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Wise to be cautious in background checks

By Polina Bernstein and Diana Friedland

For many employers, running criminal background checks on job applicants has become a standard practice as companies have become more cognizant of avoiding negligent hiring lawsuits and minimizing workplace safety and security risks. But litigation challenging employers' use of criminal records, the substantial penalties associated with misusing those records, and a recently released study by the National Employment Law Project (NELP), a nonprofit research and advocacy organization, should caution employers to reassess their policies and procedures with respect to criminal background checks.

According to the study, more than one in four adults in the U.S. are estimated to have criminal records. Moreover, a survey of job advertisements posted on Craigslist by both large and small companies shows that many employers are routinely denying people with criminal records the ability to obtain employment. The study identified advertisements stating, "No Exceptions! ... No Misdemeanors and/or Felonies of any type ever in background," and "You must not have any felony or misdemeanor convictions on your record. Period." But because both federal and California law place numerous restrictions on when, and the extent to which, employers can use criminal background information to make employment decisions, employers who fail to comply with these laws can face serious liability.

> Employers should therefore be vigilant about ensuring that the consumer reporting agency provides only that information which the employer may permissibly consider.

In lawsuits across the country, the Federal Trade Commission (FTC), the Equal Employment Opportunity Commission (EEOC), and private litigants have asserted discrimination and unfair business practices claims against employers who allegedly misused criminal background information to make adverse employment decisions. For example, in a case prosecuted by the EEOC, Pepsi Beverages agreed to pay $3.13 million to resolve a charge of race discrimination uncovered when an EEOC investigation revealed that more than 300 African Americans were disproportionately denied employment due to Pepsi's criminal background check policy that denied outright employment to applicants who had been arrested or convicted of certain minor offenses. Similarly, in *Hudson v. First Transit, Inc.*, a case filed in the Northern District of California, plaintiffs brought a class action on behalf of potentially hundreds of individuals alleging that the defendant's "policy or practice of rejecting job applicants and terminating employees with criminal records, regardless of the nature or age of the offense or the offense's relation to the job in question," violates Title VII of the Civil Rights Act of 1964, California's Fair Employment and Housing Act, and the California Unfair Competition Law. And just recently, the FTC reached a $2.6 million settlement with HireRight Solutions, Inc., a criminal background screening company, over allegations that the company failed to ensure the accuracy of the background screening reports it provided to employers concerning job applicants' personal backgrounds.

These lawsuits should caution employers who maintain rigid policies that automatically reject applicants with criminal histories to reevaluate this approach. The EEOC has reaffirmed its position that "an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII," and employers who make adverse employment decisions based on a worker's criminal history should first consider the "nature and gravity of the offense or offenses," the "time that has passed since the conviction and/or completion of the sentence," and the "nature of the job held or sought."

In addition, the federal Fair Credit Reporting Act (FCRA) and several California statutes, including the Investigative Consumer Reporting Agencies Act (ICRAA), the Labor Code, and Fair Employment and Housing Commission regulations, closely regulate how and when employers can seek and rely on criminal history information when making employment decisions. California law expressly prohibits employers from obtaining applicant information regarding arrests or detentions that did not result in conviction; referrals to, and participation in, any pretrial or post-trial diversion program; convictions for which the record has been judicially ordered sealed, expunged, or statutorily eradicated; and misdemeanor convictions for which probation was successfully completed or otherwise discharged and the case was judicially dismissed.

Moreover, employers who use investigative consumer reporting agencies to collect criminal history information must comply with numerous statutory requirements contained in the FCRA and ICRAA. Namely, before conducting a background check, employers must first provide applicants numerous disclosures, including a description of the nature and scope of the report that will be run by the agency, a summary of the applicant's rights under the FCRA and ICRAA, and a form containing a checkbox that allows the applicant to indicate whether he or she would like to receive a copy of the report. The employer

must obtain the applicant's written authorization to obtain the report.

The FCRA and ICRAA also limit the information that may be included in the report. For example, as to most employers, the report may not contain adverse data concerning events that occurred more than seven years before the report, including arrest, indictment, information, misdemeanor complaint, and conviction data. Employers should therefore be vigilant about ensuring that the consumer reporting agency provides only that information which the employer may permissibly consider.

Employers who consider taking adverse action based in whole or in part on the information contained in the report must provide applicants a pre-adverse action notice that contains a copy of the report and a summary of rights under the Fair Credit Reporting Act. If the employer ultimately takes adverse action, the employer must provide the applicant written notice of the adverse action; the contact information of the consumer reporting agency that furnished the report; a statement that the consumer reporting agency did not make the decision to take adverse action; and allow the consumer to obtain a free copy of the report and dispute the accuracy of the report with the consumer reporting agency.

Employers who rely on information provided by an investigative consumer reporting agency but fail to comply with these regulations can face substantial liability. The California Civil Code authorizes an award of actual damages sustained by the consumer or, except in the case of class actions, $10,000, whichever is greater; reasonable attorney fees and costs; and, under certain circumstances, punitive damages. Because claims alleging that an employer improperly considered certain criminal history information can be pursued as a class action, employers who violate these rules can potentially face significant monetary exposure.

Given the frequency with which employers today are conducting criminal background checks, the significant number of adults in the U.S. estimated to have criminal records, the substantial damages and penalties available for failing to comply with the applicable laws, and the increasing rates at which both workers and administrative agencies have begun challenging employers' background-checking practices, employers would be well-advised to carefully review their policies to ensure that they comply with the procedural aspects of these laws and avoid unlawfully discriminating against workers with criminal records.

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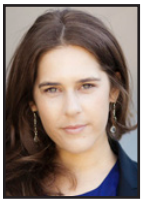

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