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**Human Resources and Administrative Investigations
Notification of Curriculum Use
April 2014***

The enclosed Human Resources and Administrative Investigations curriculum was developed by the Project on Addressing Prison Rape at American University, Washington College of Law as part of contract deliverables for the National PREA Resource Center (PRC), a cooperative agreement between the National Council on Crime and Delinquency and the Bureau of Justice Assistance (BJA). The Prison Rape Elimination Act (PREA) standards served as the basis for the curriculum's content and development, with the goal of the Human Resources and Administrative Investigations curriculum to satisfy specific PREA standards requirements.

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Training Curriculum:
Human Resources and Administrative Investigations

**MODULE 8:
HUMAN RESOURCES AND
PRE-EMPLOYMENT PRACTICES**

**The Project on Addressing Prison Rape
January 2014**

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Objectives

- Describe PREA's impact on pre-employment and post-employment agency practices
- Identify proactive steps that agencies can take to comply with PREA requirements
- Identify proactive steps agencies can take to meet the PREA standards relating to human resources matters



Stages of Employment

- Pre-hire/promotion
- Prevention policies
- Misconduct investigations
- Termination/discipline



Pre-hire and Promotion

- Screening
 - Reference Checks
 - Background Checks (including criminal & sex offender registry)
- Promotion
 - Anti-discrimination law



Summary of PREA Requirements

- Agencies **must not hire** employees with backgrounds of sexual misconduct
- Agencies **must continue to monitor** current employees for incidents of sexual misconduct
- Agencies **must conduct background checks** before hiring new employees



PREA on Screening and Hiring

28 CFR § 115.17: Hiring and promotion decisions

(a) The agency **shall not hire** . . . anyone who may have contact with inmates, and shall not enlist the services of any contractor who may have contact with inmates, who

(1) **Has engaged in sexual abuse** in a prison, jail, lockup, community confinement facility, juvenile facility or other institution;

(2) **Has been convicted of engaging or attempting to engage in sexual activity** in the community facilitated by force, overt or implied threats of force, or coercion, or if the victim did not consent or was unable to consent or refuse;

(3) **Has been civilly or administratively adjudicated to have engaged in the activity** described in paragraph (a)(2) of this section.



PREA on Screening and Hiring

28 CFR § 115.17: Hiring and promotion decisions

(b) **The agency shall consider any incidents of sexual harassment** in determining whether to hire . . . anyone, or to enlist the services of any contractor, who may have contact with inmates.

(f) The agency shall **ask all applicants and employees who may have contact with inmates directly about previous misconduct** described in paragraph (a) of this section in written applications or interviews for hiring.



PREA Requirements to Conduct Background Investigations

28 CFR § 115.17: Hiring and promotion decisions

(c) Before hiring new employees who may have contact with inmates, the agency shall:

(1) **Perform a criminal background records check**

(d) The agency shall also **perform a criminal background records check before enlisting the services of any contractor who may have contact with inmates.**

(e) The agency shall either conduct criminal background records checks at least **every five years of current employees and contractors who may have contact with inmates** or have in place a system for otherwise capturing such information for current employees.



PREA on Reference Checks

28 CFR § 115.17: Hiring and promotion decisions

(c) Before hiring new employees who may have contact with inmates, the agency shall:

(2) Consistent with Federal, State, and local law, **make its best efforts to contact all prior institutional employers for information on substantiated allegations of sexual abuse or any resignation during a pending investigation of an allegation of sexual abuse.**



How to Conduct Reference Checks: Potential Problems

Other employers may decline to provide anything more than confirming dates of employment

Why? Defamation law



Defamation Law

- Defamation is a tort which protects a person from harm to their reputation based on another person/entity “publishing” something that:
 - Injures character
 - Is untrue
- For private persons, **the defendant** generally has to show that the statement made was **untrue**
- This means that defamation suits can be expensive to defend, even if you win in the end



Defamation Suits by Former Employees

- Public policy supports former employers telling the truth about “bad apple” former employees
- So the law grants a **qualified privilege** which
 - Says that employers are not liable for defamation:
 - (1) If a statement was made in the course of a communication involving **legitimate business interest**
 - (2) If it was made in “**good faith**”



