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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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New York Court of Appeals Holds that Out-of-State Entities Can be Liable for Aiding and Abetting Discrimination Under the New York Human Rights Law

Out-of-state entities with the power to dictate a New York employer's hiring and retention policies take notice: you can be subject to liability under the New York Human Rights Law (NYHRL) if you "aid and abet" discrimination against individuals who have a prior criminal conviction, even if you are not the direct employer of those individuals. In *Griffin v. Sirva, Inc.*, the New York Court of Appeals held that while liability under Section 296(15) of the NYHRL (which prohibits employment discrimination based on prior criminal convictions) is limited to an aggrieved party's employer, liability can extend beyond a direct employer under Section 296(6) of the NYHRL "to an out-of-state non-employer who aids or abets employment discrimination against individuals with a prior criminal conviction."

In Griffin, the plaintiffs were employees of Astro, a New York moving company. The plaintiffs had prior criminal convictions for sexual offenses against children. After the plaintiffs were hired, Astro entered into a moving services contract with Allied, a nationwide moving company based on Illinois. As a result of that contract, a large majority of Astro's work was thereafter performed on behalf of Allied.

The contract required Astro to adhere to Allied's Certified Labor Program guidelines, one of which required that employees who perform work in a customer's home or place of business pass a criminal background check. Under Allied's guidelines, employees with prior sexual offense convictions automatically failed the screening. Pursuant to the contract with Allied, Astro would have been subject to escalating penalties if it used unscreened labor. Accordingly, the plaintiffs were screened and when their convictions were identified, Astro fired them.

The plaintiffs filed suit in the U.S. District Court for the Eastern District of New York against both Astro and Allied, alleging that their terminations based upon their prior criminal convictions violated the NYHRL. Allied, which was not the plaintiffs' direct employer, moved for summary judgment on the NYHRL claims. The District Court granted its motion, holding that: (1) Section 296(15) of the NYHRL applies only to employers and that Allied was not the plaintiffs' employer; and (2) Section 296(6) of the NYHRL (the "aiding and abetting" provision) could not be used to impose liability on Allied because Allied did not participate in firing the plaintiffs.

The plaintiffs appealed the District Court's decision to the Second Circuit Court of Appeals, which posed the following three questions to the New York Court of Appeals regarding the interpretation of Section 296(15) and 296(6) of the NYHRL: (1) Does Section 296(15) of the NYHRL, prohibiting discrimination in employment on the basis of a criminal conviction, limit liability to an aggrieved party's "employer"? (2) If liability under Section 296(15) is limited to an aggrieved party's employer, what is the scope of the term "employer" for purposes of that provision? (3) Does Section 296(6) of the NYHRL extend liability to an out-of-state non-employer who aids or abets employment discrimination against individuals with a prior criminal conviction? The Court answered the first question by holding that liability under Section 296(15) is limited to an aggrieved party's employer. The Court answered the second question by holding that common law principles of an employment relationship should be applied, "with greatest emphasis placed on the alleged employer's power to 'to order and control' the employee in the performance of his or her work." The Court answered the final question by holding that an out-of-state non-employer who engages in conduct that aids or abets employment discrimination against individuals with a prior criminal conviction — for example, by imposing contractual terms on a New York employer prohibiting the use of employees with certain types of criminal convictions from performing work under the contract —

can be held liable under Section 296(6) of the NYHRL if the employer is determined to have violated Section 296(15) of the NYHRL by complying with the terms of the contract.

While the plaintiffs' appeal to the Second Circuit regarding the dismissal of their claims against Allied was pending, their claims against Astro (their direct employer) proceeded to a jury trial. The jury found that Astro did not violate the NYHRL by firing the plaintiffs due to their prior criminal convictions. Therefore, in this particular case, it does not appear that Allied will be subject to liability. However, the interpretation of Section 296(6) of the NYHRL set forth by the New York Court of Appeals can certainly be used in future cases to impose liability on an out-of-state non-employer who imposes contractual terms on a New York employer that cause the New York employer to violate Section 296(15) of the NYHRL.

If you have any questions about this Information Memo, please contact Richard S. Finkel or any of the attorneys in our Labor and Employment Law Practice, or the attorney in the firm with whom you are regularly in contact.

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