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HIRING

Conducting background checks has become a routine part of the hiring process for many employers seeking to provide a productive and safe work environment and to avoid claims of negligent hiring, Dechert attorneys Nicolle L. Jacoby and Melissa Bergman Squire write in this BNA Insights article.

However, they caution, the use of information regarding an applicant's criminal and financial history is not without limitation. It is critical that employers obtain and use such information in compliance with applicable state and federal laws.

Jacoby and Squire outline relevant federal laws and court decisions, give a snapshot of state requirements, with a focus on New Jersey, New York, and Pennsylvania, and offer practical advice to employers seeking to conduct checks without running afoul of the law.

Conducting Background Checks in the Hiring Process: A Catch-22

BY NICOLLE L. JACOBY AND MELISSA BERGMAN SQUIRE

To verify credentials and uncover desired information regarding an applicant's work, criminal, and personal history, many employers conduct background checks as a regular step in their hiring process. In addition to ensuring job qualifications, conducting background checks can help employers protect themselves and the public from individuals who pose an unreasonable risk of harm to others and may also shield employers from potential negligent hiring lawsuits when done properly.

While conducting background checks may be in the best interest of employers, in conducting such checks, employers must be cognizant of state and federal laws regulating the procurement and use of information regarding an applicant for the purpose of making hiring decisions. In recent years, stemming from concerns regarding employee privacy and the disparate impact that using criminal history and other information to disqualify applicants may have on minorities, laws govern-

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ing background checks have evolved into a legal minefield, leaving employers puzzled regarding their rights and responsibilities.

Employers now find themselves in a catch-22, fearing liability for failing to properly screen out applicants for employment, while, at the same time, endeavoring to avoid running afoul of the myriad anti-discrimination and other laws that govern the manner in which background information may be procured and to what extent it may be considered in making selection decisions.

Why Do Employers Conduct Background Checks?

A series of recent surveys conducted by the Society for Human Resource Management (''SHRM'') showed that approximately three out of four U.S. employers conduct background checks as part of their pre-employment screening programs. In conducting these background checks, employers hope that by taking a proactive approach during the initial hiring process, they will improve the overall safety and productivity of their workplaces and curb future employment litigation. The following are some compelling reasons why employers choose to conduct background checks:

Legal Requirements

Whether or not to conduct a background check might depend in part on the employer's industry. Employers in many industries, including those involved in child care, health care, elder care, education, and securities and banking may be required by federal and/or state law to perform background checks.

Avoiding Workplace Violence and Theft

Workplace violence and instances of employee theft continue to make headlines. Conducting background checks on prospective employees may help employers identify those individuals who are more likely to engage in violence, theft, or other criminal behavior, thereby preventing bad hires.

Improving Productivity

Unfortunately, not all applicants are truthful in the application process. They might inflate their employment or educational background, fabricate skills, gloss over the reasons for their separation from past employers, or provide inaccurate dates of employment or degrees. Conducting a background check serves to validate the accuracy of the information provided by applicants to ensure their truthfulness. Taking the extra time to ensure that a candidate possesses the skills and abilities reflected on his or her resume may lower turnover rates and decrease management time necessary to discipline poor performers.

Avoiding Liability for Wrongful Acts of Employees

While respondeat superior liability does not encompass crimes committed by an employee outside the ''scope of employment,'' employers are not shielded from liability for such wrongful acts. Rather, under the doctrine of negligent hiring, courts have emphasized that employers have a general duty to protect their employees, customers, and the public from injuries caused by employees whom the employers know or ''should have known'' pose a risk of harm to others.

In other words, employers have a duty to hire and retain competent, safe employees. While some courts have concluded that employers do not have a duty to conduct criminal background checks, other courts have disagreed, finding employers liable in negligent hiring cases for not completing thorough background checks. Consider, for example:

- *Blair v. Defender Services, Inc.*, 386 F.3d 623, 629 (4th Cir. 2004), permitting a negligent hiring claim brought by a victim of a physical assault on a college campus to survive summary judgment because a reasonable jury could find that the employer was negligent for failing to run a criminal background check before hiring the janitor who attacked the plaintiff.
- *Keibler v. Cramer*, 36 Pa. D. & C. 4th 193, 196-97 (Pa. Ct. C.P. 1998), holding that the plaintiff stated a cause of action for negligent hiring against a gas company for failing to run a criminal background check on an employee hired as a gas meter reader who subsequently raped the plaintiff in her home.
- *T.W. v. City of New York*, 286 A.D.2d 243, 729 N.Y.S.2d 96 (N.Y. App. Div. 2001), reversing the lower court's grant of summary judgment in favor of the employer in a negligent hiring case, finding that there was a genuine issue of material fact as to whether the employer, a youth organization, had a duty to conduct a background check on an employee, with a known conviction, who allegedly sexually assaulted a child.
- *Lingar v. Live-In Companions Inc.*, 692 A.2d 61, 66, 12 IER Cases 1462 (N.J. Super. 1997), holding that the trial court erred in dismissing the plaintiff's negligent hiring claim where a jury question existed as to whether a company that provided care for elderly and disabled individuals performed an adequate background check on an employee who neglected and stole from a disabled customer.
- *Glover v. Augustine & Ponte Equities*, 832 N.Y.S.2d 184, 185 (N.Y. App. Div. 2007), denying the employer's motion for summary judgment in a negligent hiring claim brought by a woman who was attacked by an elevator operator in an office building, finding that there was a triable issue of fact as to whether the employer was negligent in hiring the elevator operator, who the employer knew had been convicted of a felony, without conducting a background check.
- *Malorney v. B & L Motor Freight, Inc.*, 146 Ill.App.3d 265, 268, 496 N.E.2d 1086, 1089 (Ill. App. Ct. 1986), holding that material issues of fact existed as to whether an employer negligently entrusted a truck with a sleeping compartment to an employee without checking his criminal background where the truck driver allegedly sexually assaulted a hitchhiker he picked up in his truck.

