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**“[T]here are competing legal issues involved with the hiring of individuals with criminal records.”**

**WINNING THE TALENT ACQUISITION GAME WITH AN UNTAPPED LABOR POOL**

According to a News Release from the U.S. Department of Labor, Bureau of Labor Statistics, the unemployment rate in January of 2019 was 4.0%. While the unemployment rate is up slightly from 2018, the continuing trend in low unemployment presents an ongoing challenge for Human Resource professionals in finding talented workers.

One way to get ahead of the game in talent acquisition is to consider a largely overlooked population - the almost 75 million job seekers who have a criminal record. Employment of persons with criminal records is one of the biggest societal issues facing the United States. According to the Brennan Center for Justice, just as many Americans have criminal records as college diplomas. Further, many applicants with criminal records have years of prior work experience which can greatly benefit potential employers. Yet many businesses do not give convicted felons a chance to earn a living, despite the fact that these persons have served their sentence and just want to live a normal life.

On January 27, 2019, the Society for Human Resource Management (“SHRM”) launched a new initiative to encourage businesses to adopt more inclusive hiring policies regarding applicants with a criminal background. As described by SHRM, “Getting Talent Back to Work” is “a national initiative that champions the hiring of individuals with criminal records, an untapped talent pool that has traditionally been shut out of the labor market.” The initiative calls on businesses to pledge to consider applicants regardless of criminal record, giving those who deserve it a second chance. SHRM does not advocate the elimination of background checks, but it does encourage businesses to give all applicants equal consideration and evaluation based on each individual’s merits, balancing overall risks against potential rewards. SHRM provides tools and resources to those who join this initiative to help them evaluate applicants with criminal records, adopt more inclusive hiring practices, and reduce legal liability. Many businesses and industry leaders, representing over 50% of the American

workforce, have publicly joined this SHRM initiative.

Admittedly, there are competing legal issues involved with the hiring of individuals with criminal records. There is potential liability for negligent hiring, for an incident caused by an employee when the employer knew (or should have known) that the employee posed a risk. There is also the concern over workplace violence resulting in workers’ compensation liability. However, just because an individual has been convicted of a felony does not mean they are violent. It simply means they made a mistake and got caught, and have paid the societal price imposed through incarceration. Further, the risk of liability for negligent hiring is less than commonly assumed, and relatively few negligent hiring cases are actually filed.

On the other hand, there is significant potential liability for violation of anti-discrimination laws if criminal history is used to exclude workers without business justification, and such exclusion has an adverse impact on protected classes. Liability under the latter scenario is a real concern given the current enforcement environment.

In 2012, the U.S. Equal Employment Opportunity Commission (“EEOC”) issued an Enforcement Guidance on employers’ use of applicants’ arrest and conviction records in making employment decisions, and the potential for liability under the Federal anti-discrimination law - Title VII of the Civil Rights Act. The Guidance includes some best-practice recommendations for employers.

Employers must treat *arrest* and *conviction* records differently for purposes of making employment decisions. The EEOC Guidance states that the fact of an arrest does not establish that criminal conduct has occurred, and that an exclusion based solely on an arrest is not job-related and consistent with business necessity, particularly if it has an adverse effect on protected groups. Many protected groups, such as African-Americans and Hispanics, are arrested at rates substantially higher than their proportion of the general population. The Guidance indicates, however, that an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

In contrast, the Guidance states that a conviction record would

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“Privilege protects the attorney and client from being compelled to disclose confidential communications between them made for the purpose of furnishing or obtaining legal advice or assistance.”

## THE ATTORNEY-CLIENT PRIVILEGE FOR ORGANIZATIONS: BROADER THAN YOU THINK?

It is increasingly common for businesses to use outside consultants, independent contractors and other third-party nonemployees to develop and manage their business. These third parties often operate in the same manner as employees of the business and possess information the business’ attorneys would not otherwise have if it were not for the nonemployee. The issue is whether the attorney-client privilege protects these communications between a corporation’s legal counsel and a third-party nonemployee of the corporation.

The Tennessee Supreme Court recently addressed this issue in *Dialysis Clinic, Inc. v. Medley*, No. M2017-01352-SC-R11-CV, 2019

Tenn. LEXIS 17 (Jan. 25, 2019) and held the attorney-client privilege applies to communications between an entity’s legal counsel and a third-party nonemployee of the entity if (1) the nonparty is the functional equivalent of the entity’s employee; (2) when the communications relate to the subject matter of legal counsel’s representation of the entity; and, (3) the communications were made with the intention that they would be kept confidential.

Generally, the idea of privilege is this: communications between a client and the attorney are confidential. Privilege protects the attorney and client from being compelled to disclose confidential communications between them made for the purpose of furnishing or obtaining legal advice or assistance. It is best to check your local laws in order to determine the precise definition of “privilege” for your state.

