



## EEOC Loses Wellness Discrimination Case

A U.S. District Court in Madison, Wisconsin, ruled on Dec. 30 against the Equal Opportunity Employment Commission in its suit against Flambeau Inc. The EEOC had accused the plastics manufacturer of violating the Americans with Disabilities Act by requiring employees to take part in a wellness program to be eligible for group health benefits provided by the company. The wellness program included a health risk assessment and biometric screening. The court ruled Flambeau's requirements were protected under the ADA's safe harbor provision, which allows medical inquiries like these if they are undertaken in conjunction with "the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks." This is the second safe-harbor ruling in favor of a wellness program. The first was *Seff v. Broward County, Florida*, which was affirmed by the 11th U.S. Circuit Court of Appeals in Atlanta in August 2012.

HIRING CHECK-OFF > SCOTT SINDER, CHELSEA GOLD AND JONATHAN FRANSEN

## Thinking Outside the Box

When should you ask someone if they have a criminal history?

### One of the privileges of my role with

The Council is doing an initial read of the articles slated to be published in *Leader's Edge* and The Council's *Management Series* e-newsletter. I recently previewed an article discussing the trend toward banning questions about criminal conviction history as part of an initial job application. Ironically, this trend is juxtaposed with insurers' rising interest in conducting their own background checks of individual producers as part of the appointment process.

State and local ban-the-box laws appear to be overridden in the insurance

context by federal law that prohibits certain classes of former felons from gaining willful employment in the insurance business. That said, nothing in the federal law requires private-sector employers to conduct their own independent background checks. We can leave that to the regulators.

Nineteen states enforce ban-the-box laws, which generally prohibit asking job applicants about their criminal history during the application process. Seven of those states (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon and Rhode Island) and the

District of Columbia apply the prohibition to private-sector employers. Another 27 local governments have enacted similar prohibitions that apply in the private sector. At least 14 cities also bar vendors and contractors from doing business with them if they exclude felons early in the hiring process.

President Obama has asked Congress to do the same for federal jobs. He also ordered his administration to stop asking candidates for most federal jobs about criminal history until later in the process. Strange bedfellows Senators Rand Paul, R-Kentucky, and Cory Booker, D-New Jersey, are teaming up again to pass legislation that would allow nonviolent offenders to eventually have their criminal records sealed.

In the immortal words of Arlo Guthrie in "Alice's Restaurant:" "Friends, they may think it's a movement." But as you might expect, there are a few problems. >>

### REGULATORY NEWS TICKER

but this bill would permit insurers to require them. [www.ksinsurance.org](http://www.ksinsurance.org)

**KENTUCKY** Names Brian Maynard insurance commissioner, succeeding Sharon Clark. Maynard was most recently a contract examiner for Kentucky. >> Gov. Matt Bevin, elected in November, tells federal authorities he plans to get rid of state's health insurance exchange. Wants to transition citizens to federal exchange "as soon as practicable." >> State exchange insurer Kentucky Health Cooperative placed into liquidation Jan. 15. Was in rehabilitation since Oct. 29, 2015. <http://insurance.ky.gov/>

**MONTANA** As of Jan. 1, regulates Montana State Fund, state's largest workers comp insurer at 60% of all coverage. Starting July 1, premiums will undergo rate review, but fund remains exempt from 2.75% premium tax private workers comp insurers pay. Chief legal counsel for state auditor and insurance commissioner says this is first step in privatizing the insurer. <http://sao.mt.gov>

**NEW HAMPSHIRE** Approves new health insurer, Tufts Health Freedom Plan, formed with five hospitals as co-owners in partnership with Tufts Health Plan. Brian Wells is president of new company. [www.nh.gov/insurance](http://www.nh.gov/insurance)

**NEW JERSEY** Gives insurance commissioner enforcement powers through new insurance certificate law. Includes fines of up to \$1,000 per violation. Commissioner may adopt rules and regulations to put the law into action. Law makes it illegal to request issuance of certs with false or misleading information, takes effect April 10. [www.state.nj.us/dobi/insmnu.shtml](http://www.state.nj.us/dobi/insmnu.shtml)

**NEW YORK** Nominates Maria Vullo as Department of Financial Services superintendent, succeeding Benjamin Lawsky, who left last June. Anthony Albanese served in the interim until November. Vullo's nomination awaits state Senate confirmation at press time. >> Officials plan to

begin building a five-mile-long U-shaped flood barrier consisting of earthen berms, walls and gates in 2017 with a target finish date of 2022. Current proposals extend around Manhattan's southern end from about Bellevue Hospital to several blocks north of the World Trade Center. Project is at least \$300 million short at this point. [www.dfs.ny.gov](http://www.dfs.ny.gov)

**NORTH CAROLINA** Gov. Pat McCrory signed executive order in December establishing Employee Classification Section, a new office in the Industrial Commission, to increase enforcement against employers who misclassify workers as independent contractors. >> Increased

## HIRING CHECK-OFF

» The details of the ban-the-box prohibitions vary from jurisdiction to jurisdiction. Jennifer Mora, an attorney who specializes in advising employers on background check practices, says the biggest challenge for employers operating in states that regulate these practices is simply understanding the precise requirements of the applicable rules.