What Procedures Must Employers Follow in Conducting Background Checks?

In addition to requesting that applicants provide background information on employment applications and checking references, an increasing number of employers choose to conduct more thorough investigations into their applicants' backgrounds. While some employers choose to conduct background checks in house, many employers engage third parties, who have

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specialized experience, training, and expertise, to perform these background checks on their behalf.

In using outside specialists, however, employers must comply with the Fair Credit Reporting Act, 15 U.S.C. § 1681a et seq. (''FCRA''), which prescribes detailed procedures employers must follow in obtaining and using ''consumer reports'' for employment purposes. Unwary employers run the risk of violating the FCRA. Although the title implies that its application is limited to traditional credit reports, the act has been drafted and interpreted broadly. In addition to abiding by the requirements of the FCRA, employers also should be aware that many states further regulate an employer's ability to access and use information regarding an individual's credit history and personal background.

The Fair Credit Reporting Act

Originally passed in 1971, Congress amended the Fair Credit Reporting Act with the Consumer Credit Reporting Reform Act of 1996 and the Consumer Reporting Employment Clarification Act of 1998. Among other things, both amendments were intended to provide additional protections to consumers whose rights were subject to abuse through improper information obtained by employers through consumer reports. Pursuant to the amendments, although employers may still use ''consumer reports'' for employment purposes, they must now take certain steps before doing so.

The procedure employers must follow varies slightly depending on whether the employer is seeking a ''consumer report or an ''investigative consumer report'' from a ''consumer reporting agency.'' A ''consumer reporting agency'' is any person which ''for monetary fees, dues, or on a cooperative basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.'' 15 U.S.C. § 1681a(f).

Key Terms

a. Consumer Reports

A ''consumer report'' is any communication by a consumer reporting agency ''bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part . . . for employment purposes.'' 15 U.S.C. § 1681a(d).

''Employment purposes'' is broadly defined by the FCRA to cover virtually every aspect of the employment relationship, including using a consumer report ''for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.'' 15 U.S.C. § 1681a(h).

The term ''consumer report'' includes criminal background reports. Pursuant to the act, civil litigation and arrest history may generally only be sought for seven years prior to the date of the report. *See* 15 U.S.C. § 1681c(a). This limitation was lifted as to convictions by the 1998 amendments. *See* 15 U.S.C. § 1681c(a). An employer may now seek information regarding a consumer's criminal convictions regardless of the date. In addition, the seven-year limitation is not applicable if the consumer report is to be used in connection with the employment of an individual at an annual salary of $75,000 or higher. *See* 15 U.S.C. § 1681c(a).

The Federal Trade Commission, the agency charged with enforcing the FCRA, also has interpreted the term ''consumer report'' to include reports containing information regarding an individual's motor vehicle records, educational and employment background, and licenses. *See* Jun. 9, 1998 FTC Staff Opinion - Haynes-Beaudette; Jun. 9, 1998 FTC Staff Opinion - Haynes-Islinger; Jun. 10, 1998 FTC Staff Opinion - Haynes-Poquette; Jun. 11, 1998 FTC Staff Opinion - Haynes-Lewis; Jun. 11, 1998 FTC Staff Opinion - Haynes-Halpern.

b. Investigative Consumer Reports

''Investigative consumer reports'' require additional documentation on top of the documentation required for standard ''consumer reports.'' An ''investigative consumer report'' is defined as a consumer report ''in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.'' 15 U.S.C. § 1681a(e). An ''investigative consumer report'' is simply a ''consumer report'' that was prepared by interviewing third parties. Note, for example, that the common employer practice of checking references could constitute an ''investigative consumer report'' if the employer hires a third party to perform the check. *See* Jun. 9, 1998 FTC Staff Opinion - Haynes.

Procedures to Follow in Procuring and Using Consumer Reports and Investigative Consumer Reports

a. Provide written notice to the applicant or employee.

■ **Consumer Reports**. Before an employer obtains a consumer report, it must notify the employee or potential employee that it is obtaining or may obtain a consumer report for employment purposes in a clear and conspicuous writing. *See* 15 U.S.C. § 1681b(b)(2)(A). The disclosure must be contained in a document that consists solely of the disclosure. It may not for example be a paragraph contained in an employer's application form.

■ **Investigative Consumer Reports**. In order to procure an investigative consumer report, in addition to complying with the procedure for standard consumer reports, an employer must clearly and accurately disclose to the employee that the report to be procured will contain information as to the subject's ''character, general reputation, personal characteristics and mode of living.'' *See* 15 U.S.C. § 1681d. The disclosure must: (i) be made in writing and mailed or otherwise delivered to the consumer within three business days after the date on which the employer requests the report; (ii) include a statement of the consumer's right to request a complete and accurate disclosure of the nature and scope of the investigation; and (iii) include a copy of the Summary of Rights form published by the Federal Trade Commission. *See* 15 U.S.C. § 1681d(a). If the consumer so requests, the employer must make a complete disclosure of the nature and scope of its investigation in a written statement mailed or otherwise delivered to the consumer no later than five business days after the date

on which the request was received or the report was first requested, whichever is later. *See* 15 U.S.C. § 1681d(b).

b. Obtain written authorization from the applicant or employee.

The employer must obtain written permission from the employee or potential employee before attempting to obtain a consumer report or an investigative consumer report. The authorization can be given on the separate disclosure form referenced above. *See* 15 U.S.C. § 1681b(b)(2)(A).

In obtaining such authorization, employers should seek a blanket authorization from the individual that would allow the employer to obtain consumer reports with respect to present and future employment decisions.

For example, an employer may obtain an individual's authorization to use a consumer report during the application process *and* at any future time for use in evaluating the employee for promotion, reassignment, or retention. *See Kelchner v. Sycamore Manor Health Center*, 135 Fed.Appx. 499 (3d Cir. 2005) (requiring an employee to sign a blanket authorization for his of her employer to obtain consumer reports in the future does not violate the FCRA).

