

## THE WASHINGTON REPORT

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#### On the Hill

Much of the focus in Congress in February has been on the Keystone pipeline legislation, the President's request for authorization for the use of military force, and funding for the Department of Homeland Security, which is scheduled to expire February 28<sup>th</sup>. Privacy issues of potential interest to employment and tenant screeners also received some attention.

On February 12th, Senator Pat Toomey (R-PA) and Senator Joe Manchin (D-WV) introduced S. 474, a bill to require schools receiving federal funds to perform background checks on all personnel who have unsupervised access to children, including substitute teachers, coaches, classroom aides, and bus drivers who, according to the sponsors frequently are hired as contractors and are not subject to background checks in 12 states.

On February 11<sup>th</sup>, The Senate Committee on Commerce, Science, and Transportation held a hearing, entitled The Connected World: Examining the Internet of Things. The primary focus of the hearing was the FTC's January report on the Internet of Things (discussed below) and privacy and security steps that could be taken regarding Internet of Things devices, but the committee also discussed the FTC's role in privacy and data security and the scope of the FTC's authority under Section 5 of the FTC, with Senators noting the challenges to the FTC's authority being brought by Wyndham and LabMD.

On January 27<sup>th</sup>, the House Energy and Commerce Subcommittee on Commerce, Manufacturing and Trade held a hearing on data breach legislation titled "What are the Elements of Sound Data Breach Legislation?" The hearing, which is expected to lay the ground work for the House Energy and Commerce's data breach legislation efforts in the new Congress, discussed issues such as the key elements of a federal breach notification bill, the types of personal information that can be used in identity theft, ways to reduce the complexity of breach notification, and steps that can be taken to protect consumers from over notification. Subcommittee Chairman Michael Burgess (R-TX) said that "[a] single requirement across the states would give companies some confidence that their methods are sound in handling electronic data, an inherently interstate activity."

On January 22nd, Representative Stephen Lynch (D-MA) introduced H.R. 490, "To provide for a strategic plan to reform and improve the security clearance and background investigation processes of the Federal Government, and for other purposes." The bill in part is in response to deficiencies in the federal background check process identified in the aftermath of the Washington Navy Yard shootings in 2013. The bill would require the President, within six months of the bill's enactment, to submit a strategic plan to the appropriate congressional committees to improve security clearance and background investigation activities carried out by the Federal Government. The bill also seeks to reduce the role of private contractors in the conduct of federal background checks as a result of allegations of misconduct against USIS in connection with its conduct of federal background checks. In a press release announcing the bill Congressman Lynch is quoted as saying: "In light of these allegations regarding extended waste,

fraud, and abuse in security clearance contracting, it is imperative that we bring key background investigative work back into the federal government...My legislation will ensure that federal employees, rather than outside contractors, perform critical investigative functions, including Top Secret Clearance level investigations.”

#### At the Supreme Court

On January 21<sup>st</sup>, the Supreme Court heard oral arguments in *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project, Inc.* over whether Fair Housing Act discrimination cases can be brought on the basis of the disparate impact theory, which argues that discrimination can occur if an action has a disparate impact on protected classes even if that impact is not intended by the party taking the action. Disparate impact theory has been used by plaintiffs to claim that background check practices can be discriminatory if they have an adverse impact on minorities or other protected classes. While the case before the Supreme Court focuses on the Fair Housing Act, the Court’s ruling, which is expected by June, could have implications for disparate impact cases brought in the employment context under Title VII of the Civil Rights Act of 1964 as well.

#### At the FTC

On January 21<sup>st</sup>, the Eleventh Circuit dismissed LabMD, Inc.’s latest action against the FTC alleging that the agency lacks authority to regulate companies’ data security practices, ruling that the suit is not yet ripe for the Court’s consideration because a final determination has not yet been made in the FTC’s administrative proceeding against the company.

On January 27<sup>th</sup>, the FTC released a report on the “Internet of Things,” which recommended best practices for companies to use in the development and deployment of smart devices. The FTC noted that while the FCRA could provide consumer protections if consumer reporting agencies were to seek to include information from Internet of Things devices in consumer reports, the FCRA exclusion from the definition of “consumer report” for first party reporting of transaction and experience information means that many Internet of Things device manufacturers would not be restricted by the FCRA with respect to how they use and disclose such information.

#### At the Federal Aviation Administration

On February 15<sup>th</sup>, the FAA and the Department of Transportation issued proposed rules to govern the use of small drones domestically for commercial purposes. One of the proposed requirements for drone operators is a background check to be conducted by the Transportation Security Administration.

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