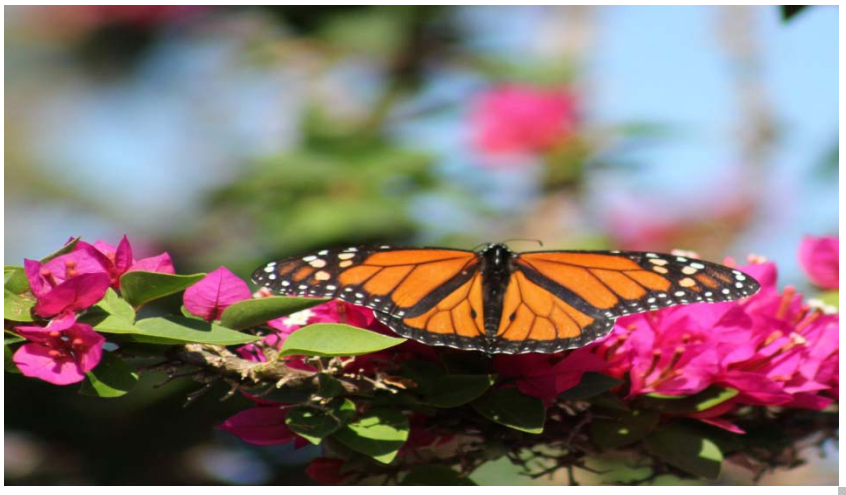
San Diego Chapter American Payroll Association Newsletter ~ Summer 2012



Contents:

The federal EEOC contends that using criminal records to screen out employees may be unfair

The EEOC looks askance at criminal background checks for job applicants. What seems like a commonsense business protocol is seen by our federal government as a proxy for filtering out minority applicants. In April 2012, the EEOC updated its policy position on the matter, and employers should take steps to ensure that hiring practices comply.

Why the EEOC Cares

The federal Equal Employment Opportunity Commission (EEOC) contends that using criminal records to screen out employees may be unfair because it disproportionately impacts minorities.

In its new Enforcement Guidelines, the EEOC writes: "African Americans and Hispanics are incarcerated at rates disproportionate to their numbers in the general population. Based on national incarceration data, the U.S. Department of Justice estimated in 2001 that 1 out of every 17 White men (5.9% of the White men in the U.S.) is expected to go to prison at some point during his lifetime … This rate climbs to 1 in 6 (or 17.2%) for Hispanic men … For African American men, the rate of expected incarceration rises to 1 in 3 (or 32.2%)." The EEOC takes the position that given these statistics, employers should have job-related reasons for screening out convicted criminals.

Is the Bad Guy Not So Bad?

The EEOC contends that rather than applying a blanket rule of exclusion for convicted criminals, employers should consider the circumstances and make individual determinations. The EEOC encourages employers to take the following three factors into account: (1) The nature and gravity of the offense or conduct. The more serious the crime and the greater the harm caused, the more appropriate it is to exclude the applicant. (2) The time that has passed since the offense, conduct and/or completion of the sentence. Crimes committed years ago, perhaps during the person's youth, are less relevant than recent convictions. (3) The nature of the job held or sought. The convicted felon may be ok digging ditches at an industrial site, but hiring as a kindergarten teacher is out of the question.

EEOC Cont:

Time to Explain

If the employer is inclined to exclude the applicant on account of the criminal history, then the EEOC contends that the employer should provide an opportunity for the individual to "demonstrate that the exclusion does not properly apply to him." The employer should "consider whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity." According to the EEOC, the individual's rebuttal evidence may include information that he was not correctly identified in the criminal record, or that the record is otherwise inaccurate.

Arrests May Not Count

According to the EEOC, arrests should not count against an applicant. An arrest is not the same as a conviction, and people are falsely arrested all the time. Especially minorities, the EEOC points out. Accordingly, the EEOC takes the position that employers should not use arrest records alone to screen out applicants. However, the circumstances of an arrest may be taken into consideration. The EEOC writes: "Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question. The conduct, not the arrest, is relevant for employment purposes."

