Louisiana Employment Law Letter

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LEGISLATION

2003 legislative developments easy to swallow for employers

The 2003 regular legislative session ended on June 23. Overall, the Legislature's menu for employers this session ended up being pretty tasty, with the restoration of the noncompetition law as the main course.

Many of the bills that left a sour taste in our mouth failed to pass in the Legislature, such as the bills seeking to expand the universe of protected classes under employment discrimination law by adding sexual orientation or gender identity to the list and those attempting to raise the minimum wage. The bill seeking to once again shorten the deadline for issuing final paychecks to discharged employees also failed to pass. We're also pleased to report that the bill that would have subjected employers to punitive damages for wage discrimination on the basis of sex, race, or national origin failed to pass. So let's skip the appetizers and move right on to the main course.

Noncompetition agreements restored

House Bill (HB) 1770, which legislatively overrules the Louisiana Supreme Court's 2001 *SWAT 24 v. Bond* decision, was signed into law by Governor Mike Foster on June 18. The revisions to the noncompetition law will be effective August 15. As you may recall from our previous issues, the supreme court in *Swat 24* concluded that any provision of a noncompetition agreement that prevents an employee from going to work for a competitor as an employee is invalid. HB 1770, enrolled as Act No. 428, clarifies the noncompetition law by specifically providing that working as an employee for a competing business may be prohibited by an otherwise valid noncompetition agreement. So the Legislature has reaffirmed that keeping your employees from going to work for your competitors can be the subject of an enforceable noncompetition agreement, which should ease your heartburn over *Swat 24*.

HB 1770 (Smith).

No more getting stuck with the bill?

HB 1642 was signed into law on June 27. Effective immediately, the bill revises current law, which generally allows an employer to seek reimbursement from an employee for the cost of

preemployment medical or drug tests if the employee quits before the expiration of 90 working days or never reports to work. To seek reimbursement, current law requires that the employee be employed full-time, be paid $1 more than the federal minimum wage, and sign a written authorization allowing the costs to be withheld.

The new law simply adds a disclosure requirement that the written authorization fully explain the terms and conditions under which the right of reimbursement is established. The change in the law is that the contract must be more than a simple authorization allowing employers to withhold the costs of a preemployment medical exam or drug test under approved circumstances.

To satisfy the new requirement, a plain-language approach is advisable. Consider using a single-page document that clearly explains that the company will pay for any preemployment medical examination and/or drug test but that if the employee fails to report to work or quits within 90 working days for any reason other than a substantial change in employment by the employer, the company may withhold the costs of those tests from his last paycheck. You may even consider including the cost of the tests, if known, in the authorization. Also, the signed authorization should explain the other circumstances that must be present for the reimbursement to apply — namely, that the employment or offer of employment is full-time and that the pay is at least $1 more than the minimum wage.

HB 1642 (Guillory).

Checking for bad eggs

Both bills affecting employers' rights to conduct background checks for "bad eggs" will become law on August 15. While current Louisiana law doesn't prohibit an employer from obtaining an applicant's criminal records and even requires certain employers to conduct inquiries in certain situations, Senate Bill (SB) 801 revises the law to expressly recognize an employer's right to do so provided the applicant signs a form authorizing the employer to obtain those records (which in most cases was already required by the Fair Credit Reporting Act (FCRA)).

Under the new law, an employer may obtain conviction records that are maintained by the Louisiana Bureau of Criminal Identification and Information. The law provides that the bureau will supply the requisite authorization form for the applicant's signature. The available conviction records will contain only records kept electronically by the bureau. Expunged records will not be produced, but the available records do include guilty findings as well as pleas of guilty or *nolo contendere* (literally, "I won't contest it " — a plea whereby the accused doesn't admit or deny the charges, though a fine or sentence may still be imposed). The bureau currently uses an authorization form for certain agencies and organizations that are already allowed to request such information, so it's likely that it will use the same or a similar form for employers to obtain such information.