As a side note, the FTC staff has opined that the FCRA does not prohibit an employer from taking adverse action against an employee or prospective employee who refuses to authorize the employer to procure a consumer report. Nor does the act specifically authorize such practice. *See* Oct. 1, 1999 FTC Staff Opinion - Brinckerhoff-Fischel.

In *Kelchner v. Sycamore Manor Health Center*, 135 Fed.Appx. 499 (3d Cir. 2005), the U.S. Court of Appeals for the Third Circuit likewise concluded that the FCRA does not prohibit an employer from taking adverse action against an employee who refuses to authorize the employer to procure a consumer report.

c. Provide a certification to the consumer reporting agency.

Before an employer procures or attempts to procure a consumer report or an investigative consumer report from a consumer reporting agency, the employer must make specific certifications to the consumer reporting agency that it has complied with and will continue to comply with the FCRA's requirements. *See* 15 U.S.C. § 1681b(b)(1); 15 U.S.C. § 1681d(a).

d. Provide a pre-adverse action notice.

Before an employer takes any adverse action (i.e., denying employment or any other action that adversely affects a current or prospective employee) against an applicant or employee based in whole or in part on a consumer report, the employer must provide the individual with a pre-adverse action notice. The pre-adverse action notice must include (a) a copy of the report and (b) the Summary of Rights form published by the Federal Trade Commission. *See* 15 U.S.C. § 1681b(b)(3). The Summary of Rights form should be provided by the consumer reporting agency when it furnishes the requested consumer report and also can be found on the Federal Trade Commission's website at www.ftc.gov. *See* 15 U.S.C. § 1681b(b)(1)(B). The purpose of this notice is to provide the employee or potential employee with an opportunity to contact the employer or consumer reporting agency to dispute or explain the contents of the report.

e. Provide an adverse action notice.

When the employer makes the adverse decision final, it must provide the individual with oral, written, or electronic notice of the adverse action. The notice must contain the following information: (1) the name, address, and telephone number of the consumer reporting agency making the report, including the toll-free telephone number established by the agency if the agency operates on a nationwide basis; (2) an explanation that the agency did not take the adverse action and cannot give the reasons for it; and (3) a statement of the consumer's right to obtain a free copy of the report within 60 days and the right to dispute the accuracy or completeness of the information contained in the report. *See* 15 U.S.C. § 1681m(a).

FTC has taken the position that the employer may not take any adverse action against an applicant or employee until the individual has had an opportunity to review the report and discuss any discrepancies. Although no such requirement is specifically stated in the statute, to be prudent, employers should wait a reasonable period of time after informing an applicant or employee of its intent to make an adverse decision before doing so. FTC has indicated that waiting five business days after supplying the required notice before taking adverse employment action appears reasonable, but has cautioned that the facts of any particular employment situation may require a different time period. *See* June 27, 1997 FTC Staff Opinion - Brinckerhoff-Weisberg.

Penalties for Noncompliance

FTC is responsible for enforcement of the FCRA. FTC may conduct investigations and bring enforcement actions for violations. *See* 15 U.S.C. § 1681s(a). A state attorney general also may sue for injunctive relief and may bring an action on behalf of a resident of the state to recover damages for willful or negligent violations of the act. *See* 15 U.S.C. § 1681s(c). Finally, employers may face private causes of action by applicants or employees for negligent or willful noncompliance with the FCRA's requirements. *See* 15 U.S.C. § 1681o; 15 U.S.C. § 1681n.

Actual damages could include out-of-pocket expenses, back pay, front pay, and compensation for emotional distress. In addition nominal and punitive damages may be awarded for willful noncompliance even in the absence of actual damages. Criminal liability also may ensue. *See* 15 U.S.C. § 1681q.

FTC has recently started cracking down on employers that fail to comply with the FCRA's requirements. In separate complaints, FTC alleged that Quality Terminal Services LLC and Rail Terminal Services LLC (RTS) obtained consumer reports on job applicants and employees but failed to inform the subjects of the consumer reports of their rights under the FCRA and/or provide pre-adverse action and adverse action notices. *See United States v. Quality Terminal Services LLC*, No. 09-cv-01853-CMA-BNB, D. Colo., *consent judgment* 8/11/09; *United States v. Rail Terminal Services LLC*, No.09-cv-1111 MJP, W.D. Wash., *consent judgment* 8/11/09). The two companies involved have agreed to pay a total of $77,000 in civil penalties to settle the claims and will be required to provide the FCRA-required notices in the fu-

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ture and to retain records so FTC can monitor compliance (154 DLR A-4, 8/13/09).

State Counterparts to the FCRA

Many states have their own notification and consent requirements applicable to employment-related background checks, and some apply even where the employer chooses to conduct the background check itself without going through an outside agency. So, it is critical to refer to the applicable state law and consult legal counsel before proceeding to obtain or use background information.

New York

New York employers are subject to New York's Fair Credit Reporting Act (''NYFCRA'') as well as the FCRA. The NYFCRA, like the FCRA, regulates the dissemination of consumer reports and imposes certain requirements on employers that request consumer reports. However, there are some important differences between the two. For example, unlike the FCRA, which permits reporting of certain adverse information like arrests not leading to conviction, acquittals, or dismissals (in some cases, limited by time period), the NYFCRA generally restricts reporting and maintaining information on arrests and criminal charges that do not result in conviction.

In addition, recent statutory amendments to both the NYFCRA and the New York Labor Law provide that an employer seeking to conduct a criminal background check or obtain an investigative consumer report must distribute a copy of Article 23-A of the New York Corrections Law, governing Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses (''Article 23-A'') to the applicant or employee before conducting the check or requesting a report.

