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Revisiting Background Check and Drug Testing Obligations as Hiring Ramps Up After COVID-19

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In this article, the authors review the various rules that come into play in the hiring context.

As businesses reopen and COVID-19 restrictions loosen, help-wanted signs adorn many a shop window, and many employers are struggling to fill jobs. Given the anticipated and very welcome hiring surge, it makes sense for employers to re-familiarize themselves with the various rules which come into play in the hiring context. Conducting background checks, criminal history checks, credit checks, and drug screens are extremely common practices and, if done right, are critical to ensuring a successful hire. Full compliance with the myriad and detailed rules in this area is a challenge, however, and employers that misunderstand their obligations, commit even minor mistakes, or rely blindly on third parties for conducting these checks, can end up enmeshed in very costly litigation.

This article addresses the rules and regulations at the federal level, including the Fair Credit Reporting Act ("FCRA"), as well as federal and state restrictions on criminal history checks and credit checks, and provides practical guidance with regard to handling background checks. This article concludes with a discussion of

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pre-employment testing for marijuana usage and practical advice in this area.

Employers can look forward an increase in hiring, and can ensure that these hires are successful, by reviewing, understanding, and complying with the myriad federal, state, and local laws governing the background check area.

FAIR CREDIT REPORTING ACT

Although the past year was unprecedented in so many respects, some things remained unchanged – the number of putative class action claims filed concerning technical violations of the FCRA continue to rise. While some employers choose to conduct background checks in house, most engage third party companies with specialized experience to perform these background checks. When doing so, however, employers must comply with the FCRA,[1] which prescribes detailed procedures for obtaining and using "consumer reports" for employment purposes.

Procedural Requirements

Under the FCRA consumer reports include a broad array of background information from a variety of sources, including criminal and driving records, credit reports, and information regarding an individual's educational and employment background. An "investigative consumer report" is essentially a "consumer report" that was prepared by interviewing third parties.[2]

Before obtaining either type of consumer report, employers are required to disclose their intent to procure such a report, and obtain the individual's written authorization for doing so.[3] The disclosure must be in writing in a document that consists solely of the disclosure, often referred to as the "standalone" requirement. The disclosure must be "clear and conspicuous" and may not contain extraneous information that may detract from the notice or confuse the reader. The required written authorization may be given on the "standalone" disclosure or in a separate document. Many employers seek a blanket authorization permitting them to obtain consumer reports during the application process and at any future time for use in evaluating the employee for promotion, reassignment, or retention.

Before an employer takes any adverse action against an applicant or employee based in whole or in part on a consumer report, the employer must provide a pre-adverse action notice. This notice must include a copy of the background check report as well as the FCRA Summary of Rights form.[4] The pre-adverse action notice gives the applicant or employee an opportunity to review the report and discuss or explain any discrepancies. The FCRA specifies that the individual must be given a "reasonable" period of time to dispute the report, although no specific

number of days is required. Best practice suggests that an employer wait five days before taking final action. Once a final decision is made, an employer must send the individual an additional notice, called an adverse action letter, containing a laundry list of specific information prescribed by the statute.[5]

Class Action Fever

In the past decade or so, employers have paid out more than $150 million dollars to settle class action lawsuits alleging violations of the FCRA. The FCRA's hyper-technical requirements coupled with the availability of attorneys' fees and statutory damages between $100 and $1,000 per violation – even absent a showing of actual harm – make it a perfect storm for class actions.

Article III Standing Hurdle

In 2016, the U.S. Supreme Court limited the ability of plaintiffs to bring FCRA class actions in federal court, requiring plaintiffs to show that they suffered from an actual concrete and particularized "injury-in-fact" – not just a bare procedural violation. This is known as Article III standing.[6] Many assumed, incorrectly as it turns out, that *Spokeo, Inc. v. Robins* would be the death knell of class action litigation.

