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Labor & Employment Law

The newsletter of the Illinois State Bar Association's Section on Labor & Employment Law

Pre-employment screening in Illinois

BY LAURYN E. PARKS

When making personnel decisions, such as hiring, promotion, or reassignment, employers often seek to examine the background of the applicant, including the applicant's credit history or criminal history. However, there is an ever-growing array of Federal, state and local laws and regulations that limit if or when employers may consider this information. Furthermore, under Title VII, an employer must also consider whether examining the arrest or conviction records of applicants could lead to direct or indirect discrimination.

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Navigating mandatory arbitration in Cook County's Law Division, Commercial Calendar Section

BY NICOLE M. ANDERSON

When most employment attorneys think of mandatory arbitration in Cook County, they think of smaller cases and disputes usually reserved for employment contract disputes in the Municipal Department. In Cook County, however, a recent change in the Law Division has left some attorneys both excited and confused. The change sends cases originally destined for trial within the Law Division to mandatory arbitration; but not the mandatory arbitration you're used to.

Discovering the Commercial Case Calendar Section

Our firm filed a case within the law division alleging damages over $50,000 for an employment dispute focused primarily

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Pre-employment screening in Illinois

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Credit Histories

Under both Illinois and Federal law, an employer is restricted as to if, or when, it can inquire into an applicant's credit history. The Illinois Employee Credit Privacy Act, 820 ILCS 70/1, et seq, ("ECPA"), provides that an employer may not order an applicant or employee's credit report, inquire about the applicant's employment history, or otherwise discriminate against an individual on the basis of his or her credit history or credit report unless the position in question meets certain criteria. 820 ILCS 70/10. Exempted from these requirements are employers in the financial and insurance industries and certain governmental employers. Otherwise, in order to inquire into applicant's credit history, a satisfactory credit history must be an "established bona fide occupational requirement" of the position. The statute elaborates on several duties which meet this criteria, including having management responsibilities; custody or unsupervised access to cash or marketable assets valued at $2,500 or more; or having access to confidential information, financial information or trade secrets. 820 ILCS 70/10(b).

Recently, Illinois courts have demonstrated that they will construe these factors narrowly in order to discourage the use of pre-employment credit checks for positions that do not clearly fall within an exemption. In *Ohle v. The Neiman Marcus Group*, 2016 IL App (1st) 141994, the plaintiff was denied an entry-level position as a "Dress Collections Sales Associate" on the basis of her credit check. Neiman Marcus claimed that the sales associate fell within one of the listed exemptions to the ECPA because the position would have given the plaintiff "access" to personal and confidential consumer information when she accepted store credit card applications from customers. Id. at ¶11. The court found that the employees were merely acting as "conduits" for the information and that this does not qualify as "access" under the ECPA. The court cautioned that the purpose of the ECPA is to "help those who have fallen on hard times find employment" and that an employer cannot find an exception under the ECPA for a position that consists of "performing simple tasks at the cash register." Id. at ¶40.

Even if an employer can meet one of the exemptions of the ECPA, it must also meet the disclosure and reporting requirements set by the Fair Credit Reporting Act, (FCRA), 15 U.S.C. Sect. 1681, et seq. The FCRA sets out three stages of disclosure and reporting that must be met by employers who seek to obtain a "consumer report" for a job applicant.

Under the FCRA, the employer must make certain disclosures to applicants *prior* to obtaining a consumer report. Specifically, the employer must make a clear and conspicuous disclosure in writing, in a separate document that consists only of the disclosure, that a consumer report may be obtained for employment purposes, and the applicant must authorize the procurement of the report in writing. 15 U.S.C. Sect. 1681b(b)(2)(A). If the consumer report forms the basis for an adverse employment decision, either in whole or in part, the employer must provide the applicant with a copy of the report and "A Summary of Your Rights Under the Fair Credit Reporting Act." 15 U.S.C. Sect. 1681b(b)(2)(B). The statute is silent as to how long the employer must wait after providing the applicant with notice before taking the adverse employment decision, or as to whether it has any duty to reconsider this decision if the applicant contacts the employer. If the employer fails to provide the applicant with any of the pre-adverse decision disclosures and information, the applicant may file a private suit15 U.S.C. Sect. 1681n-o. If the employer moves forward with the adverse employment action, it must provide additional written notice to the applicant, which must contain a statement of the applicant's rights to obtain a free copy of the report and dispute the accuracy or