An employer receiving a consumer report or investigative consumer report from a consumer reporting agency that contains information about criminal convictions must provide a second printed or electronic copy of Article 23-A to the subject of the report upon receipt of the report. In addition, all New York employers must post a copy of Article 23-A in a ''visually conspicuous manner'' and ''a place accessible'' to all employees. *See* N.Y. Gen. Bus. L. § 380 et seq.

New Jersey

In addition to the FCRA, New Jersey employers are subject to the New Jersey Fair Credit Reporting Act. The New Jersey law, however, is substantially similar to its federal equivalent and does not impose any additional burdens on employers. *See* N.J.S.A. § 56:11-30 et seq.

Chapter 59 of the New Jersey Administrative Code permits employers to conduct background checks into convictions and pending arrests for the purpose of determining an applicant's qualifications for employment. Employers may obtain the records from the State Bureau of Investigation (''SBI'') by the use of prescribed forms, which must be signed by the applicant. *See* N.J.A.C. § 13:59-1.1 et seq.

To obtain the information, however, the employer must certify that: (a) the employer is entitled to the information requested to determine employment qualifications; (b) the information will be used solely for determining the applicant/employee's qualifications for employment; (c) the records will not be disseminated for unauthorized purposes; (d) the requesting employer will furnish the applicant with adequate notice to challenge the accuracy of the records provided by the SBI; (e) if requested by the applicant, the requesting employer will provide the applicant with a reasonable period of time to correct the records; (f) the requesting employer will not presume guilt for any pending arrests or charges indicated in the records received; and (g) the employer will otherwise comply with the regulations. *See id* at § § 13:59-1.2, 13:59-1.6(b).

Pennsylvania

Pennsylvania has not yet enacted a statutory equivalent of the FCRA. However, employers should be mindful of the Pennsylvania Criminal History Record Information Act, which is discussed below.

What Are The Legal Restrictions on Employers' Use of Background Information?

Criminal Background Information

Federal Anti-Discrimination Laws

Although a criminal conviction policy may protect an employer from negligent hiring lawsuits, a poorly crafted policy may open the door for an employment discrimination claim against the employer. Discrimination because of criminal history is not directly prohibited by Title VII or any other federal statute. Nevertheless, job applicants have brought discrimination claims under Title VII asserting that an employer's use of criminal background checks discriminates against minorities. Such claims are typically brought as disparate impact discrimination claims, because it is difficult for a plaintiff to assert an intentional discrimination claim in this area. *See Pollard v. Wawa*, 366 F. Supp. 2d 247, 95 FEP Cases 1275 (E.D. Pa. 2005) (court dismissed intentional discrimination claim based on use of a criminal conviction screening policy).

EEOC Guidance on Employer's Consideration of Conviction Records

Based on statistics that show that African Americans and Hispanics are convicted at a ''rate disproportionately higher than their representation in the population,'' the Equal Employment Opportunity Commission (''EEOC'') has adopted the presumption that any policy or practice that causes an adverse employment action to be taken solely because of that individual's conviction record has an adverse impact on members of those protected classes. *See* EEOC Policy Statement on the Issue of Conviction Records (Feb. 4, 1987). Accordingly, an absolute bar to employment based on the mere fact that an individual has been convicted of a crime is unlawful under Title VII. Therefore, employers are advised to inform candidates that a prior conviction will not automatically lead to disqualification.

Employers may rebut the adverse impact presumption resulting from the use of conviction records by offering statistical evidence that African Americans and/or Hispanics are not convicted at a disproportionately greater rate or that there is no adverse impact in its own hiring process resulting from its convictions policy. *See* EEOC Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records (Jul. 29, 1987). Where a dis-

parate impact is shown, ''an employer must be able to establish that a hiring decision based in whole or in part on a conviction was justified by ''business necessity'' after considering the following factors: (a) the nature and gravity of the offense or offenses; (b) the time that has passed since the conviction and/or the completion of the sentence; and (c) the nature of the job sought by the applicant.'' *See* EEOC Policy Statement on the Issue of Conviction Records (Feb. 4, 1987).

EEOC Guidance on Employers' Consideration of Arrest Records

Consistent with its policy on the use of conviction records, EEOC has concluded that the ''use of arrest records as an absolute bar to employment has a disparate impact on some protected groups.'' *See* Policy Guidance on the Consideration of Arrest Records in Employment (Sept. 7, 1990). Thus, employers only may make adverse decisions based on an individual's prior arrest after considering the following:

■ First, the employer must consider the likelihood that the individual engaged in the conduct for which he or she was arrested. While conviction records are reliable evidence that an individual in fact engaged in the alleged conduct, arrest records alone are not reliable evidence that the person actually committed the charged crime. Thus to justify the use of arrest records, this additional inquiry must be made.

■ Second, the employer must consider whether the individual's conduct is relatively recent and related to the job at issue.

According to EEOC, a blanket exclusion of individuals with arrest records will almost never withstand scrutiny. Therefore, employers are strongly cautioned to avoid basing a hiring decision on an applicant's prior arrest history unless the sensitive nature of the employment clearly warrants it. Employers are further cautioned against making pre-employment inquiries into arrest records, because information which is obtained will likely be used or presumed to be used.

Illustrative Cases Concerning Employers' Criminal Record Policies Under Title VII

■ *El v. SEPTA et al.*, 479 F.3d 232, 100 FEP Cases 195 (3d Cir. 2007). Douglas El, an African American, was hired by a subcontractor of the Southeastern Pennsylvania Transportation Authority (''SEPTA'') to provide transportation services to people with mental and physical disabilities. Pursuant to the contract between SEPTA and the subcontractor, which precluded the hiring of individuals with violent criminal convictions, the subcontractor discharged El upon learning of his prior homicide conviction. El had been convicted of second degree murder in 1960—more than 40 years before his employment by SEPTA's subcontractor. The murder took place in the context of a gang related fight when El was 15 years old. *See El*, 479 F.3d at 235-236.

