WHOM TO HIRE: RAMPANT MISREPRESENTATIONS OF CREDENTIALS MANDATE THE PRUDENT EMPLOYER MAKE INFORMED HIRING DECISIONS

JOHN E. MATEJKOVIC, J.D.† AND MARGARET E. MATEJKOVIC, J.D.‡

INTRODUCTION¹

Literature Professor Quincy Troupe was a much-loved member of the University of California at San Diego faculty. He was a prolific and acclaimed poet who was just as committed to working with his students as he was to his scholarship.

When Mr. Troupe joined the UC-San Diego faculty in 1990, the university did not confirm his academic credentials, including his representation that he was a graduate of Grambling College. He represented that he had been awarded a bachelor's degree from Grambling in 1963 when, in fact, he had never completed a full semester. Mr. Troupe created this misrepresentation at the outset of his teaching career sometime during the mid-1970s, and the misrepresentation went undetected until it was brought to light during a background investigation in 2003.

The genesis of this investigation was an event that should have been one of the highlights of Mr. Troupe's professional endeavors – he was nominated by the Governor of California to be the official poet laureate for the state. Rather, this nomination resulted in the ultimate discovery of Mr. Troupe's misrepresentation of his academic credentials that in turn resulted in his resignation from the esteemed poet laureate position and his retirement from the faculty of UC-San Diego.

An academic anomaly? Unfortunately not.

† Assistant Professor of Business Law, College of Business Administration; The University of Akron; Akron, OH 44325 (jem@uakron.edu).

‡ Assistant to the Dean, School of Law; The University of Akron; Akron, OH 44325 (ema18@uakron.edu).

OVERVIEW OF ISSUE

In today's workplace, an employer is confronted with a host of human resources-related issues, not the least of which is effecting hiring decisions that are appropriate for the organization and compliant with the plethora of employment laws and regulations. An additional, and often unexpected, challenge for the employer in this regard is awareness of and managing applicant misrepresentations about education, work experience, and the like.

In its 2002 Hiring Index study, ADP's Screening and Selection Services operating unit reports that 40% of individuals' resumes showed discrepancies in employment and education history,\(^2\) and more than 50% of individuals' resumes contained discrepancies as reported in ADP's 2003 study.\(^3\) According to a 2002 FBI report, in the United States, approximately 500,000 people falsely claim to have a college degree.\(^4\) In fact, in a recent survey conducted with college students as subjects, 95% of the students stated that they would lie to get a job, and 41% said that they had already done so.\(^5\) Misrepresentations are not limited to college students or other younger individuals embarking on their careers; the CEO of a global outplacement firm recently commented that some notable examples he has recently observed included top-level executives (e.g., chief executive officers, chief financial officers).\(^6\)

So, why is it that all employers do not conduct thorough background investigations of their potential employees? And what considerations should be included in an employer's thorough background investigation process of its applicants?

This Paper explores a few of the myriad of considerations upon which an employer may wish to reflect when conducting thorough background investigations to attempt to select the most qualified individual for the position vacancy by recognizing the epidemic of credential falsification. Specifically, considerations are presented herein as related to background investigations impacted by criminal record verification and the Fair Credit Reporting Act.


\(^3\) Vanessa Blackburn, Background Checks: For many employers, checking into an applicant's history has gone from a rarity to a necessity, Bellingham Bus. J. Sept. 1, 2004, at C1.

\(^4\) Id.

\(^5\) Wendy Bliss, Avoiding 'Truth or Dare' in Reference Checks, HRFocus, May 2000, at 5.

BACKGROUNd INVeSTIGATIONS

According to the Society for Human Resources Management ("SHRM"), 82% of employers surveyed in 2003 conducted applicant background investigations, up from 66% in 1996. But recently, the CEO of a global outplacement firm suggested that only about 15% of resumes are ever thoroughly checked by prospective employers.

SHRM also reports that larger organizations are more likely to conduct a background investigation of an applicant, and companies employing less than 100 individuals are least likely to do so.

The cost for an outside firm or organization to conduct a background investigation can range from as low as $50.00 to $300.00 or more per investigated individual. While a background investigation can involve an employer’s affirmative efforts to collect information about an applicant, it can also involve simple verification that the applicant is providing truthful information. And, while an employer can perform its own investigation (often with information via the internet), internal investigations often result in significant costs to the employer in terms of administrative time spent. In recognition of the costs associated with the application process (as well as to encourage only those applicants who have a strong interest in the available position), some employers have even taken the novel, sometimes controversial, approach of assessing an employment application fee to the applicant.

In the age of seemingly endless items for sale on the Internet, one can find an example of an aid in perpetration of discrepancies and falsifications of credentials and reinforcing the need for thorough background investigations. Consider www.fakedegrees.com: customers of this website can purchase up to five fraudulent diplomas - even one from Harvard University - for a mere $75.00 registration fee.

