A Timely Analysis of Legal Developments

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Indiana Passes New Legislation Restricting Criminal History Information Reported in Background Checks

By Rod Fliegel, Jennifer Mora, and William Simmons

The EEOC's April 25, 2012 updated enforcement guidance on the use of arrest and conviction records by employers has generated renewed and substantial interest in the controversial subject of criminal background checks in the context of Title VII of the Civil Rights Act of 1964. Although it is important for employers to review the EEOC's updated guidance, employers also need to be mindful of the increasing number of related state laws. The latest of these laws is Indiana House Bill 1033, which, starting July 1, 2012, will, in part: (1) prohibit certain pre-employment inquiries; (2) restrict the types of criminal history information that employers and background report providers (known as "consumer reporting agencies" or CRAs) can obtain from Indiana state court clerks; and (3) restrict the types of criminal history information that CRAs can report to employers in background reports.

Changes to Criminal History Information that Employers May Obtain from Prospective and Current Employees

The law provides that, effective July 1, 2012, residents of Indiana with restricted or sealed criminal records may legally state on an "application for employment or any other document" that they have not been adjudicated, arrested or convicted of the offense recorded in the restricted records. In addition, covered employers will be prohibited from asking an "employee, contract employee, or applicant" about sealed and restricted criminal records. The law does not define the term "employer," and does not specifically address what it means for applicants and employees to be able to "legally" state on documents that they do not have certain previous criminal records.

Changes to Criminal History Information that CRAs and Employers Can Obtain from the State of Indiana

Also effective July 1, 2012, the law will restrict information that individuals and businesses such as employers and CRAs can obtain from Indiana state court clerks. This affects the scope of information that employers can expect in background reports. Specifically, the law prohibits courts from disclosing information pertaining to alleged infractions where the individual:

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- is not prosecuted or if the action against the person is dismissed;
- is adjudged not to have committed the infraction;
- is adjudged to have committed the infraction and the adjudication is subsequently vacated; or
- was convicted of the infraction and satisfied any judgment attendant to the infraction conviction more than five years ago.

Changes to Criminal History Information that May Be Reported to Employers

Effective July 1, 2013, the law also will restrict information that "criminal history providers" can report to others. The law defines a "criminal history provider" to be a "person or an organization that assembles criminal history reports and either uses the report or provides the report to a person or an organization other than a criminal justice agency or law enforcement agency," such as CRAs that typically provide background checks to employers.

Under the law, criminal history providers that obtain criminal history information from the state may only provide information pertaining to criminal convictions. Moreover, the law explicitly states that criminal history providers such as CRAs will no longer be permitted to provide the following information in background reports:

- an infraction, an arrest or a charge that did not result in a conviction;
- a record that has been expunged;
- a record indicating a conviction of a Class D felony if the Class D felony conviction has been entered as or converted to a Class A misdemeanor conviction; and
- a record that the criminal history provider knows is inaccurate.

Moreover, CRAs that obtain criminal history information from the state may not include any Indiana criminal record information in an assembled report unless the CRA updates the information to reflect changes to the official record occurring 60 days or more before the date the criminal history report is delivered.

Remedies

Employers who violate the law by asking employees, contract employees or applicants about sealed and restricted criminal records are deemed to have committed a Class B infraction, which may result in a fine, currently up to $1,000. There is no explicit provision for a private right of action against employers who ask individuals about their sealed and restricted criminal records or take adverse employment actions against employees who exercise their right under the law to withhold information about sealed or restricted criminal information in response to employer inquiries. It remains to be seen whether employees will nonetheless argue that they should be permitted to sue employers under the law.

In contrast, the law does establish a private right of action for violations of its provisions regarding reports by criminal history providers and allows aggrieved individuals to recover their attorneys' fees and costs and the greater of actual damages or liquidated damages of $500. The law also permits the Indiana Attorney General to bring an action to enforce those provisions and seek civil penalties of $1,000 for a first violation and $5,000 for subsequent violations.

Implications for Employers

The apparent purpose of the new law is to limit the universe of Indiana criminal record information available to employers among other entities. Thus, once the new law becomes effective, employers should be aware that background reports provided to them may not paint a complete picture about an applicant or employee because the law will preclude the reporting of certain criminal history information. In addition, Indiana employers should ensure that they do not ask applicants or employees whether they have sealed or restricted criminal records on an employment application or otherwise.

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Of course, when conducting employment-related background screening, employers also should be mindful of the various laws that relate to the use of criminal records. For example, as mentioned above, the EEOC has taken a renewed and vigorous interest in whether routine pre-employment criminal record screening has a "disparate impact" on protected class members for purposes of Title VII of the Civil Rights Act of 1964. In addition, when using a third-party screening company to obtain background information on applicants or existing employees, employers must follow the requirements of the federal Fair Credit Reporting Act (FCRA), including the FCRA's provisions requiring advance consent for the background check and providing appropriate notices when any adverse employment decision is made based in whole or in part on the information disclosed in a background report.

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