

# What to Expect in 2014

## Legal Changes Affecting Employers

By Charles B. Baldwin and Amanda C. Couture

**E**mployers once again will face changes in federal and state regulatory policies and agendas in 2014. Three of the more significant changes we anticipate are: (1) aggressive enforcement against social media policies by the National Labor Relations Board (NLRB); (2) limitation on the use of employees' arrest and conviction records by the U.S. Equal Employment Opportunity Commission (EEOC) and the Indiana Legislature; and (3) alteration of benefits in light of the IRS' post-DOMA (Defense of Marriage Act) guidance.

### Limits on social media policies

Social media polices have become a major focus for the NLRB, which is critical of policies that limit employees' ability to engage in protected concerted activity. It is important for employers to note that the NLRB is especially concerned with how social media policies are applied to non-union employees.

The NLRB's general counsel has issued an almost unprecedented three special memoranda on social media cases in the past two years. His January 2012 memorandum describes 14 cases involving social media issues, seven of which deal with policies per se, rather than personnel actions – five of the seven policies were found unlawful. The unlawful policies included prohibitions on disparagement; inappropriate, unprofessional or disrespectful comments; comments negatively impacting the employer's reputation or interfering with its mission; disclosure of confidential, sensitive, non-public company information; and use of the company name or service marks.

The NLRB has devoted a special page on its web site ([www.nlr.gov/concerted-activity](http://www.nlr.gov/concerted-activity)) to Protected Concerted Activity cases, where you can learn more about adjustments that may need to be made to your social media policy.

### Background checks: Proceed with caution

In 2014, we also anticipate that the EEOC will be taking enforcement action against employers that use far-reaching background checks.

The EEOC issued new guidance on the consideration of arrest and conviction records in employment decisions in 2012. The most important (and controversial) aspect of the guidance was the EEOC's position that, for a background check based on convictions to be job related and consistent with a business necessity, it should include a targeted screen. This screen would take into account the nature of the crime, the time elapsed since the crime and the nature of the job. The EEOC suggests individuals eliminated by the screen should be given an individualized assessment (i.e., employers should contact the applicant to get his or her side of the story).

In June 2013, the EEOC filed two high-profile lawsuits against large employers, claiming their use of criminal background checks disproportionately screened out black job applicants. These lawsuits set the stage for court decisions that may ultimately validate or invalidate the EEOC's guidance on

employers' use of arrest and conviction records. In the meantime, employers may want to use targeted screening, rather than a broad policy that excludes all applicants with criminal history.

Indiana's new expungement law presents the possibility that Indiana citizens can have certain misdemeanor and felony conviction records sealed and/or expunged. The statute makes it unlawful for employers to refuse to employ a person on the basis of a conviction that has been expunged. It also provides that "in any application for employment, a license, or other right or privilege, a person may be questioned about a previous criminal record only in terms that exclude expunged

convictions or arrests, such as: "Have you ever been arrested for or convicted of a crime that has not been expunged by a court?"

The expungement law, also known as the "second chance" law, raises quite a few questions about how it will be applied. It is unclear how the Indiana law will interact with federal laws; for example, laws that prohibit felons from possession of firearms or that require background checks for child care workers. As we watch the process play out in 2014, our recommendation is that employers comply with the Indiana law to the extent they can do so without violating their other legal obligations.

### Changes in same-sex partner benefits

Finally, we anticipate new compliance issues for employers related to providing benefits for the same-sex partners of their employees. In June 2013, the Supreme Court ruled that DOMA's definition of marriage for the purpose of federal benefits – one man and one woman – was unconstitutional. Under DOMA, health insurance provided to an employee's same-sex spouse was treated as income and subject to federal taxation.

In August 2013, the IRS issued a revenue ruling finding that is no longer the case, given the Supreme Court's ruling. Note, though, that to be treated as married for federal tax purposes, the employee must be married in a state that recognizes the marriage, regardless of where the employee lives. Civil unions and domestic partnerships do not change employees' tax status. In 2014, we expect to see additional post-DOMA changes implemented regarding taxes, FMLA and other same-sex benefits.



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