9. How to Do Background Checks Properly, supra note 7, at 11.
12. Id.
14. It should be noted that in the Disclaimer portion of its web site, fakedegrees.com states, "These novelty certificates are intended for novelty purposes only. They are not intended for, and we take no responsibility for, their use in any matters perpetrating fraud or dishonesty." http://fakedegrees.com/fakedegrees/disclaimer.asp.
Recognizing that falsification of academic credentials is an area of growing concern, a growing number of states have enacted legislation prohibiting such conduct. For example, in Arkansas, the use of a false transcript, grade report, or diploma from a post-secondary educational institution is a misdemeanor and upon conviction subject to a fine not to exceed $1000.00 and/or six months' imprisonment.\(^{15}\) In Florida, making false claims of an academic degree is a first-degree misdemeanor.\(^{16}\) And in Tennessee, knowingly issuing, selling, or manufacturing a false academic degree is a Class A or Class C misdemeanor.\(^{17}\)

In addition to verification of an applicant's claim of academic credentials, characteristics such as trustworthiness, reliability, and verification of a history void of violent behavior frequently are highly-relevant areas of investigation by an employer in the pre-hire process.

For example, while an employer may not be legally-mandated to deny employment to an applicant with a history of violence, the employer needs, at minimum, to take such a history into consideration prior to employing the individual lest the employer face later claims based on tort theories of negligent hire, supervision, or retention and face potential resulting liability should the employee endanger the safety of\(^2\) and/or harm a customer, business visitor, or fellow employee.

Some state courts are split on whether an employer's failure to conduct an acceptable background investigation on an employee who subsequently injures another exposes the employer to a claim of negligent hire. For example, consider the contrasts between the Ohio cases \textit{Stephens v. A-Able Rents Co.}\(^{19}\) and \textit{Peters v. Ashtabula Metropolitan Housing Authority}.

In \textit{Stephens}, without conducting any sort of background investigation, the employer hired a truck driver who had a history of illegal drug use. The driver's drug history, including use of crack cocaine, was known to his former Oklahoma employer, and a management official of the Ohio employer acknowledged that the company would not have hired the driver had it known of his history of drug use.\(^{21}\) While making a stop at a customer's home, the driver assaulted and at-

\(^{15}\) \textsc{Ark. Code Ann.} § 5-37-225 (Michie 2005).
\(^{17}\) \textsc{Tenn. Code Ann.} § 39-17-112 (2005).
\(^{18}\) While this Paper does not address the numerous implications of the Americans with Disabilities Act ("ADA") in the hiring context, it is important to note that in defending an allegation of disability discrimination, the ADA permits an employer to exclude employees from its workforce who pose a direct threat to the safety of the employee or others. See 29 C.F.R. § 1630.15(b)(2) (1991).
\(^{19}\) 654 N.E.2d 1315 (Ohio Ct. App. 1995).
tempted to rape the customer while under the influence of crack cocaine. The court found that the employer should have known of his drug abuse and that "consequently a reasonable jury could have found" the company's failure to inquire about his employment history prior to hire to be a causal connection and indeed may have proximately caused the attack on the customer.

Conversely, in Peters, the employer, a subcontractor to a local housing authority, hired a tile layer to perform work in the apartment units of the housing authority. The tile layer subsequently raped a nine-year-old occupant of one of the units. The court recognized that the subcontractor had a duty of ordinary care and held that no facts were presented in this case to give rise to the duty of the employer to conduct a background check. Neither the housing authority nor the subcontractor had any apparent knowledge of the employee's criminal history, and the subcontractor further noted it would not have made any difference even if it had known of the criminal background before making its hiring decision as the employee's criminal history was more than twenty years old. The trial and appellate courts agreed, with the appellate court noting that the employee's criminal history was so remote in time that it could not reasonably afford a basis of liability against the subcontractor for the employee's future criminal acts.

Successful assertion of the tort of negligent hire, supervision, and/or retention frequently requires the plaintiff to prove elements such as the following:

1. the existence of an employment relationship;
2. the employee's incompetence;
3. the employer's actual or constructive knowledge of such incompetence;
4. the employee's act or omission causing the plaintiff's injuries; and
5. the employer's negligence in hiring or retaining [or supervising, etc.] the employee as the proximate cause of plaintiff's injuries.

22. Stephens, 654 N.E.2d at 1318.
23. Id. at 1319.
25. See generally Amy D. Whitten & Deanne M. Mosley, Caught in the Crossfire: Employers' Liability for Workplace Violence, 70 Miss. L.J. 505 (2000) (and cases discussed therein). See also Restatement (Second) of Agency § 213 cmt. d (1958) (stating that an employer "may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him").
The conundrum of challenges related to verification and corresponding action taken by an employer in connection with an applicant's work-related background has been accurately described as "Catch-22" in nature.\(^2\) That is, not hiring an individual on the basis of a criminal record may violate a federal or state statute; "yet not investigating an individual's criminal background" may lead to a successful assertion of negligent hiring or negligent retention.\(^2\)\(^8\)

Accordingly, an employer's considerations in such a circumstance may include the permissibility of criminal record inquiries as well as possibly polygraph examinations and other forms of testing, interviews with former co-workers and supervisors, and the related implications of each form of background investigation.