Problem with Qualified Privilege

- The defendant still has to litigate over whether the statement was made for:
 - (1) a **legitimate business purpose** and
 - (2) in **good faith**
- Cautious legal counsel often tell employer-clients to avoid a lawsuit altogether by only **confirming dates and position of employment**



Dealing with Defamation Law

- Key solution is to ask job applicants to sign a **waiver of their right to sue** their former employer for any negative information provided in response to a request for a job reference
- Courts will **uphold** such waivers
- This may make former employers more willing to disclose information about former employees



Other Options

- “Back channel” communications
 - HR offices often will not provide substantive references *but*
 - **People you know within the former employer organization may be willing to speak off the record about a former employee**
 - This kind of information can be very helpful, but because it is **not on the record**, it **cannot be disclosed** as the reason for not hiring someone
 - This can create potential allegations of unequal treatment or discrimination, as we will discuss later



Under PREA: Key Sources of Information Should be Checked

- Legal records - criminal, financial, etc.
- Internet available information
 - Facebook – increasing numbers of employers are requiring employees to provide their passwords
 - The legality of this is still being tested but it is likely, legal
 - Legal databases, e.g., WESTLAW



Use a Written Protocol

- Define how the organization will conduct background investigations
- This should be the **same for all similarly situated applicants.**
- Prepare a check list, and follow it
- Should not contact prior employers for some similarly situated applicants and not others
- Should not waive standards for one applicant but not another



Negligent Hiring Claims

- May apply if an employer hires an employee and **should have known** by doing a background check that that employee has caused harm to others in the past
- And that employee then **causes harm** on the job

The employer may be **liable** for the tort of negligent hiring, *if* the plaintiff (person harmed by the employee, such as inmate) can show that:

If the employer had taken reasonable steps to investigate the employee's background, it would have discovered the information



PREA and Negligent Hiring: Take-Aways

- Employers should take **reasonable steps** to investigate job applicants' background
- What steps are reasonable?
 - Look to the PREA Standards for guidance



“Quiz” Question

- Plaintiff was a probationary employee at a police department but was not retained after her probationary period. As a condition for plaintiff’s agreement to depart voluntarily, the police department agreed it would not release the information that she had failed her probationary period to future employers.
- The plaintiff later applied for a job with the U.S. Marshall’s Service (USMS). The USMS required her to sign an authorization for release of information from prior employers. She did so. When the USMS asked the police department for information about her, it told USMS that the plaintiff had failed the probationary period.

Okay?

Not Okay?



What A Court Said: *Smith v. Holley*, 827 S.W 2d 433 (Tex. App. 1992)

- The plaintiff sued the police department for defamation, alleging that it had acted wrongfully by giving information to the USMS after it agreed not to release the information as a condition of her voluntary departure.
- The court held that the plaintiff, by signing the authorization requested by the USMS investigators, had consented to the release of this information, and was therefore barred from pursuing her defamation action.

Okay?



Not Okay?

Promotion

- PREA requires the agency to take reasonable steps to evaluate the promotion applicant's background and work record
- PREA offers concrete guidance about what matters need to be looked into
- Also be aware of equal treatment issues



What is Illegal?

Federal, state, and some municipal laws say:

- It is illegal to discriminate on the basis of certain “protected characteristics”
- What are these?
 - Race (minority OR majority)
 - Ethnicity
 - Religion
 - Gender, sex, and sometimes sexual orientation
 - Age (older than 40 yrs. old)
 - Disability



Anti-Discrimination Law and PREA

- Equal treatment requirement comes up in all contexts related to employees' "terms and conditions of employment," *e.g.*,
 - Hiring
 - Salary and major features of work assignments
 - Avoiding "hostile environment," *e.g.*, one that demeans employees of a certain race or gender
 - Discipline
 - Promotion
 - Termination/discharge



How Do Plaintiff-side Antidiscrimination Lawyers Think?

