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Newsletter

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Permissible Investigation in the Hiring Process: Use of Background Checks, Consumer Reports, Criminal History and Social Media

By: Stephen J. Galati, Esquire

The hiring of a new employee is often stressful for both the prospective employer and employee. The employer is seeking to gather sufficient information to intelligently determine if the job candidate is right for the position, while at the same time, the candidate has concerns about his privacy and the employer delving into personal information irrelevant to the job. Often both employer and employee are unsure of the limits on the appropriate scope of the inquiry. The following is a brief summary of the permissible information gathering process for a prospective employer:

Job Application

Much of the information the employer needs to know is learned from the job application. Information typically requested on the application includes educational history, job history, former or current supervisor's contact information, salary range, potential start date, professional affiliations, and information regarding licenses and certifications. If the applicant's social security number is requested it is critical that the employer have in place measures to safeguard this information.

Certain information should not be requested, including:

- Age
- Disabilities
- Religion
- Genetic information
- Marital status
- Sexual orientation
- Arrest record
- Personal bankruptcy

References

References are often checked in order to verify the information provided by the candidate. Through checking references, the employer will obtain relevant information about an applicant's work experience, skills, past performance and qualifications. References also permit the employer to predict the success of job candidates by comparing their

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experience to the required competencies of the new position. The checking of references may also uncover background information not identified through other selection procedures. Many employers will require the candidates to execute a waiver that authorizes the employer to contact references and which releases the employer and the reference provider from liability resulting from appropriate reference checking discussions.

Relevant information learned by checking references includes:

- Dates of employment
- Positions held
- Salary history
- Reason for leaving
- Work attitude
- Productivity
- Attendance and reliability
- Strengths and weaknesses
- Overall assessment
- Eligibility for rehire
- Relationship with coworkers, subordinates, and superiors
- Types of work for which the candidate was responsible
- Why the reference would or would not recommend the candidate

Inappropriate topics should be avoided and the prospective employer should disregard information about which the reference provider has no first-hand knowledge, or that is unrelated to the applicant's skills, performance and qualifications.

Background Checks

A prospective employer has permissible reasons to conduct background checks in order to:

- Reduce risk of workplace violence
- Confirm accuracy of credentials
- Reduce risk of employee theft and other honesty crimes
- Reduce risk of non-compliance with immigration law
- Reduce litigation risks through negligent hiring, supervision, or retention

Consumer Reports

Requirements for obtaining consumer reports is governed by the Fair Credit Reporting Act ("FCRA").

These reports are defined broadly to include:

- Credit reports
- Criminal and civil records
- Driving records
- Reference checks and any other information obtained by a consumer reporting agency, which include:

Our Attorneys:

Presentations, Seminars and Honors

Gene and Stephen were both recognized in Philadelphia Biz magazine this month for being Top Attorneys in the area. Editor Michelle Boyles said, "according to the current population survey, 1.2 million attorneys were working in the United States in 2015. With the staggering number of options available, finding the right one to work with your business needs can pose a significant challenge. Our first-ever list of top business attorneys presents you with 49 of the top legal minds in Philadelphia."

If you have any questions or would like to talk to Gene or Stephen, please email at emattioni@mattioni.com or sgalati@mattioni.com

1. Credit bureaus
2. Private investigators
3. Collection agencies
4. Detective agencies
5. Internet/social medial background screening services.

FCRA excludes certain information in consumer reports for employment purposes relating to jobs that pay less than \$75,000 annually:

- Chapter 11 bankruptcies more than 10 years old
- Paid tax liens more than 7 years old
- Delinquent accounts more than 7 years old (except govern-sponsored student loans)
- Other adverse information (other than criminal convictions) more than 7 years old.

FCRA requires that the employer obtain a disclosure/authorization from the applicant before the background check is performed. The act also requires the employer to send a copy of the report to the applicant if it discloses information that might disqualify the applicant and a summary of the applicant's FCRA rights. In addition, the employer must give certain other notices and wait a reasonable period before taking any action based on the information in the report. The applicant must have the right to dispute the information with the consumer reporting agency.

