

## THE WASHINGTON REPORT November 2013

### On Capitol Hill

With the Federal government back in business (at least until the end of the current continuing resolution in January), the Congress has resumed consideration of a myriad of issues, including those relating to background checks. Background check bills introduced or considered since the last edition of *The Washington Report*, include background check bills for those involved in signing people up for insurance under the Affordable Care Act, changes to the process of monitoring individuals with security clearances as a result of the Navy Yard Shootings, and enhanced background check requirements for school employees.

On October 16<sup>th</sup>, Representative Dennis Ross (R-FL) introduced H.R. 3299, the “Security Before Access Act of 2013,” which would amend the Public Health Service Act to require “navigators” that assist individuals sign up for insurance under the Affordable Care Act to undergo “both a criminal background and fingerprint check” within 60 days of providing enrollment assistance and would require that the individual “has a clean record free of criminal infractions.” The bill would also prohibit a health insurance navigator or assister from accessing any individual’s PII without the individual’s express, written, witnessed consent and also prohibit any person from accessing such data until the Comptroller General and Department of Health and Human Services (HHS) Inspector General jointly certify that HHS has established appropriate security protections for financial and health information.

On October 22<sup>nd</sup>, the House of Representatives passed H.R. 2083, the “Protecting Students from Sexual and Violent Predators Act,” by voice vote under suspension of the rules (at least a two-thirds vote was required). The bill would allow a state educational agency to maintain an inventory of all information obtained from background checks conducted on school employees statewide. The bill would amend the Elementary and Secondary Education Act of 1965 and would require each state educational agency that receives funds under the Act to:

- Require criminal background checks for each school employee, including searches of the criminal registry or repository for each state in which the employee has previously resided;
- Require a state educational agency or local educational agency to report to local law enforcement whenever background check information indicates that a sexual predator has applied for employment;
- Require background checks to be repeated or updated in accordance with state law or local educational policy but not less than every five years; and
- Provide each school employee who has had a background check with a copy of, and a timely process to appeal, the results.

On October 29<sup>th</sup>, Senator Pat Toomey (R-PA) introduced a companion bill in the Senate, S. 1596. Both measures have been referred to the Senate Health Education Labor and Pensions Committee.

On October 30<sup>th</sup>, Senator Susan Collins (R-ME) introduced S. 1618, the “Enhanced Security Clearance Act of 2013,” which would make enhancements to the Office of Personnel

Management's (OPM) background check system for the granting, denial, or revocation of security clearances or access to classified information for employees and contractors of the federal government in the aftermath of the Navy Yard shootings. The bill would require the OPM to implement an automated review that would search public records and databases for information on every individual that holds a security clearance at least twice, at random times, every five years. If the review finds any information pertinent to a security clearance, the OPM would be required to notify the agency employing the individual. The security clearance process received additional attention on October 31<sup>st</sup>, when the Government Accountability Office released a report finding that 8,400 individuals found eligible for a clearance during the period surveyed were found to owe \$85 million in unpaid federal taxes as of June 2012. Several Senators, including Senator Tom Coburn (R-OK), Senator Orrin Hatch (R-UT) and Senator Susan Collins (R-ME) called for changes to address the issue.

### **At the Supreme Court**

It appears that the Supreme Court will not have an opportunity this term to clarify the scope of the disparate impact doctrine, which has been used in both the employment and housing contexts as a means to allege violations of the nation's civil rights laws in instances where an action has a "disparate impact" on minorities without evidence of intentional discrimination by employers or landlords.

We noted in the July edition of *The Washington Report* that the Supreme Court had accepted certiorari in a disparate action case, *Mount Holly v. Mount Holly Gardens Citizens in Action Inc.*, which involved allegations that a New Jersey township's plan to redevelop a "blighted" area should not be allowed to move forward because it would have a disparate impact on minority residents of the area in violation of the Fair Housing Act. Oral arguments were scheduled before the Supreme Court on December 4<sup>th</sup>. As with a similar case last term, however, the parties have settled the case before the Supreme Court could hear the case. On November 13<sup>th</sup>, the parties announced that they had both approved a settlement and that they would ask the Supreme Court to dismiss the case.

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