Best Practices

Check for Convictions. Criminal background checks are permissible. Find a good service provider; the cost is affordable for most businesses. The EEOC is careful to note that it has not banned the practice. Consider whether it would be prudent to screen your applicants given the nature of your business and the position in question. Certain positions involving access to cash or financial data, credit information, or interaction with the public (particularly in homes, or with vulnerable persons such as children) may predominantly warrant the check. No Blanket Exclusions. Unless mandated by law (e.g. a daycare center), do not automatically exclude applicants with convictions. Follow the EEOC guidelines by considering the circumstances referenced above. Be sure to document your justification for the decision. Train Staff. Train managers, recruiters, and others who hire regarding these best practices so that they do not inadvertently turn away candidates without considering the circumstances.

Additional Resources

To review the EEOC's new publication, visit the EEOC's website at: www.EEOC.gov and then enter "EEOC and Arrest and Conviction Records" into the website search box.

Other relevant individualized evidence includes, for example:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; Whether the individual is bonded under a federal, state, or local bonding program. If the individual does not respond to the employer's attempt to gather additional information about his background, the employer may make its employment decision without the information

Contributed by: Barker, Olmsted and Barnier, APLC
via Legal Update

Medicare 2013 ~ Additional for High Earners

IRS Offers Initial Guidance on Additional Medicare Tax on High Earners, Effective in 2013 - American Payroll Association Compliance Update

Under the Patient Protection and Affordable Care Act (Pub. L. No. 111-148, as amended), the Medicare tax rate will increase 0.9% (for employee withholding only) – from 1.45% to 2.35% – on wages paid over $200,000, effective for taxable years after December 31, 2012. The IRS has posted questions and answers on its website to assist employers and payroll service providers in adapting systems and processes that may be impacted. In addition, in conference calls with the APA and other payroll industry stakeholders, the IRS has discussed related Form 94x series reporting issues.

• An individual is liable for the additional Medicare tax if the individual's wages, other compensation, or self-employment income (together with that of his or her spouse if filing a joint return) exceed the threshold amount for the individual's filing status.

• All wages that are currently subject to Medicare tax are subject to the additional Medicare tax if they are paid in excess of the applicable threshold for an individual's filing status.

• The statute requires an employer to withhold additional Medicare tax on wages or compensation it pays to an employee in excess of $200,000 in a calendar year, regardless of whether the employee will actually reach the applicable threshold. Any discrepancies between the amount withheld and the amount of the employee's actual liability for the additional Medicare tax will be reconciled on the individual's income tax return (Form 1040).

• There is no employer match for the additional Medicare tax (as there is with the regular Medicare tax). Therefore, employers will continue to pay an amount equal to 1.45% of the employee's wages in excess of $200,000.

• An employee who anticipates liability for the additional Medicare tax may request additional income tax withholding on Form W-4.

• An employer is required to begin withholding additional Medicare tax in the pay period in which it pays wages in excess of $200,000 to an employee. It may not withhold the additional Medicare tax in anticipation of an employee's wages exceeding the threshold. If a wage payment takes an employee from under $200,000 in wages paid to over $200,000 in wages paid, the employer must not withhold the additional Medicare tax on the wages paid up to $200,000.

• Additional Medicare tax withholding applies only to wages paid to employees that are in excess of $200,000 in a calendar year.

• Wages paid by an employer and third-party sick payer need to be aggregated to determine whether the $200,000 withholding threshold has been met. The same rules that currently assign responsibility for sick pay reporting and payment of Medicare tax apply also to additional Medicare tax.

• An employer calculates wages for purposes of withholding additional Medicare tax from nonqualified deferred compensation in the same way that it calculates wages for withholding the existing Medicare tax from nonqualified deferred compensation.

• When an employee is performing services for multiple subsidiaries of a company, and each subsidiary is an employer of the employee with regard to the services the employee performs for that subsidiary, the wages paid by the payer on behalf of each subsidiary should be combined only if the payer is a common paymaster.

• An agent with approved Forms 2678, *Employer Appointment of Agent*, acting as an agent for two employers should not combine the wages paid on behalf of the separate employers in determining whether to withhold additional Medicare tax.

Form 941 reporting

The IRS advises that the 2013 94x series forms will have a new line added for reporting the additional Medicare tax on wages and tips paid to an employee in excess of $200,000 (APA anticipates that it will be Line 5d). The IRS has not confirmed that Medicare wages in excess of $200,000 will be reported on the new line. Line 5c, *Taxable Medicare wages & tips*, will be unchanged and the employer will report the first $200,000 in Medicare wages plus the employee and employer tax on those wages.

