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PHILADELPHIA, PA

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

SUBMITTED TO THE

U.S. COMMISSION ON CIVIL RIGHTS

BRIEFING ON

“ASSESSING THE IMPACT OF CRIMINAL BACKGROUND CHECKS AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION’S CONVICTION RECORDS AND POLICY ON THE EMPLOYMENT OF BLACK AND HISPANIC WORKERS”

DECEMBER 7, 2012
Introduction

Good morning Chairman Castro, Vice-Chair Thernstrom, and distinguished members of the Commission. My name is Jonathan Segal, and I am Partner at Duane Morris LLP specializing in employment law in general and equal employment opportunity in particular. I also am the Managing Principal of the Duane Morris Institute. The Institute provides training for human resource professionals, in-house counsel, benefits administrators and managers. I frequently speak and write on employment law and issues affecting human resource professionals and the workplace. I am also the Pennsylvania state legislative director for the Society for Human Resource Management, also known as SHRM, and it is in that capacity that I appear before you today as a member and representative of SHRM.

SHRM is the world’s largest association devoted to human resource (HR) management. Representing more than 260,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

HR professionals play a critical role in creating a workforce comprised of skilled and talented employees as well as creating a work environment that yields high levels of employee satisfaction. SHRM has participated in ongoing discussions at both the national and state levels regarding the appropriate use of background information in the employment process. These discussions are heightened by the competitive employment environment created by today’s economy. SHRM and its members are supportive of, and involved with, various public policy initiatives focused on finding jobs for the unemployed. SHRM, for example, is currently working with the US Departments of Labor and Defense to help increase employment among returning military veterans and disabled individuals.

My comments will describe the hiring process, shed some light on how HR professionals use background checks in the hiring process, the specific role of criminal background checks, and touch on various aspects of the recent EEOC guidance on the use of criminal background checks.

At organizations large and small, HR professionals are charged with ensuring that each individual hired possesses the talent, skills, and work ethic needed for the organization’s success. The consequences of making a poor hiring choice can be great, possibly leading to financial losses, an unsafe work environment, and, if the employee engages in severe misconduct, legal liability to customers, shareholders or other employees in the form of a negligent hiring lawsuit or other legal claims. As a result, HR professionals strive to make the most informed choices possible under the law when selecting candidates for their organizations.
In today’s market, it is not uncommon to receive hundreds of applications in response to just one advertisement for a vacant position. To cull through these job candidates, employers must use many factors to narrow the applicant pool to those who are most qualified. Factors may include years of work experience, work experience in the same industry, education, certifications and more. Once a group of candidates or a finalist is selected for a position, most often after an initial round of interviews, the HR department typically conducts a background check on the candidates or candidate.

While the background check process is often a standard practice for most employers, the process varies, depending on the employer and the position being filled. Employers typically run a credit check, for example, on only those finalists for positions that involve money-handling or other fiduciary responsibility.

It is important to remember that certain federal and state laws, along with county and local ordinances, statutorily require employers to conduct specific background checks for certain positions such as licensed health care professionals, day-care providers, teachers and athletic coaches, and police and firefighters. The U.S. Congress has also been supportive of targeted criminal background checks, passing legislation allowing certain organizations to obtain national and state criminal history background checks on their volunteers and, in other legislation, tying federal funding to mandatory criminal background checks of employees. Many state laws require the use of criminal background checks for certain industries to maintain their licenses. Health care and child care are two industries that commonly have state law requirements that all or virtually all applicants submit to criminal background checks as a condition of employment. Some convictions under such state laws are automatic disqualifiers for employment. I include this information to illustrate the legal requirements placed on employers and the apparent recognition from Congress of the importance of these types of checks in the employment process.

One difficulty faced by organizations seeking to hire an employee is that an individual’s previous employer is frequently reluctant to provide an accurate assessment of the former employee’s work history, strengths, and weaknesses for fear of potential liability. In the reference check process, employers can face claims made by the former employees themselves (in the form of a defamation or retaliation lawsuit) or a future employer (negligent referral) simply by giving an unabridged assessment of a candidate’s work background. As a result, most employers only provide the bare minimum amount of information in response to a reference check – confirming only that the candidate had worked for them, their title, and dates of employment. This lack of direct and complete reference information from the previous employer is one reason that many employers use the services of a background check company in an attempt to obtain the most accurate and complete picture of the potential employee.
SHRM has surveyed its HR professional members on their use of background checks—including seeking information from references and obtaining credit and criminal background information. Employers have identified several reasons for the use of criminal history information. Fifty-two percent of employers cite the need to reduce the chances of legal liability because of a negligent hire. For example, assume a landlord of apartments hires someone to fix problems in apartments and the employee has unescorted access to all apartments. What if an applicant has a recent rape conviction, no background check is done, the individual is hired and he tragically rapes a tenant. A negligent hire claim is inevitable.

This reason is followed closely by the need to provide a safe work environment for employees, cited by 49 percent of respondents. Providing each and every employee access to a safe work environment is required under the general duty clause of the Occupational Safety and Health Act. People are an employer’s greatest asset and a top priority for most employers is to protect their assets. I will provide a specific safety example in a few minutes.

In addition, thirty-six percent of employers use this information to reduce their risk of theft and embezzlement within their organization or by an employee against a customer. The National Retail Security Survey estimates that the U.S. retail industry lost more than $34 billion in 2011 due to employee theft. With losses such as these, it’s understandable why employers are using every type of screening method they can to avoid making a poor hiring decision.

