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## Due Diligence or Discrimination?

Pre-employment background checks are under increased scrutiny

Conducting a background check on prospective candidates is considered part of the normal due diligence in the hiring process by many employers. Reviewing a candidate's criminal record and credit provides the hiring manager with more information on that candidate and may identify potential "red flags". The practice has, however, come under increased scrutiny by the Equal Employment Opportunity Commission (EEOC), state and local legislatures, and Congress.

### Just Part of the Hiring Process

For most companies, the background check is just one part of the overall hiring process. Many hiring managers believe that an individual's credit history and criminal record provide valuable insight into the candidate's reliability and trustworthiness. Gathering as much information as possible on each candidate allows the hiring team to make a more informed decision. Making a mistake at the executive level can have a significant adverse effect upon the company. The direct and indirect costs of a bad hire can be several times the salary for the position.

In addition, failure to conduct a thorough background check on a candidate can subject the company to litigation. For example, a company could be subject to a negligent hiring claim if a criminal background check on a new hire would have revealed prior violent offenses and that employee later injures a co-worker. Similarly, if a public company hires a candidate with a poor credit history that would have been revealed through a credit check and that candidate embezzles money from the company, the company could face a shareholders suit for the negligent hire.

Many corporate leaders view background checks as an inexpensive, legal, and prudent way to minimize the risk of theft or litigation from a bad hire. Unfortunately, those leaders must now

guard against increased litigation risks and liability that could result from using background checks in the hiring process.

### Neutral Criteria, but Still Discriminatory

The EEOC casts the use of background checks in the hiring process in an unfavorable light. In 2007, the EEOC started an initiative called Eradicating Racism & Colorism from Employment (or E-Race). On the EEOC's website, one of the justifications for the program is to prohibit the use of "facially neutral employment criteria" (such as criminal records and credit reports) that have a disparate impact on certain races. Two of the stated goals of E-Race are to "Develop Strategies, Legal Theories, and Training Modules to Address Emerging Issues of Racism" and "Enhance Visibility of EEOC's Enforcement Efforts in Eradicating Race and Color Discrimination." (Source: [www.eeoc.gov](http://www.eeoc.gov)). Credit background checks and arrest and conviction records are specifically identified as employment criteria that lead to race based discrimination.

Obviously, using the results of criminal background checks to intentionally exclude candidates of a certain protected class is prohibited under Title VII of the Civil Rights Act of 1964 ("Title VII"). That does not mean, however, that conducting criminal record checks on all candidates and excluding any candidates who have felony arrests or convictions from further consideration is permissible. Although neutral in its application, that practice would probably not survive scrutiny from the EEOC. The EEOC has taken the position that using arrest or conviction records as the basis for employment decisions has a disparate impact on individuals of certain races, and therefore, violates Title VII.

Similarly, a policy of excluding candidates with poor credit histories would probably run afoul of the EEOC's policies. In October 2010, the EEOC

held a public meeting on the topic in an effort to better understand potential discriminatory effects. The EEOC's stated position on its website is that pre-employment inquiries regarding a candidate's credit history or economic status should "generally be avoided, because they tend to impact more adversely on minorities and females."

In December 2010, the EEOC succeeded in making this issue more visible by filing a lawsuit against Kaplan Higher Education Corporation in the Northern District of Ohio. The Commission alleges that Kaplan violated Title VII by excluding candidates based on their credit histories, because the practice had a disparate impact on African Americans. In a press release regarding the lawsuit, a regional attorney for the EEOC said, "Employers need to be mindful that any hiring practice be job-related and not screen out groups of people, even if it does so unintentionally." Hiring managers should view the filing of this lawsuit as a warning from the EEOC regarding the use of credit reports in the hiring process.

#### **Political Efforts**

Recently, the use of credit checks as employment screening tools has become a hot legislative topic, because the economic downturn has damaged the credit of many Americans. Four states, Washington, Hawaii, Illinois, and Oregon, have enacted laws which prohibit the use of credit information in employment decisions except in certain circumstances (e.g. positions with financial institutions, where legally required, if substantially job-related, etc.). Twenty other states considered similar legislation in 2010.

At the federal level, the "Equal Employment for All Act" (H.R. 3149) was introduced in the House in July 2009 and hearings were held at the subcommittee level in September 2010. If passed, this legislation would amend the Fair Credit Reporting Act (FCRA) to prohibit the use of credit background checks for employment decisions (even if the candidate consents) unless (i) the position requires national security or FDIC clearance, (ii) the position is a state or local government position that requires a credit check, (iii) the position is a supervisory, managerial, professional, or executive position at a financial institution, or (iv) a credit check is otherwise required by law.

The use of a criminal background check in the hiring process has also been an area of focus. Several states and local governments have passed legislation prohibiting public employers from conducting a criminal background check until either an offer of conditional employment is made or a candidate is selected for an interview. Last year, Massachusetts joined Hawaii as a state that passed this so called "ban the box" legislation with respect to all employers – public and private. In Massachusetts, an employer may not ask about criminal history on the initial written application. In Hawaii, an employer may not ask or inquire into a candidate's criminal history until a conditional offer of employment has been made.

#### **Between a Rock and a Hard Place?**

Employers should evaluate the use of background checks in employment decisions in light of the recent litigation and legislative activity. Everyone involved in the hiring process should be educated regarding local legal requirements. For companies subject to Title VII, the hiring team must be able to clearly articulate why conducting a background check for a particular position is job related or consistent with business necessity. A policy of conducting background checks for all positions is not likely to survive scrutiny.

For most companies background checks are only one box to be checked, and not a critical part of the hiring process. In a survey conducted by the Society for Human Resource Management (SHRM) entitled *Background Checking: The Implications of Credit Background Checks on Hiring Decisions*, the respondents identified (i) good cultural fit, (ii) relevant previous work experience and (iii) specific skills and expertise necessary for the job as the three most determinative factors that impact hiring decisions. Sanford Rose Associates® search consultants use the proprietary Dimensional Search® process to dig deeper into each of these determinative factors and find candidates who will truly make a difference for their clients.

—Rick Carter

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