Affirming the decision of the lower court granting summary judgment in favor of SEPTA, the court of appeals concluded that SEPTA demonstrated that its hiring policy was job-related and consistent with business necessity. In so holding, the court gave little deference to EEOC's guidance on the use of conviction records in the hiring process, noting that the guidance did not substantively address Title VII. *See id*. at 244. The court expressly declined to find that any bright line policy with regard to criminal convictions violates Title VII. According to the court, if a ''bright line policy can distinguish between individual applicants that do and do not pose an unacceptable level of risk, then such a policy is consistent with business necessity.'' *Id*. at 245.

■ *Green v. Missouri Pacific R.R. Co.,* 523 F.2d 1290, 11 FEP Cases 658 (8th Cir. 1975). Buck Green, an African American, applied for an office job and was not considered because of his prior conviction for refusing to answer the draft. The employer maintained a bright-line policy in which it refused to hire anyone for any position who had been convicted of any offense other than a minor traffic violation. Green filed suit, contending that the employer's policy violated Title VII because it had a disparate impact on African Americans. After concluding that the statistics presented established a prima facie case of disparate impact, the court further opined that the employer's policy was too broad to be justified by business necessity. *See Green*, 523 F.2d at 1298.

■ *Gregory v. Litton Systems, Inc.*, 316 F. Supp. 401, 2 FEP Cases 821 (C.D. Cal. 1970), aff'd by *Gregory v. Litton Systems, Inc.*, 472 F.2d 631, 5 FEP Cases 267 (9th Cir. 1972). Earl Gregory, an African American, was denied employment as a sheet metal mechanic by Litton Systems Inc. when the company learned that he had been arrested, but not convicted, approximately 13 times. The company had a policy of denying employment to individuals who had been arrested ''on a number of occasions'' for things other than minor traffic offenses. Gregory brought suit, alleging that Litton's policy violated Title VII. The U.S. District Court for the Central District of California agreed. Finding no evidence that persons who have been arrested, but never convicted of a crime, would perform less efficiently or honestly than other employees, the court concluded that an individual's arrest record is ''irrelevant to his suitability or qualification for employment.'' *Gregory*, 316 F. Supp. at 403. The court further noted that African Americans are arrested more frequently than Caucasians in proportion to their numbers. *See id*. Accordingly, the court found that Litton's policy of excluding from employment persons who have been arrested several times without any convictions was unlawful under Title VII because it ''has the foreseeable effect of denying black applicants an equal opportunity for employment.'' *Id*. at 403.

■ *Field v. Orkin Exterminating Co.,* No. 00-5319, E.D. Pa., 10/31/01. Sandra Field, a bookkeeper at a small exterminating firm, was terminated by Orkin after the company learned that she had been convicted of a felony within the previous 10 years. Field brought suit, alleging discrimination on the basis of her age and sex. The court rejected the defendant's argument that Field could not challenge the criminal conviction policy because she is white. According to the court, ''[i]t has long been recognized that a blanket policy of denying employment to any person having a criminal conviction violates Title VII. . . While concern for the possible disparate impact of such a policy upon minority applicants may have inspired the rule, the rule is one which applies equally to all job applicants.'' Note that this decision was decided several years before the court of appeals decision in *El* discussed above.

■ *Foxworth v. Pennsylvania State Police*, 402 F. Supp.2d 523, 97 FEP Cases 505 (E.D. Pa. 2005). Roderick Foxworth, Jr., an African American applicant for a state police cadet position, was automatically disquali-

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fied after revealing an expunged criminal record for theft. Roderick brought a Title VII race discrimination claim against the state police. The court analyzed Roderick's claims under both the disparate treatment and disparate impact theories of discrimination. In rejecting the plaintiff's disparate impact claim, the court concluded that Roderick failed to present evidence demonstrating that the racial disparity in the ranks of state police cadets was caused by the challenged practice. *See* 402 F. Supp. 2d at 534-535. Moreover, the court concluded that even if causation were established, ''the automatic disqualification factors almost certainly are justified by business necessity.'' *Id*. at 535. ''The automatic disqualification factors serve important purposes: ensuring both public safety and that police officers do not disregard, nor are perceived as disregarding, the law.'' *Id* at 536. The court further rejected Roderick's disparate treatment claim, finding that he failed to demonstrate that the state police's legitimate justification for its action was a pretext for discrimination. *See id* at 537-538.

Current EEOC Philosophy

In recent years, EEOC has become more aggressive in challenging employers' use of criminal record information in the hiring process. This renewed focus is part of EEOC's E-RACE (''Eradicating Racism and Colorism from Employment'') initiative, in which EEOC developed goals designed to eradicate race discrimination over a five year period (*See* http://www.eeoc.gov/eeoc/initiatives/e-race/index.cfm).

One of EEOC's specific goals for the E-RACE initiative is to develop investigative and litigation strategies for addressing ''21st Century manifestations of discrimination,'' which EEOC has emphasized includes the use of credit and background checks, arrest and conviction records, and other facially neutral factors in the hiring process.

As part of its enforcement initiative, in the past two years, EEOC has filed at least two lawsuits against companies that have adopted criminal history policies that, in EEOC's view, have a disparate impact on African-Americans and Hispanics.

In September 2008, EEOC filed a complaint against Peoplemark, Inc. in the U.S. District Court for the Western District of Michigan, claiming that Peoplemark's policy of denying employment to any person with a criminal record violates Title VII because it has a disparate impact on African American applicants. Similarly, in September 2009, EEOC filed a nationwide class action against Freeman Companies in the U.S. District Court for the District of Maryland, asserting that the convention and corporate events planning company unlawfully discriminates against African Americans and Hispanic males by using credit history and certain types of criminal history information as selection criteria in a manner that has a disparate impact on the applicable protected groups.

Furthermore, on Nov. 20, 2008, EEOC held a public meeting on the use of criminal background information in the hiring process. EEOC has emphasized that it may soon revisit its guidance on employers' use of arrest and conviction records, which was written approximately 20 years ago.