Form W-2 unchanged

The IRS advises that it will not add additional boxes to Form W-2 for the additional Medicare tax on wages in excess of $200,000. Employers will report aggregate Medicare wages and tips in Box 5 and the aggregate Medicare tax in Box 6.

Wages insufficient for additional Medicare tax withholding

The IRS advises that when an employee's cash wages are insufficient to allow withholding of the additional Medicare tax on wages in excess of $200,000, then for purposes of reporting on 94x series forms the non-withholding will be handled like standard Medicare tax non-withholding. The taxes will be reported on Form 941 on the new line and the line for total social security and Medicare taxes (currently Line 5d), with an appropriate adjustment for the Medicare tax not withheld on Form 941, Line 9. However, the additional Medicare tax on the wages in excess of $200,000 that cannot be withheld will not be reported on Form W-2 in Box 6 or in Box 12, with Codes B or N. The IRS will process the additional Medicare tax through the employee's income tax return.

Lunch Police Recalled
CA Supremes Finally Decide
Brinker Case

By Christopher W. Olmsted

Weary patrol officers of the Lunch Police (aka California employers) have been called off the beat. After an inexplicably long wait, the California Supreme Court finally issued a unanimous ruling in a landmark case titled *Brinker v. Superior Court*. The decision favors employers because it relieves them of the duty to force employees to break. But employers who don't read beyond newspaper headlines risk getting sued for failing to learn the nuances of the Court's ruling.

Much is at stake. The cost of violating California's meal and rest period rules is a penalty, on each occasion, equal to one hour's extra pay to the affected employee. In a class action involving a large group of a company's hourly employees over a three to four year time span, the compensation claim can soar into the millions.

The following issue is at the heart of the *Brinker* case: under California law, is it enough for an employer to make meal and rest periods available to employees to take or not take as they see fit, or does the employer have an affirmative duty to force employees to actually take their breaks?

Rest Period Basics

Let's start with rest periods as required under California law. Basically, California employees working a standard 8 hour shift are entitled to two 10 minute on the clock rest periods.

In *Brinker*, the California Supreme Court reviewed the state's wage orders (wage regulations) and confirmed the following rules:

- Shift under 3 ½ hours: No rest period required.
- 3 ½ hours to 6 hour shift: One 10 minute rest period.
- 6 hours to 10 hour shift: Two 10 minute rest periods.
- 10 hours to 14 hour shift: Three 10 minute rest periods.

Rest breaks are on the clock and employees should be relieved of all duties during the 10 minute period.

Rest Period Timing

The plaintiff employees in the *Brinker* case quibbled with the timing of breaks during the shift. They argued that it was illegal to put the first break after the meal period.

Does the employer have to provide a 10 minute rest period *before* any meal period? No.

The Court confirmed the general rule, but noted it is flexible: "In the context of an eight hour shift, as a general matter, one rest break should fall on either side of the meal break. Shorter or longer shifts and other factors that render such scheduling impracticable may alter this general rule."

The Court observed that the wage orders (regulations) do not speak to the sequence of meal and rest breaks. "The only constraint is that rest breaks must fall in the middle of work periods 'insofar as practicable,'" wrote the Supreme Court.

For example, assume an employee is assigned a six hour shift. The employee is entitled to take one meal period and one rest period. Assume a break is taken at two hours and another at four hours into the shift.

The Supreme Court observed that there is nothing in the law which would compel the conclusion that a rest break at the two-hour mark and a meal break at the four-hour mark of such a shift is lawful, while the reverse, a meal break at the two-hour mark and a rest break at the four hour mark, is per se illegal.

"Employers are thus subject to a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible." The Court declined to offer any opinion on what considerations might be legally sufficient to justify such a departure.

The California Supreme Court has allowed some flexibility with respect to the timing of rest and meal periods. The safest thing to do is keep rest periods close to the middle of each four hour period. Deviations from the general rule for eight hour shifts should be carefully considered and made the subject of legal counseling. Employers need help determining what might be "legally sufficient" to justify a departure from the general rule.

