

News and Legislation Relating to Employment and Background Checks**Federal News and Legislation:****Background Checks**

- On April 27th, the U.S. Supreme Court agreed to hear Spokeo Inc.'s (Spokeo) challenge to a Ninth Circuit decision to revive a Fair Credit Reporting Act (FCRA) suit against Spokeo for allegedly publishing inaccurate information about the plaintiff on the company's search engine. The issue in the case is whether websites that collect consumer personal data can be sued for publishing inaccurate information, even if the errors do not cause any actual harm. Spokeo has argued that a fear that potential employers would rely on inaccurate information to make decisions on prospective employees does not amount to actual harm. The Court's decision to hear the case comes after the U.S. Solicitor General filed a brief with the Court last month urging the Court to deny certiorari.
(*Spokeo, Inc. v. Thomas Robins et al.*, No. 13-1339 (S. Ct., Apr. 27, 2015).)
- On April 29th, a federal district court denied Whole Foods Market Group, Inc.'s (Whole Foods) attempt to stay a proposed class action lawsuit alleging violations of the FCRA until the Supreme Court decides Spokeo's FCRA action. The complaint against Whole Foods alleges that the grocery chain's background check disclosure policies violate the FCRA. Whole Foods, in its motion to stay, argued that the Supreme Court's decision in the Spokeo case would affect the plaintiff's standing to pursue his claims related to Whole Food's background check policies. However, the federal court rejected the company's argument, stating that a "grant of certiorari by the Supreme Court does not change the law and does not constitute new law, that a stay of these proceedings to await a decision from the Supreme Court in Spokeo is not warranted."
(*Colin Speer v. Whole Foods Market Group, Inc.*, No. 8:14-cv-03035 (M.D. Fla., Apr. 29, 2015).)
- On April 23rd, the Equal Employment Opportunity Commission (EEOC) urged a federal district court to deny BMW Manufacturing Co. LLC's (BMW) attempt to compel the agency to turn over its analysis of BMW's background check policy in a racial discrimination lawsuit. On the same day, BMW filed the initial motion to compel the

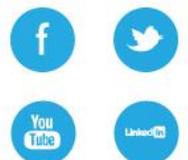
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EEOC to produce, in particular, a “spreadsheet created by the EEOC’s expert” related to BMW’s background check policy. The EEOC argues that the spreadsheet is privileged work product and that the analysis is derived from information that BMW already has. According to BMW, “the EEOC’s efforts to prevent BMW from learning about what the EEOC provided and withheld from its expert witness are aimed at hindering BMW’s ability to challenge the methodology and conclusions of [the EEOC’s] expert.” The EEOC originally filed the lawsuit in June 2013, alleging that BMW’s use of criminal background checks for hiring has a disparate impact on African-American job applicants, in violation of Title VII of the Civil Rights Act of 1964.

(United States Equal Employment Opportunity Commission v. BMW Manufacturing Co. LLC, No. 7:13-cv-01583 (D.S.C., Apr. 23, 2015).)

- On April 21st, Home Depot USA, Inc. (Home Depot) agreed to pay at least \$1.8 million to settle a putative class action lawsuit for allegedly violating the FCRA over its background check policies. According to the terms of the settlement stated in the plaintiffs’ motion for preliminary approval, Home Depot would be required to pay between \$15 and \$100 to eligible members of the settlement class, which Home Depot estimates to be approximately 120,000. The initial complaint alleged that Home Depot’s background check disclosure forms contained extraneous information other than a disclosure that the company would conduct a background check and obtain a credit report on the individual, a violation of the FCRA according to the plaintiff.
(Fernandez v. Home Depot USA, Inc., No. 8:13-cv-00648 (C.D. Cal., Apr. 21, 2015).)

