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Employer Risks in Using Employment-Related Criminal Background Checks

By Doug Taylor

Use of employment-related background checks by employers to discover information about the work history, education, criminal record and financial history of job applicants has become ubiquitous. In one recent survey of employers, 92% of those responding stated that they subjected all or some of their job candidates to criminal background checks. The reasons for increased employer reliance on criminal background checks are straightforward - to control theft and fraud and address heightened concerns about potential liability for workplace violence and negligent hiring. It is not illegal for an employer to ask questions about an applicant's or employee's background, or to require a background check. However, anytime an employer uses that information to make an employment decision, irrespective of how the employer has obtained the information, the employer must comply with federal anti-discrimination and credit reporting laws, and state and local restrictions.

This article summarizes briefly what has become a complex and rapidly evolving area of the law and the heightened risks to employers, especially those with high employee turnover, of utilizing criminal background checks in making employment decisions. Nationally, the U.S. Equal Employment Opportunity Commission ("EEOC") has become increasingly aggressive in recent years in pursuing employment claims against employers who use blanket criminal background checks for all hiring decisions. The Federal Trade Commission actively enforces the Fair Credit Reporting Act, which places additional limits on employers who gather employee background information from third party consumer reporting agencies. At the state and local levels, Virginia, Maryland and the District of Columbia, as well as Fairfax County, Montgomery County and Prince George's County, all have recently implemented "ban the box" legislation that restricts, or affects the timing of, an employer's use of employment-related criminal background checks.

The EEOC and Title VII of the Civil Rights Act

The EEOC is primarily responsible for enforcing federal employment discrimination laws, including Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits employment discrimination based on race, color, religion, sex and national origin. In 1991 Congress amended Title VII to include disparate impact discrimination as a statutory basis for law suits against employers. Disparate impact theory posits that any use of a job selection method that is factually non-discriminatory may still be considered discriminatory, if it affects proportionally more of one protected group than another. An employer can fend off a discrimination claim by showing that its selection criteria are job-related and consistent with business necessity.

In recent years, the EEOC has become increasingly vigilant, even overbearing according to some, in pushing its contention that the blanket exclusion by an employer of all applicants with a criminal history violates federal anti-discrimination law. This is because the employer's decision to reject such job applicants is, in the EEOC's view, based on racial or ethnic stereotypes about criminality, rather than qualifications and suitability for theposition. The EEOC finds support for its position in data showing that there has been a significant increase in the number of people with criminal records in the working-age population and arrest and incarceration rates are especially high for African American and Hispanic men, who are arrested at a rate two to three times higher than the general population of men.

In 2012, the EEOC issued updated enforcement guidance ("Guidance") on employer use of arrest and conviction records in employment decisions. The Guidance makes it

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abundantly clear that the EEOC will treat any employer policy disfavoring individuals with criminal records as one that disproportionately impacts racial and ethnic minorities, in particular African Americans and Hispanics. This would hold true, in the EEOC's view, regardless of the type of crime, the type of job, the location or the nature of the employer's business, unless the employer also uses a narrowly targeted filter that does not automatically exclude all persons with criminal records but instead carefully considers the circumstances of each applicant's history to determine each candidate's suitability consistent with the employer's particular legitimate business justifications.

Whether a particular employer policy is related to the particular job and consistent with the employer's business necessity has been assessed by the EEOC based on three factors.

(1) **The nature and gravity of the offense**. The nature of the offense relates to the harm caused by the crime, e.g., theft causes property loss, while felony theft involves deception, threat and intimidation. Gravity of the offense entails consideration of whether the offense was a misdemeanor, which are generally less severe, or a felony. Arrests are not proof of criminal conduct, according to the EEOC, and are insufficient to establish that criminal conduct has occurred. By contrast, a record of a criminal conviction generally will establish that the person engaged in the particular criminal conduct. This inquiry is the first step in determining whether a specific crime may be relevant to employer concerns about risks in a particular position.

(2) **The time that has passed since the offense or conduct**. The EEOC has not endorsed a specific duration for criminal conduct exclusions. It has posited, however, that permanent exclusions from all employment, based on any and all criminal offenses, is inconsistent with its business necessity standard.

(3) **The nature of the job held or sought**. This involves the employer's factual inquiry into the particular job subject to exclusion, including consideration of the nature of the job's duties (e.g., data entry, lifting boxes), and the circumstances under which it is performed (e.g., the level of supervision, oversight and interaction with co-workers or vulnerable individuals) and the environment in which the job is performed (e.g., out-of-doors, in a warehouse, in a private home).

