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February 5, 2018

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OPINION NO. 2017-12

THIRD PARTY EMPLOYMENT
SCREENING SERVICES:

NRS 179A.103, as amended by Assembly Bill 26 (79th Session of the 2017 Nevada Legislature), permits an authorized employment screening service, when designated to receive criminal history records on behalf of an employer or volunteer organization, to disseminate records of criminal history to that employer or volunteer organization. However, NRS 179A.103 does not permit an authorized employment screening service to disseminate such records to third-party employment screening services.

James M. Wright, Director
Nevada Department of Public Safety
555 Wright Way
Carson City, NV 89711

Dear Director Wright:

By letter dated December 4, 2017, you have requested a formal opinion from the Office of the Attorney General, under Nevada Revised Statute (NRS) 228.150, on one question:

QUESTION PRESENTED

Does NRS 179A.103, as amended by Assembly Bill No. 26 (A.B. 26) of the 79th Session of the Nevada Legislature (2017), permit an authorized employment screening service to share with third-party employment screening services the criminal history information obtained by the authorized service in connection with name-based criminal history records checks performed through the Central Repository of Nevada Records of Criminal History?¹

SUMMARY ANSWER

NRS 179A.103, as amended by A.B. 26, permits an authorized employment screening service to conduct a name-based search of records of criminal history of an employee, prospective employee, volunteer, or prospective volunteer to obtain a criminal history for that individual to assist an employer or volunteer organization in determining the suitability of that individual for employment or volunteering. This program is referred to as the Civil Name Check (CNC) Program. The CNC Program authorizes an employment screening service that is designated to receive criminal history records on behalf of the employer or volunteer organization to disseminate the records of criminal history to that employer or volunteer organization. It does not, however, allow an authorized employment screening service to disseminate records of criminal history to a third-party employment screening service.

ANALYSIS

Enacted in 2015, NRS 179A.103 grants limited authority to employment screening services to disseminate records of criminal history obtained pursuant to a contract with the Central Repository. Under

¹ As used herein, “employment screening service” has the meaning ascribed to it in NRS 179A.103(10)(f), as amended by A.B. 26, and an “authorized” employment screening service means an employment screening service that has entered into a contract described in NRS 179A.103(10)(a), as amended by A.B. 26.

subsection 7 of the 2015 enactment, such authority was limited to communications between the employment screening service and in-state employers or volunteer organizations, *if* the employment screening service had been “designated to receive records of criminal history on behalf of an employer or volunteer organization.” NRS 179A.103(7).

In 2017, A.B. 26 amended subsection 7 of NRS 179A.103 to add an additional restriction regarding record keeping. Subsection 7, as amended, provides that “[a]n employment screening service that is designated to receive records of criminal history on behalf of an employer or volunteer organization may provide such records of criminal history to the employer or volunteer organization upon request of the employer or volunteer organization, *if the employment screening service maintains records of its dissemination of the records of criminal history.*” Act of May 26, 2017, ch. 135, § 1(7), 2017 Nev. Stat. 615-616 (A.B. 26) (emphasis added).

Additionally, A.B. 26 confined participation in the CNC Program to “authorized” entities. *Id.* As A.B. 26 pertains to employment screening services, the term “authorized participant” means an employment screening service “who has entered into a contract with the Central Repository to participate in [the CNC Program].” *Id.* at § 1(10)(a), p. 616. Having entered into such a contract, an employment screening service may provide records of criminal history to the “employer” on whose behalf the employment screening service has been designated to receive the records. *Id.* at § 1(7), p. 616. As used in this context, the term “employer” includes persons who hire employees as well as persons who engage independent contractors in lieu of hiring employees. *Id.* at § 1(10)(d), p. 616.