State Anti-Discrimination and Other Statutes

In addition to federal anti-discrimination laws, state law may impose restrictions on an employer's use of arrest and conviction information. Accordingly, employers are urged to review local requirements before procuring or using arrest or conviction records in their hiring processes.

Pennsylvania

Pennsylvania Human Relations Act: The Pennsylvania Human Relations Commission (''PHRC''), the state agency charged with enforcing the Pennsylvania Human Relations Act (''PHRA''), has long opined that employer policies disqualifying applicants with criminal histories from employment can have a disparate impact on members of protected classes.

In PHRC's ''Pre-Employment Inquiries'' guide published on its website, the agency states that ''[w]ithout proof of business necessity, an employer's use of arrest records to disqualify applicants is unlawful.'' With respect to conviction records, PHRC takes the position that ''[a]n employer must be able to show that inquiry into conviction is substantially related to an applicant's suitability to perform major job duties. Conviction records should be cause of rejection only if their number, nature or recentness would cause the applicant to be unsuitable for the position.'' PHRC advises employers that ask about convictions on job applications to add a clarifier explaining that ''[a] conviction will not necessarily disqualify you from the job for which you have applied.''

Citing statistics demonstrating that African-Americans and Hispanics are convicted of crimes at a rate disproportionately greater than their representation in the general population, PHRC recently proposed a new policy guidance concerning the exclusion of individuals from employment on account of prior criminal convictions. Under its new policy, when investigating complaints of disparate impact by African-American and/or Hispanic complainants based on the application of an employer's conviction policy, the PHRC will presume that the complainants have established a prima facie case of discrimination.

PHRC sought public comments through March 2, 2010, on its ''Policy Guidance Concerning the Disparate Impact Discrimination Implications of a Denial of Employment Based on a Criminal Record,'' which can be found on PHRC's website. If adopted, the proposed guidance will not have the full force and effect of law, but will serve as a tool to guide PHRC's decision-making with respect to disparate impact claims.

To some extent, PHRC's proposed policy guidance tracks the principles outlined by EEOC in its 1987 policy statement concerning the use of conviction records in excluding applicants from employment. However, PHRC's guidance appears more exacting in describing what an employer needs to show to rebut the presumption of discrimination.

According to PHRC, an employer can rebut the presumption of disparate impact by using conviction data from a more limited geographic area or by using conviction data solely for the specific crimes being screened. PHRC noted that it also would consider ''applicant pool'' data, but cautioned that such data may not be persuasive as it tends to exclude otherwise interested applicants who choose not to apply due to the employer's policy or practice concerning convictions. PHRC emphasized that an employer cannot rebut the presumption of disparate impact by relying on evidence of diversity within its workforce.

In addition, PHRC's proposed policy guidance explains that an employer can defend against disparate impact claims by demonstrating that its policy or practice of excluding applicants on account of prior convictions is justified by business necessity. The proposed guidance states that ''[t]o demonstrate business necessity, an employer must show 'with some level of empirical proof' that the individual excluded from employment has been convicted of a crime, not merely arrested, and poses an 'unacceptable level of risk.' ''

Factors that PHRC will consider in determining whether an individual poses an ''unacceptable level of risk'' include: (a) the circumstances, number and seriousness of the prior offenses; (b) whether the prior conviction substantially relates to the individual's suitability for the job; (c) the length of time that has elapsed since the individual's conviction or release from prison (with a presumption against a showing of business necessity where it has been seven or more years since the individual's last offense, excluding time spent in jail); (d) evidence of the individual's rehabilitation, including completion of parole, maintaining steady employment, educational attainment, etc.; and (e) the manner in which the employer solicited the individual's criminal history during the hiring process (i.e., PHRC will look more favorably upon a policy or practice that does not consider an individual's criminal history until later in the hiring process).

However, even if an employer is able to demonstrate ''business necessity,'' an applicant may still prevail by showing that there was an alternative, less discriminatory policy or practice that the employer could have adopted that would have satisfied its business needs. Employers should note that the proposed policy guidance would not prohibit employers from denying employment based on a criminal record where the employer is specifically authorized or required to do so by existing state or federal law (e.g., laws regarding child care, school and nursing home employees).

The proposed guidance includes a list of various federal and state laws that PHRC recognizes as restricting the employment of individuals convicted of certain criminal offenses. While PHRC explains that its proposed policy guidance has no impact on such laws, it encourages employers to ''fully explore and understand the parameters of such laws'' to ensure that they confine their employment restrictions accordingly.

Although PHRC's proposed policy guidance is not yet in force, it is likely that it will be implemented in its current or slightly modified form. A comparison of PHRC's current version with EEOC's 1987 policy statement suggests that, if adopted, Pennsylvania employers will have a more difficult time defending against disparate impact claims by African American or Hispanic applicants based on the use of criminal history information.

Pennsylvania Criminal History Record Information Act: In addition to any anti-discrimination restrictions, Pennsylvania employers are bound by the Pennsylvania Criminal History Record Information Act (''PCHRIA''), 18 Pa. Stat. § 9101 et seq., which limits their right to conduct criminal background investigations.

The act prohibits employers from considering arrest records in the hiring process. *See* 18 Pa. Stat. § 9125. Furthermore, under the PCHRIA, employers may only consider felony and misdemeanor convictions if the conviction relates to the applicant's suitability for employment in the particular position in question. *See id.* Pennsylvania employers may not otherwise consider an individual's criminal history for the purpose of deciding whether or not to hire the individual. *See id.*

The statute further provides that, if the decision not to hire an applicant is based in whole or in part on such applicant's criminal history, the employer shall so notify the applicant in writing. *See id.*

In the event of a violation of the act by a prospective employer, an applicant may be entitled to injunctive relief, actual damages, attorneys' fees and costs, and punitive damages. *See* 18 Pa. Stat. § 9183.

