

**TAB 1**

**FISHER & PHILLIPS LLP**  
ATTORNEYS AT LAW

www.laborlawyers.com

LEGAL OPINION  
**SCANNED**

**Tampa**  
2525 SunTrust Financial Centre  
401 E. Jackson Street  
Tampa, FL 33602  
(813) 769-7500 Tel  
(813) 769-7501 Fax

Writer's Direct Dial:  
(813) 769-7509

Writer's E-mail:  
wsmith@laborlawyers.com

August 21, 2008

Jim Freeman  
City Clerk  
City of Palmetto  
P.O. Box 1209  
Palmetto, Florida 34220

**Re: Background Investigations**

Dear Mr. Freeman:

This correspondence is to summarize issues we discussed with you and Michelle Hall regarding background investigations and the City's concerns related to same. The City would like to implement background checks on current employees, many of whom have never had criminal background checks run on them (at least as City employees). This plan has generated concern from some employees and presents some potential legal issues for the City, which we will address more fully below.

Most municipalities we represent have been conducting background screening for some time now. When they initiated screening, as far as we are aware, they did so only with new hires. We do not know of any other public sector entities in Florida that have retroactively implemented background screening for all employees. Some have had to conduct retroactive screening in the context of new legislation – but only for certain classes or positions as mandated by the respective new statute. However, that does not mean the City of Palmetto cannot implement across-the-board screening as long as it weighs the relative risks and benefits, and ensures certain parameters and safeguards are put in place and maintained.

Authorization to Conduct Level Two and Other Background Screening

As we discussed, some individuals, e.g., the commissioners and police officers, are already undergoing Level Two screening which involves screening by the FDLE as well as the FBI. (Level One screening requires screening through the FDLE's records only.) Other current employees, unless subject to a specific law requiring screening (e.g., the Jessica Lunsford Act) have not been screened unless hired within approximately the last one and one-half years. This means that a number of employees who have worked for the City for many years have never undergone screening.

Section 166.0442, Florida Statutes, was enacted in 2002 through the passage of Chapter 2002-169, Laws of Florida, which was a law passed, in part, to expand the right to

conduct mandatory background screenings based upon fingerprinting individuals. The language of Section 166.0442 states that "a municipality may require, by ordinance, employment screening" for positions found to be "critical to security or public safety." The legislative history of Section 166.0442 indicates that in the wake of the terrorist attacks on September 11, 2001, reviews were conducted into the security of various governmental and infrastructure facilities. Of concern was the lack of background screening and the inability to conduct the "Level 2" FBI background checks based on fingerprints for individuals (including employees, contractors, etc.) working in areas of security or public safety. While local governments could liberally access FDLE records, federal law restricted the ability of local governments to access the "Level 2" FBI fingerprint screenings unless state law expressly provided local governments authority to access them. This restriction in federal law requires specific legislation for access. For example, the "Jessica Lunsford Act" is specific legislative authorization to conduct "Level 2" FBI fingerprint screenings for individuals having jobs involving contact with children.

Section 166.0442 creates a right to conduct these more significant fingerprint screenings for areas "critical to security or public safety" with the local government identifying by ordinance specific positions in areas "critical to security or public safety." For example, a municipality has the right to decide that its water treatment facilities are areas "critical to security or public safety" and conduct "Level 2" FBI fingerprint screenings for all employees, contractors, etc. that work with that facility. Notably, the legislative analysis to this Section also recognizes that a local government has the inherent right to conduct background investigations. However, Section 166.0442 is not an open-ended authorization to require "Level 2" FBI screening of all employees, only those in positions legitimately "critical to security or public safety."

In sum, while Section 166.0442 addresses only "Level 2" FBI fingerprint screenings in areas "critical to security or public safety" it is not a restriction on the City's right to conduct other, more limited criminal background investigations. However, Section 112.011 of the Florida Statutes does place limitations on background screening by public employers:

112.011 Felons; removal of disqualifications for employment, exceptions.--

(1)(a) Except as provided in s. 775.16, a person shall not be disqualified from employment by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person may be denied employment by the state, any of its agencies or political subdivisions, or any municipality by reason of the prior conviction for a crime *if the crime was a felony or first degree misdemeanor and directly related to the position of employment sought* (emphasis added).

