

## **LEGAL ISSUES FOR JOB SEEKERS**

September 20, 2010

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### **❖ What are my rights regarding background checks that a potential employer wants to run on me?**

Potential employers have the right to ask you to consent to a background check before hiring you. Many employers will make a job offer contingent upon you successfully passing a background check. If an employer utilizes the services of a separate entity to run its employee background checks, then the employer and that entity must comply with the federal Fair Credit Reporting Act. Pursuant to the Fair Credit Reporting Act, an employer must provide you with a written consent form that you must sign before they can obtain a background check. The consent form should state what the background check will include (education verification, criminal records, credit reports, driving records, etc.). The consent form must be its own separate document used solely for the purpose of obtaining an employee's written consent to perform a background check. In other words, the consent form cannot be buried in the middle of another larger document that you may sign without realizing you have agreed to a background check.

Before an employer takes any adverse action against you (such as withdrawing their job offer) because of any information discovered through the background check, it must provide you with (1) a copy of the report from the entity that ran the background check and (2) a copy of your rights under the Fair Credit Reporting Act. The purpose of providing you with these items is to give you an opportunity to explain the information discovered in the background check before a final decision is made regarding your employment. You can find out more about the Fair Credit Reporting Act from the Federal Trade Commission at their website at [www.ftc.gov](http://www.ftc.gov).

### **❖ While I was at my last job, I had a garnishment attached to my wages because of some outstanding debts. Can a new employer terminate me after they find out that my wages might be garnished?**

The federal Consumer Credit Protection Act ("CCPA") prohibits an employer from terminating an employee whose earnings are subject to garnishment from one debt. However, the CCPA does not prevent an employer from discharging an employee whose earnings are separately garnished for two or more debts. The CCPA also sets limits as to the maximum amount of monies that may be garnished in any workweek or pay period regardless of the number of garnishment orders the employer may receive for you. You can learn more about the CCPA at the United States Department of Labor's website at [www.dol.gov/compliance/guide/garnish.htm](http://www.dol.gov/compliance/guide/garnish.htm).

### **❖ Do employers check job applicants' social networking website pages like Facebook and MySpace?**

It is becoming more common for employers to check social networking website pages of their employees or applicants. Just last year, in *Nguyen v. Starbucks Coffee Corp.*, Starbucks successfully defended itself against an employee's lawsuit for race harassment and religious discrimination based in large part on the employee's MySpace website page. The employee had told her co-workers about her MySpace page. While Starbucks was in the process of investigating the employee's allegations that she had been harassed by co-workers, one of the employee's co-workers showed Starbucks management her MySpace page which contained comments about her

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use of illegal drugs and her thoughts of going berserk and shooting everyone. Based on the comments, Starbucks terminated her for threatening violence to the company and its employees which the court found to be legitimate, non-discriminatory reasons to justify her termination.

Courts allow employers to obtain information from employee social networking websites where the employer can show that information is relevant in a lawsuit the employee has brought. Last year in *Ledbetter v. Wal-Mart Stores, Inc.*, a court allowed Wal-Mart to subpoena the Facebook, MySpace and Meetup social networking websites of two electrical workers who sued Wal-Mart to recover damages for injuries they sustained while performing work at a Wal-Mart store. The employees claimed that they had suffered ongoing physical and psychological injuries. The court upheld Wal-Mart's subpoenas that sought information regarding the employees' health and mental wellbeing because the employees had themselves raised those issues in their lawsuit.

As a rule of thumb, if there is personal information or after-work activities that you do not want an employer to know about, you should probably not write about it or post pictures of it on websites like Facebook and MySpace.

❖ **I was just hired by an employer who provided me with a company-issued laptop computer and BlackBerry. Do I have any right to privacy regarding any personal e-mails or documents on the laptop? Do I have any right to privacy in any text messages from a company-issued BlackBerry or similar device?**

Employers who provide their employees with computers, BlackBerrys, cell phones, and other electronic devices generally have policies that inform their employees that such devices are to be used for company business and the company has the right to monitor and inspect such devices. Courts have typically found that such policies eliminate an employee's expectation of privacy in any e-mails or other messages sent from or documents stored on company-provided electronic devices.

