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High Unemployment Leads to Increase in Claims of Discrimination Relating to Background Checks

By: John E. Murray

Although the present economy is challenging for almost every business, there has been one silver lining. Higher unemployment allows employers to be more selective in the hiring process. As a result, some employers are rejecting applicants with arrest or conviction records, or other blemishes on their backgrounds. Because of the difficulty finding new employment, many of these rejected applicants are filing claims of discrimination based on their arrest or conviction records, race, and national origin. As a Firm, we have seen an increase in such claims over the last several months.

Wisconsin is one of a handful of states which protects applicants and employees from discrimination based on a pending arrest or a past conviction. Although employers may ask about pending arrests or past convictions, they may reject an applicant only for a pending arrest for a criminal charge or for a conviction for a felony, misdemeanor or other offense if it is substantially related to the position sought. When an applicant or employee is convicted of a felony, misdemeanor or other offense, the circumstances of which substantially relate to his/her job duties, the employer may refuse to hire, discharge, or transfer that applicant/employee. However, if an employee is merely arrested, the employer cannot discharge the employee solely because the charge is substantially related to the employee's job duties. The employer may suspend the employee, without pay, only if the arrest was due to a criminal charge and only until the charge is resolved.

In addition to a rise in ERD complaints for arrest/conviction-record discrimination in Wisconsin, our Firm also has seen an increase in EEOC charges nationally that allege race and national origin discrimination relating to background checks. In some cases, applicants have alleged that the employers' decisions not to hire them based on their criminal convictions were based on race and/or national origin discrimination, both on disparate treatment and disparate impact

theories. Applicants and employees also have alleged national origin discrimination with regard to employers verifying their eligibility to work in the United States, including investigating information which calls into question the work authorization of the applicant or employee or the validity of his/her documentation.

Because of the increase in claims alleging arrest/conviction-record discrimination, as well as claims of race and national origin discrimination relating to background checks, Lindner & Marsack is presenting a webinar on April 29 at 11:30 a.m. – 1:00 p.m. (Central time) to review background check procedures and practices, and help employers avoid liability with respect to their background check processes. The webinar will address the following topics:

- ▶ Best practices for obtaining arrest/conviction information from applicants and for conducting background checks;
- ▶ Using third parties to conduct background checks and limitations imposed by the Fair Credit Reporting Act;
- ▶ Determining when an arrest or conviction substantially relates to the job duties of an applicant or employee under the Wisconsin Fair Employment Act;
- ▶ How to respond when an employee is arrested or convicted of a crime or offense which substantially relates to that employee's job duties; and
- ▶ Verifying the work authorization of applicants and employees to work in the United States, including how to respond to credible information questioning an applicant or employee's work authorization

To register for the webinar, please send an email to Mary Gemeinhardt at mgemeinhardt@lindner-marsack.com.

If you have any questions about the issues raised by this e-alert, please feel free to contact John E. Murray at (414) 273-3910 or by e-mail at jmurray@lindner-marsack.com, or any of the attorneys with the whom you regularly consult at Lindner & Marsack.

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