(b) Except as provided in s. 775.16, a person whose civil rights have been restored shall not be disqualified to practice, pursue, or engage in any occupation, trade, vocation, profession, or business for which a license, permit, or certificate is required to be issued by the state, any of its agencies or political subdivisions, or any municipality solely because of a prior conviction for a crime. However, a person whose civil rights have been restored may be denied a license, permit, or certification to pursue, practice, or engage in an occupation, trade, vocation, profession, or business by reason of the prior conviction for a

crime if the crime was a felony or first degree misdemeanor and directly related to the specific occupation, trade, vocation, profession, or business for which the license, permit, or certificate is sought.

First, with respect to the above statute, it is not completely clear whether it is intended to apply only to prospective employees or to current employees as well. Taking a risk-adverse position, our view is that it should be considered as applying to both. We generally advise public sector clients that considering arrests (where there was no conviction) in taking adverse employment action violates subparagraph (a) above. From a practical standpoint, an arrest without a conviction does not indicate guilt. Further, a current employee could argue that termination or other adverse action based on an arrest is a due process violation, in that basing such action solely on an arrest is irrational (e.g., I was arrested ten years ago but never convicted, have had a stable work history for years, and yet I was fired based on this "old" unproven charge against me).

The Equal Employment Opportunity Commission also opposes using arrest records in making employment decisions for a different reason. The EEOC's position is that Black and Hispanic males are significantly more likely to have arrest records than non-Hispanic or non-Black males and that considering arrests in making employment decisions has an unfair, disparate impact on those groups. So, Section 112.011 and the EEOC's guidance provide two compelling reasons not to use arrest records where there was no conviction as a basis for adverse action against current employees or prospective hires.

The City may, in the course of conducting its background examinations, discover records of convictions for offenses committed by current employees. Assuming that Section 112.011 does apply to current employees, less serious offenses cannot be used as a basis for adverse action, only felonies and 1<sup>st</sup> degree misdemeanors. The City would next need to determine if the employee may be unfit because the nature of the conviction is directly related to the position he or she holds.

If the conviction is unrelated to the job, we believe there will be a risk in taking any adverse employment action against an employee based on the conviction. However, if the conviction is related to the position the employee holds or seeks, we recommend the City meet with the employee and request an explanation of the events, and consider any mitigating factors before making an adverse determination. We also strongly recommend that the employee's length of service with the City and performance history should be weighed into any decisions before adverse action is taken; otherwise, due process violations could result. An existing employee will have a strong argument that the employee's performance on the job is a better indicator of whether he or she is unfit for continued employment than past convictions. The older the conviction, the stronger and more legally compelling this argument will be.

One way to mitigate the due process issue would be to retroactively screen only employees with a certain length of service and forego screening employees with longer service records. For example, the City could draw a line in the sand and conduct screens only on those employees with seven years of service or less. This is just a practical suggestion – there is nothing legally significant about using seven years or some other benchmark as a standard.

The City also needs to keep in mind that conducting screens on current employees can create the basis for unlawful discrimination claims. To the extent retroactive background screening results in adverse actions that have a disparate impact on a particular minority or minorities, this can amount to unlawful discrimination. Disparate impact claims do not require a discriminatory motive or intent. The mere existence of a statistically significant impact on a particular protected group can be used as evidence of unlawful discrimination. We recommend consideration of one or the other of the following to reduce the possibility of discrimination claims resulting from adverse employment actions:

(1) Determine first whether the conviction meets the test for seriousness under Section 112.011(a). If it does, employ the EEOC's three-factor test in deciding whether to discharge, demote or transfer individuals based on criminal convictions – consider the seriousness of the offense, how long ago it occurred, and whether the nature of the offense bears on the suitability of the employee for the position in question. The three factors should be evaluated on a case-by-case basis. Especially if termination or demotion is being considered, we also recommend that the employee's length of service and employment history should be factored into any employment decisions to reduce the likelihood of due process claims. The downside of making decisions with this method is that each situation will require a case-by-case determination, which may be time-consuming. And, since some degree of subjectivity may be involved, decisions may not seem "fair" to some of those affected; or

