The Crossroads Between Criminal and Employment Law

Employment law and criminal law intersect on occasion. This means that employers may need to consider the impact of criminal law from time-to-time. These intersections occur pre-employment, after an employee has received a job offer and even during employment. This article highlights these intersections.

Kelsey Dame
kdame@wnj.com
616.752.2519

Pre-employment: "Ban the Box"

Civil rights advocates have been advocating "ban the box" legislation across the country, with significant success. "Ban the box" laws prevent employers from asking applicants on the initial employment application whether they have been convicted of a crime. "Ban the box" laws protect applicants with criminal histories from immediate rejection without the employer first considering the nature of the crime or the applicant's later rehabilitation. Currently, Michigan's "ban the box" legislation applies only to state agencies and does not extend to private sector employers. Nevertheless, several states "ban the box" for all employers. Therefore, multistate employers, or employers with online applications available to applicants in any state, must be up-to-date on whether "ban the box" legislation affects their current application process.

Post-employment offer: Background checks and the FCRA

Employers gather background information on an applicant in several ways. Employers may perform independent online searches or contact past employers. Employers also may hire third parties to conduct criminal background checks on jobseekers. When employers hire a third party to obtain information, the reports produced by the third party are subject to the requirements of the Fair Credit Reporting Act (FCRA). Under the FCRA, employers must inform applicants of their intent to use a third party to obtain a consumer report. The applicant must explicitly authorize the employer to do so, usually by signing an authorization form. If the report uncovers a disqualifying criminal history, the employer must notify the applicant and give him/her the opportunity to dispute the accuracy of the information before the employer may rescind the job offer. If the offer is rescinded, the employer must send another notice including certain details. Failure to follow these requirements can result in a violation of the FCRA.

During employment: Workplace criminal investigations

Employers must conduct investigations when alleged criminal misconduct occurs in the workplace. This may include allegations of sexual assault/stalking or theft/embezzlement. When investigating potential criminal activity, an employer must be aware that its internal investigation may run concurrent with a formal law enforcement investigation. Below are a few tips:

- **Do not wait.** Take immediate action to investigate and respond to complaints. This can help reduce financial liability, media attention and limit reputational damage.
- **Make sure you conduct your own investigation.** Employers cannot assume that police are taking over the investigation. Although employers should report the possible crime to police, an employer can still be liable for failing to conduct a thorough investigation.
- **Cooperate with law enforcement.** Although criminal investigations will usually have an impact on business operations, employers can minimize intrusion by cooperating with search warrants and assisting investigators.
- **Be aware of conflicts.** An employee accused of a crime will usually need separate counsel because the interests of the employer may not align with the employee.

- **Consider using legal counsel.** A crime means someone may go to prison. This could lead to a very serious situation. Getting legal advice early on can be very important.
- **Do not turn over privileged documents.** It is important to understand which documents are protected by the attorney-client privilege. An employer can waive the privilege by turning over privileged documents to law enforcement investigators. If the privilege is waived as to a document in one situation, an employer will not have a basis to withhold that document in future proceedings.
- **Know how to maintain your investigation notes and understand what to tell the employee who is being investigated.** The Michigan Bullard-Plawecki Employee Right to Know Act has very specific requirements about certain criminal investigations in the workplace and when the employee must be informed.

The intersection of criminal and employment law can occur throughout all stages of employment. If you find yourself at such a crossroad, Warner Norcross + Judd has experienced attorneys in both practice areas who can help you.

The Pendulum Swings: A Look at Recent NLRB Decisions

The National Labor Relations Board (NLRB or Board) shifts its policies depending on the party in the White House. The NLRB's decisions tend to be more pro-employee/pro-union with a Democratic president and relatively more employer-friendly with a Republican president.

Rob Dubault
rdubault@wnj.com
231.727.2638

Alexandra Woods
awoods@wnj.com
616.752.2589

Over the past two years, the "Trump Board" overturned or scaled back several "Obama Board" positions. The Trump Board also took aim at long-standing Board precedents. This trend has picked up speed over the past few months.

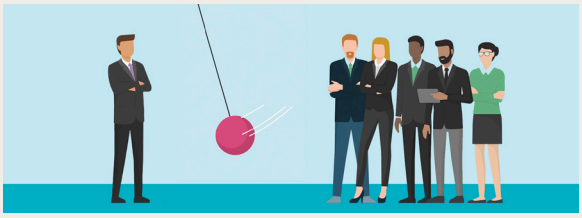
For example, in three recent cases, the Board favored employers. These decisions demonstrate the high regard the Board has for property rights.

- In *Bexar County Performing Arts Center Foundation, dba Tobin Center for the Performing Arts*, 368 NLRB No. 46 (Aug. 23, 2019), the Board ruled that a foundation, which owned and operated a performance hall, did not violate the National Labor Relations Act (NLRA) when it prohibited symphony musicians from handing out leaflets during a ballet performance. The Board found the musicians were contract workers—not employees—of the foundation. Although they often performed at the hall, the contract workers could protest there only if they "regularly and exclusively" performed at the hall and did not have any other lawful way to express their views.
- In *UPMC and its subsidiary, UPMC Presbyterian Shadyside*, 368 NLRB No. 2. (June 24, 2019), the Board held that a hospital did not violate the NLRA by requiring two non-employee union organizers to leave its cafeteria. Before *UPMC*, union organizers could solicit employees in public areas of employer property, unless their conduct was disruptive. In *UPMC*, the Board rejected this "public space" exception. Instead, the Board concluded that the hospital was not discriminatory for two reasons. First, there was no evidence that the hospital knowingly allowed other non-employee organizational activity on its premises. Second, union organizers had other ways to communicate with employees.

