New York State Department of Labor
Eliot Spitzer, *Governor*
M. Patricia Smith, *Commissioner*

November 20, 2007

[redacted]

Re: Request for Opinion
Fingerprinting - Labor Law §201-a
Our File No.: RO-07-0115

Dear [redacted]

I have been asked to respond to your letter of November 2, 2007 in which you ask whether a private company (designated by you as "XCO") engaged in debt collection may require its employees to be fingerprinted so as to be eligible to perform collection work for a financial institution (designated by you as "YCO"). Please be advised that it is this office's opinion that fingerprinting employees under the circumstances you describe would be a violation of Labor Law §201-a.

Labor Law §201-a states, in full:

> § 201-a. Fingerprinting of employees prohibited. Except as otherwise provided by law, no person, as a condition of securing employment or of continuing employment, shall be required to be fingerprinted. This provision shall not apply to employees of the state or any municipal subdivisions or departments thereof, or to the employees of legally incorporated hospitals, supported in whole or in part by public funds or private endowment, or to the employees of medical colleges affiliated with such hospitals or to employees of private proprietary hospitals.

You rely on the phrase "except as otherwise provided by law" to argue that as 12 USC §1289(a), (Section 19 of the Federal Deposit Insurance (FDI) Act) prohibits any person convicted of certain criminal offenses from being employed or retained by an insured depository institution, the fingerprinting of XCO's employees is "provided by law."

Under the facts presented, however, this office does not believe that XCO and its employees are parties to whom 12 USC §1289(a) is applicable. According to the FDIC's policy

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statement 63 FR 66177, cited by you, 12 USC §1289(a) "covers institution-affiliated parties, as defined by 12 U.S.C. 1813(u), and others who are participants in the conduct of the affairs of an insured institution." It is clear from the facts provided that XCO is not an "institution-affiliated party" (hereinafter referred to as "IAP") as defined by 12 U.S.C. §1813(u) or a participant in the affairs of YCO. You have described XCO as an accounts receivable management company that is neither a financial institution nor an FDIC insured institution. You have further stated that work for accounts receivable of various financial institution clients of XCO." Accordingly, XCO is clearly not an IAP as defined by 12 U.S.C. §1813(u)(1), (2), or (3). XCO is, at most, an independent contractor performing work for YCO via contract. Although 12 U.S.C. §1813(u)(4), provides that an independent contractor may be considered an IAP if it "knowingly or recklessly" participates in a violation of law, breach of fiduciary duty or unsafe or unsound practice, since the language of New York State Labor Law §201-a contains a broad prohibition against fingerprinting employees, there are no circumstances under which XCO could be considered to have "knowingly or recklessly" failed to prevent any of the acts triggering 12 U.S.C. §1813(u)(4), by failing to fingerprint its employees. To the contrary, it could be argued that the only means of preventing such acts would have been the *illegal* fingerprinting of employees[1]. Accordingly, under the facts presented, there do not appear to be any circumstances under which XCO would be considered an IAP as defined by 12 U.S.C. §1813(u).

Neither could XCO be considered to be "otherwise participating, directly or indirectly, in the conduct of the affairs of (YCO)." As stated above, XCO is, at most, an independent contractor of YCO. According to 63 FR 66177:

> Whether other persons who are not institution-affiliated parties are covered depends upon their degree of influence or control over the management or affairs of an insured institution. *For example, section 19 would not apply to persons who are merely employees of an insured institution's holding company ...* Typically, an independent contractor does not have a relationship with the insured institution other than the activity for which the insured institution has contracted ... *In terms of participation, an independent contractor who influences or controls the management or affairs of the insured institution would be covered by section 19.* (Emphasis added.)

In the present matter, you have repeatedly stated that the employees in question are employees of XCO, not YCO. You have also failed to provide any information that would lead to the conclusion that XCO or its employees are influencing or controlling the management or affairs of YCO, or that they have relationship with YCO other than the collection of accounts receivable for which YCO has contracted.

Accordingly, your reliance on the phrase "except as otherwise provided by law" in Labor Law §201-a is misplaced as you have provided no grounds on which to conclude that XCO or its

[1] Please note that it would be circular reasoning to argue that if §201-a did not apply then XCO would be reckless if it did not fingerprint employees. As §201-a is applicable, in these circumstances, unless and until XCO is proven to be an IAP, the mere allegation that §201-a is inapplicable cannot be used to determine that it is, in fact, inapplicable.

employees are institution-affiliated parties, or persons participating, directly or indirectly, in the conduct of the affairs of an insured institution. There is no discernable basis on which to conclude, therefore, that Section 19 of the FDI Act is in any way applicable to XCO or its employees or to any insured institution, including YCO, that may wish to retain them as independent contractors under the circumstances described. Therefore, any fingerprinting of XCO employees by XCO would not be required or permitted by Section 19 of the FDI Act and would be a violation of Labor Law §201-a.

This Department does not agree with YCO's argument that it may require XCO, as part of their contract, to fingerprint XCO's employees. Even if a party hiring an independent contractor may require that independent contractor to submit to fingerprinting as a condition of hiring (an issue on which this Department expresses no opinion at this time), YCO does not, in this situation, seek to fingerprint XCO's employees itself; but instead demands that XCO fingerprint its own employees, an act clearly prohibited by Labor Law §201-a.

Neither this office's opinion letter of May 26, 1999 nor the FDIC's letter of June 11, 1996 is in conflict with the above analysis. The former dealt with situations in which an insured institution fingerprints "current employees and applicants for employment," while the latter deals with situations in which insured institutions contract "with employment agencies through which temporary employees have been hired." Such opinions are applicable to employers who are "insured institutions" subject to Section 19 of the FDI Act. However, as the employer, here, is XCO, which is neither an "insured institution" nor otherwise subject to Section 19, and as you have repeatedly stated that neither XCO nor its employees are employees (temporary or otherwise) of YCO, these two letters are not applicable to the present circumstances.

Finally, in regard to your claim that "XCO was informed by YCO that at least two local competitors of XCO, who also perform collection work for YCO, are fingerprinting their employees," please provide the Buffalo Office of the Division of Labor Standards with the identity of these "two local competitors of XCO" so that an investigation may be conducted to determine if violations of Labor Law §201-a have, in fact, occurred; and, if they have, so that appropriate action may be taken by this Department.

This opinion is based on the information provided in your letter of November 2, 2007. A different opinion might result if the facts provided were not accurate, or if any other relevant fact was not provided.

Very truly yours,

Maria L. Colavito, Counsel

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