(2) Assuming the conviction is a first degree misdemeanor or felony and is at least arguably job-related (these need to be threshold determinations before adverse action is considered), the City can choose to have an absolute standard for making adverse decisions affecting current employees. An absolute standard may be easier to manage and is likely to make the City less open to intentional discrimination claims because it will be enforcing the same standards across the board regardless of race, sex, religion, national origin, etc. As an example, the City could choose to exclude across the board all convictions more than ten years old, all misdemeanors, and/or "victimless crimes." The downside to using this method is that using an absolute standard does not eliminate the possibility of a disparate impact claim. It may also force the City to make some difficult termination decisions, since less discretion will be possible if a bright line rule is going to be consistently enforced.

#### Benefits of Retroactive Background Screening

The anticipated benefit of retroactive screening is that it would enable the City to obtain information presently unknown to it about whether current employees have criminal backgrounds that might make them a liability to employ. Terminating or transferring such employees would presumptively reduce the City's potential liability for on-the-job misconduct committed by employees against third parties. For example, screening will reduce the possibility of successful claims against the City by third parties alleging negligent hiring, supervision, or retention.

One way the City might also reduce potential liability without screening every employee across the board would be to screen only certain classes of employees who are, by virtue of their jobs, more likely to be in a position to harm a third party on the job. For instance, the City might choose to screen all employees who regularly interact with the public or all employees whose jobs allow them to enter onto private property or into residents' homes. This way, the City could show it is making a good faith effort to screen employees who are the most potentially "risky" because of their jobs while not background checking everyone. The City can also begin requiring all current employees to report all arrests or convictions (excluding some lesser offenses) to the City within a certain period of time. Requiring employees to self-identify regarding these matters going forward will also help it screen out employees whose conduct may make them a risk to continue to employ with or without background checking.

#### The Process of Implementing Screening

You expressed some concerns about whether to allow local law enforcement to conduct screening through the FDLE or to use an outside company/third party database. Either way is lawful, assuming confidentiality of these records is appropriately maintained throughout the process. If screening is done by going directly to the FDLE, the City will not have to comply with the Fair Credit Reporting Act (FCRA). This would relieve the City of an administrative burden; however, FDLE checks do not come back as quickly in some cases and we understand they are slightly more expensive. We also understand you have some concerns, which we think are legitimate, about privacy issues if law enforcement personnel are making these checks for the City. The City's Human Resources or other designated personnel could conduct the checks by going directly to the FDLE without assistance from law enforcement, which would negate FCRA compliance requirements. Use of a third party data base is also an option and will presumably be a faster way to obtain background screens, but the City would need to conduct the checks in compliance with the FCRA. If you would like to know more about FCRA compliance and what it entails, please let us know and we will forward you some materials. At a minimum, the FCRA requires employees to sign an acknowledgement and waiver in order to conduct background screening. Your current employment application's waiver provision is not adequate for FCRA compliance.

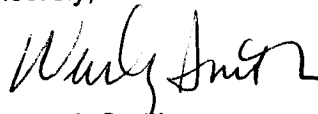
#### Conclusion

To fully determine the relative benefits of a better-screened workforce, the City will have to balance the administrative burden, costs, and potential for employment-law related claims by employees against the anticipated benefits. Should the City proceed with its plan to screen current employees, we recommend that careful thought should be given to how this will be implemented, who will be evaluating criminal background history, and that adverse actions are carefully considered before action is taken. The City will need to carefully weigh the risk of continuing to employ individuals with criminal records against the potential claims that could result from adverse actions and the impact of job losses, especially where long-time employees are involved. Relatively recent convictions for serious offenses may justify the risk of terminating a current employee. Older convictions and less serious offenses probably may not justify the attendant risks, especially if the employee has had a solid employment history with the City for a significant period of time.

Jim Freeman  
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This summarizes our advice regarding background checking. Should you have any questions at all regarding the foregoing, please do not hesitate to contact us. Thank you for the opportunity to be of service to the City.

Sincerely,



Wendy J. Smith  
For FISHER & PHILLIPS LLP

cc: Michelle Hall

WJS:lc  
Enclosures