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Management Alert

New York's Highest Court Clarifies Who Can Be Liable for Discrimination Based on Criminal History

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***Seyfarth Synopsis**: On May 4, 2017, New York's highest court, the Court of Appeals, held that the New York State Human Rights Law ("NYSHRL") prohibits employers from discriminating on the basis of criminal conviction history. Entities that are not direct employers may also be liable, however only for aiding and abetting a violation of the NYSHRL.*

In *Griffin v. Sirva, Inc.*, the U.S. Court of Appeals for the Second Circuit ("Second Circuit") posed three questions to the New York Court of Appeals ("Court of Appeals"), New York's highest court, regarding the appropriate interpretation of New York state law, the NYSHRL. Specifically, the Court of Appeals was asked to determine whether (1) Section 296(15) of the NYSHRL, which prohibits discrimination against individuals with prior criminal convictions, is limited to a party's "employer"; (2) if so, is an "employer" only a "direct employer," or can the coverage extend to other related entities; and (3) does Section 296(6), which provides for aiding and abetting liability, apply to Section 296(15) to impose liability on out-of-state entities that may have a connection to an in-state employer?

As background, the direct employer in the case was Astro Moving and Storage Co., who was a contractor for Allied Van Lines. Plaintiffs had convictions for sex crimes with minors, which disqualified them from working for Allied, and Astro terminated their employment because they could not perform services for Allied. Plaintiffs sued Astro, Allied, and Sirva, Inc. (Allied's parent). Among other claims, Plaintiffs alleged discrimination due to their criminal conviction histories, as prohibited by Section 296(15) of the NYSHRL. As is most relevant here, they sued Allied (which was not their direct employer). Thus, since the interpretation of the NYSHRL had not been resolved on this point, the Second Circuit certified its questions to the Court of Appeals.

In its response, the Court of Appeals held definitively that Section 296(15) of the NYSHRL is limited to direct employers. Although the statutory text states that "any person" is prohibited from discriminating, the Court nevertheless found that this language was contextually designed to target direct employers.

With respect to the second question, the Court of Appeals clarified who the NYSHRL considers an "employer." To make the determination, the Court of Appeals turned to the common law test for determining the employer-employee relationship, as enunciated by New York's Appellate Division, Fourth Department, in *State Div. of Human Rights v. GTE Corp.*, 109 A.D.2d 1082 (4th Dept. 1985). The test consists of four factors: "(1) the selection and engagement of the servant; (2) the payment of salary or wages; (3) the power of dismissal; and (4) the power of control of the servant's conduct." The primary focus on this test, the Court of Appeals quoted the Fourth Department, is the "right of control, that is, the right of one person, the master, to order and control another, the servant, in the performance of work by the latter." This pronouncement is noteworthy in that it clarifies the definition of "employer" for NYSHRL claims.

Last, the Court of Appeals turned to the breadth of liability for aiding and abetting, under Section 296(6). The Court noted that one does not need to be a direct employer, or have any employment connection to the plaintiff. The Court pointed out, for example, that in *National Org. for Women v. State Div. of Human Rights*, 34 N.Y.2d 416 (1974), a newspaper company had no employment relationship with the plaintiff, but was nevertheless found to have aided and abetted discrimination by running two sets of help wanted ads: a separate list of jobs for men, and a separate list of jobs for women, despite the fact that the newspaper did not employ anyone from these ads. The Court also noted that the NYSHRL has an extraterritoriality provision that captures out-of-state actors when their acts have an impact within the state. Thus, an out-of-state entity can be liable for acts that constitute discrimination, or aiding and abetting, that have an impact in New York. This interpretation is not a change in the lower court's opinions, but an affirmation that third party entities should understand that if they have control over hiring decisions, they could be at risk.

Outlook and Potential Ramifications

The Court of Appeals has made certain clarifications that have a potential impact on any employer, as well as any entity who works with another entity that is an employer, where questions surrounding criminal background checks come up that have an impact on employees in New York. Beyond direct employers, who are directly covered by Section 296(15), non-employers, even those outside New York, may nevertheless find themselves ensnared in a claim under the NYSHRL for aiding and abetting. Thus, the ramifications of this decision extend beyond the universe of direct employers, and beyond New York's state lines. Employers within New York would be well-served to revisit their compliance requirements with Section 296(15). Further, any companies who does business with a New York employer, regardless of whether the company is located in or outside of New York, would likewise be well-served to review their business practices for any "impact in New York" that might run afoul of the NYSHRL.

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