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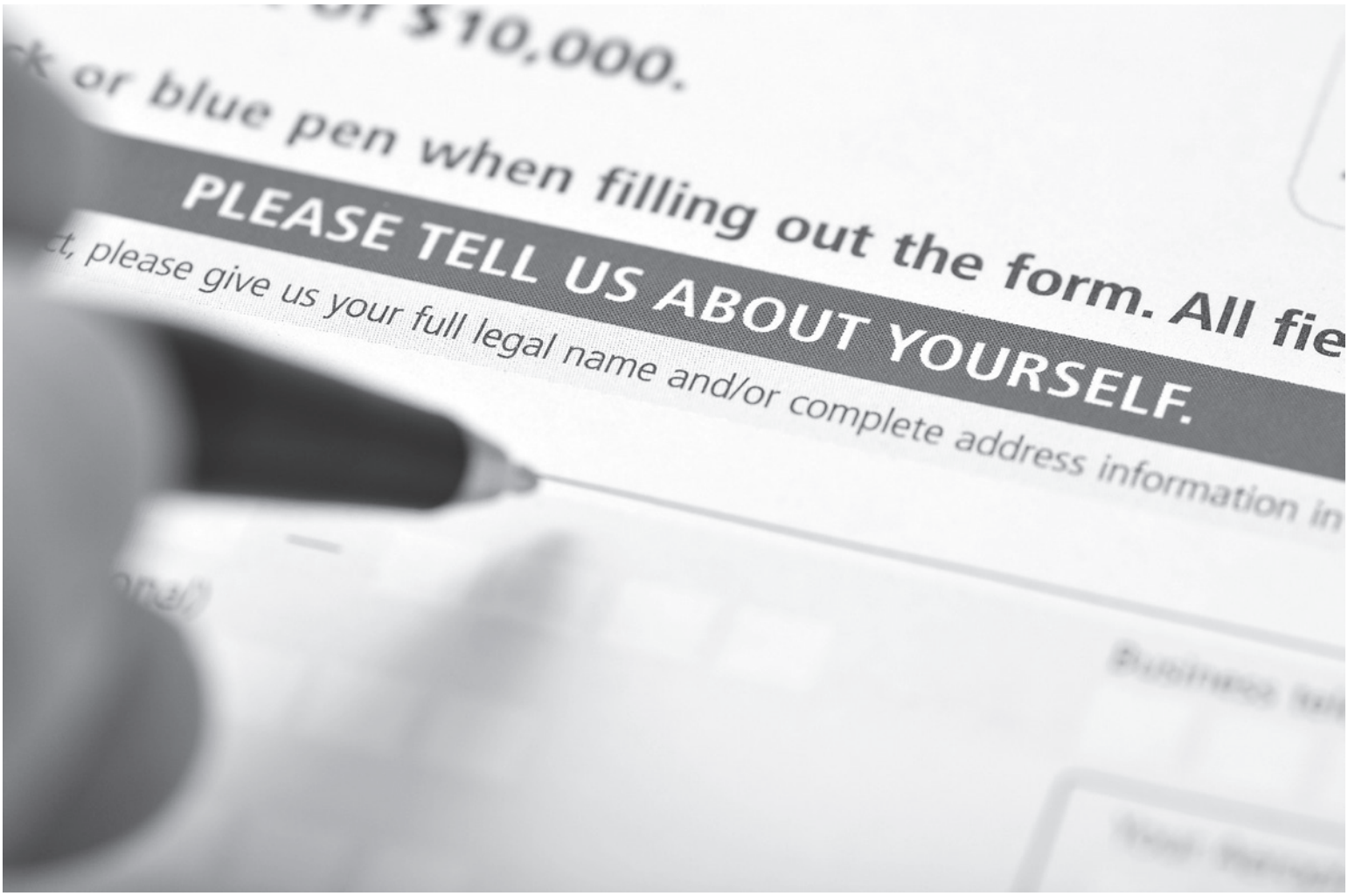
Pre-Employment **Testing and Screening:** Common Practices, Potential Issues



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BY JAMES R. HAYS AND SEAN J. KIRBY

JAMES R. HAYS *is a partner at Sheppard, Mullin, Richter & Hampton in New York, where he practices in the labor and employment group and co-chairs the firm's traditional labor law team.* SEAN J. KIRBY *is an associate in the group.*

Many employers conduct some type of pre-employment testing and/or screening of prospective employees. These tests run the gamut from credit checks and criminal history background checks to drug and cognitive testing.