For example, in *Syed v. M-I, LLC*,[7] the U.S. Court of Appeals for the Ninth Circuit held that the plaintiff suffered an injury-in-fact when his employer included a liability waiver in its FCRA disclosure because it deprived the plaintiff of the ability to "meaningfully authorize" the procurement of a consumer report and that such injury was real and concrete. The court inferred that Syed was confused by the form and would not have signed it had it contained a sufficiently clear disclosure.[8]

On December 16, 2020, the Supreme Court granted certiorari in *Ramirez v. TransUnion LLC,*[9] another FCRA class action case concerning Article III standing where the vast majority of the class suffered no actual injury. This case is one to watch as the outcome may further clarify standing requirements for FCRA class-action plaintiffs.

Even in the absence of Article III standing, plaintiffs are typically free to proceed in state court in jurisdictions with more liberal standing requirements. In fact, since *Spokeo*, many more FCRA class actions have been filed in state courts.

Common Pitfalls and Creative Theories of Liability

Putting aside the procedural standing speedbump, the two most commonly asserted technical violations of the FCRA are the inclusion of

extraneous language in the disclosure and the rejection of an applicant without properly following the pre-adverse action notice procedure. The employee-friendly Ninth Circuit has been a particularly fertile ground for class actions based on FCRA technical violations. In March 2020, the Ninth Circuit issued an opinion in *Walker v. Fred Meyer, Inc.*,[10] expressing a very narrow view of the FCRA's "standalone" requirement. Walker claimed that Fred Meyer, a grocery store chain, violated the FCRA because the disclosure form included information concerning investigative consumer reports and the right to inspect certain files, and thus was not a "clear and conspicuous" document consisting solely of the disclosure.

Although the district court found for the company, the court of appeals disagreed, emphasizing that the statute "meant what it said" and expressly required that the disclosure document "consist solely of the disclosure."[11] Endeavoring to offer some guidance to employers, the court further explained that "beyond a plain statement disclosing 'that a consumer report may be obtained for employment purposes,' some concise explanation of what that phrase means may be included. . . ."[12] For example, the document could "briefly describe what a 'consumer report' entails, how it will be 'obtained,' and for which types of 'employment purposes' it may be used."[13]

Turning to the disclosure at issue, the court held that the employer's inclusion of information regarding investigative consumer reports did not violate the "standalone" requirement because such reports are a subcategory of "consumer reports" which may be obtained for employment purposes. However, the employer's inclusion of information concerning an applicant's rights to inspect the files maintained by the consumer reporting agency was improper. While noting that the information was provided in good faith, the court held that it should have been provided in a separate document as it could not reasonably be deemed part of the "disclosure."

The case of *Gilberg v. California Check Cashing Stores, LLC*,[14] also is instructive. There, the court addressed the common employer practice of consolidating the required FCRA disclosure with similar state law disclosures, a practice which is meant to simplify the forms and ease the administrative burdens of multi-state employers. Notwithstanding the fact that the various state law equivalents of the FCRA, such as California's Investigative Consumer Reporting Agencies Act, contain overlapping and almost identical provisions, the Ninth Circuit concluded that the FCRA's "standalone" provision requires employers to use separate disclosure forms when conducting background checks, rather than combining both federal and state disclosures into a single document. This holding further complicates employers' administrative burdens as it eliminates the ability to cover all of bases by providing a "one-size-fits-all" FCRA disclosure form. Instead, employers will be tasked with ensuring that they are providing the correct disclosure documents depending upon the state in which an applicant is applying.

It has not been entirely doom and gloom for employers over the last few years in the FCRA arena, however, even in the Ninth Circuit. In the *Walker* case discussed above, the court of appeals rejected an additional claim raised by the plaintiff concerning the sufficiency of Fred Meyer's "pre-adverse action" notice. Specifically, the plaintiff alleged that the right to dispute the contents of a consumer report encompasses not only an opportunity to correct erroneous information, but also an opportunity to discuss or explain the report with current or prospective employers. According to plaintiff, his "pre-adverse" action notice should have informed him that he had a right to speak directly to Fred Meyer, in addition to the consumer reporting agency. Looking to the plain language of the statute, the court dismissed this argument, explaining that the FCRA only requires notice of an opportunity to dispute the consumer report with the consumer reporting agency.