“Some jurisdictions allow an employer to inquire about criminal history after an interview, while other jurisdictions require the employer to wait until after making a conditional offer of employment,” she writes. “Some of these laws also require employers to conduct an ‘individualized review’ before rejecting an applicant with a conviction record, which is similar to the review the Equal Employment Opportunity Commission recommends as a best practice.”

### SATISFYING SECTION 1033

Further complicating things, 18 United States Code Section 1033 bars

your firms and any individual “who is engaged in the business of insurance” from “willfully permit[ting]” participation “in the business of insurance by an individual who has been convicted of a felony involving dishonesty or breach of trust.” Section 1033 also gives state insurance regulators the authority to waive the prohibition for a convicted felon on a case-by-case basis.

For more than 15 years, The Council has recommended firms deploy a standardized hiring process, including asking all applicants whether they have been convicted of a felony for a covered offense, which would bar participation in the industry pursuant to the Section 1033 requirements. There are two basic justifications for this.

► First, the prohibition on “willfully permit[ting]” an individual who has been convicted of one of the covered classes of felonies to participate in the business of insurance cannot be read to require an affirmative background check under the applicable case law.

Instead, it likely can be read to require some level of basic inquiry.

► Second, if you do ask, receive negative answers and then later learn the employee did have a prior conviction, you could then terminate the employee

based on the application misrepresentation. That would comply with your 1033 obligations. If you do not ask, you may face a lawsuit for unfair termination in non-employment-at-will jurisdictions.

Most, if not all, of state ban-the-box laws that apply to private-sector employment can be read to exempt employers who are required by law to inquire into criminal history as part of the hiring process. Thus it does not appear these regimes apply directly to you and your firms. But they likely do regulate the hiring practices of many if not most of your clients. So you need to be aware of them.

You may be working with carrier partners who are invoking Section 1033 to defend their requests to perform their own criminal background checks on

individual producer appointees. I don’t believe anything in Section 1033 mandates such inquiries. You also must grapple with the practical reality that your producers generally have multiple appointments and the transaction cost of submitting to multiple background checks is significant.

In states where criminal background checks are incorporated into the licensure and renewal process, it’s difficult to envision a justification for individual checks. One of the many benefits of the National Association of Registered Agents and Brokers (NARAB)—when it’s up and running—will be that every NARAB member will have to clear a regulatory criminal background check as a condition of membership. This should eliminate insurers’ interest in performing their own checks.

For many reasons, that day cannot come soon enough.

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**Federal law prohibits certain classes of felons from gaining willful employment in insurance.**



## REGULATORY NEWS TICKER

captive insurers by 44 in 2015. Passed captive law in 2013 and now has 336 risk-bearing captive entities, consisting of 96 captive insurers and 240 cells or series. [www.ncdoi.com](http://www.ncdoi.com)

**OKLAHOMA** Licensed 26 new captives in 2015, raising currently regulated captives to 73. [www.oid.ok.gov](http://www.oid.ok.gov)

**OREGON** Insurance Division and Division of Finance and Corporate Securities merged, renamed Division of Financial Regulation, effective Jan. 1. Insurance Commissioner Laura Cali heads new division. <http://insurance.oregon.gov/>

**RHODE ISLAND** Names Elizabeth Dwyer insurance superintendent, succeeding Joseph Torti III, who left the post at the end of 2015 to join Fairfax Financial as VP of regulatory affairs. Dwyer had been serving as the insurance division’s associate director and was previously the division’s legal counsel. [www.dbr.state.ri.us/divisions/insurance/](http://www.dbr.state.ri.us/divisions/insurance/)

**SOUTH CAROLINA** Licensed 30 new captives in 2015: 12 pure captives, three RRGs, three special purpose captives, three sponsored, nine incorporated cells. [www.doi.sc.gov](http://www.doi.sc.gov)

**SOUTH DAKOTA** Bill in House would allow employees injured at one part-time

job to receive workers compensation for wages at other part-time jobs the injury prevents them from doing. Seasonal employers would be exempted from covering non-seasonal job wages. Still in committee at press time. South Dakota has highest percentage of employees with multiple jobs in the nation—8.9%. [www.state.sd.us/drr2/reg/insurance/](http://www.state.sd.us/drr2/reg/insurance/)

**TENNESSEE** Increased licensed captives by 37% in 2015, with 57 new captives: 47 pure captives, four RRGs, six protected cell captives comprising 106 protected cells. Seven of the licensees were redomiciles—the movement of an existing captive into the state—the largest amount

since 2011 changes to captive law. They moved from Delaware, Montana, Nevada, South Carolina, South Dakota, Vermont and St. Kitts. Tennessee has 126 total captives up from two before 2011 changes. <http://state.tn.us/commerce>

**TEXAS** Reduced its maintenance tax rate paid on workers comp premiums for 2015 to 1.478%, down from 1.533% in 2014. Tax helps pay for operations at the Division of Workers Compensation and the Office of Injured Employee Counsel. It is assessed on insurers writing workers comp in Texas and is capped at 2% of gross premiums per insurer. Certified self-insureds and group self-insureds pay the tax based on the prior