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Michael R. Lied
Hon. William J. Borah

MANAGING EDITOR / PRODUCTION
Katie Underwood
kunderwood@isba.org

Postmaster: Please send address changes to the Illinois State Bar Association, 424 S. 2nd St., Springfield, IL 62701-1779.

completeness of its information. 15 U.S.C. Sect. 1681m.

"Ban-the-Box" Laws

In addition to restrictions on the use of credit reports in employment screening, there has been a recent rise in "ban-the-box" laws which typically delay when an employer may access information regarding the applicant's criminal history.

The Illinois Job Opportunities for Qualified Applicants Act, 820 ILCS 75/1 et seq., prohibits an employer from considering or inquiring into an applicant's criminal record or history until after the applicant has been notified of an impending interview or, if no interview is to take place, until after a conditional offer of employment has been made. 820 ILCS 75/15.

There are exceptions to this prohibition if (i) the employer is required by federal or state law to exclude applicants with criminal convictions, (ii) a fidelity bond is required for the position and the applicant's criminal history would disqualify the applicant from receiving the bond, or (iii) where the position requires licensing under the Emergency Medical Services Systems Act. 820 ILCS 75/15(b)(1)-(3).

Employers should also keep in mind Federal and state law prohibiting "disparate treatment" and "disparate impact" employment discrimination. For example, disparate treatment discrimination in violation of Title VII occurs where the employer rejects an African American applicant on the basis of his criminal record, but hires a similarly situated white applicant with a comparable criminal record. EEOC Enforcement Guidance: Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII and the Civil Rights Act of 1964, (https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) (last visited on November 15, 2016). Furthermore, if an employer's policy or practice significantly disadvantages individuals of a particular race, national origin or other protected characteristic, the employer must be prepared to justify the policy or practice and demonstrate that the exclusion is "job related and consistent with business necessity" for the position. *Id.*

This myriad of laws and regulations should caution employers to carefully develop any pre-employment screening process that considers an applicant's credit or criminal histories so that it is compliant with applicable law and tailored to the duties and requirements of the specific position. ■

Lauryn E. Parks is an associate attorney with Momkus McCluskey, Roberts, LLC.

Navigating mandatory arbitration

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on a retaliatory discharge following a claim for workers' compensation. The case was puzzlingly assigned to the mandatory arbitration program in the Municipal Department, instead of the Law Division. For newly practicing attorneys to Cook County, mandatory arbitration in the Municipal Department is required for personal injury, property damage, and breach of contract actions where plaintiffs are seeking damages of $30,000 or less. Cases filed in the Law Division may be transferred to the Municipal Department if, after an initial status or pretrial conference, the Court determines that the value of the case does not exceed $30,000. Either way, our employment dispute should not have qualified for the Municipal Department because (a) it is a commercial case (which will be explained in further detail below); (b) the damages exceeded well over $30,000 and $50,000 including back pay and punitive damages; and (c) there was never a hearing or pretrial conference within the Law Division that would have created a finding that this employment dispute should be assigned to the Municipal Department.