REFERENCE VERIFICATION

It is clear that a linchpin of the effective background investigations is verification of references. The reference verification process often is performed, or at minimum overseen, as an internal administrative function by the prospective employer.


\(^2\)\(^8\) Barnett, 37 SUFFOLK U. L. REV. at 1080.
In general, a prospective employer may gather beneficial information when making its employment decisions including the following:

1. prior employment and educational background;
2. character appraisal;
3. estimates of job performance capabilities; and
4. a willingness of the reference provider to hire or continue employment.\(^\text{29}\)

It has been suggested that former employers are in the best position to provide useful reference information to prospective employers.\(^\text{30}\) Yet, many employers are reluctant to exchange information with each other relative to their employees.\(^\text{31}\) Studies reveal that "more than one-half of the one thousand U.S." companies surveyed either "refuse to provide references or only provide dates of past employment."\(^\text{32}\)

One reason why employers are reluctant to provide job references is a fear of being sued.\(^\text{33}\) This fear may stem from not actually being sued, but the ancillary considerations and effects connected with being named a defendant in a lawsuit (e.g., legal expenses).\(^\text{34}\) While compliance with state immunity laws may provide viable protection to employers that provide reference information, such laws do not address the underlying fear felt by the employer (i.e., the fear of actually being sued and the resulting financial impact to the company).\(^\text{35}\)

**PRIVACY CONSIDERATIONS**

Courts customarily have found that job applicants have a lesser expectation of privacy than do existing employees.\(^\text{36}\) Therefore, employers may have more leeway in gathering information from those individuals interested in employment with the employer than those currently employed by the employer. For example, consider *Loder v. City of Glendale*.\(^\text{37}\) In connection with the permissibility of suspicionless drug testing as part of the application process, the court stated the following:

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34. *Id.*
35. *Id.* at 455.
36. See e.g., Harmon v. Thornburgh, 878 F.2d 484, 489 n.6 (D.C. Cir. 1989) (referencing Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 282-83 (1986) (noting that "[d]enial of a future employment opportunity is not as intrusive as loss of an existing job").
[T]he drug screening program is administered in a reasonable fashion as part of a lawful preemployment medical examination that is required of each job applicant, drug testing of all job applicants is constitutionally permissible under the Fourth Amendment even though similar drug testing of current employees seeking promotion is not. As [other] decisions establish, in evaluating the "reasonableness" of a drug testing program for purposes of the Fourth Amendment, it is necessary to weigh the importance or strength of the governmental interest supporting suspicionless drug testing against the intrusion on reasonable expectations of privacy imposed by such testing. As we explain, we conclude that an employer has a significantly greater need for, and interest in, conducting suspicionless drug testing of job applicants than it does in conducting similar testing of current employees, and also that a drug testing requirement imposes a lesser intrusion on reasonable expectations of privacy when the drug test is conducted as part of a lawful preemployment medical examination that a job applicant is, in any event, required to undergo. Because of these significant differences in both the strength of the interest supporting preemployment drug testing and in the diminished intrusion upon reasonable expectations of privacy implicit in the testing, we conclude that in the preemployment context, unlike the prepromotional context, such drug testing is reasonable, and hence constitutionally permissible, under the Fourth Amendment.38

The contention of greater leeway permitted to an employer in gathering applicant information is also supported by federal regulations such as those outlining an employer's responsibilities under the Americans with Disabilities Act ("ADA").39 Acceptable pre-employment inquiries permit an employer's ability to make "inquiries into the ability of an applicant to perform job-related functions, and/or ... ask an applicant to describe or to demonstrate how, with or without reasonable accommodation, the applicant will be able to perform job-related functions."40 The medical exams that are permissible under the ADA "do not have to be job-related and consistent with business necessity."41 With respect to current employees, an employer "may require a medical examination (and/or inquiry) of an employee that is

41. 29 C.F.R. § 1630.14(b)(3) (1991). The regulation goes on to provide, however, that "if certain criteria are used to screen out an employee or employees with disabilities as a result of such an examination or inquiry, the exclusionary criteria must be job-related and consistent with business necessity, and performance of the essential job functions cannot be accomplished with reasonable accommodation as required in this part." Id.
job-related and consistent with business necessity. A covered entity may make inquiries into the ability of an employee to perform job-related functions.”42