Finally, the use of individualized assessments can help employers avoid potential Title VII liability by allowing them to consider more complete information on individual applicants or employees, as a part of a policy that is job related and consistent with business necessity. Individualized assessment generally entails the employer informing the individual that he may be excluded because of past criminal conduct and providing the individual with a reasonable opportunity to show that the exclusion does not properly apply to him (See Guidance, Section V.B.9, for examples).

There can be significant risk to an employer in adopting a policy of using employment-related criminal background checks in employment decisions that does not comport with the factors identified in the EEOC's Guidance. Since June 2013, the EEOC has vigorously pursued civil litigation against BMW Manufacturing Co. and Dollar General Stores, alleging that both entities discriminated against minority job applicants by failing to engage in sufficiently individualized assessments of criminal background check results for job applicants. While acknowledging that it is appropriate for employers to be concerned about physical or security risks to customers and other employees in making hiring decisions, the policies adopted by the EEOC also seem to expose employers to the whims of the agency as to individual hiring decisions.

The Fair Credit Reporting Act

Having considering the perils summarized above, an employer who still decides to use employee criminal background checks faces additional restrictions under other federal statutory provisions, namely the Fair Credit Reporting Act ("FCRA"). An employer who uses consumer reports to make employment decisions, including hiring, retention, promotion or reassignment, must comply with the FCRA. The Federal Trade Commission ("FTC") enforces the FCRA.

The term "consumer report" means any written, oral or other communication of any information 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. Consumer reports are used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for employment purposes. That can include information from a variety of sources, including credit reports and criminal records. Thus a criminal background check is considered to be a "consumer report."

An employer must take certain required steps in connection with obtaining and using a "consumer report" related to a job applicant, which can be summarized as follows:

Before obtaining a consumer report, an employer must:

- Provide written notice to the applicant, in a stand-alone document, that you might use the information in their consumer report for decisions relating to their employment;

- Obtain written permission from the applicant to obtain a consumer report;

- Certify that the company from which you obtain a consumer report is in compliance with the FCRA and EEO laws.

Before taking an adverse action, i.e., rejecting a job applicant based on information in the consumer report, you must provide the applicant with:

- Notice that includes a copy of the consumer report;

- A copy of the FTC's A Summary of Your Rights Under the Fair Credit Reporting Act (available at www.ftc.gov).

After an adverse action has been taken, based on information in the consumer report, an employer must:

- Give notice of the fact of the adverse action to the applicant, in writing or electronically (oral notice also allowed but is not recommended).

State and Local Government "Ban the Box" Laws

At the state and local levels, seventeen states, including Virginia and Maryland, the District of Columbia and more than 100 cities and counties, notably Fairfax County, Virginia, and Montgomery and Prince George's Counties, in Maryland, have passed some form of legislation generically referred to as a "ban the box" statute. "Ban the box" refers to laws that variously prohibit or restrict employers from requiring applicants for employment to divulge their criminal history through a check box on an application for employment. The theory behind "ban the box" statutes is that they promote hiring practices that give applicants a fair chance and require employers to judge individual job candidates on their merits, instead of automatically disqualifying those who have a criminal history.

While Virginia, Maryland and the District of Columbia all have laws on the books that restrict, among other things, employers from initiating criminal background checks until after a conditional offer of employment has been made, the reach of Virginia's and Maryland's laws extends only to public sector employees, as does Fairfax County's law. Only the District of Columbia's, Montgomery County's and Prince George's County's ban the box statutes are applicable to private employers.

District of Columbia law mandates that an employer covered by the statute - those with 11 or more employees - cannot inquire about an applicant's criminal history until after the employer has made a conditional offer of employment. While the law permits an employer to withdraw a conditional offer of employment based on criminal background investigation of the employee, that can be done only for legitimate business reasons, taking into account essentially the same factors relied upon by the EEOC in its 2012 Guidance.

Montgomery County's recently enacted ban the box statute covers private employers that have 15 or more full-time employees. Employers in the County are not permitted to conduct an investigation into an applicant's criminal conviction record until after the completion of the initial job interview. An employer that decides to withdraw a conditional job offer must provide the applicant with a copy of the background check, identify the information relied upon for the decision to withdraw and afford the applicant seven days to review the information.

Prince George's County's ban the box statute took effect in December 2014. Similar to the law in neighboring Montgomery County, an employer may not ask about a job applicant's arrest or conviction record until after the initial employment interview. Employment decisions based on an applicant's criminal record are limited to consideration of criminal offenses that specifically demonstrate unfitness for the desired position, applying factors similar to those utilized by the EEOC. Finally, like Montgomery County, if a Prince George's County employer rescinds a job offer based on an applicant's criminal history, the employer must provide written notice to the applicant of the recision, an explanation of the information on which the decision was based and a copy of the criminal background check that was used.