Credit Scores

A credit score generally has little value in employment decisions and an applicant's credit history should be used in the selection process only if the information is substantially job related. Several states bar the use of such information in making employment decisions. The EEOC is closely scrutinizing the potentially disproportionate impact of credit checks on minority candidates for employment. The Dodd-Frank Wall Street Reform and Consumer Protection Act established new disclosure requirements under FCRA whenever a credit score is used in decision-making.

Bankruptcy

Under the Federal Bankruptcy Act, public employers may not deny employment to an applicant who has filed for bankruptcy. Private employers, however, may refuse to hire an individual based on a prior bankruptcy.

Criminal History

Pennsylvania restricts the extent to which an employer may rely on criminal history information in making hiring decisions. See 18 Pa. C.S.A. ss 9125. Convictions may be considered only to the extent that it relates to the applicant's suitability for employment in the position. Written notice must be provided to the applicant that the decision not to hire was based on the criminal history information. Employers may consider felony and misdemeanor convictions as they relate to the specific position in question.

Joseph Bouvier

Joe has been an integral part of the Greater Swedesboro Business Association and currently sits on the Board. For the last 10 years, he has taken on the responsibility of being the Chairperson for the Annual Golf Tournament hosted by the GSBA. This tremendous event has consistently grown over the last 10 years under his direction. After the outing is a dinner titled "A Taste of Swedesboro . . . and Beyond". This year's event was held on May 26th and boasts to be the most successful event to date. All of the funds raised from this night go to local high school seniors for scholarships, new computers for the local libraries, and publishing area business directories. Portions of the night's proceeds go to well-deserving charities as well.

If you have any questions or would like to talk to Joe, please email at jbouvier@mattioni.com

Factors to consider include:

- The specific job duties
- Time since the offense
- Age at time of offense
- Seriousness of offense
- Evidence of successful rehabilitation

The Philadelphia Code, in the “Ban the Box” Law prohibits certain employers from asking questions on the job application and in the initial interview process and taking adverse action against an applicant because of arrests that did not result in convictions.

EEOC guidelines provide that an employer should not disqualify an applicant based upon a prior arrest record, and that an employer may not have blanket policies excluding those with convictions that are not job related and/or consistent with business necessity. To establish business necessity an employer must either conduct a statistical validity study or “targeting screening.”

Social Media

Social media makes it possible to discover vast amounts of information about a job candidate, including demographic and affiliation information that could create exposure to employment discrimination claims. This often includes age, race, nationality, disability, marital status, religion, sexual orientation, familial status, political views and genetic markers. Appropriate safeguards should be put in place by the employer to have in place an established policy and to respect the employee’s privacy protections and the terms of third-party social media websites. An employer should not ask potential employees to provide social media sign-in information. The employer should also be consistent in its social media investigative process and keep problematic information from the hiring official.

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Don't Text and Drive, but Don't Text a Driver, Either

By: Anna M. Haslinsky, Esquire

We all know the risks—distracted driving is dangerous and illegal. Nonetheless, cell phone use seems to be an ever prevalent cause of car accidents. Most states, including Pennsylvania and New Jersey, have passed laws to prevent a driver from engaging in distracting activities while driving, such as using a hand-held cell phone to make calls or send messages. As recent court cases in New Jersey and Pennsylvania are revealing, civil liability for distracted driving may be expanding to include a person who sends a text message to a driver.

In a 2013 Superior Court of New Jersey case, *Kubert v. Best*,

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a driver crossed the double yellow center line into the other lane of traffic, causing a head-on collision with a couple who was riding a motorcycle. As a result of the collision, both riders had their left legs amputated. In the personal injury case that followed, the plaintiffs named the driver's girlfriend as a defendant in the matter because the text message records showed that he sent a text message to her immediately before the crash. Plaintiffs claimed it could be inferred from the message records that he was responding to the text message she sent to him twenty-five seconds earlier.

On appeal, plaintiffs argued that the girlfriend could be liable if a jury found that her texting was a proximate cause of the accident. Apparently, this is the first time any court was confronted with such a question. For the purposes of that case, plaintiffs did not have enough evidence and the Superior Court upheld the lower court's dismissal of the case against the girlfriend. However, the Court opened the door to liability in other cases, holding that "a person sending text messages has a duty not to text someone who is driving if the texter knows, or has special reason to know, the recipient will view the text while driving."