AFTER-ACQUIRED EVIDENCE, RESUME FRAUD, AND EMPLOYMENT CONTRACTS

One source of the privacy rights of an employee is the employment contract. And in connection with employment contracts, what has come to be commonly referred to as “resume fraud,”43 “even when discovered after termination, may serve as a defense to claims of wrongful discharge predicated on contract or equity.”44 Even though it is well-settled that after-acquired evidence may not be used to justify discriminatory discharge, it may be used to limit plaintiff's recovery (e.g., limit damages to back pay while eliminating the possibility of front pay and reinstatement).45 In other words, as noted by the Colorado Supreme Court in Crawford, the court in McKennon provides that claims based on alleged violations of federal employment discrimination statutes cannot be completely barred by after-acquired evidence.46

As noted above, the after-acquired evidence rule announced in McKennon applies to cases in which the after-acquired evidence concerns the employee’s misrepresentations in a job application or resume. In Wallace et al. v. Dunn Construction Co.,47 Joyce Neal was one of the plaintiffs employed by Dunn Construction as a flag person on highway construction. In the lawsuit, Neal alleged violations of the Equal Pay Act, Title VII, and corresponding retaliation protections. During discovery, Dunn learned that Neal had pleaded guilty to possession of marijuana and cocaine in 1987, despite answering “no” when asked on her application for employment whether she had been convicted of a crime. In its motion for partial summary judgment, the company stated that Neal would have been terminated upon discovery of such falsification without regard to her sex or retaliation.48 In holding that McKennon was applicable to employee misrepresentations on job applications and resumes, the court noted that two of the defense witnesses, including the named plaintiff Wallace, stated in their depo-

42. 29 C.F.R. § 1630.14(c) (1991).
43. For the purposes of this Paper, the authors define resume fraud as the falsification of credentials by a job applicant in the recruitment process, particularly as related to educational degrees and employment history.
46. Weissman, 938 P.2d at 548.
47. 62 F.3d 374 (11th Cir. 1995).
sitions that if someone lied on their application and the company found out, the individual could be fired.49

"In order to provide a defense to an employer in a wrongful discharge claim, the after-acquired evidence must establish valid and legitimate reasons for the termination of employment."50 Not every misrepresentation in an employment application will allow an employer to avoid liability for a breach of contractual or equitable obligations – only if the employer can provide that the employee's concealment undermined the very basis upon which the employee was hired (i.e., the misrepresentation was material and the employer would not have hired the employee had the employer discovered the misrepresentation at the outset of the hiring process).51

Resume fraud has been described as "rampant."52 And, frequently, an employee's resume fraud comes to the attention of the employer during a difficult time – after the employee's termination or separation of employment.

An employer's discovery of resume fraud subsequent to an employee's termination of employment is precisely what transpired in the case of Mildred Johnson, an employee of Honeywell Information Systems.53 Johnson applied for and was hired by Honeywell as a field relations manager, responsible for affirmative action compliance assistance. Eight years later, Honeywell terminated Johnson's employment for unsatisfactory job performance, for her "refusal to follow the reasonable directions of" her supervisor, and for her refusal "to improve her availability, flexibility, or knowledge."

Johnson sued her employer, alleging wrongful discharge and that the company terminated her employment in retaliation for confrontations she had had with her supervisors relative to affirmative action goals. During the discovery phase of the trial, Honeywell learned that Johnson had falsified her application for employment in several respects, including her representation of attainment of a bachelor's degree, a stated prerequisite for the field relations manager position.

"As a general rule, in cases of resume fraud, summary judgment [is] appropriate where the misrepresentation or omission was material, directly related to measuring a candidate for employment, and

49. Wallace, 82 F.3d at 380.
51. Weissman, 938 P.2d at 549.
53. Johnson, 955 F.2d at 414.
was relied upon by the employer in making the hiring decision.\textsuperscript{54} While not all misrepresentations on an employment application constitute just cause for dismissal or serve as a complete defense to a wrongful discharge action, the \textit{Johnson} court concluded that the number of Johnson's misrepresentations, coupled with "Honeywell's express requirement of a college degree and its warning to applicants that misrepresentations may constitute just cause for termination" provided an "adequate and just cause" for the plaintiff's dismissal.\textsuperscript{55}

In the above-referenced \textit{Weissman} case, the Colorado Supreme Court appears to reconcile \textit{McKennon} and \textit{Johnson} in finding that an employer was entitled to affirmance of the lower court's granting of summary judgment and found that a breach of contract claim does not implicate the public policy interests protected by \textit{McKennon}. Such claims, rather, "relate to a private contract or promise between an employer and employee and do not raise any public-policy concerns, other than the general interest society has in the integrity of the employment relationship between employer and employee."\textsuperscript{56}

Susan Weissman was a former employee of Crawford Rehabilitation Services ("Crawford") and was terminated for insubordination when she did not report for work on a day that she had requested, and was denied, time off. In her lawsuit against Crawford, Weissman alleged, inter alia, breach of contract and promissory estoppel.