Meal Period Basics

Moving on to meal periods, the Supreme Court confirmed the general understanding regarding meal period entitlements. The rules are as follows:

- Shift under 5 hours: No meal period required.
- Shift over 5 hours, up to 6 hours: Afford a meal period, or consent to a mutually agreed-upon waiver.
- Over 6 hours: Afford a meal period (unless special circumstances permit an on duty meal period agreement).
- Over 10 hours, up to 12 hours: Afford a second meal period, or consent to a mutually agreed-upon waiver (unless first meal period already waived).
- Over 12 hours: Afford a second meal period.

The meal period requirement is satisfied if the employee (1) has at least 30 minutes uninterrupted; (2) is free to leave the premises, and (3) is relieved of all duty for the entire period. If these requirements are met, the meal period is also off the clock and unpaid.

"Providing" Meal Breaks Is Enough

The Supreme Court next considered this long-winded question: Does California's Labor Code and wage orders impose on employers a duty to not only provide uninterrupted meal periods, but to further force employees to take their meal periods and to police their compliance regardless of the reason proffered by the employee for not wanting a meal period and even against the employee's will?

The answer is: No. California law requires employers to "provide" meal periods, not force them to happen. The employer satisfies this obligation if it (1) relieves its employees of all duty; (2) relinquishes control over their activities; and (3) permits them a reasonable opportunity to take an uninterrupted 30-minute break; and (4) does not impede or discourage them from doing so.

The law does not impose a duty on employers to *prevent* their employees from working during meal periods. Once an employer relieves the employee of all duty, the period becomes an off duty meal period, regardless of whether or not work continues during the break.

Meal Period Penalties ("Premium Pay")

Does the employer owe a penalty ("premium pay") if the employer provides a meal period, but the employee continues to work during a meal period? No.

"If work does continue, the employer will not be liable for premium pay. At most, it will be liable for straight pay, and then only when it 'knew or reasonably should have known that the worker was working through the authorized period.'"

In other words, if an employee chooses to work through lunch, the employer (who is aware of this) should pay the employee his regular rate of pay, but does not owe the penalty. On the other hand, where the employee works through his lunch because the employer did not relieve him of all duties, the employer should pay the one hour penalty.

According to the Court, an employer is not liable for the penalty merely because it knows of employees working through the meal period. Otherwise employees could work the system. "Employees cannot manipulate the flexibility granted them by employers to use their breaks as they see fit to generate such liability."

"The employer is not obligated to police meal breaks and ensure no work is thereafter performed. Bona fide relief from duty and the relinquishing of control satisfies the employer's obligations, and work by a relieved employee during a meal break does not thereby place the employer in violation of its obligations and create liability for premium pay."

The Exception: Impeding or Discouraging Breaks

The Court reminded employers that giving lip service to meal periods can lead to liability. "An employer may not undermine a formal policy of providing meal breaks by pressuring employees to perform their duties in ways that omit breaks." The Court cited two earlier cases where the employer made it extremely difficult for employees to take breaks as a practical matter.

The court referenced a prior case called *Cicairos v. Summit Logistics, Inc.*, where the employer failed to provide meal periods. The case involved truck drivers who sued their employer, alleging that they were deprived of meal periods during their busy delivery schedules. Unlike *Brinker*, in that case, another California appellate court upheld class certification; that is, the employees won. It is notable that Summit Logistics management did not outright disallow meal periods. The court found that by implication, it discouraged meal periods, which was the same as not providing them. The *Cicairos* court considered the following evidence:

Not scheduled. The trucking company did not schedule meal periods for the drivers. The implication was that if it did not schedule meal periods, it did not freely provide them.
Not recorded. The truck drivers used a time-tracking computer system to record their daily activities. But the company did not program an activity code in the system for meal periods. The implication was that the company did not want the drivers to take meal periods.
Management Awareness. Supervisors knew that drivers were not taking duty free lunch periods. They didn't encourage drivers to take the time off.
Management pressure. Drivers testified that the company's management pressured drivers to make more than one trip daily, making it harder to stop for lunch.

Under those facts, the *Cicairos* court found that the company failed to establish that it "provided" the drivers with their required meal periods. The defendant in *Cicairos* knew that employees were driving while eating and did not take steps to address the situation. This, in combination with management policies, effectively deprived the drivers of their breaks.

This case, cited by the California Supreme Court in the *Brinker* case, should serve as an example of what *not* to do.