It's important to note that this new law doesn't purport to be the exclusive method by which an employer can obtain criminal background information about applicants or employees, nor does it in any way limit the applicability of the federal FCRA. Remember that when an employer seeks a "consumer report" (which includes criminal background information) from a third party that constitutes a consumer reporting agency under the FCRA, the employer is required to obtain the applicant's or employee's written authorization in a form separate from an employment application. Additionally, if the employer makes an adverse employment decision regarding the applicant or employee based on the contents of the consumer report, it must comply with other

requirements of the FCRA, including notification to the applicant or employee of the basis for the decision and his rights under the Act.

Although the Fair Trade Commission, which interprets the provisions of the FCRA, has issued opinion letters finding that other state and federal agencies providing criminal background information aren't consumer reporting agencies within the meaning of the FCRA, it hasn't yet been decided whether the bureau constitutes such an agency. Thus, in deciding whether to comply with the FCRA when obtaining any information from the bureau or making any employment decisions based on that information, you should consult your legal counsel for an opinion regarding your obligations.

HB 429 exonerates employers from civil liability arising from the disclosure or dissemination of background information obtained from a lawful background check. To benefit from the protection, the employer must have received written consent from the employee or prospective employee to conduct the background check or it must have been requested to perform the background check by the owner of the facility where it performs work. The limitation of liability extends to all employee claims based on failure to hire, wrongful termination, and invasion of privacy arising from the disclosure or dissemination of such information. Additionally, the employer will be protected from claims of negligent hiring or retention.

SB 801 (Marionneaux); HB 429 (Pitre).

The dish on workers' compensation

HB 1097 was signed into law by Governor Foster on June 27 and will be effective August 15. The bill provides that an employer or an employer's workers' comp insurer requesting records of a workers' comp claimant's wages from the Department of Labor must have written authorization or consent from the employee to obtain such records. The consent form signed by the employee must certify that the requesting party is entitled to the information and specifically inform him that his employment history and wage information may be released and used by the employer in connection with his workers' comp claim. The law provides that the party requesting the earnings records must agree to keep them confidential and use them only in connection with the workers' comp claim. The requesting party must pay all costs associated with obtaining the records.

HB 1097 (Pitre).

'Kicking it up a notch' for law enforcement officers

HB 1956 will become law on August 15. The new law requires applicants for any law enforcement position in the state on or after August 15 to provide the law enforcement agency with a DNA sample and fingerprints before commencing their duties. The DNA samples will be sent to a criminal laboratory for testing. The law also provides that law enforcement employees hired before August 15 may voluntarily provide a DNA sample to their employers but aren't required to do so. Finally, HB 1956 requires law enforcement agencies to conduct a criminal background check on any law enforcement officer hired after August 15.

Before the actual DNA testing occurs, the law enforcement officer must be notified in writing, and she must provide written consent. Without the officer's consent, the sample may be used, tested, or released only upon a finding of probable cause by a judge in a criminal case that the law enforcement officer has committed a crime or upon the officer's death to prove her identification.

HB 1956 (Welch).

Minor cooks in the kitchen?

HB 1643 became law on June 27. The bill changes the requirements for employing minors (younger than 18 years of age). For all employment of minors, except in agriculture or domestic service in private homes, the law requires employers to maintain employment certificates for each minor employed. The certificate must be accessible on the job site or in the immediate area of the work location at all times. As of January 1, 2004, the law requires the school superintendent to complete and electronically submit the Employment Certificate Interactive Form for each requesting minor on the Department of Labor's website, where the information will be stored in a database. The original employment certificate will be signed by the minor and delivered by the minor to the employer.

HB 1643 also changes the hours certain minors may work. Minors who haven't graduated from high school won't be allowed to work after 10:00 p.m. on a school night or after midnight on any day before a day school isn't in session (such as a holiday or weekend). A minor younger than age 16 who hasn't graduated from high school won't be allowed to work after 7:00 p.m. on a school night or after 9:00 p.m. on any day before a day school isn't in session. Also, a minor younger than age 16 who hasn't graduated from high school won't be allowed to work more than 40 hours in any one week or before 7:00 a.m.

HB 1643 (Guillory).