- In *Kroger Limited Partnership I Mid-Atlantic*, 368 NLRB No. 64, (Sept. 6, 2019), the Board held Kroger did not violate the NLRA when it removed union representatives from its shared parking lot. The union representatives were asking customers to sign a petition that opposed Kroger's decisions to close one of its locations and transfer employees. Although Kroger had allowed other solicitors, the Board found that Kroger's actions were lawful. The Board stated Kroger had an important property interest in its premises and the union's activities were distinguishable from the civic, charitable and commercial activities Kroger had previously allowed. The Board said discrimination only exists when similarly-situated cases are treated in a dissimilar manner. The Board also stated that the analysis it used in *Kroger* (which did not involve union organizing), applied equally to non-employee organizing activity.

These decisions should make employers feel more confident that they can regulate behavior of non-employees on their property. These decisions may also suggest how the Board will decide future cases involving employee use of employer property, such as using employer email systems for union-organizing activities.

Speaking of union organizing, in *The Boeing Company*, 368 NLRB No. 67 (Sept. 9, 2019), the Trump Board continued the shift away from pro-union policies. Specifically, the Board held that a group of two job types was not large enough to conduct a union election. The Board relied on its 2017 decision in *PCC Structurals*, Inc., 365 NLRB No. 160 (2017), which held that a group of workers can form their own union when they have a "community of interest" and their concerns are "sufficiently distinct" from those of coworkers. In *Boeing*, the Board clarified *PCC Structurals* by applying a three-part test. That test considers: (1) whether the members of the proposed unit share a community of interest; (2) whether the employees excluded from the unit have distinct interests that outweigh



similarities with unit members; and (3) guidelines the Board established for unit configurations in specific industries.

In *M.V. Transportation, Inc.*, 368 NLRB No. 66 (Sept. 10, 2019), the Board held that an employer could change employment terms without first bargaining with its employees' union. The Board held it would no longer apply the "clear and unmistakable waiver" standard to determine whether an employer's unilateral change to employment terms violates a collective bargaining agreement. Under the "clear and unmistakable waiver" standard, the Board would find a violation unless the agreement unequivocally and specifically referred to the type of employer action at issue. This test was almost impossible to meet. Now, the Board will employ the less stringent "contract coverage" test. Under the contract coverage test, the Board determines if the change was within the scope of the agreement language granting the employer the right to act unilaterally. If it was, the Board will find no violation. If the agreement does not cover the action, the Board will find a violation except in two cases. There will be no violation if the employer demonstrates the union waived its right to bargain over the change. There will also be no violation if the employer's act is justified by a compelling business reason, such as a dire financial emergency.

These are just some of the Board's recent decisions. The Board has also proposed new rules to address various issues, instead of handling them on a case-by-case basis. With the upcoming presidential election, it's a safe bet we will see many more significant developments, so stay tuned. In the meantime, if you face potential organizing or bargaining challenges at your facility, your Warner Norcross + Judd labor attorney can help.

Warner Norcross + Judd

These materials are for educational use only. This is not legal advice and does not create an attorney-client relationship.

1500 WARNER BUILDING, 150 OTTAWA AVE NW, GRAND RAPIDS, MI 49503-2487

ADDRESS SERVICE REQUESTED

LABOR AND EMPLOYMENT

Edward Bardelli*	616.752.2165	Matthew Nelson*	616.752.2539
Andrea Bernard*	616.752.2199	Dean Pacific*	616.752.2424
Kelsey Dame	616.752.2519	Steven Palazzolo	248.784.5091
Gerardyne Drozdowski*	616.752.2110	Johnny Pinjuv	231.727.2655
Robert Dubault	231.727.2638	Louis Rabaut	616.752.2147
Pamela Enslen*	269.276.8112	Kaitlin Sheets*	616.752.2564
Amanda Fielder*	616.752.2404	Margaret Stalker*	616.752.2767
C. Ryan Grondzik*	616.752.2722	Allyson Terpsma*	616.752.2785
DeAndre' Harris	616.752.2331	Karen VanderWerff	616.752.2183
Zainab Hazimi*	248.784.5169	Elisabeth Von Eitzen*	616.752.2418
Angela Jenkins	616.752.2480	Michael Wooley	989.698.3715
Jonathan Kok*	616.752.2487	B. Jay Yelton III*	269.276.8130

EMPLOYEE BENEFITS

Kathryn DeVillez	616.752.2782
Stephanie Grant	248.784.5068
Anthony Kolenic, Jr.	616.752.2412
Norbert Kugele	616.752.2186
Mary Jo Larson	248.784.5183
Heidi Lyon	616.752.2496
Brianna Richardson	616.752.2558
Kent Sparks	616.752.2295
Justin Stemple	616.752.2375
Jennifer Watkins	248.784.5192
Lisa Zimmer	248.784.5191

** Litigators*