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(FAX) 908-273-8922

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New Law Affects Independent Contractors at TCPA Facilities

Employees in "key positions" face security checks

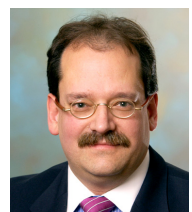
By David R. Pierce, Esq.

In December 2006, Governor Corzine signed into law a Bill with significant implications for independent contractors at facilities subject to the Toxic Catastrophe Prevention Act ("TCPA"), N.J.S.A. 13:1K-22. This new law requires employees and persons considered for employment by the independent contractor for work in a "critical position" within certain designated facilities to submit fingerprints, and to undergo a criminal history background check and an identity verification check. The law defines "designated facility" to mean a facility as defined in the TCPA, the owner or operator of which is required to submit a registration form pursuant to N.J.S.A. 13:1K-22.

The new law does not exhaustively define the term "critical position" but gives some examples of what may be deemed a critical position and delegates the responsibility for identifying critical positions to the Attorney General. The Attorney General is to identify the "critical positions" in consultation with the Director of the Office of Homeland Security and Preparedness, the Commissioner of the Department of Environmental Protection and industry representatives. The Attorney General is also responsible for developing a system to certify applicants who satisfy the background check and identity verification check as qualified for employment in critical positions at a designated facility. Credentials verifying that status must be issued to each successful applicant.

The Act expressly prohibits an independent contractor from employing or hiring any person, whether an existing employee or a new job applicant, in a critical position at a designated facility unless the Attorney General has determined that no criminal record information exists on file in the Federal Bureau of Investigation, Identification Division, or in the State Bureau of Identification and the Division of State Police, which would disqualify that individual from being employed, and that the applicant is not (cont'd ▶)

David R. Pierce has over twenty year's environmental experience. Concentrations in environmental, real estate and land use law, environmental and commercial litigation. Mr. Pierce chairs the firm's Environmental Practice and is a former chairman of the Joint Environmental Committee of the Union County Alliance and Linden Industrial Association. He can be contacted at dpierce@lindabury.com.



otherwise disqualified as a result of any required identity verification checks. The identity verification check must include, at a minimum, a credit investigation, a Social Security number verification, and a cross-referencing of all applicants against appropriate law enforcement advisories and terror watch lists.

Existing Employees

While this Act is applicable to existing employees of an independent contractor, those existing employees serving in a critical position at a designated facility will be permitted to continue to serve in that capacity unless and until the Attorney General determines that such a person is disqualified. Once a position has been identified as a critical position by the Attorney General, however, any person serving in a critical position at a designated facility must submit an application for a criminal history background check and an identity verification check within thirty (30) days.

Passing the criminal background check and identity verification check, once, however, is not the end of this program. The qualification of an individual to serve in a critical position at a designated facility must be renewed with a subsequent criminal history background check and identity verification check every five years.

The results of the criminal history background check and identity verification check are provided by the Attorney General to the independent contractor. The independent contractor is then required to notify the applicant, in writing, of his qualification or disqualification for employment. If an applicant is disqualified, the independent contractor must set forth the basis for the disqualification in the written notice. A disqualified applicant has twenty (20) days from the date of the written notice of disqualification to: (1) file an appeal for a review of the criminal history record information or identity verification information; (2) establish rehabilitation; or (3) dispute the accuracy of such information. Lastly, the

independent contractor must provide written documentation to a designated facility that all employees serving in critical positions have been certified as qualified pursuant to the requirements of this new law.

Positions identified by the legislature as possible critical positions include those positions involving: (1) information management; (2) preserving and insuring the public safety; or (3) access to information or facilities which could be used to compromise public safety and national security.

New Exposure as Employer

This new law imposes significant requirements upon independent contractors serving certain industrial facilities. Along with these responsibilities also comes potential liability for mishandling of information and/or procedural requirements. For instance, if an independent contractor fails to provide appropriate notification to an employee regarding a disqualification for service in a critical position, that employee's due process rights may be adversely affected and the independent contractor may be exposed to a claim for lost income and other damages.

This new law becomes effective on September 25, 2007. While the Attorney General has not even proposed regulations, consultants who may have employees serving in what are likely to be critical positions at designated facilities should begin to develop and implement standard policies and operating procedures designed to insure their compliance with and satisfaction of their obligations under this new law.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact David R. Pierce of the Environmental Law Group at dpierce@lindabury.com.

