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CALLING ALL CAST MEMBERS: SELECTING TALENT WITHOUT STEPPING ON LEGAL LANDMINES

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Introduction:

- **Skit #1:**

- In your opinion, was the employer's use of criminal background information justified in this instance? Why or why not?
- Was there anything you would have done differently in this scenario?

- **Skit #2:**

- In your opinion, did the employee screening create any liability for the employer in this instance? Why or why not?
- Was there anything you would have done differently in this scenario?

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- A graphic illustration of a stage with red curtains. The curtains are pulled back to reveal a white rectangular area in the center, which serves as a background for the text. The curtains have a scalloped top edge and are tied back with red bows on the sides.
- **Why revisit the use of screening tools?**
 - **Criminal background checks**
 - **Credit reports**
 - **Medical inquiries**
 - **Social Media searches**
 - **Best practices**

The EEOC Controversy

- *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., 2012, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.*
 - Created confusion regarding proper use of criminal background checks
 - Raised awareness about other types of screening tools as well
 - What's current status and best practices?

Criminal Background Checks

- Why conduct CBCs?
 - Reduce legal liability for negligent hiring suits
 - Provide safe environment for employees
 - Reduce criminal activity in workplace
 - Comply with state laws requiring pre-hire background checks
 - Assess candidate trustworthiness

The EEOC Guidance

- Top priority for EEOC's Strategic Enforcement Plan for 2013-2016
- Concerns over possible disparate treatment
 - Crime statistics
- http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Disparate Impact

- Disparate treatment vs. disparate impact
- Defining disparate impact
 - *Griggs v. Duke Power Company*, 401 U.S. 424 (1971)
 - “fair in form but discriminatory in operation”
- Proving disparate impact
 - *Watson v. Ft. Worth Bank & Trust*, 487 U.S. 977 (1988)

Avoiding Disparate Impact in Criminal Background Screenings

- *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975)
 - 1) the nature and gravity of the offense,
 - 2) the time passed since the offense, and
 - 3) the nature of the job
- *El v. Septa*, 479 F.3d 232 (3d Cir. 2007)
 - No bright-line rule; rather, question of fact
 - Distinguishing between individual applicants

Employer's Required Showing

- The employer needs “to show that the policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.” *Enforcement Guidance* at V.B.4.
 - 1) By validating the screening tool through the Uniform Guidelines on Employee Selection Procedures standards as set forth in Title VII regulations (where possible); or
 - 2) Through a targeted screen which considers the *Green* factors (the nature of the crime, time elapsed since the crime, and nature of the job) **and** through an individualized assessment for those excluded pursuant to the screen.

The Individualized Assessment

- Requires notice to the applicant that s/he has been denied due to a criminal conviction, and provides an opportunity to demonstrate that in a particular case, the exclusion should not apply.
- **“automatic, across-the-board exclusion from all employment opportunities because of any criminal conduct is inconsistent”** with the EEOC’s Guidance.

TEST YOUR KNOWLEDGE

Janice has applied for a job as a manager at the local pharmacy. Her criminal background check revealed that she was convicted of possession of a controlled substance 5 years ago. In all other respects, Janice has wonderful references from past employers. Will you hire Janice?

PA Law of Criminal Background Checks

- 18 Pa. C.S. §9125, Criminal History Record Information Act
 - allows employers to consider felony and misdemeanor convictions related to the applicants' suitability for employment in the positions for which they have applied. §9125 (b)
 - arrests that do not result in convictions **may not** be considered in hiring decisions
 - Notification to employee §9125(c)
 - Remedies 18 Pa.C.S. §9183
 - *Jones v. Ottens Manufacturing Co., Inc.*, No. 11-911, 2012 U.S. Dist. LEXIS 31646 (E.D. Pa. Mar. 8, 2012)

Credit Screening

- Increasing scrutiny by EEOC and FTC
- Requirements under the Fair Credit Reporting Act (FCRA)
 - Employers who rely on third-party consumer reporting agencies (“CRAs”) are obligated to meet certain disclosure and notice requirements under the Act
 - Prior to adverse actions, employer must provide copy of report to applicant along with description of rights
 - CRA must also notify if report is likely to have adverse effect on employment
 - Applicant has right to dispute accuracy of report
 - *Reardon v. Closetmaid Corp.*, 2:08-cv-01730, 2013 U.S. Dist. LEXIS 169821, (W.D. Pa., Dec. 2, 2013)

Disability-related Inquiries

- Pre-offer [42 U.S.C. §12112(d)(2)(A)]
 - No disability-related inquiries
 - Is applicant able to perform essential functions of job?
- Post-offer but prior to commencement of employment duties [12112(d)(3)(A)-(B)]
 - Disability-related inquiries permitted
 - BUT must subject all employees to same inquiries
- After commencement of employment [12112(d)(4)(A)]
 - No disability-related inquiries unless job-related and consistent with business necessity
 - *Bender v. Norfolk Southern Corp.*, Civ. No. 1:12-01198, 2014 U.S. Dist. LEXIS 4460, (M.D. Pa., Jan. 14, 2014)
 - *EEOC v. Hussey Copper Ltd.*, Civ. No. 08-809, 2010 U.S. Dist. LEXIS 22920, (W.D. Pa., Mar. 12, 2010)

Social Media Searches

- Increasing in popularity
- Potential risks include liability under state and federal anti-discrimination laws
 - *Gaskell v. Univ. of Kentucky*, Civ. No. 09-244-KSF, 2010 U.S. Dist. LEXIS 124572, (E.D. Ky. Nov. 23, 2010).
- Legislative responses
 - “Social Media Privacy Protection Act”

A Word about GINA

- The Genetic Information Nondiscrimination Act (“GINA”) [42 U.S.C. §2000ff, *et seq.*]
- Prohibits employers from discriminating against employees based on that employee’s genetic information, and prohibits an employer, with limited exceptions, from requesting, requiring or purchasing genetic information with respect to that employee or a family member of the employee. §2000ff-1.
- 6 statutory exceptions [§2000ff-1(b)]
- *EEOC v. Founders Pavilion, Inc.*, 13-CV-01438) (W.D. N.Y. May 16, 2013)

Best Practices

- Criminal Background Checks
 - Consistency
 - Consider Green factors
 - Train management to assist with job analysis
- Credit Background Checks
 - Apply policy consistently
 - Is screening needed for all positions?
 - If you use CRA's, are you compliant with FCRA's disclosure and notice requirements?
- Disability-Related Inquires
 - Know what can be asked at each stage of the employment relationship
 - Pre-offer; Post-offer but prior to job commencement; after employment duties have commenced
- Social Media searches
 - Do a cost-benefit analysis
 - Consider a third-party vendor to conduct searches

- Curtain Call: Final Questions

