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Walking the Tightrope of Employee Background Screening

How to Hire the Right Employees without Going Too Far

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When making a hiring decision, there are a number of reasons an employer wants to obtain as much information as possible.

Finding the right (or hopefully the best) person for the job

Protecting yourself from charges of discriminatory hiring practices

Protecting yourself from liability for an employee's intentional bad acts or gross negligence.

Negligent Hiring

- An employer can be sued for negligent hiring if it hires someone who it knew, or in the exercise of reasonable care should have known, was dangerous, unsafe, dishonest, or unfit for the particular job.

Negligent Hiring

- Courts tend to assume that if you could have known, you should have known.
- So how much checking should you do?
- The jury will tell you.

Not surprisingly, the use of criminal background checks and credit checks to screen potential employees is at all time high.

LAWSUITS CHALLENGING THE USE OF CRIMINAL BACKGROUND CHECKS ARE ALSO ON THE RISE

- BMW Manufacturing Co., LLC (BMW) reached a settlement in a suit with the Equal Employment Opportunity Commission (EEOC) that alleged BMW discriminated against African American employees through its use of criminal background checks for applicants at its Spartanburg, South Carolina, plant.

- The EEOC alleged that when BMW hired a new contractor to handle the company's logistics at its South Carolina facility, it required the new contractor to perform a criminal background checks on the existing logistics employees who re-applied to continue working in their positions at BMW.

- At that time, the company's criminal history guidelines excluded anyone from employment who had a conviction in certain categories of crime, regardless of how long ago the employee had been convicted or whether the conviction was for a misdemeanor or felony.

- Once the background checks were performed, approximately 100 logistics workers, including some who had worked at the facility for several years, did not pass. According to the EEOC, 80 percent of those who were disqualified under BMW's guidelines were black.

- BMW agreed to pay $1.6 million to 56 claimants who were named in the suit by the EEOC. In addition to monetary relief, BMW agreed to offer employment opportunities to the discharged workers in the suit and up to 90 African-American applicants who BMW's contractor refused to hire based on the company's previous conviction records policy.

- BMW also agreed to provide training on using criminal background checks in a manner consistent with federal employment laws. Additionally, BMW will be subject to reporting and monitoring requirements.

- Notably, the settlement agreement anticipates that BMW will continue to use criminal history screening as part of its hiring process.

- In a statement regarding the settlement, the EEOC acknowledged that an employer has the right to use an applicant's criminal history as a screening tool, but warned that when a criminal background screen results in the disproportionate exclusion of African-Americans from job opportunities, the employer must evaluate whether the policy is job related and consistent with a business necessity.

- **The EEOC has stated its position that "an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII."**

- **However, as noted in regard to the BMW case, even the EEOC admits Title VII does not wholly bar the use of criminal records in employment decisions.**

- **Instead, the EEOC has provided a framework for assessing criminal records when making an employment decision.**

- **According to the EEOC, an employer's consideration of criminal records may pass muster under Title VII if an individualized assessment is made taking into account:**
  - **The nature and gravity of the offense or offenses**
  - **The time that has passed since the conviction and/or completion of the sentence**
  - **The nature of the job held or sought**

Along these same lines, SHRM has conducted national research that shows that a majority of employers do not take a one-size-fits-all approach to criminal background checks in the hiring process.

EEOC Guidelines Followed

- However, according to SHRM, most organizations follow EEOC guidelines on avoiding discrimination when conducting criminal background checks.

The poll showed that:

- **Organizations conduct criminal background checks:**
  - **to ensure a safe work environment for employees (61%),**
  - **to reduce legal liability for negligent hiring (55%), and**
  - **to reduce or prevent theft or other criminal activity (39%).**

- **20 percent of organizations conduct criminal background checks on job candidates because they are required to do so by law.**

Ban the Box

- The EEOC recommends that employers remove the criminal history check box from job applications because this inquiry supposedly has a disparate impact on African Americans and men.

Ban the Box

- A number of court decisions have taken a different positon, but EEOC continues to vigorously litigate this issue and this is a constantly evolving area of the law.

Ban the Box

- Last November, President Obama announced that he was directing federal agencies that they could not inquire about criminal convictions on federal job applications. According to the president, the federal government "should not use criminal history to screen out applicants before we even look at their qualifications."

Ban the Box

- The president has directed the federal Office of Personnel Management to issue guidance to each federal agency in accordance with his directive.

Ban the Box

- This announcement is yet another sign of the momentum that the so-called “ban the box” movement continues to enjoy throughout the country. At least 19 states and more than 100 cities and/or counties have adopted some type of “ban the box” legislation.

