

News and Legislation Relating to Employment and Background Checks

Federal News and Legislation:

Background Checks

- On April 4th, the U.S. Department of Housing and Urban Development (HUD) announced its guidelines for the use of criminal background checks in screening for tenancy purposes. The guidance issued by HUD creates a framework for analyzing claims that screening for “criminal history violates the Fair Housing Act because it results in a discriminatory effect.” HUD emphasizes that the guidelines are only the beginning and suggests that the Department may conduct enforcement actions in the near future. The guidelines establish a “burden-shifting standard” that creates a three-step process for proving the discriminatory use of criminal history screening in housing. The first step requires a court to analyze whether a plaintiff can demonstrate disparate impact against a protected class on the grounds of criminal history. The second step would require the housing provider to prove that there is “substantial, legitimate, nondiscriminatory interest” in maintaining its criminal history policy. Finally, the housing provider would also be required to demonstrate that its criminal history policy has been effective in achieving its stated goals. If a housing provider is able to successfully demonstrate these standards, then the burden will shift to the plaintiff to demonstrate that different policies or practices could have a less discriminatory effect. The guidelines also specify that housing policies must “accurately distinguish between criminal conduct that indicates a demonstrable risk to resident safety and/or property and criminal conduct that does not.” (<http://www.jdsupra.com/legalnews/hud-releases-guidance-on-criminal-97957/>)
- On April 27th, a proposed class action was filed in a federal court against the Southeastern Pennsylvania Transportation Authority (SEPTA) for alleged violations of the Fair Credit Reporting Act (FCRA) and Pennsylvania’s Criminal History Record Information Act (CHRIA). The named plaintiff, Frank Long, claims that he was not provided a “proper written disclosure” that SEPTA would be conducting a credit check on him, as is required by the FCRA. The suit also

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alleges that Long and others were denied employment because of past criminal convictions “that do not relate to the applicants’ suitability for employment in the positions for which they applied.” Long has a prior drug possession and manufacturing charge from 1997 that was revealed during the course of the background check. Long’s complaint alleges that, “The SEPTA form was not only unclear and inconspicuous, but, in addition, it did not ‘consist solely of the disclosure’ that a consumer report may be procured for employment purposes, and instead contained numerous statements and requests in clear violation of the requirements set out by FCRA.” The class action will attempt to include all SEPTA job applicants that did not receive a “proper FCRA disclosure” or were denied a position based on unrelated criminal history in violation of the CHRIA. (*Long v. Southeastern Pennsylvania Transportation Authority, case number 2:16-cv-01991 in the U.S. District Court for the Eastern District of Pennsylvania*)

- On April 29th, *Nextgov* reported that the National Background Investigation Bureau (NBIB) is considering creating an “insider threat score” modeled on credit scores for certain federal government applicants, according to comments made at the National Security Alliance symposium. The “insider threat score” would allow for the “continuous evaluation” of employees with a federal security clearance. NBIB is the agency tasked with issuing federal security clearances following the Office of Personnel Management data breach. Director Jim Onusko stated that the agency is interested in creating a “Fair Isaac-like score” which would compile and use “court records, mortgage transactions, and – if authorized – social media posts” to continuously determine whether individuals are eligible for a federal security clearance. The current system only reevaluates employees with security clearance every couple of years. The new system would attempt to “reverse engineer the online activities” of applicants in order to “understand the behavioral components of leakers.” (<http://www.nextgov.com/cybersecurity/2016/04/cleared-personnel-fico-score-will-decide-what-secrets-you-can-see/127903/?oref=ng-HPtopstory>)

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