In Tennessee, privilege is protected by the language of the following statute:

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client or person who consulted the attorney, solicitor or counselor professionally, to disclose any

communication made to the attorney, solicitor or counselor as such by such person during the pendency of the suit, before or afterward, to the person’s injury.

T.C.A. § 23-3-105 (2018).

Whether privilege applies to a communication differs slightly in each state. In Tennessee, it is “question, topic and case specific.” *Bryan v. State*, 848 S.W.2d 72, 80 (Tenn. Crim. App. 1992) (citing *Johnson v. Patterson*, 81 Tenn. 626, 649 (1884)). It is important to note the attorney client does not protect communications between attorneys and clients that take place in the presence of a third party or are divulged to a third party. *Hazlett v. Bryant*, 241 S.W.2d 121, 123 (Tenn. 1951.) In other words, the attorney-client privilege can be broken by a third party.

The facts of *Dialysis Clinics, Inc. v. Kevin Medley et al.* are relatively straight forward. Dialysis Clinic Inc. owned and operated dialysis centers. They owned and leased various commercial properties to third parties but had no in-house knowledge about or experience in the management of commercial rental properties. Therefore, Dialysis Clinic Inc. entered into a property management contract with XMi to manage several of their commercial properties. Under their property management agreement, XMi acted as Dialysis Clinic’s agent on an exclusive basis to manage and operate the properties. The scope of XMi’s work included negotiating lease renewals and amendments; collecting rents and dues; canceling or terminating leases upon Dialysis Clinic’s direction; and instituting, prosecuting, and defending all actions involving the leases and their properties. XMi handled all day to day operations and tenant relations and regularly communicated with Dialysis Clinic about those matters. XMi also communicated with Dialysis Clinic’s in house and outside attorney about the properties because in XMi’s role as a property manager, it had information about the properties that Dialysis Clinic did not have.

In October 2014, Dialysis Clinic filed unlawful detainer suits for three of its properties in Davidson County. The Defendant, Kevin Medley LLC, served a subpoena on XMi and requested documents related to the properties in question be turned over. These documents consisted of emails between XMi and Dialysis Clinic’s in-house and outside counsel. Dialysis Clinic argued the emails were protected by the attorney

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usually serve as sufficient evidence that a person engaged in particular conduct. However, in certain circumstances, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision. The Guidance cites with approval the case of *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975), which held that it was discriminatory under Title VII for an employer to “follow the policy of disqualifying for employment any applicant with a conviction for a crime other than a minor traffic offense.” This case identified three factors that were relevant to assessing whether the exclusion is job-related for the position in question and consistent with business necessity:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and/or completion of the sentence; and
- The nature of the job held or sought.

The EEOC states that although Title VII does not require an individualized assessment in all circumstances, the use of a screen that does not include an individualized assessment is more likely to violate Title VII. Therefore, the EEOC suggests that best practices require that an employer conduct an “individualized assessment” after it informs an employee or applicant that he or she may be screened out due to a criminal record and that the individual then be provided an opportunity to respond.

When providing an employee or job applicant an opportunity to demonstrate that the exclusion does not properly apply to him, the individual should be permitted to explain all relevant individualized evidence, including for example:

- The facts or circumstances surrounding the events or conduct;
- The number of offenses for which the individual was convicted;
- Older age of the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references or any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

This type of information will assist the employer in determining whether or not the screening and disqualification policy as applied to the individual applicant or employee is job-related and consistent with business necessity. If the individual does not respond to the employer’s attempt to gather additional information about these factors, the employer may make its

employment decisions without the information.

The Guidance states that in evaluating the nature and gravity of the events or conduct as part of the individualized assessment, the nature of the offense or conduct should be assessed with reference to the harm caused by the crime. With respect to the gravity of the offense, offenses identified as misdemeanors may be less severe than those identified as felonies. With respect to the time that has passed since the offense or conduct, or completion of the sentence, the Guidance notes that the *Green* court did not endorse a specific time frame for criminal conduct exclusions, although it did note that permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard.

Regarding the nature of the job held or sought, an individualized assessment should begin with a factual inquiry identifying the job title, the nature of the job’s duties, the circumstances under which the job is performed (e.g., the level of supervision, oversight, and interaction with co-workers or vulnerable individuals), and the environment in which the job’s duties are performed (e.g., outdoors, in a warehouse, in a private home). Linking the criminal conduct to the essential functions of the position in question may assist the employer in demonstrating that its policy or practice is job-related and consistent with business necessity, because it bears a demonstrable relationship to successful performance of the jobs for which it was used.

The EEOC acknowledges that proving that an exclusion is “job related and consistent with business necessity” is not burdensome. The employer can make this showing if, in screening applicants for criminal conduct, it (1) considers at least the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the specific job in question, and (2) gives an applicant who is excluded by the screen the opportunity to show why he should not be excluded.