During her deposition, Weissman revealed several misrepresentations as to her initial application for employment with Crawford, including omission of a previous employer, misstatement of the nature of her employment with another employer, and failure to mention her discharge from another employer when completing an application for a fidelity bond. While Weissman contended that her omission was based on a general release settling a wrongful termination claim with the former employer that she believed prevented such disclosure, the court found that she also concealed the former employment to increase her chances of securing employment with Crawford. Her failure to completely identify the nature of other former employment was also an attempt to conceal gaps in her employment. In other words, she intended to create a false impression on her application for employment with Crawford and, accordingly, the court found that the after-acquired evidence defense provided a complete bar to her promissory estoppel and breach of contract claims.\textsuperscript{57}

\textsuperscript{54} \textit{Id.} at 414 (referencing Churchman v. Pinkerton's Inc., 756 F. Supp. 515, 520 (D. Kan. 1991)).
\textsuperscript{55} \textit{Id.}
\textsuperscript{56} \textit{Weissman}, 938 P.2d at 549.
\textsuperscript{57} \textit{Id.} at 551.
The Weissman court expressly noted that it did not reach the question of whether after-acquired evidence of resume fraud would completely preclude an employee's action for wrongful firing in violation of public policy or whether McKennon would operate to limit the application of the after-acquired evidence rule. As previously noted, the McKennon holding has been applied in other cases involving the after-acquired evidence of resume fraud.

The application of the after-acquired evidence defense in an action for breach of an employment contract is in the nature of a 'fraud in the inducement' analysis and rests on the proposition that the employer is relieved of its contractual duties when that contract is the product of a misrepresentation. The duty of the employer arises from the contract itself and falls with that contract.

A. Resume Fraud As an Independent Cause of Action Brought by an Employer

As opposed to raising resume fraud as an affirmative defense, might an employer wish to initiate and pursue its own cause of action against an applicant, employee, or former employee?

To successfully maintain a cause of action for fraud based on misrepresentation, the employer must demonstrate that the applicant did the following:

1. acted with scienter (i.e., evidence that demonstrates the applicant acted with falsity or a reckless disregard for the truth); and
2. intended to defraud the employer.

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58. Id. at 553.
59. See e.g., Wallace, 62 F.3d at 378-79. See also Schiavello v. Delmarva Sys. Corp., 61 F. Supp. 2d 110, 114-15 (D. Del. 1999) (referencing Weissman and Johnson, “An employer can rely on after-acquired evidence of resume fraud as a complete defense [for breach of contract or equitable obligations] only if it can prove that the employee's concealment undermined the very basis upon which he or she was hired. This requirement serves the purpose of preventing 'an employer from combing a discharged employee's record for evidence of any and all misrepresentations, no matter how minor or trivial, in an effort to avoid legal responsibility for an otherwise impermissible discharge.'”).
61. Bazzi, 808 F. Supp. at 1309. See Restatement (Second) of Contracts § 164 (1981) (explaining that a contract entered into based upon a fraudulent misrepresentation by one party is voidable by the defrauded party when the defrauded party reasonably relied upon the misrepresentation).
62. Vincent R. Johnson & Shawn M. Lovorn, Misrepresentation by Lawyers About Credentials or Experience, 57 OKLA. L. REV. 529, 555 (2004) (wherein the authors note that the phraseology of the second element is "a slight overstatement... because expectation of reliance will suffice as a basis for liability, even if the [applicant] does not desire to induce reliance").
In direct dealings between a plaintiff and defendant and in resulting claims of fraud, it is relatively problem-free to demonstrate that reliance was highly foreseeable. Conversely, when there are "no personal dealings between the parties, and no evidence of intent on the part of the" applicant, it is necessary "to differentiate written misrepresentations from" verbal misrepresentations. As reflected by its title, the Restatement of Torts 2d §532 addresses "misrepresentations 'incorporated in [a] document or other thing.'" Further, it would seem that the "maker of a fraudulent misrepresentation incorporated in a document [would have] reason to expect that" the document will influence any person the document reaches. Yet, it has been suggested that a cause of action for resume fraud would fall outside the purview of the Restatement due to the Restatement's limited coverage of fraudulent misrepresentation:

One who embodies a fraudulent misrepresentation in an article of commerce, ... a negotiable instrument or a similar commercial document .... In other words, the resume does not meet the definition of a "commercial document" as outlined in the Restatement of Torts even if it misrepresents credentials or experience.

IMPLICATIONS OF INQUIRIES RELATED TO CRIMINAL RECORDS

It has been estimated that 630,000 people left United States prisons in 2002. The societal impact of reintegrating into society those convicted of crimes includes reintegration into the workforce, and employers must face the realities of such reintegration including a comprehensive background investigation process.