While such testing and screening may be common, over the past few years many jurisdictions have enacted laws which limit the types of pre-employment testing and screening employers may conduct.

Similarly, the U.S. Equal Employment Opportunity Commission (EEOC) has been active in litigating actions against employers where it believes certain pre-employment testing or screening to have a disparate impact on the hiring of individuals in a protected class. In light of these recent trends, it is important for employers to review the types of pre-employment testing and screening that they are conducting and to be aware of potential pitfalls associated with such testing.

Credit Checks

One common form of pre-employment screening is to conduct credit checks of potential employees. In most jurisdictions, pre-employment credit checks are legal provided that the employer complies with the Fair Credit Reporting Act (FCRA), and any similar state or local laws, by obtaining the applicant's consent to obtain the credit report, providing the applicant with a warning and a copy of the report if the applicant is going to be denied employment on the basis of the report, and providing the applicant an adverse action notice if the employer ultimately does not hire the applicant because of the content of the report. However, many jurisdictions have recently enacted laws (or have legislation pending) that will severely limit or bar an employer's ability to utilize pre-employment credit checks in making hiring decisions.

For instance, as of Sept. 3, 2015, employers in New York City are now prohibited, in all but limited circumstances, from requesting or using consumer credit reports in any employment decision. This law not only bars employers from considering credit reports themselves, but also prohibits the consideration of credit scores or any other credit information. While there are some exceptions to the law for employers hiring into certain positions in certain industries, such as certain positions in the financial services sector or positions in which an employee requires security clearance under federal or state law, the vast majority of employers who hire employees in New York City can no longer request credit information from current or prospective employees.

Many jurisdictions have recently enacted laws (or have legislation pending) that will **severely limit or bar** an employer's ability to utilize pre-employment credit checks in making hiring decisions.

In addition to New York City, according to the National Conference of State Legislatures, 11 states currently impose limits on an employer's ability to use credit information in making employment-related decisions, including California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington.[1] Likewise, 31 bills in 17 states are pending regarding the use of credit information in employment decisions, with 28 of those bills addressing restrictions or exemptions on an employer's use of credit information in making employment decisions.[2]

In light of the increasing number of jurisdictions that are imposing restrictions or outright bans on the use of credit information in making employment decisions, employers who utilize credit checks should be vigilant in monitoring the laws of the jurisdictions in which they do business to ensure that they do not run afoul of new legislation. Likewise, in states that have not sought to limit the use of credit checks, employers still need to ensure that their credit check procedures and reports are FCRA compliant, thereby avoiding potential litigation arising out of the use of credit checks.

Criminal History Records

As with credit checks, many employers also utilize background checks regarding prospective employee criminal history records when making employment decisions. However, also like credit checks, many jurisdictions and the EEOC have been active in monitoring or attempting to limit this practice through legislation and litigation.

