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FTC/EEOC Joint Guidance. On March 10th, the Federal Trade Commission (FTC) and the Equal Employment Opportunity Commission (EEOC) published joint guidance to applicants, employees and employers about the background screening process. The guidance took the form of two brochures, one targeted at employers--“Background Checks What Employers Need to Know”--and one targeted at applicants and employees: “Background Checks: What Job Applicants and Employees Should Know.” Issuance of the joint guidance underscores the importance that the two agencies place on hiring and screening related issues and is a likely signal that the agencies will bring enforcement actions in the months ahead against employers and possibly consumer reporting agencies that fail to comply with applicable requirements.

The employer guidance document is a high level primer on Title VII and FCRA requirements. The EEOC portions of the guidance emphasize the importance of “treating everyone equally” and cautioning that “employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, the policy or practice has a ‘disparate impact’ and is not ‘job related and consistent with business necessity.’” The FTC contributions to the guidance focus on educating employers about their obligations to obtain written authorization from the individual, pre-adverse and adverse action obligations, and other FCRA requirements.

Similarly, the guidance to employees and applicants is a high level overview of what employers can and cannot do as part of the hiring process. As with the employer guidance, the guidance to individuals addresses the importance of treating individuals equally and the disparate impact scenario, using language virtually identical to the language quoted from the employers’ guidance above. The individual guidance also notes that for disparate impact claims, it does not matter whether or not the information was in a background report. Individuals that think an employer discriminated against them based on background information are encouraged to contact the EEOC.

Safeguards Rule Review. The FTC also made another announcement that merits attention in the coming months. On March 7th, the FTC announced plans to review several agency rules during 2014, including the GLB Safeguards Rule—formally known as the Standards for Safeguarding Customer Information—which requires covered financial

institutions to implement and maintain a comprehensive information security program meeting the Rule's requirements. While employment and tenant screeners typically do not meet the definition of "financial institution," FTC revisions to the GLB Safeguards Rule still is worth paying attention to because the FTC has used the existing Safeguards Rule as a template for the contents of its information security consent decrees. Any changes that the FTC may make to the Safeguards Rule could be a signal as to what the FTC expects of all companies that handle personal information, not only GLB-regulated financial institutions.

Social Media. On March 12th, the EEOC convened a panel to discuss the use of social media in the workplace and how the use of social media in the workplace may raise discrimination concerns. Panelists noted that the use of information from social media sites could result in discrimination since social media profiles can allow employers to discern the applicant's race, gender, age and possibly ethnicity from the sites. One of the panelists, referenced by the EEOC in its media release about the event, that "to the extent that employers conduct a social media background check, it is better to have either a third party or a designated person within the company who does not make hiring decisions do the check, and only use publicly available information, not requesting passwords for social media accounts." The EEOC has previously addressed social media issues in several contexts, but convening this panel suggests that the agency may be more active on social media issues in the future.

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