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63. Johnson & Lovorn, 57 Okla. L. Rev. at 556.
64. Id.
65. Id. (referencing Restatement (Second) of Torts § 532 (1977) (stating "[o]ne who embodies a fraudulent misrepresentation in an article of commerce, a muniment of title, a negotiable instrument or a similar commercial document, is subject to liability for pecuniary loss caused to another who deals with him or with a third person regarding the article or document in justifiable reliance upon the truth of the representation").

66. Id. (referencing Restatement (Second) of Torts § 532 cmt. b (1977) ("It may be expressed by saying that the maker of a fraudulent misrepresentation incorporated in a document has reason to expect that it will reach and influence any person whom the document reaches.").
67. Id.
68. Id.
69. Id.
71. Leavitt, 34 Conn. L. Rev. at 1315 (suggesting that "perhaps all employers should conduct criminal background checks and then proceed to evaluate that informa-
In addition to considerations of the Fair Credit Reporting Act discussed below, federal law implications relative to employer inquiries into criminal records of its applicants primarily center around Title VII (i.e., the potential for a disproportionate impact on minorities). Various state law considerations also dictate the type of information that may be gathered (e.g., whether arrest information may be obtained and used in the employment process) as well as the means by which such information may be gathered (e.g., whether a third party can collect the information).

According to Society for Human Resources Management ("SHRM"), 80% of employers surveyed in 2004 performed criminal record checks, up from 51% of those surveyed in 1996.72

A. Title VII

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of an individual’s race, color, religion, sex, or national origin.73 Even though the protected classifications enumerated under Title VII do not include individuals who have been convicted of a crime, the Equal Employment Opportunity Commission ("EEOC" or "Commission") opines that a policy or practice of denying an individual employment simply on the basis of a criminal conviction is unlawful under Title VII unless the employer can prove a business necessity to do so.74 Many courts have agreed with the Commission, holding that the blanket refusal to employing anyone with a criminal conviction (except for minor traffic violations) is violative of Title VII under the theory of disparate impact;75 that is, an employment cate-

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75. See e.g., Green v. Mo. Pac. R.R. Co., 523 F.2d 1290, 1295-98 (8th Cir. 1975) (stating that an employment practice of excluding individuals on the basis of a criminal conviction alone is impermissible unless it is justified by business necessity. The business necessity test requires that “[t]he system in question must not only Foster safety and efficiency, but must be Essential to that goal. . . . In other words, there must be no acceptable alternative that will accomplish that goal equally well with a lesser differential racial impact.” (emphasis added)). See also Field v. Orkin Exterminating Co., 2001 U.S. Dist. LEXIS 24068, at *6-7 (E.D. Pa. Oct. 30, 2001) (“It has long been recognized that a blanket policy of denying employment to any person having a criminal conviction violates Title VII . . . [but] A blanket policy to refuse employment to persons with recent criminal records would not violate Title VII if the criminal conviction involved conduct which demonstrates a person’s lack of qualification for the job—e.g., a bank would not be required to hire, or retain in employment, a teller previously convicted of embezzlement.”).
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gory, tool, or test cannot tend to discriminate against certain protected classes of individuals.76

The elements of the "business necessity" test as confirmed in the Eighth Circuit's decision related to the second appeal of Green,77 and correspondingly reiterated by the EEOC,78 are "the nature and gravity of the offense[s], the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied." The business necessity test supports an employer's careful analysis of the proposed job functions with the applicant's criminal history, as noted by the Green court on first appeal:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except for a minor traffic offense, in the permanent ranks of the unemployed. This is particularly true for blacks who have suffered and still suffer from the burdens of discrimination in our society. To deny job opportunities to these individuals because of some conduct which may be remote in time or does not significantly bear upon the particular job requirements is an unnecessarily harsh and unjust burden.79

In a related vein, the EEOC has taken the position that the use of arrest records as an absolute bar to employment has a disproportionate impact on some groups protected by law and, as such, cannot be used to routinely exclude persons from employment. However, if the conduct for which the employee was arrested is "job-related and relatively recent," the Commission acknowledges that exclusion from employment is "justified."80 Even then, however, the EEOC cautions that the employer must evaluate whether the arrest records reflect the employee's conduct and, as such, should permit the individual to

76. Leavitt, 34 CONN. L. REV. at 1298. See also 42 U.S.C. § 2000e-2(k)(1)(A) (2005) (stating "An unlawful employment practice based on disparate impact is established under this subchapter only if—(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or (ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.").

77. 549 F.2d 1158, 1160 (8th Cir. 1977).

78. Conviction Records, supra note 74, at n.6.

79. Green, 523 F.2d at 1298.

80. Policy Guidance on the Consideration of Arrest, EEOC COMPLIANCE MANUAL, Vol. II § 604 (Jan. 29, 1998). It is notable that in its Policy Guidance on the Consideration of Arrest at footnote 8, the EEOC cautions that "potential applicants who have arrest records may be discouraged from applying for positions which require them to supply [pre-employment inquiries regarding arrests which did not result in convictions], thus creating a 'chilling effect' on the Black applicant pool."
explain and possibly make a credibility determination should the individual deny engaging in the conduct.  

