

Northern New England

MONDAY MORNING MINUTE

March 31, 2014

Under Increasing Fire, EEOC and FTC Issue “Background Checks: What Employers Need To Know”

In the face of increasing challenges to a key prong of its systemic discrimination litigation strategy, the EEOC issued a joint publication with the Federal Trade Commission (“FTC”) on March 10, 2014 regarding an employer’s use of background information, including criminal and credit records, medical history, and social media use, under federal law.

In April of 2012, the EEOC issued a Guidance on an employer’s use of criminal records under Title VII. The Guidance reflected the EEOC’s position that although Title VII does not necessarily require an “individualized assessment” of each applicant’s criminal history and/or justification of the denial of employment to convicted applicant’s by “business necessity,” an employer’s failure to use a criminal background screen that does not include individualized consideration of the applicant’s background is more likely to violate Title VII. See “EEOC Issues New Guidance On Criminal Background Checks By Employers,” [Monday Morning Minute](#) (June 4, 2012). Since then, the EEOC’s Guidance has come under attack in the courts, from the business community, state law enforcement officials and even from Commissioner Peter Kirsanow of the United States Commission on Civil Rights who, in testimony before Congress, challenged the assumption underlying the Guidance that criminal background checks necessarily discriminate against certain protected classes of applicants.

In *EEOC v. Freeman*, for example, the district court in Maryland granted summary judgment in favor of Freeman, a corporate events company, in a case in which the EEOC claimed that Freeman’s use of criminal and credit background checks unlawfully discriminated against black and male applicants. The district court found the EEOC’s statistical data unreliable, and ruled that “careful and appropriate use of criminal history information is an important, and in many cases, essential, part of the employment process of employers throughout the United States.” The EEOC is now

For specific information or answers to questions, please contact any of the attorneys in the Portsmouth, NH office:

Attorney Debra Weiss Ford
(603) 559-2727
Debra.Ford@jacksonlewis.com

Attorney Martha Van Oot
(603) 559-2735
Martha.VanOot@jacksonlewis.com

Attorney Daniel P. Schwarz
(603) 559-2730
Daniel.Schwarz@jacksonlewis.com

Attorney Thomas M. Closson
(603) 559-2729
Thomas.Closson@jacksonlewis.com

Attorney Nancy E. Oliver
(603) 559-2725
Nancy.Oliver@jacksonlewis.com

Attorney Elizabeth J. Baker
(603) 559-2722
Elizabeth.Baker@jacksonlewis.com

Attorney K. Joshua Scott
(603) 559-2711
Joshua.Scott@jacksonlewis.com

The information in this Email Update is published by the New Hampshire Jackson Lewis office to give general and timely information on the subjects covered. It is not intended as advice or assistance with respect to individual problems. This Update is provided with the understanding that the publisher, editor or authors are not engaged in rendering legal or other professional services. Readers should consult competent counsel or other professional services of their own choosing as to how the matters discussed relate to their own affairs or to resolve specific problems or questions. This Update may be considered attorney advertising in some states. Furthermore, prior results do not guarantee a similar outcome. © 2014 Jackson Lewis P.C.

urging the Fourth Circuit Court of Appeals to reverse the district court, contending that Freeman's use of credit checks and criminal checks had a statistically disparate impact on blacks and men.

The Sixth Circuit Court of Appeals heard arguments on March 20, 2014 in the EEOC's appeal from the dismissal of its case against Kaplan Higher Education Corp.'s use of credit checks, which the EEOC alleged had a disparate impact on black applicants and employees in violation of Title VII. As in *Freeman*, the Court was not persuaded by the EEOC's statistical evidence, and the Sixth's Circuit's ruling is seen as a test to the EEOC's ability to litigate large-scale cases on background check policies as part of its systemic discrimination litigation program.

Echoing the concerns of employers in the litigated cases, employers recently told the United States Chamber of Commerce that although many have changed their protocols in response to the EEOC's 2012 Guidance, there is confusion and significant concern resulting from the conflict between the EEOC's insistence on "individualized assessment" and state licensing laws applicable to employers charged with protecting the health and safety of their clients, including hospitals, nursing homes, child care center and home security companies. For these companies and for many small employees, the costs of potential litigation with the EEOC have compelled them to change their policies to conform to the EEOC's Guidance, but have left them exposed to claims that they are not in compliance with state or local laws.

Finally, a recent lawsuit filed in the federal district court in Texas by the State of Texas against the EEOC highlighted the tension between state law and the EEOC's position. Pointing out that state law prohibits individuals who have been convicted of certain crimes from working in law enforcement, education, elderly and disabled care and similar public service, Texas alleged in its complaint that if state agencies choose to comply with the EEOC's Guidance, they violate state law, must re-write their hiring policies at taxpayer expense and they expose state agencies to liability for employee misconduct.

The joint publication, issued on March 10, 2014, can be found at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm. It emphasizes that it is not illegal to require background checks, provided that they are conducted in compliance with the laws enforced by the EEOC, including Title VII, GINA ("the Genetic Information Non-Discrimination Act") and the ADEA ("the Age Discrimination in Employment Act"), and the Fair Credit Reporting Act ("FCRA"), enforced by the FTC. The publication explains what an employer should do before getting background information from applicants, using background information in the application process, and maintaining and/or disposing of background information. The publication also contains an appendix with useful links to other EEOC publications. A related publication, also jointly issued by the EEOC and the FTC, informs individuals of their rights under federal law when employers seeks to conduct background checks. It can be found at http://www.eeoc.gov/eeoc/publications/background_checks_employees.cfm.

For additional information regarding this, or any other labor or employment law matter, please contact the attorneys in the Portsmouth, New Hampshire office of Jackson Lewis P.C.

ON APRIL 29TH, Portsmouth Managing Shareholder **Debra Weiss Ford** will be presenting at **The 2014 Granite State Human Resources Conference at the Radisson Manchester.**

Do you want to be a part of GSHRC?

The first two people to respond to Jeanine Ulaskiewicz at Jeanine.Ulaskiewicz@jacksonlewis.com will receive Conference Passes!



*The Portsmouth Office of Jackson Lewis invites you to join us for a breakfast seminar presented by **Debra Weiss Ford**:*

Leaves of Absence: Navigating Increasingly Complex Leave Laws When Checking-The-Box Will Not Suffice



An advanced interactive workshop with complex hypothetical situations and practical management tools that are designed to address leave under the FMLA, ADAAA, and Workers Compensation, including consideration of medical privacy issues.

Who Should Attend? Jackson Lewis welcomes all corporate decision makers with employee relations responsibilities, human resource executives and professionals, in-house counsel, and chief executive officers to this informative workplace law breakfast seminar.

Friday, May 9, 2014 | 8:30 –10:30 a.m.

Portsmouth Harbor Events and Conference Center
100 Deer Street at 22 Portwalk Place | Portsmouth, NH 03801

There is no cost to attend this program, but space is limited so [click here](#) to register today!