRA), the Bridgerland Society for Human Resource Management and Utah at-large members of the national Society for Human Resource Management (SHRM). This update is best viewed in a HTML format. Please reply with “UNSUBSCRIBE” in the subject field if you no longer wish to receive this message.

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NEW “NO MATCH’ REGULATIONS BLOCKED BY JUDGE: As you have read here in recent updates, the Department of Homeland Security (DHS) recently issued new regulations impacting all employers, see:

http://www.dhs.gov/xlibrary/assets/ice_safeharbor_no-match_finalrule_2007-08.pdf

The new regulations impose stricter burdens (and related penalties) on employers to forcefully deal with employees who give them incorrect Social Security Numbers (SSNs) resulting in “no-match” letters sent to employers, i.e. letters saying that the given name and SSN do not match. Undocumented workers seldom have SSNs, so a no-match letter often, but not always, identifies a worker who cannot legally work here. Under the new regulations, an employer can avoid trouble after receiving a no-match letter by fixing the problem if it is a clerical one or discharging the employee if he/she can’t fix the problem after having a reasonable chance to do so (i.e. 90 days). These final no-match rules were set to go into effect on September 14, 2007, however a federal court in California has issued an order stopping them from taking effect until further notice and halting the issuance of some 140,000 no match letters. In short, this means the matter must be fully litigated—likely taking several months—before we will know the status of the new regulations. So, what should you do in the interim? Probably the same basic things required of the regulations. Given the delays caused by the California lawsuit, the

government may resort to its former process of sending out no match letters. If an employer somehow learns that an employee's SSN does not match his/her name, it should give the employee a reasonable time to fix what might just be a clerical problem. If the employee cannot do so, you can discharge for failure to provide you with a valid SSN. However, employers should not assume the mismatch means the employee is undocumented. Employers must be careful not to single out any employee based on race, national origin, citizenship or any other protected classification. Good legal counsel should be able to help you work through such circumstances. On a related note, employers are suing to overturn an Arizona state law that requires all employers in the state to use the federal electronic system for verifying employee SSNs. The Arizona law takes effect January 1, 2008 and so far, no court has put it on hold.

UALD TO START AWARDING FRONT PAY IN LIEU OF REINSTATEMENT:

The Utah Antidiscrimination and Labor Division (UALD) has agreed it has the authority to award front pay to a charging party for whom it rules after a discrimination, harassment or retaliation investigation. The UALD had previously concluded it could only award back pay and reinstatement. After a lobbying effort by some plaintiff-side employment lawyers, the UALD has apparently changed its mind and decided it has the statutory power (under state anti-discrimination law) to also award front pay if reinstatement is not possible or practicable in a given case. Front pay is an award of future damages, i.e. money damages designed to make an employee "whole" assuming the employee would have remained employed with an employer for some set time into the future. The UALD's decision means that employers will face greater financial exposure if the UALD issues a determination against them.

RECENT AWARDS AND SETTLEMENTS: Even the big law firms get hit with employment law claims. In October of 2007, a major national law firm agreed to pay \$27.5 million to resolve age bias claims filed by some of the partners in the firm. The Equal Employment Opportunity Commission (EEOC) recently also settled, for over \$4 million, a national origin discrimination case on behalf of Hispanic workers at one of the largest retail sellers of photographic, computer and electronic equipment in the New York metropolitan area. A Nevada federal jury has awarded a former publishing company sales employee more than \$3.7 million in damages for alleged age bias. The employee claimed he was discharged at age 53 as a result of a pattern of forcing out higher paid long-term employees and replacing them with younger, lower paid employees. Finally, the United States Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has announced that a Texas food company has paid \$1 million to settle claims that the company discriminated, based on gender and ethnicity, against some 5,300 applicants.

COURT DECISION PROVIDES BREATHING ROOM FOR REFERENCES:

A Connecticut state court has ruled that an employer cannot be sued for making untrue statements during a reference check as long as the employer was acting in good faith to provide information. The court concluded that such a qualified privilege to speak was necessary in order to encourage employers to share information with each other. The Connecticut ruling is similar to a Utah statute, passed ten years ago at the initiative of Utah SHRM groups, that reduces the risk of liability for references unless an employer

shares information knowing that it is false or acting recklessly regarding the truth/falsity of the information. You can read the Utah statute at:

http://le.utah.gov/~code/TITLE34/htm/34_14002.htm

CAN AN EMPLOYER ASK ABOUT CRIMINAL CONVICTIONS? In the question of the week, one reader asked for an update on the law regarding whether an employer can ask an applicant about criminal convictions. So, can you do this? Yes, if you do so carefully. Because it contends that such conviction inquiries disproportionately impact persons in protected classes, the EEOC requires that an employer have a legitimate business reason for asking about and considering such information. For example, you may not want to refuse to hire a janitor, with a reckless driving conviction, for a job that does not require any driving. The EEOC says three factors are relevant to this issue of business necessity: (1) the nature of the conviction, (2) when it occurred (the older it is the less likely it is to be relevant); and (3) the nature of the job duties. The states follow a similar approach, but some states are more strict than others about such inquiries. Like the EEOC, Utah allows them if there is a showing of business necessity, but also indicates that an employer should only inquire about felony convictions, see:

<http://www.rules.utah.gov/publicat/code/r606/r606-002.htm>

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Legal-mail is a legal and legislative update service sent out about twice a month to various Utah SHRM members and chapters. As a courtesy to SHRM, the Utah law firm of Jones Waldo Holbrook & McDonough P.C. underwrites the costs of the service. If you have any questions or comments, please contact Michael Patrick O'Brien.

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