The Guidance notes that in some industries, employers are subject to federal statutory and/or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions or engaging in certain occupations. As is generally the case with discrimination laws, such federal statutory and regulatory requirements take precedence over Title VII. Similarly, federal statutes and regulations that govern eligibility for occupational licenses and registrations take precedence over Title VII. Importantly, state and local laws and regulations that restrict or prohibit the employment of individuals with records of certain criminal conduct do not preempt Title VII.

Hiring employees with criminal backgrounds is arguably a wise business decision, especially in today’s competitive job market, as it offers businesses both financial and organizational benefits. It allows individuals to become productive members of society, and helps individuals who may have few employment opportunities. Also, these employees often work harder and are

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## “WINNING THE TALENT ACQUISITION GAME”

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more loyal as they are truly appreciative of the work opportunity. Financial benefits may include the ability to hire someone with years of experience at a lower wage, as well as potential

tax credits. For many businesses, the hiring of employees with criminal records is proving to be a viable solution to the ongoing and challenging talent acquisition game.

## “THE ATTORNEY-CLIENT PRIVILEGE”

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client privilege. The case made its way to the Tennessee Supreme Court, who turned to other jurisdictions for guidance on the issue.

In the 8th Circuit, the *Bieter* court observed that although the information an attorney needs to represent a client will in most cases be available from the client's employees, there will also be nonemployees whose relationship to the client suggests that they will possess the very sort of information that privilege envisions. *In re Bieter Co* 16 F.3d 292, 937-938 (8th Cir. 1994). In *Bieter*, an independent contractor worked as a consultant to a partnership on a commercial development. The independent contractor worked to procure tenants and acted as the representative to the partnership with architects, other consultants and the partnership's attorneys. His interactions were extensive and included meetings and correspondence with the attorneys. The *Bieter* court held that the attorney client privilege applied because the independent contractor had been involved daily with the partnership's principals, and the court found that the independent contractor likely possessed information that no one else possessed.

The Tennessee Supreme Court also reviewed the 9th Circuit Court of Appeals decision in *United States v. Graft*, 610 F.3d 1148 (9th Cir. 2010). *Graft* was a criminal case involving an insurance company accused of fraud. The owner of the company was prohibited under a cease and desist order from being employed by an insurance company, and therefore he denied that he was a director, officer, or employee of the company but claimed instead he was an outside consultant. The *Graft* court found the owner was the functional equivalent of a company employee because he was the company's agent with authority to communicate with its attorneys about legal matters. Under a separate test, the *Graft* court found the company's owner in his individual capacity, as opposed to his role as a functional employee, was not represented by the company's attorneys, and thus he had no personal attorney-client privilege over his communication with the company's attorneys.

In Pennsylvania, a pharmaceutical consulting firm was held to be the functional equivalent of an employee of a pharmaceutical company based on the firm's role in the development and implementation of a brand maturation plan, including administrative tasks and business strategy as well as involving the in legal and regulatory issues. *In re Flonase Antitrust Litigation*, 879 F. Supp. 2d 455 (E.D. Pa 2012). In Maryland,

a federal district court held a landscaping company, hired to address citations issued to a landowner by the county, was the functional equivalent of an employee of the landowner. *Huggins v. Price Georgy's Cnty.*, No. AW-07-825, 2008 WL 11336503, at \*4 (D. Md. Sept. 25, 2008).

The Tennessee Supreme Court formulated its own analysis in determining, under the totality of the circumstances, whether a third-party nonemployee is the functional equivalent of an entity's employee whose communications with the entity's attorneys are protected by the third-party privilege. The analysis consisted of two prongs.

First, the Court considers the following non-exclusive factors: whether the nonemployee performs a specific role on behalf of the entity; whether the nonemployee acts as a representative of the entity in interactions with other people or other entities; whether, as a result of performing its role, the nonemployee possesses information no one else has; whether the nonemployee is authorized by the entity to communicate with its attorneys on matters within the nonemployee's scope of work to facilitate the attorney's representation of the entity; and whether the nonemployee's communications with the entity's attorneys are treated as confidential. If the Court determines the nonemployee's communications qualify for the attorney-client privilege because the nonemployee is the functional equivalent of an employee outlined above, the Court will then use the standard already in place in Tennessee to determine whether the privilege attaches to the communication.

Applying its new analysis in *Dialysis Clinic*, the Tennessee Supreme Court held the attorney-client privilege applied to communications between Dialysis Clinic's legal counsel and XMi. The Court found XMi acted as a functional equivalent. Further, Court found communications between XMi and legal counsel for Dialysis Clinic related to the subject matter of counsel's representation of Dialysis Clinic's and were made with the intention that the communications would be kept confidential.

What does this mean for your company? More communications between in-house or outside counsel, third party contractors, brokers, consultants, public relation or marketing firms, or any other third-party nonemployee may be protected. Check to see whether your state uses a form of the "functional equivalent" analysis along with a review of what defines privilege in your state.



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