In 2012, the EEOC issued enforcement guidelines regarding the use of arrest and conviction records in employment decisions.[3] These enforcement guidelines explained how the use of an individual's criminal history in making employment decisions could potentially violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964 (Title VII). More specifically, the enforcement guidelines discussed disparate treatment liability and disparate impact analyses under Title VII resulting from an employer's use of criminal history records in employment decisions. The guidelines provided "employer best practices" in the use of criminal history records in employment decisions, which included, among other things: (1) eliminating policies or practices that exclude people from employment based on any criminal record; (2) developing a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct; and (3) limiting inquiries to records

for which exclusion would be job related for the position in question and consistent with business necessity.[4]

Applying these guidelines, the EEOC has been active in attempting to limit what it deems to be overbroad screening of prospective employees' criminal history records. For example, in the matter of *EEOC v. BMW Manufacturing Co.*, Case No. 13-cv-1583 (D. S.C.), the EEOC and BMW entered into a consent decree to resolve a lawsuit in which the EEOC alleged that BMW's process of checking applicants' criminal histories disproportionately screened out African-American candidates. Specifically, the EEOC alleged that BMW's former policy of barring employment of individuals with convictions of certain types of crimes, regardless of when the conviction occurred or the severity of the crime, disparately impacted African-American applicants. As stated by P. David Lopez, EEOC General Counsel, in a press release announcing the settlement, the "EEOC has been clear that while a company may choose to use criminal history as a screening device in employment, Title VII requires that when a criminal background screen results in the disproportionate exclusion of African-Americans from job opportunities, the employer must evaluate whether the policy is job related and consistent with a business necessity."[5]

In addition to the EEOC's actions, a number of jurisdictions have enacted laws limiting an employer's ability to consider an applicant's criminal history in making employment decisions. For example, New York City has enacted a law that goes into effect on Oct. 27, 2015, which prohibits employers from inquiring into candidates' criminal background at any time prior to extending a conditional offer of employment, except in instances where such information is otherwise mandated by federal, state, or local law.[6] Similarly, seven states (Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, and Rhode Island) as well as numerous cities have enacted laws prohibiting employers from asking questions about a prospective employee's criminal history on a job application.

Given the EEOC's enforcement guidelines, litigation commenced by the EEOC, and the trend by state and city governments in prohibiting questions about an applicant's criminal history, employers who utilize criminal background checks/questioning should review their policies to ensure that the policies conform with the EEOC's enforcement guidelines. In particular, employers should review whether their criminal background screening results in the disproportionate exclusion of certain protected classes of employees and, if it does, employers must ensure that the policy is job related and consistent with a business necessity. Likewise, employers need to continually monitor the laws of the jurisdictions in which they do business to ensure that no prohibitions against questioning a prospective employee about their criminal history have been enacted and, if such laws have been enacted, employers should revise their employment policies and applications accordingly.

Drug Testing

Another type of testing that employers frequently utilize in screening applicants is testing for illegal drugs. In general, employer policies requiring post-offer, but pre-employment testing for illegal drugs are permissible. However, in enforcing such policies, employers must be wary not to run afoul of disability discrimination laws.

Indeed, the EEOC has instituted a number of lawsuits against employer use of pre-employment drug screening where the EEOC believes that such drug screening resulted in disability discrimination under the Americans with Disabilities Act (ADA). For example, in the matter of *EEOC v. Kmart*, 13-cv-2576 (D. Md.), the EEOC brought suit against Kmart alleging that its requirement of pre-employment drug screening was discriminatory under the ADA. In this matter, Kmart refused to hire a prospective employee because he did not provide the requisite urine sample for a drug screen, even though Kmart had been informed that his medical condition prevented him from providing such a urine sample. In the lawsuit, the EEOC alleged that Kmart failed to reasonably accommodate the prospective employee by not allowing him to utilize another type of drug screen before deciding not to hire him for failing to provide a urine sample. The parties entered into a settlement in January 2015 for $102,000 to resolve this matter.

