A Timely Analysis of Legal Developments

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The Old (Law) is New Again: Plaintiffs Increasingly Using Old Pennsylvania Law to Challenge Background Check Decisions

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In a climate of increased national scrutiny regarding employer use of criminal background screening, plaintiffs are turning to a provision in the Pennsylvania Criminal History Record Information Act (CHRIA), 18 Pa.C.S. § 9125, as another avenue to challenge employer hiring decisions.[1] Thus, Pennsylvania employers should remember to ensure compliance with this law if they reject applicants with criminal records.

Background of CHRIA

Originally passed approximately 35 years ago, the CHRIA provides that Pennsylvania employers may only consider felony and misdemeanor criminal convictions in hiring if the convictions "relate to the applicant's suitability for employment in the position for which he has applied." The law also requires employers to provide written notice to applicants when a rejection is based in whole or in part on a criminal history. The law applies to any use of criminal record information, not just use of criminal record information obtained through third-party background screening companies (e.g., consumer reporting agencies). By its terms, the law applies only to ***hiring*** decisions, but some employees have nonetheless filed common law wrongful discharge claims, contending that the law provides a "public policy" to expand its mandates to termination decisions as well.

Remedies Available Under CHRIA

The CHRIA is a fee-shifting statute. 18 Pa.C.S. § 9183. Thus, individuals who prevail on CHRIA claims may receive an award for attorneys' fees and costs. In addition, they may receive "actual

1 For more information regarding the increase in Fair Credit Reporting Act (FCRA) litigation against employers, *see* Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler ASAP (Jan. 6, 2014); Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014). For more information regarding the U.S. Equal Employment Opportunity Commission's (EEOC) attacks on employment screening, *see* Rod Fliegel and Jennifer Mora, *Sixth Circuit Upholds Dismissal of EEOC Suit Against Employer Screening Applicants Based on Credit History Information*, Littler ASAP (Apr. 17, 2014). For the most up-to-date information on the "ban the box" trend, and laws restricting the use of employment credit screening, *see* Rod Fliegel, Jennifer Mora, Joseph Harkins and Melanie Augustin, *Private Sector Employers in the District of Columbia Will Soon Be Required to Comply with a New Law Restricting Their Ability to Rely on Criminal Records for Employment Purposes*, Littler ASAP (Aug. 22, 2014); Rod Fliegel, Bruce Young and Jennifer Mora, *Nevada is the Latest State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (May 30, 2013).

damages of not less than $100 for each violation." If the plaintiff demonstrate thats the violation of the CHRIA was "willful," exemplary and punitive damages of $1,000 to $10,000 may be awarded. The statute does not define a "willful" violation. The CHRIA also provides for the Attorney General "or any other individual or agency" to seek injunctive relief to compel compliance.

Increasing Litigation Under CHRIA

For many years, claims under the CHRIA were rare, but they are now increasing, as are attempts to expand the reach of the CHRIA beyond its plain text. Indeed, in the 30 years from the CHRIA's passage until 2011, there were no more than five decisions available in legal research databases that interpreted its substantive employment provisions. Approximately the same number of decisions issued in just the three-year period of 2011-2013; in the 2014 calendar year, there have been at least four decisions interpreting the statute's employment provisions.

First, plaintiffs are attempting to stretch what it means under the CHRIA for an employer to "consider" convictions in hiring decisions. In *McCorkle v. Schenker Logistics Inc.*, Civ. No. 1:13–CV–3077 (M.D. Pa. Oct. 8, 2014), for instance, an employer rejected the plaintiff because he did not fully disclose his criminal record in the hiring process. The employment application asked: "In the last ten years, have you been convicted of, or pleaded guilty to, any crimes (including crimes committed during military service)?" It then asked the applicant to "briefly describe the details" of the conviction or guilty plea, indicating the date, nature, and place of the offense and the sentence received. The plaintiff responded affirmatively but disclosed only that he had been convicted of "stalking [and] harassment while trying to gain custody of [his] daughter." A third-party background check revealed that the plaintiff also had convictions for public drunkenness, disorderly conduct, possession of drug paraphernalia, possession of a controlled substance, and driving under the influence of marijuana, among others. The employer's decision to reject the plaintiff's application was based on the omission and falsification. The plaintiff contended the employer was required to undertake an in-depth analysis of whether each conviction was job-related. Thus, the plaintiff claimed that the decision was prohibited by the CHRIA. The court disagreed, however, finding that where the employer makes a decision not to hire based on an applicant's material omissions or falsifications on the employment application, the decision is not "because of" the applicant's criminal record history, and therefore the CHRIA does not apply.

On the other hand, in *Hoffman v. Palace Entertainment*, Civ. No. 12-cv-06165 (E.D. Pa. Mar. 25, 2014), a court allowed a plaintiff's claim under the CHRIA to survive a motion to dismiss where the employer contended that it decided not to hire an applicant because it did not find him credible in its discussions concerning an arrest that appeared on a background check. The plaintiff alleged that he was denied employment because of the old arrest, despite the employer's contentions. Taking all inferences in the plaintiff's favor, the court found the plaintiff's allegations sufficient to plausibly suggest that the decision had been made on the mere fact of the arrest, in violation of the CHRIA.

Second, plaintiffs are attempting to expand the law beyond traditional "hiring" scenarios. In *Negron v. The School District of Philadelphia*, 994 F.Supp.2d 663 (E.D. Pa. 2014), a federal district court held that although the CHRIA only restricts hiring decisions, an employer's decision not to retain a provisional employee in a permanent position could be deemed a "hiring" decision for purposes of the CHRIA. On the other hand, in *Ripley v. Sodexo, Inc.*, Civ. No. 14-cv-75 (W.D. Pa. Aug. 29, 2014), a different federal district court dismissed a CHRIA claim in arguably analogous circumstances. There, the employer hired an employee conditioned on the employee's successful background screening. The employee started work, and approximately a year and a half later, the employer initiated a background check under revised procedures (due to a contract amendment) required to place the employee at its client's site. The check revealed criminal offenses that were undisclosed on the employment application, and the employee was fired as a result. The court found that the CHRIA did not apply because the decision was to terminate his employment, which it concluded was not a hiring decision.

Practical Guidance

Against the backdrop of increased litigation and attempts to expand the coverage of the CHRIA, employers should be cognizant of the CHRIA and consider whether an applicant's criminal background history relates to the job before denying employment based on that history. The statute's plain language requires that criminal history broadly "relate to the applicant's suitability" for a job, which should result in a low threshold for employers to prevail. However, plaintiffs contend the statute's language leaves room to argue whether any given offense truly "relates" to suitability for a job. In addition, employers must remember that even if the applicant's criminal history is obtained through a law enforcement agency, such as through FBI fingerprinting or employer searches of Pennsylvania criminal records, the CHRIA requires written notice to the applicant if the decision was made in whole or in part based on the applicant's criminal records.

Further, all employers making adverse employment decisions based on criminal records must be mindful not only of the EEOC's interpretation of Title VII, but related federal and state laws, such as the FCRA and the increasing wave of class claims alleging FCRA violations, and state fair employment laws restricting inquiries into, and the use of, credit history and criminal records.

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