Meal Period Timing

The employees argued that Brinker violated meal period rules by failing to provide meal periods on a rolling five hour basis. That is, the employees argued that at no time must a five hour span pass without the employee taking a meal period at some point during that span. The employees objected to Brinker's practice of "early lunching," under which Brinker allegedly requires its hourly employees to take their meal periods soon after they arrive for their shifts, usually within the first hour, and then requires them to work in excess of five hours, and sometimes more than nine hours straight, without an additional meal period.

Normally, in a typical 8 hour shift, an employee is entitled to only one 30 minute break. If the plaintiff employees were correct, however, an employee taking a meal break early on in the 8 hour shift (say in the second hour) would be entitled to a second meal period towards the end of the shift.

The Supreme Court rejected this argument. An employer's obligation is to provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work. Beyond this, there are no meal timing requirements. Accordingly, an employee's first meal period may take place more than five hours before the second meal break.

What To Do Next

Employers may want to update their meal and rest period policies in light of the *Brinker* case. However, the potential for liability for the penalty remains, so employers should take the precaution of seeking legal advice before making changes.

Pay particular heed to the Court's reference to "impeding or discouraging breaks." Employers will need to maintain clear evidence that they have not interfered with an employee's choice to take a break. Employees will argue that it was impractical for them to take breaks based on their schedules, their workloads, and other factors. They will argue that the employer expressly or impliedly discouraged employees from taking breaks despite having a formal policy allowing for breaks.

Some employers may decide that it is safest to stick with their current policies of scheduling and forcing breaks. After all, this is the only sure way to avoid arguments over whether the employer "impeded" or "discouraged" employees from taking breaks.

Summertime!

I've always said, you can't do a potato wrong…mashed, fried, baked, it's always delicious. And the same is definitely true for sweet potatoes. I came across this tasty recipe for sweet potato burgers that I thought I'd share with all of you:

Sweet Potato Veggie Burgers
makes 7-8 large patties

2 cans cannellini white beans, drained
1 large sweet potato, baked/peeled/mashed (about 2 cups)
2 Tbsp tahini sauce (garlic, lemon juice and salt)
2 tsp maple or agave syrup
1 tsp lemon pepper seasoning or Cajun seasoning (or any favorite spice)
1/4 cup quinoa flour

Mix ingredients together and heat oil (safflower or olive) in pan. Fry to taste ~ about 5-7 minutes each side.

optional: additional seasoning (whatever you have on hand such as a few dashes cayenne, paprika or black pepper)

Top burgers with: avocado, Dijon style mustard, romaine lettuce or spinach leaves, onion and serve on an all-grain bun. YUM!!

Time to Refresh and Renew!

Summer Fruit Punch

Ingredients:

2 cups diced stone fruit (apricots, plums, peaches, nectarines)

2 cups apricot juice

2 cups sparkling wine

1 cup seltzer

Preparation:

Combine fruit, juice, wine and seltzer and serve over ice.

For a non-alcoholic alternative, substitute the sparkling wine for sparkling cider!

SDAPA Board Members:

- *President – Cheryl Sims
- * Vice President – Jean Soltmann
- * Secretary – Kathrine Williams
- * Treasurer – Christine O'Donnell
- * Program Director – Sonha Nguyen
- * Membership Director & Charity Chair Person – CeCe Bramlett
- * Chapter Coordinator - Denise Caballero
- * Government Liaison – Kaly McKenna
- * Education Coordinator – Debby Sargent
- * Webmaster – Tammy Britt
- * Advisor - Vickie Rivera
- * Advisor & Past President – Leah Messenger
- * Advisor & Past President – Don Suycott
- * Advisor & Past President – Suzanne Luciano
- * Auditor – Claire Abernethy

Featured SDAPA Member

Featured SDAPA Member

Donald Suycott

Don has been a member of the San Diego American Payroll Association since its inception in mid 1980s. Don has served as President and Chapter Coordinator and currently sits on the Board of Advisors. Don rarely misses a board meeting and continues to bring invaluable experience and knowledge to our APA Chapter. And if any of you see Don out and about and want to buy him a drink, his favorite is the Rusty Nail! Thank you, Don, for all your contributions.

~ To both Joshua Smitley and Sarah Smitley
on winning the San Diego American Payroll Association's
2012 education scholarship award ~

SDAPA SPONSORS:

MetLife

Global Cash Card™

Ultimate SOFTWARE

People first.