Imprudent Background Check Policies Pose Substantial Risk to Employers

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Many employers conduct background checks when screening applicants for employment. Some recent developments suggest that employers should take care when conducting such checks.

On April 19, 2011, Vitran Express Inc. agreed to a $2.6 million settlement in a class action resulting from Vitran's alleged failure to comply with the Fair Credit Reporting Act (FCRA) when conducting applicant background checks. Specifically, the plaintiffs claimed that the company failed to abide by the notice and disclosure requirements of the FCRA. The settlement exemplifies the risks associated with imprudent employer background check policies.

The Vitran case arose after a Vitran applicant learned through a consumer report agency that Vitran had run an unauthorized background check on the applicant. Vitran declined to hire the applicant based on the report, which erroneously identified the applicant as having 27 felony convictions. According to the applicant, Vitran never sought authorization prior to obtaining the report, nor did Vitran provide him with a copy of the report or a statement of his FCRA rights prior to refusing employment.

The FCRA requires employers who use consumer reports in hiring decisions to follow specific procedures. The FCRA requires employers to notify applicants of the employer's intention to obtain a consumer report in a "clear and conspicuous" disclosure and to obtain an applicant's written consent before seeking a report. If the employer considers the report in its decision to refuse employment, the employer must provide the applicant with a copy of the report and a written description of the applicant's rights under the FCRA before taking any adverse action against the applicant. As the Vitran case demonstrates, failure to follow these procedures may result in considerable costs for the employer.

In addition, in December 2010, the Equal Employment Opportunity Commission (EEOC) filed a nationwide hiring discrimination lawsuit against Kaplan Higher Education Corporation, accusing the company of race discrimination for refusing to hire a class of black job applicants based on their credit history. The EEOC argues that use of applicants' credit histories has an unlawful discriminatory impact and is neither job-related nor justified by business necessity.

The EEOC has previously issued opinions and guidance on pre-employment inquiries regarding an applicant's credit or criminal history. The EEOC advises employers to avoid inquiries into an applicant's credit history unless essential to the job because credit histories tend to adversely impact females and minorities. With respect to an applicant's conviction or arrest record, the EEOC advises that although such inquiries are not prohibited by federal law, employers who use these records as an absolute bar to employment risk adversely impacting certain protected groups. Before making a decision

based on an applicant's conviction or arrest record, the EEOC recommends that the employer consider the nature of the job, the seriousness of the offense and the length of time since the event.

The trend toward restricting employers' use of credit reports in employment decisions extends to state legislatures. Five states (Maryland, Hawaii, Illinois, Oregon and Washington) have passed legislation that restricts an employer's use of credit history in employment decisions, while many other states are currently considering similar legislation.

The foregoing events serve as an important reminder that all employers who conduct background checks must take care.