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State Appellate Court Considers Employer's Duty to Conduct Criminal Background Checks

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In the last few years, there has been a significant spike in the number of lawsuits challenging employer use of criminal background checks, including class action lawsuits brought under the federal Fair Credit Reporting Act.¹ There also has been a sharp increase in the number of state and local laws that restrict when employers can ask job applicants to self-disclose their criminal history (so-called "ban the box" laws). Of course, employers also must be mindful of the types of conviction and arrest records that are considered "off limits" at the state and local level.

Given this hot litigation and legislative climate, many employers ask themselves whether to even screen their workforces and take on the burden of navigating through these murky waters. For those employers that do not conduct criminal background checks on their workforces, a recent Texas Court of Appeals decision highlights the importance of carefully determining whether an employer can justify a failure to screen workers based on the employer's industry and the specific job duties at issue.

In *Najera v. Recana Solutions, LLC*,² a temporary staffing agency placed the plaintiff for a position as a lead at a rice mill. During a shift, the plaintiff told his crew that employees had to work late. One of those employees, who also had been placed at the mill by the staffing agency, became insubordinate and physically assaulted the plaintiff with his hard hat. The staffing agency terminated the assaulting employee. The plaintiff suffered damage to his teeth and received a shoulder injury.

The plaintiff sued the staffing agency for, among other claims, negligence. More specifically, the plaintiff alleged that the staffing agency had a duty to hire, supervise and retain employees who were both competent and nonviolent and that the staffing agency breached that duty by failing to conduct a criminal background check on the assaulting employee. Although the assaulting employee stated in pre-hire paperwork that he had never been convicted of a felony, his criminal record reflected prior misdemeanor convictions for drug possession, driving while intoxicated and assault. The staffing agency did not, however, conduct a criminal background check on the assaulting employee.

1 See Jennifer Mora, Jennifer Warberg, and Philip Gordon, *Oregon to Become the Latest State to Ban the Box*, Littler ASAP (Jun. 22, 2015); Jennifer Mora, David Warner and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (Jun. 12, 2015).

2 2015 Tex. App. LEXIS 8748 (Tex. App. – Houston [14th Dist] Aug. 20, 2015).

The trial court granted the staffing agency's motion for summary judgment. The Texas Court of Appeals affirmed. The court started with the precept that while an employer may not be an "insurer of its employees' safety at work, it has a duty to use ordinary care in providing a safe workplace. In this regard, "an employer is liable if it hires, retains, or supervises an employee whom it either knows or should have known was not competent or fit for the job and whose incompetence or unfitness creates an unreasonable risk of harm to others because of the employee's job-related duties." The issue, therefore, was whether the staffing agency had a duty to conduct a criminal background check on the assaulting employee.

After reviewing Texas cases that previously had considered when, if at all, a failure to run a criminal background check constitutes negligence, the court found that the assaulting employee's job as a laborer on the plaintiff's team did not "require any special or unique skills or experience, and did not involve circumstances of heightened confrontation or particularly dangerous tools or weapons" and, therefore, was "not a situation that foreseeably created a peculiar risk of harm to others by reason of the employment duties." The plaintiff presented no evidence that the assaulting employee was incompetent or unfit or would come into contact with vulnerable individuals.

The court also considered the "administrative burden and costs" employers would face if it were to rule that employers, under these facts, had a duty to background check job applicants and even opined that such a judicial rule might hinder the ability of ex-offenders to obtain employment. Ultimately, the court affirmed the grant of summary judgment based on the absence of any facts to show that the staffing agency "knew or should have known that, because of its acts in hiring, placing, and retaining [the assaulting employee] as a laborer without performing a criminal background check, the assault might occur."

Takeaways for Employers

Employers that do not consider criminal history as part of their pre-hire screening program should consider whether to implement a background screening program given the nature of their business and their employees' job duties. Although the employer in *Najera* did not have an obligation to screen its workers based on the standard for negligence in Texas, the case certainly could have come out differently and, thus, employers in all states should consider the standard of care in their particular jurisdiction when deciding whether to add criminal background checks as part of a pre-hire screen. Of course, employers that adopt a conviction-based screening policy will then need to, among other things, assess compliance with the various state, county and city laws that protect job applicants with criminal records and potential disparate impact risks under Title VII of the Civil Rights Act. Employers that implement new background screening policies should also be mindful of, and comply with, the various laws that impact the use of criminal records in addition to Title VII and the state fair employment laws, including "ban-the-box" laws and federal and state fair credit report laws, such as the FCRA.