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THE HIRING PROCESS: EMPLOYERS' EXPOSURE TO RISK

THE FINE LINE BETWEEN REASONABLE INQUIRY AND ILLEGAL INTRUSION

It is self-evident that employers should make some reasonable level of inquiry into the history and suitability of potential employees.

An employer may not care too much about the history of a new receptionist or a line worker in a warehouse. However, the background of a new Controller or other worker who has access to the company's money will likely be of greater significance. The same could be true as to the driving record of an employee hired to drive a company's trucks or to drive school buses.

In the past, such inquiries were significantly limited by available technology. An employer could talk to former employers and perhaps other references that are disclosed by the applicant. The employer often had to take information provided by the applicant at face value. Job applicants could easily omit mention of former employers and other persons with knowledge detrimental to the applicant.

Moreover, for fear of potential legal liability, many companies do not voluntarily disclose any information about former employees. Other companies limit the disclosure to dates employed, positions filled and/or salaries earned.

Today, however, much more information is readily available from various sources, primarily as a result of technological advances such as:

- Electronic data collection and dissemination have made criminal convictions, credit

reports and motor vehicle records available at reasonable cost;

- Medical advances have made drug testing more available;
- Search engines (e.g. Google) and social media (e.g. Facebook) can reveal much information relevant to an applicant's history and suitability for a position.

The risk to the employer's business operations that may result directly from a poorly researched hire is obvious.

Less apparent, however, is the risk of injuries to other employees or to unrelated third parties that could result from an ill-conceived hire. The Courts in many states recognize the tort (legal claim) known as "negligent hiring."

Take the following example: a Company hires a security guard who will carry fire arms; insufficient inquiry is made into the applicant's history; the guard then shoots someone that he wrongfully believed to be an intruder...the intruder is, in fact, an authorized delivery person. If a criminal background check would have revealed similar reckless conduct by the employee at previous jobs, the employer could be liable to the injured delivery person for "negligent hiring."

Since a negligent hiring claim might well be covered by the employer's general liability policy, casualty carriers often now insist that employer insureds follow certain specified procedures in processing employee applications.

However, the employer must proceed carefully. State and federal laws establish strict requirements for employers conducting criminal background inquiries¹ and/or making employee decisions based on the results of such inquiries.² These are discussed in the following sections.

Criminal Background Checks.

First, the employer must understand the difference between conviction of a crime and similar terms. Under applicable Federal and New York State law, an employer may inquire into crimes committed by the applicant or an employee. However, there are several limitations:

- The employer may not inquire into arrests;
- The employer may not inquire into criminal charges, other than charges pending when the inquiry is conducted.

¹ Reporting companies and the production and use of their reports are governed by the NYS Fair Credit Reporting Act (N.Y. GBL § 380) and the federal Fair Credit Reporting Act (15 U.S.C. § 1681). The NYS statute may be found at: <http://codes.lp.findlaw.com/nycode/GBS/25> and the federal statute at:

<http://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0111-fair-credit-reporting-act.pdf>

² NYS Corrections Law Article 23-A; Section 752. The entire text of Article 23-A ,may be found at: <http://codes.lp.findlaw.com/nycode/COR>

- The employer may only inquire into criminal convictions (i.e. felonies and misdemeanors) and may not inquire into non-criminal convictions (i.e. violations)
- The employer may not inquire into criminal convictions without prior written notice to the applicant.
- If the position pays less than \$25,000 per year, the employer may only inquire into criminal convictions in the preceding seven years.

Use of Criminal Record Information.

If a New York employer learns that an applicant or employee has been convicted of a crime, there are substantial limitations on the employer’s use of that information under the New York State Corrections Law³.

Under that law⁴ an employer is prohibited from using such information unless:

- “(1) there is a direct relationship between one or more of the previous criminal offenses and the specific...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.”

In other words, the employer must make a subjective determination about the relationship of the crime and the open position and whether employing the individual creates an unreasonable risk to property or to personal safety.

Once again, the obvious cases are in fact obvious...meaning an employer may logically feel safe denying:

- Employment as a bank teller to a convicted bank robber;
- Employment as a security guard to a convicted burglar;
- Employment as a child care worker to a convicted child abuser;
- Employment in a pharmacy to a convicted prescription drugs trafficker.

The determination becomes more difficult when the connection between the convicted crimes and the prospective job is more tenuous. For those cases, the statute provides guidance by requiring the employer to consider the following factors before denying employment or otherwise coming to an adverse employment decision as to the applicant:⁵

³ NYS Corrections Law Article 23-A

⁴ NYS Corrections Law Section 752

⁵ NYS Corrections Law Section 753

- “(a) The public policy of this state, as expressed in this act, to encourage the employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the employment sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.”

Under these criteria, it becomes obvious that there are few if any situations where an employer can feel totally comfortable in denying employment based on a conviction.

Use of Motor Vehicle Department Records

Many jobs require the employee to drive a motor vehicle to perform the required tasks.

- For some positions, driving a motor vehicle might actually be the job (e.g. a truck driver);
- For other jobs driving may be an important adjunct to the position (e.g. an outside salesperson or home repair technician);
- While for others it might only be incidental to the job (e.g. an office worker that must occasionally go out for business related errands).

Many employers rely on the fact that the applicant has presented what appears to be a valid driver's license. However, that does not ensure that the license is currently in full force and effect.

In most states, motor vehicle department records are readily available at minimal cost. At the very least, such records may disclose that an applicant's license to drive in the involved state has been suspended or revoked.

Under certain specified circumstances an employer may have the right to an applicant's New York State DMV driving record without the applicant's written approval (Form MV-15C). However, it is generally recommended to make the request with the applicant's written approval (Form MV-15GC).

Drug Testing

Drug testing will be the topic of a subsequent Newsletter.

Conclusion

Sound human resources policy, risk management and legal compliance require employers to devote reasonable due diligence to the hiring process. Failure to do so may result in detriment to the company in the forms of:

- Poor work performance and/or unacceptable employee conduct
- Exposure to third party claims resulting from an employee's acts or omissions
- Violation of laws that limit the scope of the employer's inquiries
- Violation of laws that limit the use of the results of the employer's inquiries

If you have any questions about the hiring process, or about any other facet of employment law, please contact Richard Waxman at:

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Please note that this Newsletter is limited to a very general overview of the topics covered. It is not intended to be relied upon, and must not be relied upon, as legal advice for any specific situation. Appropriate legal advice must always be based on numerous factors including without limit all of the specific facts of the case and the jurisdictions whose law may apply.

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