In addition to potential liability under the ADA and related state disability discrimination laws, with the advent of legalized medical marijuana employers must also be careful not to deny employment for a positive marijuana drug screen where the employee is eligible to utilize medical marijuana. For instance, the New York Compassionate Care Act, signed into law on July 7, 2014, deems patients receiving medical marijuana to be "disabled" under New York State Human Rights Law. As a result, a New York employer may not withhold employment from an applicant who is entitled to use medical marijuana based solely on a positive drug screen for marijuana.[7]

In light of the EEOC's recent actions against employer's for violating the ADA with respect to pre-employment drug screening, as well as related legislation regarding medical marijuana, employers who utilize pre-employment drug screens for illegal drugs should review their policies to ensure that such policies address instances in which a reasonable accommodation will need to be provided to a prospective employee. Likewise, employers should stay abreast of the laws in their jurisdiction regarding legalized medical marijuana and any related prohibitions against adverse employment actions resulting from a positive drug screen.

Cognitive and Other Testing

Finally, a number of employers utilize pre-employment testing of prospective employees' cognitive abilities, physical abilities, and/or personality traits to determine whether an applicant is qualified for the job. However, as with the other types of testing/screening discussed above, the EEOC has issued a fact sheet regarding such testing and has brought a number of lawsuits challenging what is alleged to be discrimination arising out of such tests.

In December 2007, the EEOC issued a fact sheet titled Employment Tests and Selection Procedures, which addresses the propriety of pre-employment cognitive and other testing, and potential legal ramifications arising out of such testing.[8] After reviewing the statutes that may be implicated by such testing, including Title VII, the ADA, and the Age Discrimination in Employment Act, the EEOC offered its best practices for employers in conducting cognitive testing. These best practices include: (1) ensuring that employment tests are job-related; and (2) if a test screens out a protected group, determining whether there is an equally effective alternative selection procedure that has less adverse impact on protected groups.

Applying these best practices, the EEOC has brought a number of lawsuits involving instances in which the EEOC deemed an employer's cognitive testing to be discriminatory. For example, in August 2015, the EEOC and a major national retailer entered into a settlement agreement, in which the retailer agreed to pay $2.8 million to resolve claims that the pre-employment cognitive testing required by the employer disproportionally screened out potential employees based on their race and gender.[9] More specifically, the EEOC alleged that the employer's use of three employment assessments violated Title VII because the tests disproportionately screened out prospective employees for certain positions based on race and gender, and that such tests were not job-related and/or consistent with business necessity of the employer.

In light of the EEOC fact sheet and lawsuits addressing employer use of cognitive and other testing, employers should review their applicant screening tests to ensure that such testing is actually related to the job being applied for and that the testing does not result in the inadvertent screening out of a protected group from employment.

Conclusion

While pre-employment testing and screening continues to be a valid method of determining whether applicants are qualified for a position or a good fit for the company, employers need to ensure that such testing is compliant with EEOC guidelines and legislation enacted by the jurisdictions in which they do business, and does not disproportionately screen out prospective employees based upon protected characteristics. Accordingly, employers should review their pre-employment testing policies and procedures to ensure compliance with these laws and the EEOC guidance, and they should continue to monitor the laws of the jurisdictions in which they do business for new legislation that may affect the testing policies already in place.

1. See Nat'l Conf. of State Legislatures, Use of Credit Information in Employment 2015 Legislation, June 2, 2015, available at http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-information-in-employment-2015-legislation.aspx.

2. Id.

3. See EEOC Enforcement Guidance No. 915.002, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964," April 25, 2012, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

4. Id.

5. EEOC Press Release, Sept. 8, 2015, available at http://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm.

6. In addition, with certain limited exceptions, New York state law prohibits employers from denying employment to a prospective employee based upon prior criminal convictions. See New York State Human Rights Law §296(15).

7. But see *Coats v. Dish Network*, 350 P.3d 849 (2015) (finding that since use of medical marijuana is illegal under federal law, employees can be terminated for violating their employers' drug policies).

8. EEOC Fact Sheet, "Employment Tests and Selective Procedures," available at http://www.eeoc.gov/policy/docs/factemployment_procedures.html (last modified Sept. 23, 2010).

9. See EEOC Press Release, Aug. 24, 2015, available at http://www.eeoc.gov/eeoc/newsroom/release/8-24-15.cfm.