Another pro-employer case, *Luna v. Hansen & Adkins Auto Transport, Inc.*,[15] addressed the disclosure and the specific language of the FCRA. The plaintiff in this case first claimed that his former employer violated the FCRA by giving him the required FCRA disclosure form at the same time as other employment documents. The court made short shrift of this argument, noting that the FCRA's "standalone" disclosure requirement is a physical requirement, not a temporal one. The court likewise summarily rejected the plaintiff's argument that his former employer violated the FCRA by failing to put the FCRA authorization in a clear and conspicuous standalone document, pointing to the clear text of the statute, which only mandates that the disclosure be on a standalone document.

Takeaways

FCRA class litigation will continue to accelerate as we recover from the global pandemic. Employers must stay abreast of the law and routinely review their forms and processes to ensure compliance. Blind reliance on forms provided by background check vendors is ill-advised as they are not always compliant. Ultimately, it is the employer that will pay the hefty price when a non-compliant form is provided to hundreds, if not thousands, of job applicants. State law versions of the FCRA should also not be overlooked. Multi-state employers are undoubtedly at increased risk as they endeavor to comply with the patchwork of state laws. When it comes to FCRA disclosure forms, "less is more." Employers should eliminate any and all extraneous information from background check disclosures, including liability waivers, at-will employment statements, state law notices, and indemnity clauses. Such information can lawfully be included in the required authorization form, provided it is a separately titled document. Where, as here, the potential liability is significant, there is no room for error – even seemingly trivial ones.

CRIMINAL BACKGROUND CHECKS

Criminal record information is among the most frequently sought during the background check process. There are myriad and compelling reasons to conduct these criminal history checks, including the need to prevent workplace violence, combat employee theft, and improve the safety and productivity in the workplace. In addition, many federal and state laws expressly require employers in certain industries, such as childcare, healthcare, education, transportation and securities and banking, to conduct these background checks. Regardless of the validity of these reasons, employers must be mindful of federal, state, and local restrictions on the procurement and use of criminal background checks.

Title VII and State Anti-Discrimination Laws

The Equal Employment Opportunity Commission ("EEOC") has long emphasized that although Title VII does not protect ex-offenders as a protected class per se, unlawful discrimination may result if an employer treats applicants or employees with similar criminal histories differently on account of a protected characteristic, or maintains a facially-neutral employment screening policy or procedure that disproportionately affects protected class members. The EEOC issued guidance (the "Guidance") regarding the use of arrest and conviction records in employment decisions almost a decade ago,[16] but litigation in this area continues unabated.

The EEOC stresses that any reliance on criminal history records that has a disparate impact on protected groups must be job-related and consistent with business necessity. In other words, an employer must show that its policies operate to "effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position." Arrests and convictions are treated differently. An arrest does not establish that criminal conduct actually occurred and may not be used to make an employment decision. By contrast, a conviction serves as evidence that a person engaged in particular conduct. The EEOC strongly cautions against the use of blanket bans on hiring individuals with criminal records. Instead, the agency urges employers to use "targeting screening," i.e., determining what criminal conduct would disqualify an applicant from a particular position, followed by an "individualized assessment" to determine whether an exception should be made to the targeted screen.

The individualized assessment involves consideration of the following factors:

- Facts or circumstances surrounding the offense or conduct;
- Number of offenses for which the individual was convicted;

- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- Length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

Both the EEOC and private litigants have fervently challenged criminal background check policies in the courts based on the theory of disparate impact. The results have been mixed. In one recent case, a split panel of the U.S. Court of Appeals for the Second Circuit nixed the disparate impact putative class action claims of two African American men who lost job offers for web development positions due to past felony convictions.[17] In support of their claims, plaintiffs cited to national statistics showing that, on average, black individuals are more likely to be arrested and incarcerated than whites. Although the case was in its infancy, the court of appeals affirmed the dismissal of the complaint, finding that a statistical disparity in the general population does not necessarily mean that the same disparity exists among the relevant pool of qualified applicants, particularly where, as here, the positions required specific educational and technical credentials.