It has been argued that a third-party employment screening service, specifically a service that is not an authorized participant in the CNC Program, may nonetheless be considered an “employer” to whom an authorized employment screening service may disseminate records of criminal history. In other words, it has been argued that the nature of the relationship between the authorized employment screening service and the third-party employment screening service is immaterial so long as the third-party service is an “employer” in its own right. This is not a principled reading of NRS 179A.103, as amended by A.B. 26.

NRS 179A.103, as amended by A.B. 26, authorizes an employment screening service who has entered into a contract with the Central Repository to disseminate records of criminal history to certain employers and volunteer organizations. An “employment screening service” is defined as “a person or entity *designated* by an employer or volunteer organization *to provide employment or volunteer screening services* to the employer or volunteer organization.” Act of May 26, 2017, ch. 135, § 1(10)(f), 2017 Nev. Stat. 616 (A.B. 26) (emphasis added). An employment screening service’s authority to disseminate records, then, is limited to situations in which the an employment screening service has a fiduciary relationship with a consumer of employment or volunteer screening services, namely an employer or volunteer organization who wishes to screen its *own* prospective employees or volunteers.

In specifically allowing for the dissemination of records within the context of such a relationship, the Legislature has both ensured that employers can engage employment-screening services to perform background checks on potential employees or volunteers, while also ensuring that the records of criminal history remain protected via the required contract between the Central Repository and the employment screening service. The contract supplies the “authorization” that an employment screening service must obtain in order to disseminate records of criminal history to an employer or volunteer organization.

Furthermore, the “designation” from the employer to the authorized employment screening service empowers the employment screening service to act “on behalf of” the employer, thus contemplating a direct agency relationship whereby the employment screening service, as agent, obtains and reviews information for the use and benefit of the principal, the employer. *Id.* at § 1(7), p. 616. Without this existing direct relationship, the employment screening service is not acting as a screening service at all, but is merely transferring or selling data to a third party service provider who intends to sell or transfer the data yet a second time, and without the requisite protections that apply to an “authorized” participant in the CNC program. NRS 179A.103, as amended, does not authorize the transfer of protected records of criminal history without the attendant protection of the contract between the “authorized” participant and the Central Repository.

A contrary reading of the statute would defeat the very purpose of requiring that a participant be “authorized” to disseminate records for the use or benefit of a specified employer or volunteer organization. It would also be inconsistent with the principal of statutory construction that “[s]tatutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory.” *Clark Cty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012). While NRS 179A.103(7), as amended, authorizes an employment screening service to provide records of criminal history to the employer or volunteer organization on whose behalf it was designated to receive them, it does not permit an employment screening service to provide the protected records of criminal history to third parties. To permit dissemination to third parties would inevitably lead to further unregulated dissemination between persons with no contractual obligations to the Central Repository. To effectuate the purpose of the statute, it must be read as granting dissemination rights only to authorized employment screening services who act on behalf of employers or volunteer organizations with a stated desire to screen their own employees or volunteers.

This reading of the statute is consistent with the general prohibition against dissemination of records of criminal history contained in NRS Chapter 179A. Specifically, NRS 179A.110 provides that:

[a] record of criminal history or any records of criminal history ... must be used solely for the purpose for which the record was requested. No person who receives information relating to records of criminal history ... may disseminate the information further without express authority of law or in accordance with a court order.

Construed in light of the general prohibition, A.B. 26 was clearly enacted to prevent information sharing between employment screening services. Insofar as A.B. 26 requires an employment screening service to be “authorized” to disseminate records pursuant to a contract with the Central Repository that imposes record keeping obligations, it cannot reasonably be interpreted to extend dissemination rights to third-party screening services.

In the event that a court might find any ambiguity regarding the language of NRS 179A.103, as amended, the legislative intent on this issue is compelling. *See We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008) (explaining that when interpreting an ambiguous statute to give effect to the Legislature's intent, courts look to the legislative history of the statute in light of the overall statutory scheme).