Further, the EEOC recognizes that courts have also required a showing that the alleged conduct for which the individual was arrested was actually committed. In its Arrest Guidance, the Commission references the Illinois case, *City of Cairo v. Fair Employment Practice Commission.* When reinstating the order of the state's Fair Employment Practice Agency ("FEP") that police officer applicants could not be barred from employment solely based on arrest record, the Illinois court noted the reference of the FEP by the Supreme Court in its decision in *Griggs v. Duke Power Co.*

[Good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability... Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.]

In its analysis, the Commission properly recognizes that the standard for arrest is far below that required for conviction and, as such, is not reliable evidence that an individual has committed a crime. Interestingly, the Commission analogizes an arrest record to a negative employment reference:

[A]n arrest record does no more than raise a suspicion that an applicant may have engaged in a particular type of conduct... the employer's suspicion may be raised by an arrest record just as it would by negative comments about an applicant's conduct made by a previous employer.

**B. State Law Considerations**

Of course, there are state law considerations as well relative to inquiries by prospective employers into an individual's history of arrests and criminal convictions. Many states, including California,
Michigan,\textsuperscript{88} and New York,\textsuperscript{89} mandate that an employer may not consider arrests at all in connection when making its employment decisions.

If state law does permit an employer to consider information related to an applicant's criminal convictions, some states prescribe the manner in which employers must handle such information. Such is the case in Connecticut, where an employer that uses a criminal conviction as the basis for rejecting an applicant is required to send a letter to the applicant via registered mail stating the evidence presented and the reason for the applicant's rejection.\textsuperscript{90}

Some states make different allowances as to the permissible uses of arrest information an employer has gathered. For example, in California, while employers are generally prohibited from using arrest information in connection with making an employment decision, employers are allowed limited use of arrest information while an individual is on bail.\textsuperscript{91}

\textsuperscript{88} See Mich. Comp. Laws Ann. § 37.2205a (West 2001) (stating "[a]n employer . . . other than a [state] law enforcement agency . . . shall not in connection with an application for employment or membership, or in connection with the terms, conditions, or privileges of employment or membership request, make, or maintain a record of information regarding a misdemeanor arrest, detention, or disposition where a conviction did not result.")

\textsuperscript{89} See N.Y. Exec. Law § 296(16) (McKinney 2005) (stating "[i]t shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association . . . to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual . . . in connection with . . . employment . . . provided, however, that the provisions hereof shall not apply to the licensing activities of governmental bodies in relation . . . to an application for employment as a police officer or peace officer").


\textsuperscript{91} See Cal. Lab. Code § 432.7 (West 2004) (stating disclosure of criminal records information by applicants for employment: "(a) No employer, whether a public agency or private individual or corporation, shall ask an applicant for employment to disclose, through any written form or verbally, information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or posttrial diversion program, nor shall any employer seek from any source whatsoever, or utilize, as a factor in determining any condition of employment including hiring, promotion, termination, or any apprenticeship training program or any other training program leading to employment, any record of arrest or detention that did not result in conviction, or any record regarding a referral to, and participation in, any pretrial or posttrial diversion program. As used in this section, a conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. Nothing in this section shall prevent an employer from asking an employee or
IMPLICATIONS OF THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act ("FCRA") was enacted, inter alia, to promote efficiencies in the banking system, to recognize the vital role of consumer reporting agencies in the consumer credit process, and to protect consumer privacy. For select employment-related purposes, employers are allowed under the FCRA to obtain a consumer report prepared by consumer reporting agencies on applicants and employees. However, the implications of the FCRA to employers particularly in the hiring arena are becoming increasingly pronounced, demonstrating that the Act’s provisions do not merely apply to an employer’s procurement of an individual’s credit report.

For example, an employer that uses a third party to assist in its background investigations must comply with, and can be liable to an employee or applicant for violations of, the FCRA. The four primary components of the FCRA relative to notice and disclosure of consumer reports are as follows:

applicant for employment about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.


93. “The term 'consumer report' means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for . . . (B) employment purposes.” 15 U.S.C. § 1681a(d) (2005).

94. Consumer reporting agencies also have obligations in the distribution of information in connection with consumer reports for employment purposes. 15 U.S.C. § 1681b (2005). For example, the consumer reporting agency can only furnish information to the employers that certify to the consumer reporting agency that they comply with all applicable laws related to equal employment opportunity as well as comply with applicable disclosure requirements.


96. At least twenty-one states have laws relative to the extent of and conditions related to an employer’s background check and reference verification process. One of the most notable states in this regard is California with its Investigative Consumer Credit Reporting Agency Act (“ICRA Act”) which, inter alia, more broadly defines the term “investigative consumer report” than as defined in the FCRA. See CAL. CIV. CODE §§ 1786-87 (West 2001).