Nevertheless, despite significant victories, employers have paid out large sums to settle lawsuits asserting discrimination in hiring due to background check policies. In September 2020, Macy's agreed to pay $1.8 million to settle a class action alleging that its background check practice had a disparate impact on minority workers.[18]

As for the EEOC's Guidance, it has meet with considerable opposition over the years. In August 2019, after six years of litigation, the U.S. Court of Appeals for the Fifth Circuit affirmed an injunction sought by Texas prohibiting the EEOC and the U.S. Attorney General from "enforcing the EEOC's interpretation of the Guidance against the State of Texas."[19]

As discussed below, federal and state anti-discrimination laws are not the end of the inquiry. Many of the EEOC's suggested practices have made their way into state and local legislation.

State and Local Laws

State and local laws governing criminal history information take many forms. While some state laws impose restrictions on the timing of an employer's procurement of arrest and conviction information, others focus on an employer's ability to use that information in making employment decisions. Compliance with these myriad laws is critical as litigation continues to increase and private employers are paying a hefty price.

Prohibited Inquiries and "Ban-the-Box" Legislation

State laws governing the procurement and use of criminal background information vary greatly. "Ban-the-box" laws regulate the timing of criminal history inquiries, requiring employers to wait until later in the selection process, after an application is submitted or a conditional offer of employment is made, before asking about an applicant's criminal history. Fourteen states and the District of Columbia have passed "ban-the-box" laws that apply to private employers: California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington. In addition to these statewide regulations, at least 23 cities or counties have adopted ban-the-box ordinances, and the regulatory landscape is continuously evolving.

The federal government enacted a "ban-the-box" policy for federal agencies and contractors. Known as the Fair Chance to Compete for Jobs Act, the law goes into effect in December 2021. With no federal ban-the-box statute applicable to private employers, multi-state employers must comply with a hodgepodge of requirements across states and even localities. Proposed federal legislation introduced in March 2021 seeks to encourage states to implement "ban-the-box" laws applicable to private employers by withholding federal funding for noncompliance, but would do nothing to unify or standardize the already muddied legal landscape.[20]

Fair Chance Laws

What an employer does with criminal history information once it receives it is also frequently regulated. Some such laws prohibit employers from discriminating against ex-offenders or otherwise considering certain criminal history information in making hiring decisions unless they can demonstrate that the ex-offender's conviction is job-related or that employing the individual would pose an unreasonable risk of harm. Often borrowing language from the

EEOC's Guidance, these state and local laws typically delineate factors employers must consider and outline specific procedures that must be followed in making employment decisions based on criminal record information. Many states and local jurisdictions have combined these "fair chance" regulations with their "ban-the-box" provisions.

While Pennsylvania has not yet enacted a state-wide "ban-the-box" law, Pennsylvania employers are bound by the Pennsylvania Criminal History Record Information Act,[21] which precludes them from considering felony and misdemeanor convictions in the hiring process unless the conviction relates to the applicant's suitability for employment in the particular position in question. Arrest records may not be considered. The act also requires an employer to notify an applicant in writing if it decides not to hire the applicant based in whole or in part on the applicant's criminal history.

Similarly, in New York (which is not a "ban-the-box" state), employers may not deny an applicant employment based on a criminal conviction unless there is a direct relationship between the criminal offense and the job sought or held by the individual, or granting or continuing employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. The statute outlines eight factors that must be considered in making the determination of whether to deny an individual employment based on a prior criminal conviction.[22]

In March 2021, Illinois became the latest state to enact a fair chance law by amending its human rights law to create new restrictions and procedural obligations on the use of criminal conviction records in employment decisions.[23] Now, Illinois employers can only disqualify an individual due to a criminal conviction if there is a "substantial relationship" between the criminal offense(s) and the job sought or held or the employer believes that the individual poses an "unreasonable risk" to the property or safety of others. To determine if one of these factors can be met, employer must conduct an "individualized assessment," considering a list of potential mitigating factors. If an employer decides to move forward with the adverse decision, it must comply with procedural notice requirements similar to those required by the FCRA.

