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CUT AND PASTE POST: JUNE 2015
AX THE TAX, BAN THE BOX, CALL THE DOC

AX THE TAX –

Beginning in 2018, the Affordable Care Act (ACA) will impose an excise tax, otherwise known as the "Cadillac Tax", on health care plans that cost more than $10,200 a year for individuals and $27,500 a year for families (excluding stand-alone dental and vision plans). Under the ACA, Cadillac plans will be taxed at 40% of the cost above those limits. According to SHRM Research survey results released in March, 33% of the respondent's plans will be subject to the excise tax in 2018. The percentage of employers subject to the excise tax is expected to rise significantly after 2018 as the tax is indexed to the Consumer Price Index, not health care cost inflation. Although the excise tax was intended to target lavish health care plans, many modest plans covering working class and middle-income Americans will be subject to the excise tax.

This excise tax is not effective until 2018. However, organizations are already restructuring their employee health and benefit offerings to avoid the tax. As a result, health and benefit offerings are being diluted and some employees will be negatively impacted due to higher copays and deductibles.

If your health plan is 'Cadillac' in nature, you may want to contact Congressman Ryan Zinke and ask him to co-sponsor H.R. 2050, the Middle Class Health Benefits Tax Repeal Act of 2015 and H.R. 879, the Ax the Tax on Middle Class Americans' Health Plans Act. Mr. Zinke can be reached at…

113 Cannon House Office Building
Washington, DC 20515
Fax: (202) 225-5687

… or via his email contact form at https://zinke.house.gov/contact/email. Deadline: 6/17/15 so do it today!

BAN THE BOX –

In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued its *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended*, 42 U.S.C. § 2000e *et seq*. In response, many employers have removed any inquiry into an applicant's criminal history from their Application forms, and some cities and states have passed "ban the box" legislation prohibiting these inquiries.

As you know, an employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964. The *Guidance* builds on longstanding court decisions and existing guidance documents that the EEOC issued over twenty years ago. The *Guidance* focuses on employment discrimination based on race and national origin, discusses the differences between arrest and conviction records, and addresses disparate impact and disparate treatment issues associated with conducting criminal background checks.

Any employer use of information obtained from background checks must be 'job related and consistent with business necessity." In the *Guidance*, the EEOC identifies these two circumstances in which it believes employers can demonstrate the "job related and consistent with business necessity" standard:

- The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
- The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job (the three factors identified by the court in *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)) and provides an opportunity for an individualized assessment for those people identified by the screen, to determine if the policy as applied is job related and consistent with business necessity. (Although Title VII does not require individualized assessment in all circumstances, the use of a screen that does not include individualized assessment is more likely to violate Title VII.).

In addition, compliance with other federal laws and/or regulations that conflict with Title VII is a defense to a charge of discrimination under Title VII and State, and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. 42 U.S.C. § 2000e-7.

The Guidance can be found at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Additional resources include:

- What You Should Know About the EEOC and Arrest and Conviction Records: http://www.eeoc.gov/eeoc/newsroom/wysk/arrest_conviction_records.cfm
- Questions and Answers About the EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII: http://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm

Stay tuned for a related presentation at an upcoming GVHRA meeting!

CALL THE DOC -

Have you ever wondered if it's OK to call an injured workers' doctor to make sure the employee is able to work? A recent Montana Federal Court case says it is. In the case, an employee had surgery. When he returned to work, he told HR he was in pain, but he could do his job. The HR Director observed the employee having difficulty parking his vehicle, and HR contacted the doctor's office, which eventually sent HR a fax indicating the employee was released to "modified duty" with limitations, including a limitation on the use of his right hand. In his lawsuit, the employee asserted that HR's actions violated his right to privacy and were retaliatory or discriminatory in nature. The case was heard before Judge Sam Haddon in April, 2015.

In a 4/17/15 ruling, Judge Haddon said the employer was not required to seek or obtain the employee's approval to ask his doctor for work restrictions. The Judge stated that 42 U.S.C. § 12112(d)(4)(B), which permits employers to make inquiries into an employee's ability to perform job-related functions, is "plain on its face". Judge Haddon added that the employer had ample justification for taking that step: The employee stated he could drive, but admitted to having difficulties and was observed having difficulty driving. Haddon said, "Good business sense mandated a query" to the doctor of the employee's limitations, even though the employee said he was able to work. Based on this, Judge Haddon concluded that "No invasion of [the employee's] privacy or violation of statute occurred."

Professional Pointer: Tred carefully when making these inquiries, but they may be done, as long as they're job related and consistent with business necessity. Judge Haddon's decision may be read at: http://scholar.google.com/scholar_case?case=4906684707169657 54&q=Lee+Provance&hl=en&as_sdt=3,27&as_ylo=2015.

ON BEHALF OF YOUR GVHRA BOARD, HAVE A GREAT SUMMER!