Ban the Box

- Many of these entities have extended these prohibitions beyond governmental employers to governmental contractors and even private employers. Oklahoma has not enacted any such legislation.

Best Practices

- Oklahoma employers that consider criminal histories need to follow a few steps to justify their reliance. First, be sure you can articulate the actual, essential job functions – the duties of the position in question that are performed on a regular basis.

Best Practices

- Second, identify those types of criminal convictions that may render an applicant unfit to perform those essential duties.

Best Practices

- Third, establish some general criteria for consistent application. For example, how recent must criminal behavior be to render an applicant unfit?

Best Practices

- Finally, when making decisions based on criminal, document your consideration of criminal history.

Employer Use of Consumer Reports

SHRM survey showed that 60% of employers do credit checks

- 47% do credit checks on some applicants
  - » Financial and safety sensitive positions
- 13% do credit checks on **all** applicants

- When evaluating applicants:
  - 64% of employers are likely to consider **outstanding judgments** as a hiring factor;
  - 49% are negatively “influenced” by debts in the **collection process**;
  - 25% consider **bankruptcy** (apparently bankruptcy relieves the economic “pressures” that can lead to misconduct);
  - Less than 20% look at foreclosures, school loan or medical debt, high debt to income balances.

Valuable Resource or Evil Tool?

According to a recent survey, the majority of Americans approve of the idea of banning the use of credit reports for employment screening.

One thousand **consumers** (presumably not employers or HR professionals) were asked:

"Employers have the right, with your permission, to check your credit report as part of background screening for employment. A number of lawmakers are interested in banning this practice – do you...- Agree with a proposed ban on this practice? Or, are you OK with allowing this practice to continue?

More than half -- 53.5% -- said they agreed with a proposed ban, with slightly more women than men in agreement. 39.3% stated they were OK with employers using credit reports to screen job applicants (8.2% they didn't know).

Valuable Resource or Evil Tool?

- Why are credit checks controversial?
- Blurring the line between work/public information and private information.
- Is it an invasion of privacy? Or, is it justified because it provides information relevant to the employment relationship?

EEOC

- EEOC has published a guidance on employment testing and selection procedures.
- Credit checks were targeted because the EEOC believes they foster “systemic discrimination.”

Public Comments at EEOC Hearing on Credit Checks

- "Many reports are riddled with errors or incomplete information."
- "Studies show that credit history is a poor predictor of job performance."
- "Credit reports fail to provide context."

Public Comments

- "One issue that we have raised is whether HR professionals are being trained in how to interpret the complex information that is provided. I would suggest it would almost be better if employers had a credit score because that is aimed at synthesizing the information in an academic way."

Public Comments

- National Consumer Law Center: "It is absurd to use credit history as a screening tool given the state of the economy."
- "It's a practice that we believe is harmful and unfair to American workers. The use of credit history for job applicants is especially absurd when you are looking at an unemployment rate of 10 percent and have many workers looking for a job."
- "We doubt whether all employers follow the law by notifying job candidates of information in their credit report that could have an adverse impact on the hiring decision.
- "Credit reports are not a valid predictor of job performance. They were designed to predict the likelihood that a consumer will make payments on a loan, not an indicator that the person would be a poor employee or might steal."

EEOC's Summary Comment

"The one thing that seems particularly clear is that there is much we do not know about how both credit reports are used, the reason for them, and what employers get out of them."

Credit Checks Can Get You Sued

- Since 2014 the number of FCRA class actions has ballooned.
- Spurred on by a number of well-publicized high-dollar settlements, including Home Depot's $3 million and Publix Super Market's $6.8 million, as well as the potential for large payouts.

Credit Checks Can Get You Sued

- These high settlements are comparatively "cheap" in the face of what a company could be facing in damages and fines if a judgement is rendered against it.

- In cases where a plaintiff proves a willful violation of the FCRA, he can recover statutory damages of $100-$1000 per violation, as well as attorney's fees and punitive damages.

Still want to use credit checks?

Why Employers Use Credit Checks

- Applicants omit previous employers from their resume or application if their performance evaluations were poor, they were fired for cause or other problems occurred during the employment relationship.
- Employers may use a credit check to obtain a list of former employers so they can ask an applicant about omitted employment.

Why Employers Use Credit Checks

- Collect information about an applicant's decision-making skills, financial responsibility and other qualities related to job performance.
- Valuable for positions with access to sensitive financial or customer information.