Of particular note, this year, both the cities of Philadelphia and New York recently passed amendments to their fair chance ordinances, extending existing protections to current employees (in addition to applicants) as well as gig workers and independent contractors. The New York City amendments, which took effect in July 2021, also:

- Extend the fair chance process requirement to situations where an employer seeks to take action based on a pending arrest or other criminal accusation (in addition to convictions);

- Establish new fair chance factors in addition to those enumerated in Article 23-A, that employers must consider when taking adverse action against applicants or employees;

- Affirmatively require employers to request relevant fair chance factor information (such as evidence of rehabilitation); and

- Extend the "reasonable" time period in which applicants or employees may provide fair chance factor information from three to five days.

Takeaways

Restrictions on the ability of employers to seek criminal history information regarding applicants and employees is evolving rapidly, requiring employers to remain cognizant of changes in the law. While not an easy task, understanding the nuances of each jurisdiction's specific requirements is critical to avoiding potential liability on an individual or class-wide basis. As we emerge from the pandemic, employers should take an opportunity to review and modify applications, policies, and procedures to ensure compliance with applicable laws. Human resources professionals and managers who will be interfacing with applicants and employees regarding selection decisions must be trained accordingly. Employers should avoid using blanket exclusions (unless expressly required by law), afford applicants and employees an opportunity to explain, and be able to justify adverse decisions based on criminal history information.

CREDIT CHECKS

The coronavirus outbreak sent shockwaves through the U.S. economy, resulting in significant financial hardship and personal loss. Those hit hardest will undoubtedly see some lingering stains on their credit histories. Despite employers' legitimate business concerns in verifying information and endeavoring to weed out unreliable or untrustworthy employees, the practice of conducting credit checks on applicants has come under attack in recent years for being unfair to vulnerable groups. Opponents of the practice say that conducting credit checks on potential employees blocks upward mobility, disproportionately affects minority job seekers and constitutes an invasion of privacy.

Despite the absence of a per se federal prohibition on the use of credit checks for employment purposes, the EEOC strongly disfavors them, having long taken the position that such use unlawfully depresses employment for certain minority groups and women in

violation of Title VII.[24] In an effort to advance its position, the EEOC has filed several high-profile Title VII class actions challenging the practice based on a disparate impact theory. However, its success has been very limited.

Although several federal bills have been introduced to tackle this issue in the last decade, none have succeeded. State and municipalities have been more successful than the federal government in passing credit-check limiting bills. Currently 11 states – California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington – and certain municipalities (e.g., the cities of New York, Philadelphia, and Chicago) have laws in place. While the rules vary by jurisdiction, most include narrow exceptions allowing the procurement of credit reports for high-level positions or those involving the management of company finances, signatory authority, or access to sensitive or confidential personal information.

Given the increase in state and local restrictions, as well as the EEOC's enforcement stance, the number of employers relying on credit checks appears to be trending downward. Employers who continue to conduct such checks should be familiar with and conform to any state or local limits that apply to them. Further, in order to reduce the likelihood of fair employment practices claims resulting from the use of credit checks, employers are advised to obtain credit reports only when required by law or for credit-sensitive jobs, develop clear criteria for use of the data, and carefully consider the record of each applicant. Employers should also monitor the effect of their use of credit-information on protected groups.

THE LAWFUL USE OF MARIJUANA AND THE HIRING PROCESS

Well, the times they are a-changin'! Despite marijuana's continued classification as an illegal Schedule I drug under federal law, a growing number of states have legalized some form of marijuana usage. The trend began in 1996 when California became the first state to legalize marijuana for medicinal purposes. Thirty-six states and the District of Columbia have since followed suit by enacting statutes legalizing medical cannabis. Then, in 2012, Washington and Colorado became the first states to legalize marijuana for adult recreational use. This past year, even as state legislatures were struggling to proceed with typical legislative sessions due to the pandemic, several states managed to pass laws legalizing recreational marijuana use. Now, 15 states and the District of Columbia permit adults to grow and consume marijuana to varying degrees: Alaska, Arizona, California, Colorado, Illinois, Maine, Massachusetts, Michigan, Montana, Nevada, New Jersey, Oregon, South Dakota, Vermont, Virginia, and Washington. As the legal landscape has evolved rapidly (with no indication of slowing down), employers must

consider how the legalization of marijuana impacts their hiring policies and practices and adapt accordingly.