97. See 15 U.S.C. § 1681a(x) (2005). Employers need to continue to consider, however, any state law restrictions that may impact such an investigation.


Notice. The employer must notify the individual in a clear and conspicuous manner (in a document with the sole purpose of disclosing such notification) prior to the procurement of the consumer report.\textsuperscript{101}

Consent. The employer must secure the individual’s express consent in writing to obtain the consumer report prior to the procurement of the consumer report.\textsuperscript{102}

Disclosure. The employer must provide a disclosure to the individual that describes the nature and scope of the proposed use of the report related to any adverse action an employer intends to take based on information provided in the consumer report.\textsuperscript{103}

Copy of Consumer Report to Employee. If the individual so requests, pursuant to the Vail letter (discussed below), the employer must also release a full, unredacted investigative report to the individual once the investigation is complete.

Reinvestigation. If the individual disputes the accuracy or completeness of the initial investigation, the consumer reporting agency must reinvestigate the matter free of charge and record the status of the disputed information within thirty days.\textsuperscript{104}

A. FACT Act

Employers also should be aware that, in connection with the enactment of the recent Fair and Accurate Credit Transactions Act of 2003 (“FACT Act”)\textsuperscript{105} amendment, the FCRA now recognizes certain procedures relative to employment investigations, particularly investigations into suspected employee wrongdoing, that permit greater latitude in excluding select communications to employees that would be otherwise mandated by the FCRA.\textsuperscript{106} Specifically, now an employer is not required to secure the permission of the employee who is under investigation for suspected workplace misconduct in advance of using the outside investigator. In addition, if the investigation results in an adverse employment action for the employee (e.g., demotion, termination), the employee is only entitled to receive a summary of the

\textsuperscript{102} Id.
\textsuperscript{103} 15 USC § 1681m (2005).
\textsuperscript{104} 15 USC § 1681i (2005).
\textsuperscript{106} The FACT Act may impact an employer’s recruitment process and policies related to existing employees, particularly from the perspective of internal promotions and transfers.
investigator's report and the employer only needs to provide such disclosure after it takes the adverse action.\textsuperscript{107}

The FACT Act amendment was passed, in part, to clarify and respond to a letter issued by the Federal Trade Commission ("FTC"), the administrative agency charged with enforcement authority of the FCRA.\textsuperscript{108} In what has commonly come to be referred to as the "Vail letter," in mid-1999, a staff attorney for the FTC, Christopher Keller, wrote a letter to Washington attorney Judi Vail in which Mr. Keller opined that whenever an employer "turns to an outside organization for assistance in investigation of harassment claims . . . the assisting entity is a CRA because it furnishes 'consumer reports' to a 'third party'" thereby invoking the provisions of the FCRA.\textsuperscript{109} A few months later, this application of the FRCA apparently was expanded to include any investigation into suspected workplace misconduct.\textsuperscript{110}

B. FCRA Exemption to State Law Causes of Action

The FCRA provides an exemption to state law causes of action such as defamation or invasion of privacy, which may be presented except in the case of malice or willful intent:\textsuperscript{111}

Except as [otherwise provided by the Act], no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency . . . or based on information disclosed by a user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report except as to false information furnished with malice or willful intent to injure such consumer.\textsuperscript{112}

\textsuperscript{108} 16 C.F.R. § 1.71 (2005).
\textsuperscript{110} See Letter from the FTC Associate Director of the Division of Financial Practices to Susan Meisinger, President of the Society for Human Resource Management (Aug. 31, 1999), available at www.ftc.gov/os/statutes/fcra/meisinger.htm (seeming to expand the application of compliance with the FCRA to any investigation of suspected workplace misconduct).
\textsuperscript{111} "A consumer has a cause of action under FCRA for damages sustained due to 'negligent [or willful] failure of a reporting agency to comply with any requirement imposed by the Act.'" Briley, 73 Fed. Appx. at 483. See 15 U.S.C. §§ 1681o, 1681n (2005).
CONCLUSION

It is not easy being an employer in today's business environment. What should be a matter of simple contract (i.e., "I'll pay you X compensation to perform Y job") is actually a significantly-regulated and legally-supervised relationship.

And the regulations and laws are warranted. History is replete with examples of employers who engaged in employment practices that were (and continue to be) reprehensible and are now unlawful. One need not merely examine history, as demonstrated by the recent publicity over the allegations of Wal-Mart's hiring of undocumented workers. The law reacted to provide equal employment opportunity and more equity in the employment relationship.

Prudent businesspeople recognize the need to protect themselves. Even though only a small percentage of the general population may be thieves, no one reacts badly when business owners and operators act to secure the cash register. And in light of the fact that a certain percentage of job applicants will misrepresent themselves, their qualifications, or their backgrounds, a smart employer will protect itself from a bad hiring decision: a decision that can have tremendous impact on its business's success.