- They look for a “case theory” supporting a story of discrimination
- How do they show discrimination?
 - They show that **one person was treated differently than another**
 - E.g., the Muslim male employee was not promoted based on a misconduct incident but the Christian male employee with a similar misconduct incident was promoted



Other Evidence Helpful to Plaintiff's Lawyers: Situations to Avoid

"Smoking Gun" admissions: where someone with decision-making authority admits that a decision was made on the basis of a protected characteristic

- This is increasingly rare but sometimes still happens
- If the statement is made by non-decision maker, it is "stray comment" relevant but not proof of discrimination



More Evidence Helpful to Plaintiffs' Lawyers

Hostile environment: workplace full of animosity towards a protected group

E.g., Hate words, slurs, "jokes," pranks, verbal abuse, physical abuse or acts, etc.

- Obviously, this kind of culture needs to be avoided for many reasons.



Danger for Employers Today: Retaliation Lawsuits

Today it is easier to win a case based on a retaliation claim than a bias claim

What is retaliation?: an employee claims discrimination and/or files a complaint with the EEOC or state agency, and then...

- The employer takes adverse action against that employee, allegedly to retaliate against the employee for complaining



More on Retaliation Claims

The standards for proving retaliation are **easier** than for proving discrimination

The plaintiff has to show that **employer did something that would discourage a reasonable employee from complaining in the future**

- *E.g.*, an undesirable shift change or less favorable work assignment

*Most cases today are won on retaliation and not discrimination claims



Avoiding Retaliation Claims

Supervisors, coworkers and other staff must be instructed **NOT** to engage in any kind of negative conduct towards any person who has filed discrimination claims.



Prior Criminal Records

- The EEOC has issued “guidance,” warning employers that policies that require a clean criminal records background may violate Title VII
- This is because there is often a “disparate impact” on racial grounds (*e.g.*, more minority applicants have criminal records)
- However, it is legal to disqualify applicants if having a clean criminal record is “job related and consistent with business necessity”
- Note: it is not legal to disqualify a candidate based on an *arrest record* not leading to a conviction, without more information



Criminal Records

- It is very likely that a clean criminal record is **necessary for corrections jobs** involving contact with inmates for obvious reasons
- Litigation risk here is low
- Plus, disparate impact cases require a lot of technical help including use of statistics
- PREA suggests that Congress wants correctional institutions to avoid hiring persons with relevant criminal infractions, esp. related to sexual abuse



EEOC's Suggestions on Criminal Records

Tailor policy to need

- *E.g.*, are juvenile records relevant? Are very old criminal convictions relevant?

Give individualized consideration

- Allow the individual to explain why a prior conviction should not be disqualifying
- Don't just throw application in the discard pile if a prior conviction is disclosed, look a bit more carefully at the situation
- Again, must give same chance to everyone who is similarly situated and apply same standards to all



Discrimination Issues: View of Managers

If you are a manager, you may see two situations as very differently

- *E.g.*, maybe the incident involving the Muslim employee was much worse than the incident involving the Christian employee
- Religion was not any consideration at all!
- A good plaintiff's lawyer can tell a different story **if the paper record doesn't explain differences** in treatment



“Take Aways” on Antidiscrimination Law

Documentation – be clear on why you are making the decisions you are making and why one situation is different from another one, note it in writing

Consistency – be sure that your supervisors are consistent in how they treat employees

Professional Workplace Culture – Avoid workplace atmospheres tainted by prejudice and bias of any kind
– Even (especially) jokes can come back in problematic ways



“Quiz” Question

A corrections agency fired a male African American supervisor following an investigation into allegations of sexual misconduct. He sued for race discrimination, pointing out that the criminal charges against him had been dismissed and alleging that a white officer had not been terminated despite having been involved in a similar case.

- How would a court view this claim? What evidence would matter?

Legal?

Title VII violation?



What A Court Said:
English v. Colo. Dep't of Corr., 248 F.3d
1002 (10th Cir. 2001)

The court held that the dismissal of criminal charges had **no bearing** on the evidentiary results of the internal investigation, and that the case of the white officer whom the agency had not terminated involved a **factually dissimilar situation**.

Legal?



Title VII violation?

Summary

- (1) PREA's Impact on Pre & Post-Employment Agency Practices
- (2) Proactive Steps Agencies Can Take To:
 - (1) Comply with PREA Standards
 - (2) Meet PREA Standards relating to HR
 - (3) Avoid Costly Litigation