Why Employers Use Credit Checks

- Employees with financial difficulties may be more tempted to steal, embezzle or sell sensitive information.
- Some employers may be required by law to perform credit checks, e.g., certain government contractors.

Limiting the Risk

- 1) Narrow the use of credit checks to positions for which an applicant's credit history has relevance, e.g., financial positions.

- 2) Allow other factors to mitigate the influence of a weak credit history; e.g., bad report the result of layoff, medical crisis?

Limiting the Risk

- 3) Give applicants an opportunity to correct or explain items in their credit report.
- 4) Understand the law and the reason for the credit check.

Employer evaluations of credit histories should be categorical –

- **Acceptable** (no further examination needed)
- **Need further inquiry** (require closer examination; applicant explanation, including explanation of problematic items or mitigating factors.
- **Not acceptable**.

Limiting the Risk

- Use clearly defined criteria to evaluate credit histories.
  - For example, the number of delinquent accounts, the number of accounts that have been referred to a collection agency.

Limiting the Risk

- Follow the same review process for applicants in the same category.
  - For example, if some applicants in the “need further inquiry” category are allowed to correct or explain things, then all applicants in that category should be able to.
  - “Not acceptable” means not acceptable.

Watch out for Adverse Impacts

- If minority applicants receive disproportionately fewer job offers, the EEOC is likely to require the employer to provide information indicating that this screening process is a **business necessity**.

How do you show "business necessity"

- The nature of the job (financial, personal/proprietary info).
- If job candidates with poor credit histories have poorer job performance.

Adverse Impact Analysis

- Measure the rate at which final job offers are made among job candidates for whom credit checks were performed.
- Compare the representation of minority candidates and reference group candidates across the different categories.
- If minority candidates are less likely to receive a final job offer than reference group candidates, the EEOC could allege adverse impact.

Adverse Impact Analysis

- Adverse impact could also be alleged if minority candidates are more likely to receive a lower grade on their credit history.
- If either of these patterns appears, examine the validity of credit histories as hiring criteria.

Adverse Impact Analysis

- The purpose of an adverse impact analysis, or a validation study, is to determine whether applicants with stronger credit histories have better job performance as reflected on evaluations.
- A comparison of evaluations could be used to assess the validity of credit histories.
- Ideally, credit histories should be indicators of a job applicant's personal responsibility, maturity, decision-making, which **should** correlate with performance.

Business Reason

- If you can't demonstrate a link between credit history and job performance, why use credit checks?

- Useless evaluation tool + legal risk = poor decision.

Fair Credit Reporting Act

- Permits employers to make credit checks by obtaining credit reports for employment purposes

Before Obtaining a Credit Report, an Employer Must:

- Disclose in writing to applicant that a credit check may be done;
- Obtain written authorization for the credit check from applicant;
- Provides applicant with a copy of his credit report, and a written explanation of applicant's rights under FCRA before making an adverse employment decision.
- Notice and Consent!!! Sounds simple enough.

FCRA Notice Requirements

- A “clear and conspicuous” disclosure must be made in writing to the applicant that a “Consumer Report May Be Obtained for Employment Purposes.”
- The applicant must provide written authorization to the employer to procure the report.
- If an employer wishes to receive an “Investigative Consumer Report,” the FCRA requires additional disclosures.

FCRA Notice Requirements

Before taking Adverse Action based in Whole or in Part on the Consumer Report, the employer must:

- Provide the applicant with a copy of the consumer report, and
- Provide the applicant with a Summary of Consumer Rights

FCRA Notice Requirements

FCRA has been interpreted to require that both a Pre-Adverse Action Notification and an Adverse Action Notification be sent to a consumer.

However, the Act does not specify how long the employer should wait before taking adverse action.

Consumer Report v. "Investigative Consumer Report"

- A **credit report** is a collection of data gathered from creditors, which summarizes credit history. It makes no inference about the applicant's general reputation or character.
- An applicant could be dishonest -- could be running a meth lab out of his garage -- but as long as he pays his bills on time, his credit report will be spotless.

Investigative Consumer Report

- A written credit report that is more like a detailed background check. In addition to covering general creditworthiness, it also involves the gathering of information on character, general reputation, personal characteristics, or way of living.
- Interviews with neighbors, friends, and associates about lifestyle, character, and reputation.
- Does not include specific factual information on a consumer's credit record obtained directly from a creditor.
- If an employer requests an investigative consumer report for employment purposes, FCRA requires them to obtain permission from the applicant. If an application for employment is rejected as a result of one, the employer must give the applicant a copy of the report.

Consumer Reporting Agency

- "Any person who for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."

QUESTIONS?