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New York Court of Appeals to Consider Scope of Law Prohibiting Discrimination Based on a Criminal Conviction

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The United States Court of Appeals for the Second Circuit recently certified three questions to the New York Court of Appeals for guidance on who may be held liable under N.Y. Exec. Law § 296(15) of the New York State Human Rights Law ("NYSHRL"). *See Griffin v. Sirva*, 835 F.3d 283 (2d Cir. 2016). Section 296(15) creates liability for violations of Article 23-a of New York's Corrections Law, which prohibits discrimination based on a criminal conviction, unless the person making a decision takes certain factors into account, such as:

- the nature and gravity of an applicant's criminal conviction;
- its bearing, if any, on the specific responsibilities of the job sought;
- the time that has elapsed since the conviction;
- the age of the applicant at the time when the offense was committed; and
- evidence of rehabilitation.

New York Correction Law §§ 752, 753. The primary issue in the case is whether entities other than direct employers may be held liable under this law. The New York Court of Appeals' determination on how broadly to interpret the NYSHRL could potentially have a great effect on background screening companies and credit reporting agencies.

In the underlying case, Astro Moving and Storage Company ("Astro") terminated two employees based on past criminal convictions that were uncovered by a criminal background check. Astro provided moving services for Allied Van Lines, Inc. ("Allied") pursuant to an agency contract. Part of the contract required Astro to conduct criminal background checks for any employees working on Allied jobs. As alleged in the complaint, certain serious convictions, for things like sexual offenses, kidnapping, murder and armed robbery, permanently disqualified a worker from Allied projects. As the two employees' convictions were for felony sexual offenses, they were disqualified from working on Allied projects and terminated by Astro.

The terminated employees sued Astro, Allied, and Sirva, Inc., a holding company for Allied, for violations of the NYSHRL. They alleged that the Allied policy that permanently disqualified employees convicted of specific crimes from performing jobs for Allied violated Section 296(15) because it did not take into account all of the Article 23-a factors.

The district court granted summary judgment in favor of Sirva and Allied. The district court determined that the NYSHRL's criminal conviction provision, Sec. 296(15), applied only to "employers" and that neither defendant had any direct employment relationship with the plaintiffs. The district court also held that Sirva and Allied were not "joint employers," nor did they "aid and abet" any violation by Astro. Griffin and Godwin appealed to the Second Circuit Court of Appeals.

On appeal, the Second Circuit found that the "question of who may be held liable under Section 296(15) is an unresolved question of New York State law." As such the Second Circuit certified the following questions to the New York Court of Appeals:

> (1) Does Section 296(15) of the New York State Human Rights Law, prohibiting discrimination in employment on the basis of a criminal conviction, limit liability to an aggrieved party's "employer"?
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> (2) If Section 295(15) is limited to an aggrieved party's "employer," what is the scope of the term "employer" for these purposes, i.e. does it include an employer who is not the aggrieved party's "direct employer," but who, through an agency relationship or other means, exercises a significant level of control over the discrimination policies and practices of the aggrieved party's "direct employer"?
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> (3) Does Section 296(6) of the New York State Human Rights Law, providing for aiding and abetting liability, apply to §296(15) such that an out-of-state principal corporation that requires its New York State agent to discriminate in employment on the basis of a criminal conviction may be held liable for the employer's violation of §296(15)?

The New York Court of Appeals has accepted the certified questions and oral arguments are scheduled for March 21, 2017.

As you can expect, a New York Court of Appeals' ruling on these certified questions will have a widespread impact on a number of businesses. We have already seen the "aiding and abetting" theory be used to assert claims against background screening companies. In 2014, the New York Attorney General obtained agreements with four of the nation's largest background screening companies based on the AG's assertion that certain automated rejection letter processes constituted "aiding and abetting" violations of N.Y. Exec. Law § 296 and New York Correction Law §§ 752,753. The AG's press release noted that the agreements, which were voluntary and did not include any admission of liability, were needed to "ensure that employers conduct the required case-by-case, individualized assessments of job candidates."

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