THE
NATIONAL LAW REVIEW

“Ban the Box” Laws & Workplace Violence: An Employer’s Failure to Sufficiently Perform Background Checks Could Lead To Costly Negligence Liability

Thursday, May 31, 2018

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Labor & Employment Law Blog

Labor & Employment
Litigation / Trial Practice
California

Many states and municipalities throughout the country have enacted laws that mandate the removal of criminal conviction history questions from job applications. This so-called “Ban the Box” movement theoretically provides individuals with criminal backgrounds the opportunity to obtain jobs for which they otherwise would not have been considered. But, these laws also provide additional burdens for employers and add additional ways for them to face liability.

In light of the “Ban the Box” legislation that went into effect in California as of January 1, 2018, it is important to examine the law and its potential effect on claims of negligent hiring, negligent supervision, and negligent retention. As discussed in previous blog articles, California’s “Ban the Box” legislation amends the Fair Employment and Housing Act (FEHA) to, among other things, prohibit employers with five or more employees from directly or indirectly inquiring into, seeking the disclosure of, or considering an applicant’s criminal conviction history until after the applicant receives a conditional offer of employment. Before denying employment based on an applicant’s conviction history, employers are required to follow a “fair chance” process and make an “individualized assessment” of whether the criminal history has a direct, negative relationship to the “specific duties” of the job. Thereafter, if a decision is made to not hire the individual, the employer must provide written notice of its “preliminary decision” to disqualify the applicant based on his conviction history and undertake a number of other procedural steps that, ultimately, will delay the hiring process. While nothing in the law prevents the employer from rejecting the applicant because of prior criminal convictions, the employer still could face civil liability for the actions of the hired individual as its employee.

Although this legislation lends itself to a more cumbersome background check process, it still is essential that employers conduct thorough background checks and decline to hire potentially dangerous applicants. If an employer fails to do so, and an employee commits an act of violence, the employer could potentially be liable for negligent hiring, negligent retention, or negligent supervision and face significant monetary damages as a result.

These negligence-type causes of action impose liability on an employer who knows or should know that an employee creates a risk of a particular harm and that particular harm materializes. Generally, the particularized harm is an act of violence that was foreseeable based on the employee’s past acts. Notably, in order for the employer to be liable for negligence, the employee’s act of violence must have been *foreseeable*. While foreseeability is generally a question of fact that depends on the specific factual circumstances of the situation at issue, a worker’s previous conviction for the same or a similar act would be almost conclusive evidence that the act was foreseeable. *See* *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 788 (N.D. Cal. 2016) (denying Uber’s motion to dismiss because the Uber driver’s assault was likely foreseeable because Uber “should have known about [the Uber driver’s] criminal history such that Uber may be liable for negligent hiring, supervision and retention” because, if Uber had conducted a sufficient background check, it would have uncovered the driver’s earlier assault conviction that was not disclosed by the unsatisfactory background check); *see also* *Virginia G. v. ABC Unified School Dist.*, 15 Cal. App. 4th 1848 (1993) (holding school district liable for negligent hiring after school failed to perform an adequate background check which would have shown a previous termination for sexual

misconduct). Accordingly, if an employer fails to perform a sufficient background check, or hires an employee despite a similar past conviction, a court very possibly will find that the employee's violent actions were foreseeable.

Recently, California courts have expanded the definition of "foreseeability" to encompass arguably random acts of violence. *See* *Regents of the Univ. of Cal. v. Superior Court of L.A. Cty.*, 4 Cal.5th 607, 629 (2018) (holding that mass school shootings are likely foreseeable as a matter of law). As incidents of workplace violence, like the 2015 San Bernardino Inland Regional Center shooting, become more prevalent, it is increasingly likely that these random acts of violence will be deemed foreseeable as a matter of law. Further, the potential liability (and harm) associated with workplace violence is astronomical. For example, the San Bernardino shooting led to 14 employees being killed and 22 employees being seriously injured. A verdict or settlement based on the deaths and serious injuries of over 30 employees would be incredibly costly on many fronts.[1]

Accordingly, as employers implement "Ban the Box" requirements into their hiring processes, they should remember the potential liability associated with negligent hiring, retention, and supervision claims and ensure that their protocols are not minimized just so they do not have to face the burdens imposed by this new law. Simply put, going through the procedural hoops of rejecting some applicants (when appropriate) can be worthwhile, even if doing so adds time and effort to the hiring process.

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[1] Notably, there is an exception to the exclusivity of workers' compensation remedies "[w]hen the [employee's] injury or death is proximately caused by the willful and unprovoked physical act or aggression of the other employee." *See Torres v. Parkhouse Tire Serv., Inc.*, 26 Cal.4th 995 (2001). Therefore, Labor Code section 3602 likely does not apply in instances of workplace violence.