State News and Legislation:

- On April 23rd, Montana Governor Steve Bullock (D) signed HB 343, which will “prohibit [the] request of online passwords as a condition of hiring or employment.” According to the law, an employer or employer’s agent may not require or request an employee or a prospective employee to:
 - Disclose a user name or password for the purpose of allowing the employer to access a personal social media account of the employee or job applicant;
 - Access personal social media in the presence of the employer or employer’s agent; or
 - Divulge any personal social media or information contained on personal social media.

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The law establishes exceptions that would permit an employer to obtain social media account information of an employee or prospective employee, such as when the employer:

- Has specific information about an activity by the employee that indicates “work-related employee misconduct or criminal defamation”;
- Has information related to the unauthorized transfer by the employee of the employer’s proprietary information, confidential information, or trade secrets; or
- Needs the information to be in compliance with applicable state or federal laws.

The law went into effect upon passage and approval by the governor.

(<http://leg.mt.gov/bills/2015/billpdf/HB0343.pdf>.)

- On April 23rd, the Colorado state House passed HB 1328, which would affect background checks for youth sports organizations. Under the bill, “a youth sports organization shall require all employees and volunteers who work directly with youth members five or more days in a calendar month, and any employee or volunteer who will accompany the youth sports organization on any trip that includes one or more overnight stays, to obtain a criminal history record check.” The bill defines a “youth sports organization” as a “private, for-profit or not-for-profit organization that provides sports activities designed for the participation of youth 18 years of age or younger.” The criminal history record check must attempt to identify sexual offenders and felony convictions, and include a Social Security number trace and search of the state’s Judicial Public Access System. The law states that a youth sports organization must disqualify an employee or volunteer who has previously been convicted of felony child abuse, a felony offense involving unlawful sexual behavior, or any comparable offense committed in another state. (http://www.leg.state.co.us/clics/clics2015a/csl.nsf/fsbillcont3/20FC782C7305B6AE87257DE800557407?open&file=1328_eng.pdf.)
- On April 17th, the Illinois state House passed HB 1665, which would affect background checks for school bus drivers. According to the bill, Illinois’ Secretary of State would be charged with issuing school bus driver permits to applicants who fulfill all the requirements of the application and screening process to “insure the welfare and safety of children who are transported on school buses” throughout the state. The background check would consist of the applicant submitting their fingerprints to the Department of State Police to conduct a criminal background check on information available in the state

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system and through the Federal Bureau of Investigation's databases. The cost of the background check would be charged to the applicant.

(<http://www.ilga.gov/legislation/99/HB/PDF/09900HB16651v.pdf>.)

- On April 16th, the New York City Council passed Int. 261-A, the “*Stop Credit Discrimination in Employment Act*.” Under the bill, certain employers would be banned from using credit histories to screen prospective employees. Specifically, the bill would make it “an unlawful discriminatory practice for an employer to use an individual’s consumer credit history in making employment decisions.” The bill would exempt “an employer, or agent thereof, that is required by state or federal law or regulations or by a self-regulatory organization...to use an individual's consumer credit history for employment purposes.” Additionally, the bill would exempt certain individuals, allowing employers to consider the individual’s credit history in screening the applicant.

Individuals include:

- Police officers;
- Peace Officers; and
- Law enforcement personnel at the Department of Investigation.

The bill awaits action by the Mayor, who scheduled a hearing in relation to the bill for May 6th. No further information has been provided regarding the hearing.

(<http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=1709692&GUID=61CC4810-E9ED-4F16-A765-FD1D190CEE6C&Options=&Search>.)

- On April 16th, the Texas state House passed HB 2145, which would affect background checks for “certain individual insurance license applicants to act as insurance agents.” According to the bill, the state may issue a “provisional permit” to insurance agent applicants upon the receipt of, among other things:
 - A written application for a provisional permit;
 - A properly completed license application; and
 - A certificate signed by the appointing agent, insurer, or health maintenance organization stating that, among other things, the appointing agent, insurer, or health maintenance organization completed a background check on the applicant that did not show any felony convictions.

(<http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB02145E.pdf#navpanes=0>.)

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