Prior to passage of A.B. 26 in 2017, the Central Repository introduced amendments to NRS 179A.103 to authorize employment screening services to conduct work on behalf of other employment screening services. Mindy McKay, Records Bureau Chief, General Services Division, in testimony before the Assembly Committee on Corrections, Parole, and Probation provided the following explanation of the purpose of the bill:

to establish[] the authority needed by employment screening services to conduct work on behalf of other employment screening services and on behalf of employers outside of Nevada by entering into an agreement approved by the Central Repository. The agreement is necessary to ensure the security of the dissemination of criminal history records information from one employment screening service to another employment screening service, and ultimately to an employer.

Hearing on A.B. 26 before the Assembly Committee on Corrections, Parole, and Probation, 2017 Leg., 79th Sess. 19 (February 14, 2017).

With respect to Chief McKay's comments about ensuring appropriate oversight by the Central Repository, A.B. 26, as introduced, had proposed to add a subsection to NRS 179A.103 as follows:

8. An employment screening service which is an authorized participant and which is designated to receive records of criminal history on behalf of another employment screening service that is not an authorized participant may provide such records

of criminal history to that employment screening service if both employment screening services:

- (a) Enter into an agreement that has been approved by the Central Repository; and
- (b) Maintain records of their dissemination of records of criminal history.

In response to this proposed statutory language, the Assembly Committee on Corrections, Parole, and Probation voiced concerns with allowing an employment screening service to disseminate records of criminal history to another employment screening service that had not entered into an agreement directly with DPS designed to protect the records of criminal history. *See id.* at 20-28.

Chairman Ohrenschall expressed his concern about the attendant risks, stating, “[w]hile we want efficiency, none of us want anyone’s data being put at risk or having to worry about that.” *Id.* at 23. Assemblyman Watkins likewise expressed concern that the language in the bill would make “unintended difficulties ... worse.” *Id.* at 25. Assemblyman Pickard found it “troubling” that “[t]here does not seem to be any kind of controls.” *Id.* at 27. He expressed that the employment screening service companies “could conceivably be getting a lot of sensitive personal information without any oversight or control of how it is ultimately disseminated.” *Id.* After much discussion, Assemblyman Wheeler indicated that they would discuss this bill offline. *Id.* at 28.

At the following work session before the Assembly Committee, the Central Repository proposed an amendment eliminating the language that would have allowed an employment screening service to conduct criminal history record services on behalf of another employment screening service. Chairman Ohrenschall conveyed his approval of the proposed change, stating that it “addresses a lot of concerns the committee members had at the hearing about the unauthorized participants and the security of this information.” *See Work Session on A.B. 26 Before the Assembly Committee on Corrections, Parole, and Probation, 2017 Leg., 79th Sess. (March 14, 2017).* The Legislature then passed the amendment removing the language that would have allowed for an employment screening service to conduct

James M. Wright, Director
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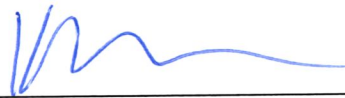
criminal history record services on behalf of another employment screening service. Accordingly, A.B. 26 initially included—but the Legislature intentionally removed—provisions that would have allowed authorized employment screening services to share records of criminal history with third-party screening companies. As evidenced by the legislative history, the objective was to discourage the unauthorized dissemination of sensitive information by disallowing an authorized employment screening service to disseminate such information to a third-party, unauthorized employment screening service.

CONCLUSION

NRS 179A.103, as amended by A.B. 26, permits an authorized employment screening service to conduct a name-based search of records of criminal history of an employee, prospective employee, volunteer or prospective volunteer, and to disseminate those records to an employer or volunteer organization for whom the authorized employment screening service has been designated to provide employment or volunteer screening services. It does not, however, allow for such an employment screening service to disseminate records of criminal history to third-party employment screening services.

Sincerely,

By: _____



KATHLEEN BRADY
Deputy Attorney General
Department of Motor Vehicles
Department of Public Safety

KMB/bc