There are, however, some court decisions that uphold an employee's right to privacy in electronic communications from employer provided devices. For example, this year the New Jersey Supreme Court held in *Stengart v. Loving Care Agency, Inc.*, that e-mails exchanged between an employee and her attorney on the employer's company-issued laptop computer through the employee's personal, web-based e-mail account were protected by the attorney-client privilege. The New Jersey Supreme Court upheld the privilege because the employee took reasonable steps to keep her e-mails to her attorney confidential by using her personal, web-based e-mail account (rather than her employer's e-mail system) that was protected by a password she never shared with her employer. The United States Supreme Court recently ruled on the issue of whether public sector employees have any right to privacy in personal text messages sent from employer-issued texting devices in *City of Ontario v. Jeff Quon*.

Even if an employee can argue that certain communications may be private, the simplest way to avoid problems with employers reviewing your private documents, e-mails, and text messages is to not use company-issued electronic devices to create, send, or store them.

❖ **Everyone pads their résumés a little bit. Can an employer hold it against me later if it discovers I lied on my résumé?**

Lying on your résumé is never a good idea. Employers can run background checks on applicants and current employees that can reveal that you have lied on your résumé and give them a legitimate reason to either not hire or fire you. Furthermore, lying on your résumé can harm you later if you have to sue your employer because of a legal concept known as the "after-acquired evidence rule." "After-acquired evidence" is evidence of employee misconduct that an employer discovers after it has already disciplined or terminated the employee on different grounds. For example, let's say an employer terminates an employee for violating its rule about making personal phone calls during business hours. If the employer later discovers that the employee lied on his or her résumé, the fraudulent résumé would constitute "after-acquired evidence" and be a separate, independent reason for the employer to have terminated the employee. Now let's say that an employee who is Hispanic later sues the employer because he or she claims the employer only enforces the personal phone call policy against Hispanic

employees. The employer can use the after-acquired evidence to (1) prevent the employee from seeking reinstatement to his or her former job and (2) limit the monetary damages the employee may be entitled to recover by limiting the employee's award for lost wages from the date of the termination to the date the employer discovered the employee lied on his or her résumé.

❖ **Is there any information I should leave off a résumé?**

You should not include personal information about your interests or hobbies that might be controversial or used against you. For example, if you list on your résumé that you like target shooting, some employers might like that, but others could see you as a potential threat in the workplace. Even innocuous interests like "spending time with my kids," could give a potential employer the impression that you will put your family ahead of your job.

❖ **Are there any questions that a potential employer should not ask me during a job interview?**

In general, employers should not ask you questions about protected characteristics such as race, age, religion, or national origin during an interview. Nor should an employer ask you about whether you have children, plan to have children, or what your child care arrangements are. Such questions could be evidence that the employer may be considering these protected characteristics when deciding whether or not to hire you in violation of federal employment discrimination laws like Title VII of the Civil Rights Act of 1964 ("Title VII"), the Age Discrimination in Employment Act ("ADEA"), and state laws like the Florida Civil Rights Act. If you feel an employer did not hire you because of a protected characteristic, you can contact your local Equal Employment Opportunity Office ("EEOC") and/or the Florida Commission on Human Relations ("FCHR") to file a discrimination charge within the required time period.

The EEOC is responsible for investigating complaints of discrimination and retaliation pursuant to Title VII, ADEA, and the ADA. Charges of discrimination pursuant to these statutes must be filed with the EEOC within 300 days from the date you were first discriminated or retaliated against. The FCHR is responsible for investigating complaints of discrimination and retaliation pursuant to the Florida Civil Rights Act. Charges of discrimination pursuant to the Florida Civil Rights Act must be filed with the FCHR within 365 days from the date you were first discriminated or retaliated against. For more information on these agencies, you can visit their websites at [www.eeoc.gov](http://www.eeoc.gov) and [fchr.state.fl.us](http://fchr.state.fl.us).

Nor should an employer ask you about whether you have filed workers' compensation claims with past employers. Such questioning could be evidence that an employer is deciding not to hire you due to your past workers' compensation claims in violation of Florida Statute 440.205 which prevents employers from retaliating against employees who file claims.

