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Privacy Implications of Employment Background Checks: U.S. Supreme Court Rules for Employers

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Employers in the public and private sector should take note of the path taken by the U.S. Supreme Court in its decision on January 19th, addressing a privacy challenge to a background check by government contractor employees. The case, *NASA v. Nelson* (*NASA*), overturned a Ninth Circuit Court of Appeals ruling holding that certain questions in a background check were an unconstitutional violation of the “right to informational privacy.” The Supreme Court determined that the disputed questions used in the background check were reasonable in light of the government’s interests in managing its internal operations.

Of interest to private employers is the Court’s favorable acknowledgment that private employers frequently and legitimately use background checks. This case should remind all employers to take note of the requirements associated with such pre-employment inquiries and update their background check process for compliance with the current state of the law.

The employees in the *NASA* decision, who staffed earth-observation and technology-development projects for the California Institute of Technology, took issue with a series of questions that addressed prior use, possession, supply, or manufacture of illegal drugs. Depending on the nature of the employee’s response, the government demanded additional information regarding treatment and/or counseling efforts, along with a release authorizing the request of additional personal information from past employers and schools attended.

The Court found the nature of these inquiries reasonable in light of the government’s concern of “ensuring the security of its facilities and in employing a competent, reliable workforce”—concerns private employers also face. The Court also rejected the assertion of a constitutional burden to demonstrate that inquiries for personal information in an employment background check must be “necessary” or the least restrictive manner in which the employer could address these concerns.

Although the government’s victory in *NASA* is favorable for private employers, this case serves as a reminder to all employers of the importance of properly conducting a background or reference check. The nature of the employment position and the type of information sought by the employer will impact not only the legality of the background check, but also whether additional requirements will be enforced on the employer requesting the information.

An inquiry by an employer to certain entities regarding a person’s credit matters, character, or living arrangements might be subject to compliance with the Fair Credit Reporting Act (FCRA) as a consumer report. The coverage of “consumer reports” under the FCRA is wide in scope and goes beyond a request for an applicant’s credit score.

For example, a criminal background report that is obtained from a third-party provider in connection with pre-employment inquiry is considered a consumer report for FCRA purposes. When a consumer report

is obtained for purposes of employment, the employer may become subject to certain notice and certification requirements. The penalties for noncompliance are quite substantial and include actual damages, punitive damages, and attorneys' fees and costs.

Another example of federal information regulation is the protection of personal health information that the Health Insurance Portability and Accountability Act (HIPAA) regulates. Any information that came into the hands of a prospective employer that HIPAA covers would subject the employer to serious penalties in the event of its dissemination or use.

State and local privacy regulations also inform this process. As a best practice, employers should notify a prospective employee whenever background information is requested as part of the application process, obtain written authorization from the applicant, and be clear as to the purpose of obtaining such information. Just as important, safeguards must be put in place for those operations that will have access and perhaps storage obligations with respect to this information.

The Supreme Court looked favorably upon the *NASA* background check in part due to the application of the Privacy Act in forbidding public disclosure of such information. It should be incumbent upon all private employers to have policies and practices in place that take reasonable steps to protect such information, and all employers must comply with local privacy laws with respect to these matters.

As future courts address the intersection of technology, privacy concerns, and the workplace, as was done in the *City of Ontario v. Quon*, the text-messaging case decided by the Supreme Court last year, employers should take appropriate steps to protect their ability to obtain relevant background information on employees.

The *NASA* decision provides legal support for employers who wish legitimately to conduct reference inquiries when security and reliability concerns are addressed. These steps require an internal examination that is both procedural and substantive in nature, as the way in which background information is obtained and stored will affect the rights of the employee and the obligations of the employer.

Feel free to contact the attorney listed above for further information on this or any other related employment question.

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