Proskauer

New Texas Law Protects Employers from Negligent Hiring and Supervision Claims

June 21, 2013

On June 14, 2013, the governor of Texas signed HB 1188 to limit liability for negligent hiring and supervision of employees with criminal convictions. The new Texas law insulates employers and others from such claims, except where the employer knew or should have known that an employee had been convicted of a crime while performing duties substantially similar to those required in the current position, or had been convicted of one of several crimes enumerated in the statute. To assist employers in understanding the new Texas law, which takes effect immediately,[1] this alert discusses its coverage, prohibitions, and exceptions.

Coverage

The coverage of the new Texas law is expansive. "Employee" means a person other than an independent contractor[2] who, for compensation, performs services for an employer under a written or oral contract for hire, whether express or implied. Although the law does not define or incorporate a definition for "employer," it broadly limits liability for employers and related entities.[3]

Prohibitions

Subject to the exceptions listed below, the new Texas law prohibits a cause of action against an employer solely for negligently hiring or failing to adequately supervise an employee based on evidence that the employee was convicted of an offense.

Exceptions

The new Texas law does not protect an employer who "knew or should have known" of a prior conviction from a claim for negligent hiring or failing to provide adequate supervision, if the employee was convicted of:

- an offense committed while performing duties substantially similar to those reasonably expected to be performed in the employment, or under conditions substantially similar to those reasonably expected to be encountered in the employment, taking into consideration the factors listed in §§ 53.022[4] and 53.023(a)[5] of the Occupations Code, or

- murder; capital murder; indecency with a child; aggravated kidnapping; aggravated sexual assault; aggravated robbery; certain health and safety code violations; sexual assault; certain felonies involving use or exhibition of a deadly weapon;[6] or a sexually violent offense,[7]

In addition, the new Texas law will not accord protection to an employer in an action concerning an employee's misuse of funds or property of a person other than the employer if an employee:

- had previously been convicted of a crime that included fraud or the misuse of funds or property as an element of the offense, and
- it was foreseeable that the position for which the employee was hired would involve discharging a fiduciary responsibility in the management of funds or property.

Takeaway

Texas joins other states that, in at least some capacity, have tried to shield employers from negligent hiring and supervision claims. For instance, under Florida law, an employer is presumed *not* to have been negligent in hiring if it conducted a background investigation[8] that did not reasonably demonstrate the candidate's unsuitability for the position. However, with more states and localities limiting employers from performing criminal background checks on applicants or employees or from considering criminal records in personnel decisions, there is concern that a growing number of jurisdictions have failed to provide sufficient protection from negligent hiring and supervision claims arising from criminal conduct committed by employees.

Some jurisdictions have tried to address this potential Catch-22. For example, pursuant to Article 23-A of the Correction Law, New York restricts employers from disqualifying candidates based on a prior conviction, but creates a rebuttable presumption that an employer who has complied with the law has not acted negligently in hiring, retaining or supervising an employee. Likewise, Minnesota's recent "ban the box" law, which generally prevents private employers from making criminal conviction inquiries in the initial job application, also provides a measure of protection for employers from negligent hiring claims.

Because not every jurisdiction accounts for this Catch-22, employers may face liability for negligent hiring and supervising, even when restricted in their use of criminal records in making personnel decisions. Therefore, it is vital for employers to understand the laws in their jurisdictions and to vet applicants and employees to the maximum extent permissible under those laws.

* * *

If you have any questions or concerns regarding these issues, please contact your Proskauer lawyer or any co-Chair of the Employment Law Counseling & Training Group.

[1] The new Texas law only applies to a cause of action accruing on or after the effective date.

[2] The new Texas law incorporates by reference the Texas Labor Code's definition of "independent contractor," i.e., a person who contracts to perform work or provide a service for the benefit of another and who is: (i) paid by the job, not by the hour or some other time-measured basis; (ii) free to hire as many helpers as the person desires and to determine what each helper will be paid; and (iii) free to work for other contractors, or to send helpers to work for other contractors, while under contract to the hiring employer.

[3] In addition to employers, the law covers general contractors, premise owners and other third parties.

[4] Section 53.022 has required a licensing authority to consider the following factors to determine whether a conviction relates to an occupation:

(1) the nature and seriousness of the crime;

(2) the relationship of the crime to the purposes of the license sought;

(3) the extent to which a position might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of the licensed occupation.

[5] Section 53.023(a) has required a licensing facility to consider the following factors, in addition to those listed in § 53.022:

(1) the extent and nature of the person's past criminal activity;

(2) the age of the person when the crime was committed;

(3) the amount of time that has elapsed since the person's last criminal activity;

(4) the conduct and work activity of the person before and after the criminal activity;

(5) evidence of the person's rehabilitation or rehabilitative effort while incarcerated or after release; and

(6) other evidence of the person's fitness, including letters of recommendation from:

(A) prosecutors and law enforcement and correctional officers who prosecuted, arrested, or had custodial responsibility for the person;

(B) the sheriff or chief of police in the community where the person resides; and

(C) any other person in contact with the convicted person.

[6] The legislation excludes offenses listed in § 3g, Article 42.12, Code of Criminal Procedure.

[7] "Sexually violent offense" is defined in Article 62.001 of the Texas Code of Criminal Procedure to include any of the following offenses committed by a person 17 years of age or older: continuous sexual abuse of a young child or children; indecency with a child; sexual assault; aggravated sexual assault; sexual performance by a child; aggravated kidnapping (if the defendant committed the offense with intent to violate or abuse the victim sexually); certain burglary offenses; or an offense under the laws of another state, federal law, the laws of a foreign country, or the Uniform Code of Military Justice that contains elements substantially similar to the elements of one of the listed crimes.

[8] Under the Florida law, a "background investigation" may be satisfied with no more than a reference check or interview of the prospective employee (to name a few).

Authors of this alert: *Katharine H. Parker, Leslie E. Silverman, Daniel L. Saperstein and Kelly Anne Targett*.