While there is no federal law that absolutely prevents an employer from asking applicants about arrest and conviction records, the EEOC has stated that employers cannot use such records as an absolute bar to employment since it might harm minority groups that history has shown may have a greater chance of being arrested. Because an arrest is not evidence that a person has actually committed a crime, the EEOC notes that an employer should allow an employee the opportunity to explain why he or she was arrested. The EEOC also states that regardless of whether an employer is reviewing an applicant's arrest or conviction record, it should consider (1) the nature of the job, (2) the nature and seriousness of the offense, and (3) the amount of time that has passed since the arrest or conviction.

The EEOC further states that employers who run background checks on applicants that include criminal background checks should make sure they comply with the requirements of the federal Fair Credit Reporting Act described above. In fact, the EEOC issued a legal advisory letter warning about the potential discriminatory use of credit checks (also covered by the Fair Credit Reporting Act) by employers. The letter, written in response to an employee who wrote to the EEOC about his employer's use of credit checks, notes that Title VII prohibits employment practices that disproportionately screen out racial minorities and women. The letter specifically states "if an employer's use of credit information disproportionately excludes African-Americans and Hispanic

candidates, the practice would be unlawful unless the employer could establish that the practice is needed for it to operate safely and efficiently.”

In contrast to federal law, Florida law does have some restrictions on an employer’s use of criminal records obtained during a background check. Specifically, Sections 943.0585 and 943.059 of the Florida Statutes prevent employers from accessing criminal records that have been expunged or sealed unless you are applying for a job with: (1) a criminal justice agency, (2) the Florida Department of Education or any public, private, or parochial school, (3) a licensed child care facility, (4) the Florida Department of Children and Family Services, (5) the Florida Agency for Health Care Administration, (6) the Florida Agency for Persons with Disabilities, (7) the Florida Department of Juvenile Justice, or (8) a seaport.

❖ **What if an employer tells me that I have to sign an agreement not to compete with it following my termination? Can an employer require me to sign such an agreement before it hires me?**

Section 542.335, Florida Statutes governs the enforceability of an employee’s agreement not to compete with a former employer or solicit its customers. Such agreements are known as restrictive covenants or covenants-not-to-compete. A court will enforce a covenant-not-to-compete against an employee if: (1) it is in writing and signed by the employee, (2) it is reasonable in time, geographical area, and line of business, (3) it protects a legitimate business interests such as a trade secret, confidential business information, or substantial relationships with prospective or existing customers.

Covenants-not-to-compete time restrictions that are less than six months are presumed to be reasonable and enforceable while a restriction of over two years will be presumed to be unenforceable. The enforceability of a geographical restriction will depend upon where the employer does business. If an employer only does business in a single city or county, it is unlikely that a court will enforce a geographical restriction for an area where the employer never did business. Also, a court will not enforce a covenant-not-to-compete that restricts an employee from working in a different line of business from the former employer. Covenants-not-to-compete that protect legitimate business interests are enforceable regardless of whether an employee is involuntarily terminated or resigns. Unfortunately, an employee’s economic hardship is not a reason for a court to decide that a covenant-not-to-compete is unenforceable.

Furthermore, employees should be aware that even if a court finds that a covenant-not-to-compete is too geographically broad or its time restriction is too long, a court will not simply refuse to enforce it. Rather, a court will modify the restrictions to the point where they are enforceable to protect the employer’s legitimate business interests. Therefore, before you agree to sign a covenant-not-to-compete, you and your potential employer should try to agree upon what line of business the covenant applies to and what geographical area the employer is seeking to restrict you from working.

❖ **Can my previous employer say negative things about me to a prospective employer or provide information regarding my disciplinary history?**

Section 768.095, Florida Statutes provides an employer with qualified immunity from civil liability for disclosing information about a former or current employee, unless the employer disclosed information that is knowingly false or information that violates any rights protected by the Florida Civil Rights Act. Thus, the statute gives employers significant leeway in what they can say about former and current employees. However, many employers have policies stating that they will provide only very limited information about former employees, which typically includes the dates of employment and the last position or job title held.