Lastly, twenty-eight percent cite compliance with state law as the primary reason for conducting criminal background checks. In these cases, an employer must comply or the consequence may be the employer’s loss of its license to operate.

SHRM’s own survey data provides a more complete picture of current HR practices and demonstrates that having a criminal record is not an automatic bar to employment. In fact, employers are more heavily influenced in the hiring decision by factors unrelated to criminal background information. According to SHRM surveys, 85 percent of HR professionals, when making hiring decisions, are most interested in finding an employee who will be a “good fit” with the organization (based on legal criteria), 82 percent want to know whether the candidate has previous work experience that is directly applicable to the job, 80 percent whether the candidate possesses specific skills or expertise needed to perform the job requirements, and 67 percent are most interested in whether the candidate performs admirably during the interview process.

Once an employer identifies candidates that they believe will help meet these objectives, they look at several legally-available sources of information about the candidate to supplement what the applicant has supplied. This supplementary information includes criminal history checks which are conducted by 87 percent of employers according to SHRM research data. HR professionals will also often talk to
the candidate’s named references, verify information with the educational institutions included on the resume, and talk with former employers. If adverse information is found as a result of the criminal background check, 58 percent of SHRM respondents indicated they offer the candidate the opportunity to explain the circumstances surrounding the results before the job decision to hire or not hire is made.

Failure to conduct a criminal check can result in an unreasonable risk. One illustrative example of the risk employers and employees may face involved BP’s efforts during the Gulf Oil Spill a few years ago. BP worked with state unemployment offices in Florida, Alabama, and Mississippi to fill thousands of positions to clean-up affected beaches. In this case, no criminal background checks were required—only drug tests. A BP contractor ended up hiring a supervisor who had a criminal history and had been placed on the national sex offender registry who, during his employment on a clean-up crew, allegedly raped one of the workers he supervised. As you can imagine, the media stories about the clean-up efforts quickly changed from kudos for the job opportunities provided to thousands of unemployed individuals to stories condemning the company for failing to protect the safety of other employees and the public by not performing a criminal background check on every clean-up employee hired.

We should also keep in mind the fact that employers must comply with legal restraints on how they obtain and use criminal history information. First, the federal Fair Credit Reporting Act (FCRA) specifically allows for the use of background checks for “employment purposes.” Under the Act, an employer that uses a third-party provider in the background process must notify the potential employee in advance of the process and obtain the applicant’s written approval to have his or her background checked by the provider. An employer is also required to notify the applicant if the individual was not chosen because of information in the report.

In addition, the federal Equal Employment Opportunity Commission (EEOC) published updated guidance for employers to avoid discrimination when using criminal history information in April 2012. SHRM members were pleased to see that the guidance did not impose any new bright-line rules explicitly designed to prohibit employer access to and use of certain information. Instead, the Commission, in this guidance, continues to embrace use of the long-standing three-factor test identified by the case Green v. Missouri Pacific Railroad Company when evaluating criminal history. The Green factors are:

(1) The nature or gravity of the offense or conduct;
(2) The time elapsed since the conviction and/or completion of the sentence; and
(3) The nature of the job sought or held.
These factors are familiar to HR professionals. Indeed, SHRM has not received significant negative feedback from its members about the guidance as a whole. HR professionals have long taken seriously the need to balance the rights of job applicants against the needs of the employer when criminal history information is considered.

Two specific aspects of the guidance, however, have been mentioned as areas of concern by SHRM and its members. First, our members have expressed concern and confusion about the statement in the guidance that compliance with state and local laws will not shield employers from liability under Title VII. Although we appreciate preemption, this provision places employers between a rock and a hard place—between losing their state license (or opening themselves up to liability) if they don’t comply with a state law mandating criminal background checks and risking a class action lawsuit if they go forward with criminal background checks and base hiring decisions on the results. State laws serve an important purpose—that of protecting certain segments of the population, often the most vulnerable—from harm. The laws themselves are often the result of devastating events that no one wants repeated.

We believe state law requirements can fit within the EEOC’s concept of a “targeted exclusion” based on the *Green* factors and specifically allowed for by the guidance. While our members have not reported any investigations brought against an employer resulting from this provision, the guidance raises the possibility and we are hopeful that the EEOC will clarify the validity of state law requirements as “targeted exclusions.”

Secondly, SHRM is concerned about the guidance’s interpretation of disparate impact. The guidance states, “National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.” It is not clear how imputing disparate impact based on national data can be reconciled with the concept of the individualized assessment. Further, as written, it appears that employers may be vulnerable to EEOC investigation anytime they take an adverse employment action against individuals of certain races or national origins based on criminal background checks regardless of whether they have conducted a valid individualized assessment—seemingly making criminal convictions a new protected status. More specifically, under the guidance, assume an employer rejects one applicant and one applicant only for rape. The applicant is African American. It appears that the EEOC could allege adverse impact, even though only one applicant was adversely impacted. While I don’t know the exact number necessary for there to be a large enough pool for adverse impact to exist, I know it is larger than one. SHRM believes this section should be clarified to help employers comply.

In conclusion, we believe that the EEOC’s guidance serves an important societal interest and is generally consistent with long-standing case law. We do believe,
however, that the two areas I have mentioned should be clarified for the benefit of employers, employees and third parties who do business with an employer.

Thank you for your invitation to participate in today's discussion, and I welcome the opportunity to answer any questions.