New York

New York Corrections Law Article 23-A, Sections 752, 753: Under New York Corrections Law Section 752, New York employers may not lawfully deny an applicant employment based on criminal convictions *unless*:

(1) ''There is a direct relationship between one or more of the previous criminal offenses and the . . . employment sought or held by the individual; or

(2) the . . . granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.''

As discussed earlier (*see* NYFCRA discussion *supra*), all New York employers must post a copy of Corrections Law Article 23-A in a ''visually conspicuous manner'' in ''a place accessible'' to all employees. In addition, before undertaking a criminal background check on an applicant, the employer must supply the applicant with a copy of Corrections Law Article 23-A and upon receipt of a report containing information of a criminal conviction.

Factors to be considered under Section 753 of the New York Corrections Law in making the determination of whether to deny an individual employment based on prior criminal convictions include:

- public policy to encourage employment of persons previously convicted;
- specific duties and responsibilities necessarily related to the employment sought;
- relationship between the conviction(s) and ability to perform the job;
- time elapsed since occurrence of the criminal offense(s);
- age at the time of the offense;
- seriousness of the offense;
- information regarding rehabilitation and good conduct; and,
- legitimate interest of employer in protecting property, and safety and welfare of specific individuals or the general public.

New York Executive Law Section 296: Under Section 296(15) of the New York Executive Law, it is unlawful to ''deny. . . employment to any individual by reason of his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three A of the Correction Law.''

Moreover, absent certain limited exceptions, an employer is prohibited from taking adverse action against an employee or applicant because of information the employer obtains with respect to ''any criminal accusation not then pending'' that was terminated in favor of the individual. Exec. L. § 296(16); Crim. Proc. L. § 160.50(3). An adverse employment decision based on

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an arrest that led to an acquittal is unlawful. Exec. L. § 296(16).

Notably, the New York Legislature amended the New York Human Rights Law in September 2008 to make it more difficult for plaintiffs to successfully sue employers for negligently hiring or retaining a person convicted of a crime.

The amendment created a rebuttable presumption in favor of excluding from evidence prior convictions in negligent hiring/retention cases if, after learning about past criminal conviction history, the employer evaluated the Corrections law factors and made a reasonable, good faith determination that such factors favored hiring or retaining an applicant or employee. Exec. L. § 296(15).

New Jersey

New Jersey Law Against Discrimination: Having a criminal record is not expressly identified as a protected category under the New Jersey Law Against Discrimination (''LAD''). Nevertheless, the New Jersey Division on Civil Rights (''DCR''), the agency charged with enforcing the LAD, takes the position that it is unlawful to inquire about an applicant's arrest history. *See* DCR, A Guide for Employers to the LAD, p. 13 (1989).

According to DCR, employers may inquire into convictions that bear a relationship to the job, and have not been expunged or sealed by a court. *See id*. The DCR recommends that, in all cases, employers advise applicants that a criminal conviction is not an absolute bar to all employment.

Legislation: On Nov. 23, 2009, the New Jersey Legislature introduced identical bills (A4198/S12) that would prohibit New Jersey employers from denying employment to persons who have been convicted of a criminal offense or because the applicant lacks ''good moral character'' based upon a prior conviction.

Employers would not be subject to the proposed prohibition if: (i) there is a direct relationship between the previous criminal offense and the specific employment sought; or (ii) hiring the individual would pose an unreasonable risk to property or to the safety/welfare of specific persons or the general public.

In determining whether either of the above exemptions applies, employers would be required to weigh the following factors: (a) the public policy of encouraging employment of persons who have been convicted of crimes; (b) the specific duties and responsibilities of the position sought; (c) the relevance of the criminal offense to the applicant's fitness or ability to perform the required duties; (d) the amount of time that has elapsed since the offense was committed; (e) the applicant's age when the offense was committed; (f) the seriousness of the offense; (g) evidence of rehabilitation and good conduct; and (h) the legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.

The bills also would preclude employers from asking applicants whether they have ever been arrested, charged with a crime, convicted of a sealed noncriminal offense, or adjudicated as a juvenile.

Finally, the bills contain procedures to be followed by employers in conducting background checks. Employers that perform background checks would be required to: (a) advise applicants that a background check may be required; (b) advise the applicant that a background report was requested within 30 days of requesting same and provide the name and address of the reporting agency and a copy of the law; and (c) advise applicants that they may review the background report. With respect to any applicant who was denied employment, the employer also would be required to provide a written statement as to the basis for denying employment within 30 days of the applicant's request for such explanation.

The bills would authorize DCR to enforce its provisions and are similar to existing New York Article 23-A discussed above.

Credit Information

Running credit checks on prospective employees has become a common practice. Employers that conduct credit checks emphasize that the practice gives them valuable information regarding applicants' sense of responsibility and trustworthiness.

In recent years, however, the practice of conducting credit checks on potential employees has come under fire by employee advocates who contend that the practice traps lower income people in debt because their past financial problems make it impossible for them to find suitable employment.

State Statutes

While there is currently no federal law that directly precludes employers from conducting credit checks on prospective employees (provided they comply with the FCRA, of course), employers must be mindful of state laws.

Hawaii and Washington both have laws that prevent employers from using credit reports in the hiring process except in cases where the information sought would be particularly relevant to the job sought. Similarly, on March 29, 2010, the governor of Oregon signed a bill that will prohibit the consideration of credit history for employment purposes including hiring, discharge, promotion and compensation (118 DLR A-3, 6/22/10). The law, which took effect July 1, 2010, provides exceptions for financial institutions, public safety offices and other employment if credit history is job-related and the use is disclosed to an applicant or employee. Similar bills have been proposed in a number of other states.

Proposed Federal Equal Employment for All Act

On a federal level, Rep. Stephen Cohen (D.Tenn.) introduced a bill in July 2009 concerning the use of credit history for employment purposes. The proposed Equal Employment for All Act would amend the FCRA to prohibit the use of consumer credit checks in making adverse employment decisions against employees or prospective employees, with only a few exceptions. The proposed measure has 33 co-sponsors and has been referred to the House Financial Services Committee.

