January 19 - February 1, 2009

SAN FERNANDO VALLEY BUSINESS JOURNAL

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Starbucks Glad Marijuana Claim Went Up In Smoke

EMPLOYMENT LAW

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Almost every employer uses some form of written job application. However, many employers are unaware of legal requirements governing what types of questions a job seeker may be asked. Employers who do not follow these rules face stiff penalties and expensive compliance lawsuits.

For example, while employers understandably want to know whether an applicant has a criminal history, California law specifically limits what types of questions an employer may ask on the subject. Generally, an employer can ask an applicant if he or she has ever been convicted of a crime. However, California law makes it a crime for an employer to ask job seekers about any arrests which did not actually lead to a conviction.

To complicate matters even further, inquiring about certain convictions also is illegal. Specifically, in the 1970's, then-Governor Jerry Brown signed legislation reducing certain marijuana possession crimes from a felony to an infraction. Following the passage of that legislation, the California Labor Code rules on job applications were changed so that persons with minor marijuana convictions could not be barred from employment. Labor Code Section 432.7 specifically prohibits employers from asking job applicants about criminal convictions for certain minor marijuana-related offenses which are more than two years old. The Labor Code also makes it a misdemeanor to even ask about the subject. An employer who uses a job application with the offending inquiry (or asks about the subject in an interview) is liable for a penalty of $200 or actual damages, whichever is greater.

Still reeling from its $105 million tip-pooling judgment in San Diego earlier this year, Starbucks was sued yet again in a class action challenging its right to ask job applicants if they had ever been convicted of a crime. The plaintiffs were seeking a whopping $26 million because the Starbucks application did not conspicuously advise the applicant to omit any references to marijuana convictions when answering a general question about criminal convictions. The plaintiffs contended that the general question forced job applicants to reveal something about their past which the Legislature prohibited employers from asking. Starbucks Corporation vs. Superior Court (December 10, 2008).

Starbucks lost the first round. However, the State Court of Appeal in Orange County saw things differently. The Court of Appeal used the Starbucks case to clarify what an applicant must prove to recover penalties under the marijuana conviction statute. However, the case also had an ominous tone for California employers insofar as the Court cautioned that Starbucks' way of doing business could get them in trouble.

Like many multi-state employers, Starbucks used a standardized job application for all of its locations nationwide. The application asked the applicant to state whether he or she had ever been "convicted of any crime in the last 7 years." Notably, there was no statement anywhere near the question alerting the applicant not to include information about any marijuana convictions which were less than two years old. However, Starbucks did include such a disclaimer on the reverse side of the application, buried in some small print along with other States' disclaimers, the standard at-will language and the applicant's certification that everything stated in the application was accurate.

Starbucks was sued in a class action over the job application by three unsuccessful job applicants. They purported to represent a class of 135,000 unsuccessful job applicants at 1,500 Starbucks locations throughout California. The plaintiffs asserted that the inquiry about criminal convictions violated the Labor Code and that the violation was not cured by the disclaimer language because the disclaimer was buried on the reverse side of the application where it was unlikely to be seen when the applicant was answering the conviction question.

The Court saw that this case was a set-up from the very beginning and found a way to rule for Starbucks, despite problems with the application. Specifically, none of the three named plaintiffs actually had a marijuana conviction to disclose. Nevertheless, they sought $200 for themselves and every other unsuccessful job applicant (a total of $26 Million in penalties). The Court recognized that the ones to profit from this claim were not the injured applicants, but rather the class action lawyers who sought to collect a sizable portion of the penalty.

The Court of Appeal agreed that the California disclaimer language would have been sufficient had it been more conspicuously placed (such as right after the question seeking information on criminal convictions). However, the Court criticized Starbucks for burying the disclaimer on the back side of the application and for attempting to use a "one size fits all" job application for its locations nationwide. The Court cautioned that Starbucks should have tried to tailor the application to satisfy the specific California restrictions on what criminal conviction inquiries are appropriate.

Luckily for Starbucks, the Court concluded that the lower court erred in allowing the case to proceed when the three named plaintiffs testified under oath that they read and understood the California disclaimer, and that none of them was actually harmed because they had no convictions to disclose.

In reaching this common sense solution, the Court declined to "adopt an interpretation that would turn the statute into a veritable financial bonanza for litigants like plaintiffs who had no fear of stigmatizing marijuana convictions." The Court boldly noted "there are better ways to filter out impermissible questions on job applications that allowing 'lawyer bounty hunter' lawsuits brought on behalf of tens of thousands of unaffected job applicants."

The state's "civil justice system is not well-served by turning Starbucks into Daddy Warbucks." the Court observed.

The Court also noted that since the Labor Code makes it a crime (i.e., a misdemeanor) for an employer to intentionally violate Section 432.7, this should "sufficiently deter miscreant employers from improperly intruding into job applicants' protected zone or privacy."

Although Starbucks won in the end, it no doubt cost them a fortune in legal fees to defend the case. A simple change in the application would have avoided the whole matter entirely. Moreover, Starbucks got lucky in this case because none of the named plaintiffs actually had a marijuana conviction in their past. Based on the Court's ruling, things would have turned out differently if any of the plaintiffs had a criminal record.

The Starbucks case is a wake up call for every employer. As a matter of risk management, every employer ought to have expert labor counsel review the company's job application for legal compliance with all state laws in which the company is doing business, as other states also restrict (and even prohibit) inquiries on criminal convictions. It is also a lesson in the old adage of not being "penny wise and pound foolish." The Court cautioned that the application must be tailored to relevant state law, and that printing costs will not be an adequate justification for creating a confusing document.

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