The Washington Report by Montserrat Miller

Montserrat Miller is a Partner with the law firm Arnall Golden Gregory, LLP and is based in Washington, DC. Ms. Miller's practice focuses on privacy and immigration compliance, as well as representation before Congress and federal regulatory agencies such as the Federal Trade Commission, Equal Employment Opportunity Commission, Consumer Financial Protection Bureau and the Department of Homeland Security.

You can contact Monterrat at Montserrat.Miller@AGG.com or visit http://www.agg.com/Contents/Home.aspx

Hello and welcome to the first edition of The Washington Report! I'm pleased to be a part of *The Background Buzz* and look forward to sharing with you news and my thoughts about what is happening in the Nation's Capitol.

What is capturing my attention this month can't be fully explored in one column, but I will **at least start the dialogue. The issue of the month is hiring. It seems folks in Washingto**n don't appreciate the value of credit reports and criminal background checks used for employee hiring and retention.

The Equal Employment Opportunity Commission (EEOC) is scrutinizing both. As a part of its push to address barriers to employment, they have held a series of meetings on point. This includes an October 2010 meeting on the use of credit reports in employment screening and a February 2011 meeting looking at barriers the unemployed face when seeking employment due to their unemployment status. Next up for the EEOC is a meeting looking at the use of criminal records in employment screening. Word is that the EEOC may be revisiting its earlier guidance from the late 80s on the use of arrest and conviction records in employment decisions. It is possible such a meeting could take place in May.

The EEOC recently filed a nationwide hiring discrimination lawsuit against Kaplan Higher Education Corp. in the U.S. District Court for the Northern District of Ohio (Civil Action No. 1:10-cv-02882), alleging that they engaged in a pattern or practice of unlawful discrimination by refusing to hire African-American job applicants nationwide. The allegation is that they rejected job applicants based on their credit history and that this practice has an unlawful discriminatory impact because of race and is neither job-related nor justified by business necessity. All of which leads to charges that Kaplan Higher Education Corp. has violated Title VII of the Civil Rights Acts of 1964.

Leaving the EEOC and heading to the Congress, there is legislation by Representative Steve Cohen of the 9th district of Tennessee, entitled *Equal Employment for All Act* (H.R. 321). The bill would amend the Fair Credit Reporting Act (FCRA) to prohibit the use of credit reports for prospective and current employees for the purpose of making adverse employment decisions. While the legislation has some exceptions to this general prohibition on the use of credit reports, the end result is that it eliminates the use of same in private employment situations unless "…the consumer applies for, or currently holds, a supervisor, managerial, professional, or executive position at a financial institution." The bill reworks section 604 of the FCRA regarding permissible purposes of consumer reports to include a general prohibition. For private employers, the above stated exception for "financial institutions" must be read in the context of how such is defined in the FCRA, which is "…a State or National bank, a State or Federal savings and loan association, a mutual savings bank, a State or Federal credit union, or any other person, that directly or

indirectly, holds a transaction account (as defined in section 19(b) of the Federal Reserve Act) belonging to a consumer." (Section 603(t) of FCRA). Presently this legislation stands little chance of passage, but it's there and serves as a model for others.

Before you think it's all doom and gloom, at least the Supreme Court ruled favorably for the background screening industry in *NASA v. Nelson*(562 U.S. ____, 131 S. Ct. 746 (2011)) earlier this year. The case involved a constitutional challenge by NASA contract employees regarding the legality of "open-ended" and drug related questions as a part of a government mandated background check. While not addressing the existence of a constitutional right to privacy, the Supreme Court stated that, "The questions respondents challenge are part of a standard background check of the sort used by millionsof private employers….the Government has an interest in conducting basic background checksin order to ensure the security of its facilities and to employ a competent, reliableworkforce to carry out the people's business." (Page 3 of the Supreme Court Syllabus). Later, relative to the drug treatment inquiry, the Supreme Court states, "[t]he challenged questions on the SF-85 and Form 42 are reasonable, employment-related inquires that further the Government's interests in managing its internal operations." (Page 3 of the Supreme Court Syllabus).

Unfortunately my word count feature tells me it's time to wrap up. Before I finish, make sure to keep an eye on *Appolon, et al. v. University of Miami* in the Southern District of Florida. This and several other cases pending in federal courts are challenging the use of credit checks. The instant case involves Title VII of the Civil Rights Act, alleging disparate impact discrimination against African-American and Latino job applicants relative to the use of credit reports.

That's all for this month. Tune in next month.