Anti-Discrimination Statutes

Employers in jurisdictions that do not presently restrict the use of credit history in making employment decisions must nevertheless consider the risk of disparate impact claims under federal and state anti-discrimination laws.

Many state fair employment practice agencies have cautioned that the use of credit checks in the selection process may have a disparate impact on minorities, who statistically tend to have less favorable credit scores.

For example, in PHRC's ''Pre-employment Inquiries'' guide published on its website, PHRC emphasizes that questions regarding credit records, charge accounts and home ownership ''are almost always irrelevant to performance of the job in question. Because census figures indicate that minorities, on the average, are poorer than whites, consideration of these factors by employers can have an adverse impact on minorities. Therefore, requests of this nature could probably be shown to be unlawful unless clearly required by business necessity.''

Furthermore, EEOC had made it clear that it is considering publishing guidance on the use of credit history in making employment decisions.

Federal Bankruptcy Law

Federal bankruptcy law affords protection to individuals who have filed for bankruptcy or are associated with someone who has.

There are two key provisions.

First, Section 525(a) prohibits governmental entities from discriminating against certain debtors. Pursuant to this section, public employers may not ''deny employment to, terminate the employment of, or discriminate with respect to employment against,'' a person solely because that person is or has been a debtor under the Bankruptcy Act or is associated with such a person. 11 U.S.C. § 525(a).

Second, Section 525(b) makes it unlawful for private employers to ''terminate the employment of, or discriminate with respect to employment against,'' a person solely because that person has sought the protections of federal bankruptcy law or has experienced other similar financial difficulties. 11 U.S.C. § 525(b).

While there is no question that private employers may not discharge an employee because he or she files for bankruptcy, the anti-discrimination provision for private employers is silent as to whether an applicant's bankruptcy status may be considered when making a hiring decision.

Noting that Congress crafted Section 525(b) more narrowly than Section 525(a), most courts have concluded that the bankruptcy code does not prevent private employers from declining to hire job applicants because they filed for bankruptcy protection. *See e.g.*, *Fiorani v. CACI*, 192 B.R. 401, 407 (E.D. Va. 1996) (granting the defendants' motion to dismiss each of the plaintiff's counts alleging that he was not hired because of his prior bankruptcy filing, finding that Section 525(b) does not impose liability on an employer for refusing to hire an applicant); *Pastore v. Medford Savings Bank*, 186 B.R. 553, 555 (Bankr. D. Mass. 1995) (holding that the bankruptcy code's anti-discrimination provisions do not apply to a private employer's decision not to hire an individual on account of his or her present or past bankruptcy status); *Burnett v. Stewart Title Inc.*, No. 06-34312-H4-13, S.D. Tex., 3/29/10) (finding that Section 525(b) does not prohibit private employers from discriminating against prospective employees based on their bankruptcy status); *Rea v. Federated Investors*, No. 09-1205, W.D.Pa., 1/29/10 (same).

However, in *Leary v. Warnaco Inc.*, 251 B.R. 656 (S.D.N.Y. 2000), the U.S. District Court for the Southern District of New York concluded that a private employer could not refuse to hire an applicant solely because he had filed for bankruptcy. According to the court, Section 525(b)'s prohibition against discrimination in the private sector ''with respect to employment'' applies to ''*all* aspects of employment,'' including hiring. 251 B.R. at 659. In rejecting the opinions noted above, the court emphasized that the intent of the bankruptcy code is to provide debtors a fresh start and that Congress could not have intended to exclude hiring decisions from protection. *See id*. at 658.

Although the majority of courts have concluded that a prospective employee does not have a cause of action against an employer that fails to hire an applicant due to bankruptcy status, there is at least some risk of a more expansive interpretation of Section 525(b). Accordingly, employers should carefully consider rejecting candidates for employment *solely* on the ground of his or her present or past bankruptcy status.

Practical Guidance

Although conducting criminal background checks has become a routine part of the hiring process for many employers seeking to provide a productive and safe work environment and avoid claims of negligent hiring, the use of information regarding an applicant's criminal and financial history is not without limitation. It is critical that employers obtain and use such information in compliance with applicable state and federal law. Failure to do so may expose them to significant potential liability. The following summarizes some best practices for employers in conducting background checks:

- Comply with the federal Fair Credit Reporting Act and any applicable state law governing the procurement of background information on prospective employees, including the notice and consent obligations and any required pre-adverse action and/or adverse action notices.
- Tailor your background check to request only the information that you need to make a sound hiring decision with respect to the specific position at issue. An overly broad search is likely to produce information that is not relevant to the position sought. Having such information may put you at risk as plaintiffs and juries may assume that you based your decision at least in part on any adverse information in your possession.
- Don't request information concerning arrests that did not result in convictions. Information concerning pending arrests may be requested, but employers should be careful in using such information to disqualify candidates and are encouraged to investigate the circumstances surrounding the pending arrest.
- Identify the types of criminal conduct that are related to the particular job in question and limit your inquiry accordingly. Consider narrowing the temporal scope of your criminal history record check.
- Request information regarding an applicant's credit history only when relevant to the position sought. For example, many employers limit credit reports to management and executive positions or to positions that have significant responsibility or access to company cash, assets, or a company credit card.
- Where possible, or unless required by law, avoid blanket and inflexible disqualifications. Carefully consider applicable federal and state law in making your decision not to hire a candidate on account of the candidate's adverse criminal or financial history. Look at each applicant individually and make the necessary judgment calls. However, you must be careful to treat

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similarly situated applicants alike to avoid disparate treatment claims.

■ Ensure that applicants sign their employment applications verifying the truth of the information provided as omission in an application can be an independent basis for refusal to hire.

■ Document the legitimate reason why you are making the adverse decision.

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