Law Division, Commercial Calendar, Mandatory Arbitration

What we now know is that our case should have been transferred to the commercial calendar's mandatory arbitration program within the Law Division. This is a strong indication that despite the best efforts of the drafters to get the word out, many within Cook County Circuit Court are still not familiar with the new program. In fact, one judge in the Municipal Department unequivocally stated in open court that they did not know what the commercial calendar arbitration program was or that it existed. Indeed, Judge Thomas. R. Mulroy, the supervising judge of the program, stated that despite notice of the program through the Chicago Bar Association and other outlets, more attention is needed so that litigants and their attorneys are aware prior to filing, and after filing, that their participation in the program will very likely be required. Understandably, it is not too surprising that most attorneys are unaware of the program. The mandatory arbitration program is new to Cook County's Law Division and was given approval by the Illinois Supreme Court after a two-year pilot program fostered by Judge Mulroy. The program is governed by the detailed, yet simple, and straightforward Part 25 of the Cook County Circuit Court Local Rules. To qualify for the program, you must file a "commercial case" in the law division. A commercial case is defined as any case which pleads a cause of action for breach of contract, employment disputes, employment discrimination, *qui tam* claims, civil and/or commercial fraud and/or conspiracy, interference with business relationships, and/or shareholder disputes. Rule 25.2(a). Cases that fall under these categories, *and* have damages of less than $75,000, but more than $30,000, will be assigned to the Commercial Calendar of the Law Division. After an answer is on file and all pre-issue motions are disposed of, the Court delivers a "Referral to Mandatory Arbitration order" confirming that the case qualifies for mandatory arbitration and which essentially gets the ball rolling, in a faster way than the Law Division has ever seen before.

The referral order works in several ways. It most importantly goes to the Cook County Mandatory Arbitration Center on LaSalle Street; the same arbitration center that handles arbitrations from the Municipal Department. The arbitration administrator then randomly assigns an arbitrator – that has also been creatively factored into Part 25 of the rules – and immediately sets a date and time for the hearing. It is important to also note that the parties may elect for expedited arbitration. The difference being, the administrator must set the hearing within 150 days of the referral order for standard arbitrations from the commercial calendar, but within 90 days if both parties agree to expedite. This is where Part 25 is groundbreaking for Cook County employment – and other – litigants. Where cases can typically assume to take over a year to get into simple discovery, this program ensures that disputes that would otherwise go to trial have the potential to be completed and decided within half a year. This is unheard of in Cook County and is a profound step forward for attorneys and courts with high caseloads, and litigants who need quick resolutions.

After the case is referred and an arbitration hearing date is set, the arbitrator chosen does their own conflict check. In comparison to the three arbitrators for the Municipal Department, the Commercial Calendar Section only has one arbitrator. During the period of time between the referral order and the hearing, the parties are free to take discovery – expecting to comply with Illinois Supreme Court Rule 222 – but only for 120 days. (For expedited cases, discovery must be completed within 60 days). After 120 days, or 60, from the referral order, discovery is automatically closed. The point of this was to streamline discovery and avoid lengthy delays of discovery before the Court involving discovery motions. The effect is to continue to make the process simple, cost-effective, and time-efficient.

Leading up to the arbitration hearing date, the other notable difference is what the parties are required to provide the arbitrator prior to the hearing. Under Rule 25.8, the Court lists what is required of the parties and includes a meeting with opposing counsel thirty days prior to the hearing. The difference here being that there is no Illinois Supreme Court Rule 90(c) package required. Again, this is meant to expedite the process and eliminate high costs for litigants.

The hearing itself is also simple, limited to four hours. At the conclusion of the hearing, the parties are required to submit

a summary of the legal fees incurred in connection with the arbitration. The arbitrator is required to submit the award to the administrator by 5:00 p.m. on the second business day after the hearing. Rejection of the award, however, is in stark contrast to the Municipal Department. In the Commercial Calendar Section, rejection of the award must be accomplished within seven business days after receiving the notice of the award. Included with that rejection – which involves a specific form that must be filed in Room 801 – the rejecting party must pay a $750 rejection fee. The object of the fee is to deter rejections from parties that simply are not happy with the result. In addition to the fee and tight rejection timeframe, if that party fails to obtain a better result at trial, they are required to pay the other party's reasonable legal fees incurred in connection with the arbitration. According to Judge Mulroy, this innovative and marked stray from the usual is structured so that both the clients and attorneys thoughtfully consider rejecting the award.