Employment Protections for Marijuana Users

As states have moved to legalize the medicinal or recreational use of marijuana, many have enacted specific statutory protections for applicants' and employees' off-duty use, precluding employers from discriminating against marijuana users. Remarkably, California is not yet one of them. The dichotomy between federal and state law coupled with the lack of uniformity among the states has produced headaches for employers as they try to sort out their legal obligations.

Perhaps most worrisome for employers are new provisions in New York's and New Jersey's laws that provide recreational marijuana users with direct employment protections. New York's Marijuana Regulation and Taxation Act, signed by then-Governor Andrew Cuomo on March 31, 2021, amends a section of the state's labor law that bars discrimination by employers due to certain off-duty, lawful activities, such as political activism, playing sports – and now, using marijuana.[25] The law makes it illegal for an employer to discharge, refuse to hire, or otherwise discriminate against an employee 21 years or older for using marijuana off of the employer's premises and outside of work hours, which is defined to include paid and unpaid breaks and meal periods. New York's law contains a safe harbor provision allowing employers to take adverse action due to off-duty marijuana use where required by state or federal statute or where failing to act would result in the loss of a federal contract or federal funding.

New Jersey's Cannabis Regulatory, Enforcement Assistance, and Marketplace Modernization Act ("CREAMMA"), signed into law on February 22, 2021, likewise expressly provides job protections to recreational marijuana users.[26] Specifically, under CREAMMA, New Jersey employers are prohibited from refusing to hire or from otherwise taking any adverse action against an individual due to his or her recreational use of marijuana. These requirements are in addition to an employers' duty under New Jersey law to accommodate and not discriminate against employees who use medical marijuana outside of the workplace. Exceptions to CREAMMA are limited. Unlike other states that have legalized recreational cannabis use, as drafted, the law does not include specific exceptions for workers in safety-sensitive positions. However, it does contain a carve-out for federal contractors. If adherence to the new law would result in a "provable adverse impact" on an employer due to its obligations under a federal contract, then the employer's strict compliance will be excused. CREAMMA's employment-related provisions do not take effect until later this year when the Cannabis Regulatory Commission adopts initial rules and regulations.

Besides New York and New Jersey, many other states and local jurisdictions have passed laws prohibiting employers from discriminating against workers on the basis of their use of marijuana – some of these laws apply only to medical marijuana while others extend to recreational use as well. However, on the job intoxication is still off limits. Although these new laws provide broad protection for marijuana users, none of them require employers to permit marijuana use, possession or impairment on premises or during working hours. Thus, employers can and should continue to maintain "drug and alcohol-free workplaces," banning workplace intoxication, including marijuana intoxication, for purposes of maintaining a safe and efficient workplace.

Pre-Employment Testing for Marijuana

Employers should approach drug testing for marijuana with caution. A handful of jurisdictions have expressly prohibited pre-employment drug testing for marijuana, and more will likely follow. On April 28, 2021, Philadelphia joined New York City and Nevada by prohibiting employers from conducting pre-hire marijuana testing. Philadelphia's ordinance, which will take effect January 1, 2022, contains exceptions for certain positions, such as law enforcement, those requiring a commercial driver's license, and those involving the supervision of children and other vulnerable individuals. It likewise does not apply to drug testing required by law or a federal contact or grant.

New York's law prohibiting pre-employment marijuana testing became effective in May 2020. It too lists exceptions for certain positions such as law enforcement, as specified by the Department of Transportation, certain government contractors, and certain safety-sensitive jobs among others.

In January 2020, Nevada enacted a law that makes it unlawful for Nevada employers to fail or refuse to hire a prospective employee because the applicant submitted to a screening test and the results of the test indicate the presence of marijuana, provides employees who test positive for marijuana with the right to, at their own expense, rebut the original test results by submitting an additional screening test within the first 30 days of employment. Again, there are exceptions for positions that are safety-sensitive, for firefighters and EMTS, and for positions where an individual must operate a motor vehicle.