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DOL Releases Proposed Amendments to FLSA Overtime Regulations: Now is the Time to Reassess Compliance and Update Your Policies

By Rachelle Hill

The Department of Labor (DOL) has just released its proposed amendments to the white collar exemption under the Fair Labor Standards Act (FLSA). The amendments, if passed, will significantly increase the minimum salary test (from $23,660 to $50,440) and the primary duties test for workers entitled to receive overtime pay for hours worked over 40 in a work week. The amendments will have far-reaching impacts on many industries that will need to reclassify many currently exempt employees and corresponding wage and hour policies.

What does the FLSA provide for and what is the white collar exemption?

The FLSA is a federal statute that establishes minimum wage, overtime pay, recordkeeping and child labor standards. The statute requires that most employees be paid, at least, the federal minimum wage and overtime pay at one and one-half the regular rate of pay for all hours worked over 40.

The statute also provides an exemption from both minimum wage and overtime pay for employees who are employed as executive, administrative, professional, outside sales, computer or highly compensated employees. Collectively, these are known as the "white collar exemptions." To qualify for these exemptions an employee must meet the salary basis test, which requires they be paid at least $455 per week ($23,660 per year). Additionally, the employee's job must meet the "primary duties" test:

- Executive - must be managing the enterprise or a customarily recognized department or subdivision of the enterprise;
- Administrative - must be the performance of office or non-manual work directly related to the management or general business operations of the employer or the employer's customers and
- Professional - must be the performance of work requiring advanced knowledge or the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic of creative endeavor.

Why are the regulations being amended?

The DOL is specifically acting in response to a 2014 directive

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from President Obama that instructed the DOL to "modernize and streamline the existing overtime regulations." In particular, Obama indicated that the current FLSA exemptions for overtime requirements had not kept up with inflation and modern economic realities. The regulations have only been updated two times in the past 40 years with the most recent update occurring under the Bush Administration in 2004.

What changes are anticipated?

The DOL's proposed amendments, made public yesterday, include:

1. Establishing a mechanism for automatically updating the salary levels going forward;
2. Increasing the standard salary level at the 40th percentile of earnings for full-time salaried workers which currently is equivalent to $47,892 and projected to be $50,440 in 2016;
3. Increasing salary level for highly compensated employees to the equivalent of the 90th percentile of weekly earnings.

Many expected that the DOL would also propose a change to the primary duties test and implement a quantitative primary duty test similar to California's state law that would require an employee spend more than 50% of his/her time on tasks deemed exempt. However, DOP indicates in the Notice of Proposed Rulemaking that it believes the proposed salary level increase and automatic updates may address most of the concerns so that a change in the primary duties test will not be necessary. However, DOL is seeking public comment on this issue and may change the proposed amendment to include this.

What should an employer do?

Employers should start reassessing their FLSA compliance now. While this is true for all industries, it is particularly pertinent for employers in the restaurant or healthcare industries, both of which the DOL recently identified as top FLSA violators.

At a minimum, employers should:

- Determine whether you have current written job descriptions and if not, prepare detailed descriptions of each job category;
- Determine whether the written job descriptions accurately reflect job duties and essential functions;
- Identify any position currently classified as exempt that might be at risk under the proposed changes due to salary amount or lack of exempt tasks;
- Begin reviewing pay systems and budget to determine how changing these employees to hourly will impact the company and
- Review company handbook to ensure it contains FLSA safe harbor language.

Many employers assume that because they pay an employee more than $23,660 and have an employment agreement in place identifying the employee as exempt, the employer will avoid FLSA liability for misclassifications. This is not the case; while the DOL will consider the agreement, it is only one factor among many that come into play.

What's the status of the proposed amended regulations?

The proposed amendments were made public as of June 30, 2015. There will be a public comment period of 60 days after the amendments are published in the Federal Register.

When will the amended regulations go in effect?

The proposed changes will likely not be effective until Fall 2015. Following the public comment period, the DOL will draft a final regulation in response to the public comments. OIRA will then conduct a final review to approve the text of the regulation and publish it in the Federal Register. The period for a review of the draft is limited to 90 days with a possible single 30-day extension. There is no minimum time for review, with the typical turnaround being 60 days. The period may also be delayed further if affected parties file suits to challenge the revisions.

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