The Results

According to Judge Mulroy, since starting the program approximately 700 cases have been referred to the mandatory arbitration program within the Commercial Calendar Section with a very low rejection rate. The average life of a case within the section is 12 months. While the majority of the cases referred are breach of contract cases, employment disputes are included as commercial cases and decided on a case-by-case basis for referral. The employment disputes are usually referred if the facts are simple and the subject matter is not too complex. If the Court has any doubts, there is extensive consultation with counsel (or the litigants if pro se) to both determine the facts and law of the case, and the damages alleged. Judge Mulroy stressed that the most important consideration for practitioners referred to the mandatory arbitration program is to be mindful of the deadlines to reject and the time limits imposed in Part 25. As long as the parties understand the rules, the program is successful. It's intent of streamlining the entire process, making litigation less expensive and time-efficient has so far proven to be successful, with its only fault being that many practitioners in Cook County and the outlying counties are not aware of it. The entire program is designed to be fast, and that it is.

What to know before filing

The mindful practitioner should be aware of where the clerk is filing case. Referring back to my earlier example, the fact that my retaliatory discharge case over $50,000 was assigned to mandatory arbitration in the Municipal Department – before any hearing was given to decide whether or not it belonged in the Municipal Department – was an error. Employment and labor counsel should be most mindful of this program as the damages for most employment disputes typically fall within this range. Additionally, the program is most beneficial to both employees and employers who both benefit from swift resolution. After determining that the case is in the right department or division, the mindful practitioner will make sure to accurately docket the deadlines and requirements of Part 25 in order to be fully prepared for arbitration. Finally, after arbitration, the mindful practitioner will practice strong communication skills with their client, and very quickly, to ensure that the client understands the repercussions that come with rejecting an award that could eventually lose and cost more money. As it stands, the mandatory arbitration program is a success in Cook County's Law Division and is here to stay. For another thoughtful review and explanation of the program, check out Lauraann Wood's article in the Chicago Daily Law Bulletin at <http://www.chicagolawbulletin.com/Archives/2016/10/10/Arbitration-project-10-10-16.aspx>. ■

Employer flubs credit check on job applicant

BY MICHAEL R. LIED

Catherine Ohle was denied a job because of a failed credit check that she claimed was a violation of the Illinois Employee Credit Privacy Act ("Act") (820 ILCS 70/1, *et seq.*). The Act, with a few exceptions, prohibits credit checks of applicants and employees. The circuit court granted the employer summary judgment and Ohle appealed.

By way of background, Ohle applied for a job at Neiman Marcus's Oak Brook. Illinois, store as an entry-level "Dress Collections Sales Associate." Ohle was interviewed and was informed that she should expect an offer for the position, pending completion of a successful background check. Neiman Marcus ran a background check through a third-party vendor. The third party informed Neiman Marcus that Ohle failed her credit check and, on that basis, did not investigate the remaining areas of inquiry. The report indicated Ohle had several civil judgments against her and several accounts in collections. On July 17, 2012, Ohle received a letter from the reporting agency informing her that she failed the credit check, and based on her credit report, she would not be hired.

Ohle filed suit individually and on behalf of a class, alleging a claim for violation of the Act, which prohibits an employer from inquiring into a potential employee's credit history and prohibits an employer from refusing to hire the applicant or discriminating against the applicant because of her credit history. The Act provides an exemption where a satisfactory credit history is an "established bona fide occupational requirement of a particular position." An individual who is injured by a violation of the Act may bring a civil action to obtain injunctive relief, damages or both, and if she prevails, she may be awarded costs and reasonable attorney fees.

In September 2013, defendant moved for summary judgment arguing that there were no material facts in dispute and that Neiman Marcus didn't hire Ohle for a lawful and legitimate reason, namely, that a satisfactory credit check was a *bona fide* occupational requirement for the sales associate position. Defendant argued that three of the enumerated circumstances in the Act were involved in the dress collections associate position, and therefore, a satisfactory credit history was a bona fide occupational requirement for employment in that position. Those three circumstances were (1) the position involves access to personal or confidential information, (2) the position includes custody of or unsupervised access to cash, or (3) the position includes signatory power of $100 or more per transaction.

More specifically, Defendant's position was that the duties of the sales associate position involve access to personal or confidential customer information because applications for a Neiman Marcus credit card provide the associates with social security numbers, date of birth, addresses, and income information, which the associates input into the computer.

