

## Criminal Background and Credit Checks: When Can an Employer Legally Use Them?

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**T**he Equal Employment Opportunity Commission ("EEOC") has been quite active in challenging employer's use of criminal background and credit history checks during the hiring process. Although the EEOC has stepped up their activity in this area, there is significant uncertainty as to the current standards and law as to an employer's use of criminal/credit history checks. The lack of any solid guidance on this topic makes it difficult for employers to determine how to evaluate their current use of this information, as well as to understand the legal pitfalls and hurdles that the EEOC has placed in front of them.

**EEOC Directives:** The recent activity in this area emanates from the EEOC's recent directive and key priority (as per their December 2012 Strategic Enforcement Plan (SEP)) to eliminate hiring barriers. This priority includes challenges to policies and practices that exclude applicants based on criminal history or credit check. The EEOC has a keen interest in this area as the EEOC believes that criminal/credit checks have a disparate impact on African American and Hispanic applicants. As they pursue their directive, expect the EEOC to closely scrutinize failure to hire claims where a criminal history or background check was conducted. Although the background check was "facially neutral" and even if it was uniformly given to all applicants, the EEOC may investigate to determine if it have had a "discriminatory effect" on certain applicant(s).

The EEOC asserts that criminal background checks must be "job-related" and "consistent with business necessity." Employers are advised to consider: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct and/or completion of the sentence; and (3) the nature of the job held or sought. The EEOC stresses the need for an "individualized

assessment" prior to excluding an applicant based on a criminal or credit record.

**Local/State/Federal Laws:** In addition to the EEOC, based upon recent local and state legislative developments, employers face additional legal hurdles regarding hiring practices. These laws are commonly referred to as "ban the box" (i.e. restrictions on the use of criminal history in hiring and employment decisions) legislation. Making matters even more difficult, employers have also been subject to a massive surge in class action litigation under the Fair Credit Reporting Act (FCRA). The FCRA regulates the use of and gathering of criminal histories through third-party consumer reporting agencies with respect to conducting background checks on applicants and/or employees.

**Legal Actions:** In pursuit of their directive, the EEOC has filed several large-scale lawsuits against employers based upon their use of criminal and credit checks. We expect that the EEOC will continue to file similar lawsuits throughout 2015 and beyond. Most claims have been brought as failure-to-hire claims. For example, an African American woman brought a race discrimination claim alleging that she was discriminated against based on her credit history. This claim started out as a single plaintiff action, but after the EEOC conducted their initial investigation, the EEOC dramatically expanded the scope of the initial charge against the employer, alleging that the employer was engaging in a "pattern and practice of unlawful discrimination" against: (1) African American applicants by using poor credit history as a hiring criterion, and (2) African American, Hispanic, and white male applicants by using criminal history as a hiring criterion.

Reasonable employers complain that by bringing actions of this nature, the EEOC has

placed employers in a Catch 22. Employers have to choose between ignoring the criminal history/credit background, thus exposing themselves to potential liability for criminal and fraudulent acts committed by employees, and being the victim of an EEOC lawsuit for having used this information in a discriminatory way.

### TAKEAWAY: FOR EMPLOYERS

Claims involving criminal background checks and credit checks are an EEOC priority. At this time, employers have little guidance from the courts or the EEOC as to exactly what "job-related" and "consistent with business necessity" means and just how closely a past criminal conviction has to correspond with the duties of a particular job in order for an employer to legally deny employment to an applicant. Moreover, employers continue to witness expanding restrictions dealing with criminal history at the state and local level based on ban-the-box legislation, as well as with an increasing number of class action lawsuits involving background checks as required under the Fair Credit Reporting Act. Employers are encouraged to work closely with legal counsel as to what they should and should not ask on applicants as well as how and when they can use background information they obtain. Based on this evolving area of the law, we additionally recommend that employers purchase a robust EPL policy that will defend them in the event that the EEOC or a well-skilled Plaintiff's counsel pursues a claim against them for discrimination, or for failure to hire based upon criminal or credit background checks.