This does not mean that somebody who sends a text message to a driver is liable for the driver's negligence. Ultimately, it is up to the driver to drive responsibly and follow the law. The Court also noted that it would not be enough if the sender only knew the recipient was driving. Rather, if a person sends a text message to a driver, there must be "additional proof," such as the message contents, and the sender had to know the driver would read and be distracted by the message. Under the principals of negligence, that person, although in a remote location from the car, has a "duty to refrain" from sending the text message, and has ignored a known or foreseeable risk.

In March 2016, a judge in Lawrence County, Pennsylvania, looked to the Superior Court's reasoning in *Kubert*, and allowed a similar claim to survive preliminary objections. In this case, *Gallatin v. Gargiulo et al.*, a driver rear-ended and killed a motorcycle rider while she was reading or responding to a text message. Plaintiff claims the defendant who texted the driver knew or should have known that she was operating a vehicle at that time. So far, it is too soon to tell if the facts in this case will show the sender of the text messages actually knew the recipient was driving and whether the argument will stand. While neither of these cases have resulted yet in actual liability for a person who sends a text message to a driver, judges are clearly beginning to consider it.

Of course, many argue this takes the law too far, but, the trend is not slowing. You might have also heard about the 2015 Georgia case making headlines, *Maynard v. Snapchat*, in which a car crash victim claims negligence against Snapchat on the grounds that the app's speedometer feature contributed to the cause of the accident. In the same theme, New York has proposed legislation to allow "Textalyzer" technology, which would assist police in determining whether a driver was using a phone illegally while driving. We don't yet know how far the

PRACTICE AREAS

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law will go, but the trend is clear. In addition to being dangerous, if you want to avoid criminal, and possibly civil liability, texting can wait. you want to avoid criminal, and possibly civil liability, texting can wait.¹

1. *The following provides citations to the New Jersey and Pennsylvania cases: Kubert v. Best, 75 A.3d 1214 (N.J. Super. Ct. App. Div. 2013); Gallatin v. Gargiulo, No. 10401 of 2015, C.A. (C.P. Lawrence Co. March 9, 2016 Hodge, J.).*

Gender Identity Workplace Discrimination

By: Kira Rold, Esquire

In an effort to expand employment equality and promote diversity in Pennsylvania, Governor Wolf issued two Executive Orders in early April that expanded protections from workplace discrimination to prohibit discrimination based on sexual orientation, gender expression and gender identity.

Governor Wolf's Executive Orders offer these protections for state employees and employees of contractors doing business with the Commonwealth. Contractors are also required to agree not to discriminate in the award of subcontracts or supply contracts based on sexual orientation, gender identity or gender expression. Because the General Assembly has made little progress in passing the Pennsylvania Fairness Act, Governor Wolf took this action to offer a solution which partially closes the gap in equal employment protections. If passed, the Pennsylvania Fairness Act will expand these protections to all employees in the Commonwealth. In a press release accompanying the Governor's signing of the Executive Orders he stated, "[w]ith no sign that Republican leaders plan to free this bill that has broad, bi-partisan support, I am taking action to protect those that I can and send a signal to the country that Pennsylvania is open for business no matter who you are or whom you love."

In issuing this Executive Order, Governor Wolf joined at least a dozen other states that have taken similar action to protect gay and transgender employees from discrimination. The Governors of Montana, Missouri, Virginia and Massachusetts are among the group of bi-partisan Governors who have recognized the need to eliminate workplace discrimination and have taken execution action to achieve that goal. Governor Wolf's Executive Orders define sexual identity or expression as "the gender-identity, appearance, mannerisms, expression or other gender-related characteristics of an individual regardless of the individual's designated sex at birth."

Because these Executive Orders add classes of individuals who are not currently protected under Pennsylvania law, there is no ability to enforce the Executive Orders directly for the benefit of those individuals. However, if you think you may have been the subject of workplace discrimination, please reach out to our firm to discuss your rights and the possible remedies available to you.

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