Defendant argued that the duties of the sales associate position involve custody of cash valued at $2500 or more; sales associates routinely sell dresses and items above $2500 of value; purchases can be made with cash, check or credit card and as long as a purchase is under $10,000, it can be made with any sales associate.

In addition, associates have signatory power of more than $100 because they issue gift cards and process cash returns. The trial court granted defendant's motion for summary judgment finding the sales associate position involves access to personal or confidential customer information, and therefore, the job is exempt from the Act.

The parties agreed that social security numbers and other personal or confidential customer information were contained in completed Neiman Marcus credit card applications. Therefore, the outcome of whether the exemption applied to the case turned on the interpretation of one word: "access."

The appeals court found that sales associates are neither managers nor among the select few employees who Neiman Marcus trusts with personal and confidential information so as to exempt the sales associate position from the protections of the Act.

Defendant's employees testified that only its managers or select few employees—not low level employees—are entrusted with the confidential information the customer gives the store with the explicit authorization to process and keep.

A sales associate essentially acts as a conduit by (1) receiving (he application from the customer, ensuring it gets to Neiman Marcus manager or trusted employee, or (2) entering the information into the POS system for immediate credit approval, which is a task no more sensitive in nature than entering credit card numbers into a credit card machine or taking down driver's license information to accept a personal check in order to complete a sales transaction.

The court agreed with plaintiff that if the sales associate position was exempt from the Act, the exemption would swallow the rule. If "access" were construed in such a broad manner, the Act would in effect accomplish nothing and fail to protect the majority of retail sales clerks. If the Act applied where employees are simply handed credit card applications and then place the application in a drawer for processing at a later time by a different department, then retail clerks in most stores, including retail stores like Neiman Marcus, would be exempt and employers would be allowed to deny employment to citizens who face financial hardships that are often unpreventable due to the harshest economic situation in decades and who are not able to obtain employment despite bad credit.

If the extent of a sales associate's "access" to an application is merely securing it in the

register and taking it to the cash office then it was clear to the court from the legislative history that this broad interpretation of the exemption was not what the legislature intended.

Neiman Marcus failed to meet its burden of proof that an exemption to the Act applied to the dress collection sales associate position and therefore, it discriminated against Ohle when she applied for that job.

The appeals court reversed the judgment of the circuit court and remanded for further proceedings.

The case is *Catherine Ohle v. The Neiman Marcus Group,* 2016 IL App (1st) 141994. ■

The importance of a doctor's note: Medical documentation requirements under the Americans With Disabilities Act

BY A. CHRISTOPHER COX, COX & ASSOCIATES, LLC, BLOOMINGTON

As children in elementary school, we all learn the importance of a doctor's note. We learn that a simple verification from our doctor that whatever malady ails us is an unfortunate reality rather than a useful excuse to shirk some pre-adolescent responsibility can mean the difference between being punished for an absence or being permitted to take that terrifying test a day or two later than the rest of our unfortunate classmates. As adults in the workforce, a well-written doctor's note is as important to the economic fortunes of both employers and employees as it is to a student's academic fortune. This is due in large part to the fact that proper documentation of an injury or illness is vital for both employers and employees to assess whether the Americans with Disabilities Act ("ADA") mandates that a reasonable accommodation be provided to an employee.

The ADA requires an employer to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability". An employee who needs an accommodation has the responsibility of informing his or her employer of that need. An employee's request is sufficient as long as the request explains that the proposed adjustment in working conditions is for a medical condition-related reason. Once an accommodation is requested, an employer and employee must engage in an "interactive process," or a flexible dialogue, with the goal of finding an appropriate accommodation for the employee's limitation. If an employee or employer fails to engage in the interactive process in good faith, then that party violates the requirements of the ADA. As part of the interactive process, an employer may require its employee to provide documentation to substantiate the limitation that allegedly requires an accommodation. If an employee refuses to provide such documentation, the employee causes a breakdown in the interactive process that may preclude an employer's liability on an otherwise successful ADA claim. In essence, an employer may require that its employees provide a doctor's note to support the employee's claimed need for a reasonable accommodation. And if an employee fails to provide the requested note, the employee may face strict penalties.

