

## THE WASHINGTON REPORT October 2014

### On Capitol Hill

The Hill was largely been quiet in October with both Houses in recess and with most members home campaigning for next week's midterm elections.

On October 2<sup>nd</sup>, however, Senator Carper (D-DE) and Senator Coburn (R-OK), the Chairman and Ranking Member of the Senate Homeland Security and Government Affairs Committee, sent letters to the Department of Homeland Security, the Office of Management and Budget, and the Office of Personnel Management asking a number of questions about the data breach revealed over the Summer that apparently involved USIS and prompted DHS to suspend its work with the Company. The Senators requested additional information about steps the agencies are taking in response to the breach and expressed concern about the role of USIS in background investigations. As we reported in last month's edition of *The Washington Report*, OPM announced in September that it would not renew its contract with USIS.

### At the Supreme Court

The Supreme Court began its new term on October 6<sup>th</sup> and the new term may produce opinions with implications for employment and tenant screeners.

One case of potential interest, *Spokeo v. Robins*, involves an important question of liability under the Fair Credit Reporting Act (FCRA). Spokeo is seeking Supreme Court review of an adverse FCRA decision by the 9<sup>th</sup> Circuit, which held that Spokeo could be held liable for FCRA violations even in cases where the plaintiff had suffered no actual harm. On October 6<sup>th</sup>, the Supreme Court asked the Solicitor General's Office to file a brief providing the Government's views on the matter. The U.S. Chamber of Commerce, among other groups, is supporting Spokeo's position. The Supreme Court has not yet agreed to hear the case, but if it does, whatever the Court decides could have a significant impact on FCRA litigation.

On October 3<sup>rd</sup>, the Supreme Court also agreed to hear a Fair Housing Act case, *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, from Texas, which calls into question the disparate impact theory of liability in discrimination in discrimination cases. The Court has agreed to hear two similar cases in recent years only to have the cases settle before the Court could rule on the matter. At issue is whether, and to what extent, disparate impact is an acceptable liability theory. While the case before the Supreme Court involves the Fair Housing Act, a ruling by the Court, also could have implications for the use of disparate impact as the basis for Title VII cases by the Equal Employment Opportunity Commission (EEOC), including those involving criminal background checks, and Equal Credit Opportunity Act (ECOA) cases by the Consumer Financial Protection Bureau.

### At the EEOC

On September 30<sup>th</sup>, the EEOC announced a settlement agreement with The Cole Group (“Cole”), a background screening company, regarding pre-employment screening compliance with the Americans with Disabilities Act (ADA), the Genetic Nondiscrimination Act (GINA), and civil rights laws’ anti-retaliation provisions. The terms of the agreement are not currently publicly available; however, the EEOC stated in a press release that it acknowledges Cole’s “proactive changes to screening policies and practices, employee training guidelines, and website information, to ensure compliance with the ADA and GINA with regard to applicants.” Janet Elizondo, director of the EEOC’s Dallas District Office, stated, “Increasing employment opportunities through forwarding-thinking hiring and recruitment models is what both the EEOC and businesses should support. In doing so, it is important for the EEOC to engage not only with employers directly, but also with their business partners who play an important role in facilitating connections between jobs and jobseekers.”

### At USIS

On October 6<sup>th</sup>, U.S. Citizenship and Immigration Services (USCIS) announced the launch of myE-Verify, a website for employees to create and maintain personal accounts to access features for identity protection. myE-Verify will utilize Self Check to verify identities in creating an account, and utilize Self Lock to allow users to “lock” their Social Security numbers. Initially, USCIS will provide myE-Verify to individuals in Arizona, Idaho, Colorado, Mississippi, Virginia, and the District of Columbia. At a later date, it will “roll out myE-Verify across the country with plans for additional features focused on employees and job seekers.” USCIS Director León Rodríguez stated, “myE-Verify signifies a significant step forward for added transparency, features, and identity protection.” Separately, on October 7<sup>th</sup>, USCIS announced that, as of January 1, 2015, it will dispose of E-Verify records more than 10 years old.

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