Even when not expressly prohibited by law, pre-employment testing for marijuana is ill-advised in jurisdictions containing express employment protection for users. In states, such as New York and New Jersey, which disallow discrimination based on off-duty marijuana use, testing for marijuana will put employers at increased risk lawsuits by rejected applicants – even if the decision not to hire was unrelated to a positive test. (Good luck proving it!). New Jersey's CREAMMA specifically

prohibits an employer from taking adverse action against an applicant solely due to the presence of cannabinoid metabolites in the individual's system. Of course, employers regulated by federal or state laws that mandate testing must still abide by those rules.

Although beyond the scope of this article, the legalization of marijuana has profound impacts on drug testing current employees as well. The byproducts, or metabolites, of marijuana can remain in someone's system for days, long after the effects of marijuana have worn off. This makes drug testing particularly unreliable as a means to confirm an employer's reasonable suspicion of employee impairment. In fact, because a positive test does not prove that an employee was using while on-the-clock, some state and local laws, such as New Jersey's CREAMMA, prescribe detailed procedures employers must follow in taking adverse action against employees due to positive marijuana tests.

Best Practices

Rapidly changing marijuana laws present unique challenges for employers in screening applicants for employment. Legal claims related to marijuana use have dramatically increased in the past few years, requiring employers to remain up-to-date concerning their obligations across a medley of applicable state and local laws. Employers in affected jurisdictions should examine their drug testing policies and ensure that they comply with any outright prohibitions against pre-employment marijuana testing. Employers in jurisdictions providing employment protection for marijuana users should also strongly consider discontinuing pre-employment marijuana testing – even when not specifically prohibited. Bypassing marijuana screening eliminates the appearance of discrimination against those who lawfully use marijuana. Legally mandated marijuana testing, e.g., DOT testing, can and should continue.

NOTES

1. 15 U.S.C. § 1681a et seq.

2. *See* 15 U.S.C. § 1681a(e).

3. *See* 15 U.S.C. § 1681b(b)(2)(A).

4. *See* 15 U.S.C. § 1681b(b)(3).

5. *See* 15 U.S.C. § 1681m(a).

6. *See Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016).

7. *Syed v. M-I, LLC*, 853 F.3d 492, 499 (9th Cir. 2017).

8. *See also Merck v. Walmart, Inc.*, 2021 WL 1118028 (S.D. Ohio Mar. 24, 2021) (holding that plaintiff had standing to sue where he alleged that if he had received a copy of his

consumer report as required, he would have been able to explain why his criminal history, even if accurately reported, was irrelevant to the job sought).

9. *Ramirez v. TransUnion LLC*, 951 F.3d 1008 (9th Cir. 2020), *cert. granted in part*, No. 20-297, 2020 WL 7366280 (U.S. Dec. 16, 2020) (mem.).

10. *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082 (9th Cir. 2020).

11. *Walker*, 953 F.3d at 1087.

12. *Id.* at 1088.

13. *Id.* at 1088-89.

14. *Gilberg v. California Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019).

15. *Luna v. Hansen & Adkins Auto Transport, Inc.*, 965 F.3d 1151 (9th Cir. 2020).

16. *See* "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964."

17. *See Mandala v, NTT Data, Inc.*, 975 F.3d 202 (2d Cir. 2020), *rehearing en banc denied by,* 988 F.3d 664 (2d Cir. 2021).

18. *See Fortune Society Inc. et al v. Macy's, Inc.*, No. 1:19-cv-05961 (S.D.N.Y.)

19. *See Texas v. E.E.O.C.*, 933 F.3d 433 (5th Cir. 2019).

20. *See* H.R. 1598, Workforce Justice Act of 2021.

21. 18 P.S. §9101 *et seq.*

22. *See* New York Corrections Law Art. 23-A§§752, 753.

23. *See* Illinois Human Rights Act, 775 ILCS § 5/2-103.1.

24. *See* U.S. Equal Opportunity Commission, *"Pre-employment Inquiries and Credit Rating or Economic Status*."

25. *See* New York Labor Law §201-d.

26. *See* N.J.S.A. 24:6I-31.