A recent case from the Fifth Circuit, *Delaval v. PTech Drilling Tubuluars, LLC,* 5th Circ., No. 15-20471 (May 26, 2016), reaffirmed the importance of a doctor's note or other medical documentation for both employers and employees when dealing with issues of reasonable accommodation under the ADA. The Plaintiff in the *Delaval* case, Danny Delaval, was employed as a machinist by the Defendant, PTech Drilling Tubulars, LLC ("PTech") at the corporation's Texas facility. PTech's attendance policy identified "failing to show up at work for more than three … consecutive days without notifying a supervisor" as grounds for immediate dismissal. In early March 2014, Delaval informed his supervisors at PTech that he was ailing and required medical testing. Delaval also emailed one of PTech's owners to inform the owner that Delaval had a doctor's visit scheduled on March 17. On March 18, Delaval informed the PTech owner in an email that Delaval had been diagnosed with kidney stones and an enlarged spleen. In response, the PTech owner told Delaval to "follow doctor's orders" and to keep the company "informed as to what needs to be done." Delavel returned to work on March 25. On March 27, PTech terminated Delaval for failing to show up at work for more than three consecutive days without notifying a PTech supervisor.

Delaval and PTech disputed whether or not Delaval maintained contact with any representative of PTech during the time he was off of work. Delavel testified that he was in constant contact with his supervisor and office manager and that he had provided all relevant medical documentation to PTech. Delaval's supervisor at PTech, however, testified that PTech representatives had attempted to contact Delaval and Delaval had not

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The importance of a doctor's note

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returned their calls. PTech representatives also testified that they requested a doctor's note from Delaval but Delaval never provided one. The record contained a single diagnosis dated approximately one month after Delaval's termination.

Delaval filed a lawsuit against PTech alleging, amongst other things, that PTech failed to offer a reasonable accommodation to Delaval during his illness. The District Court granted summary judgment *sua sponte* in favor of PTech on that claim because the Court found that Delaval did not ask for a reasonable accommodation as the ADA required. The District Court further held that asking an employer for permission to take a medical test and then for indefinite leave to receive treatment are not reasonable accommodations pursuant to the ADA.

On appeal, the Fifth Circuit Court upheld summary judgment based upon its conclusion that Delaval impeded the interactive process by failing to provide an adequate doctor's note to PTech. The Fifth Circuit began its analysis by noting that time off, whether paid or unpaid, can constitute a reasonable accommodation. However, no employer is required to provide a disabled employee with indefinite leave. For purposes of its analysis, the Fifth Circuit assumed that Delaval triggered the interactive process by asking for leave to undergo medical testing. The Fifth Circuit noted that PTech had requested that Delaval verify his illness during his weeklong absence by providing PTech representatives with a doctor's note. The Fifth Circuit held that Delaval failed to comply with this request. In making this holding, the Fifth Circuit deemed the diagnosis that Delaval provided over a month after his termination insufficient to meet his obligations to provide his employer with reasonable documentation of his disability or illness. Because Delaval failed to provide an adequate doctor's note, the Fifth Circuit held that Delaval had actively hindered the interactive process and therefore could not succeed on his claim that PTech had failed to offer Delaval reasonable accommodation under the ADA.

The lessons of the Fifth Circuit's ruling are clear. If an employee has to miss work for a reason related to a medical condition, it is incumbent upon that employee to insure that he or she has a detailed doctor's note and other relevant medical records to provide to his or her employer promptly upon request. Employers, for their part, should always ask for detailed medical records supporting any request from an employee for a reasonable accommodation for reasons of disability or illness and should make sure those requests are verifiable and documented. If both employers and employees abide by these rules, a good doctor's note can be the cure for costly litigation.

Delaval v. PTech Drilling Tubuluars, LLC (5th Cir.c, No. 15-20471 (May 26, 2016). ■