

“AND BY THE WAY, ARE YOU A CRIMINAL?”

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Getting the answers, without violating the new EEOC guidelines

According to some studies, over 90% of employers conduct criminal-background checks for some job applicants and over 70% of employers conduct background checks on all potential new hires. This includes many hospitality-industry employers. Most decision-makers want information about criminal behavior and other related data before bringing a candidate into the organization.

The rationale for seeking this information ranges from identifying candidates who are honest when filling out their applications, to finding those who display a history of good decision making and judgment, to reducing the risk of criminal behavior in the workplace and related civil liability by excluding those applicants who may be most likely to (re)engage in criminal activity at work. Hospitality employers also do so to avoid negligent hiring lawsuits – a lawsuit from a guest or customer, for example, based on a hotel’s failure to properly screen an employee who later does harm.

Despite these important business concerns, the current regulatory climate has changed. It is moving toward limited inquiry into only certain aspects of a candidate’s background, and then only when the information sought is relevant to the position. For example, the Equal Employment Opportunity Commission (EEOC) and some states are taking the position that, given the disproportionate rate of minorities that are arrested and convicted of crimes, an

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employer's policy of disqualifying all applicants with criminal history can have a discriminatory impact on minority candidates and thereby violate Title VII's discrimination laws.

As a result, employers must rethink the wisdom of broad background-check policies that are one size fits all, and instead, decide whether, on a job-position-by-job-position basis, background information is relevant, helpful, and nondiscriminatory when it is used to assess a candidate's suitability for employment. Adopting the right background-check procedures is a critical risk-management practice to avoid EEOC claims, claims of individual litigants and even the prospect of class action-based lawsuits.

In light of this regulatory shift, we suggest asking three key questions to ensure that your hiring and screening practices are appropriately tailored, based on sound reasoning, and able to survive claims of discrimination from the EEOC, individual litigants, and potential class-action claims.

Once you know the answer to these questions, you will be better equipped to navigate the regulatory challenges and make the best decisions for your business regarding your initial decision of what kind of background checks (or updated background checks) to order, for your employees, post-hire.^[1]

QUESTION NO. 1: IS ALL AVAILABLE INFORMATION EQUALLY RELEVANT IN SELECTING A CANDIDATE?

The scope of a background screen can be as narrow as reviewing driving history or as broad as reviewing all information contained in any public and educational record. As you peruse the menu of screening choices you should ask yourself "What are we going to do with the results?" As you answer that question, remember the EEOC's announced suspicions about overemphasizing the value of criminal-history information during hiring.

CRIMINAL HISTORY

Each state has its own position on the use of arrest and conviction records. Even when abiding by those parameters, there is still the need for a comprehensive, consistent set of procedures regarding the use of criminal history to avoid claims of discrimination. The key here is to

identify by job description prior to hiring candidates, what kind of criminal background information (including how many years back) the company will look for and to ensure that the same level of background check is done for every applicant for that position.

For each job description, you should prepare a memo that describes the relevance of, and need for, such information and how it is related to the particular job description. Remember, it is inconsistency in the selection of what type of background check each applicant gets that can often get employers sued for discrimination. Establishing a policy and procedure to make sure each applicant for a job description gets the same background check and having a defensible job-related justification for the relevancy and need for the information for each job position is critical to defending against future discrimination claims.

CREDIT HISTORY

As with criminal history, the EEOC has raised concerns about the relevance of credit-history information during hiring and its potential to inject an element of discrimination into this process. While the EEOC has yet to publish comprehensive guidance on the use of credit checks, it has cautioned that:

[i]nquiry into an applicant's current or past assets, liabilities, or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because they *tend to impact more adversely on minorities and females*. [emphasis added].

In the case of a credit check, some states require an even more direct correlation than the EEOC has suggested between the duties of the position and the risk of harm or loss to the company or its customers.

Thankfully, the EEOC recognizes that credit history is properly considered where such information is essential to the particular job in question. Certain positions at financial institutions, or positions that provide access to financial assets or confidential information are examples of jobs for

which a credit check may be supported by business necessity.

In addition to looking at the relevance of credit information to a particular job, you must also assess whether the credit history discovered is indicative of the kind of financial stress that may lead to theft, embezzlement, or other workplace problems. For instance, certain collection and charge-off accounts may be appropriately considered, but medical collection accounts may not, as they may indicate an emergency situation that does not pose the same risk of financial pressure and mismanagement.

As you can see, the EEOC has set a high bar for employers who wish to consider credit history during the hiring process. If you decide to begin or continue using credit history information during hiring, we recommend the following:

- ensure that the information is sought only for positions where the correlation between job duties and risk created by financial stress is clear, such as CFO, controller, etc., or where the position provides unsupervised access to your company's financial assets;
- provide an opportunity for applicants to explain their situation and the negative credit-history information, and consider granting waivers based on the information provided;
- add language to your Fair Credit Reporting Act (FCRA) notice that informs applicants that they should contact your company if there are circumstances that may explain the information contained in their credit report;
- maintain consistency by setting up the specific kind of financial background check that will be used on a job-description-by-job-description basis, and make sure that the agreed-upon kind of financial background check is consistently used for every applicant for each applicable position; and
- create living memos on a job-description-by-job-description basis that identify the agreed-upon kind of background check that will be used and the legitimate business rationale justifying why the company needs the particular kind of credit information for the particular job position because of the business risks associated with the

applicant's financial stress that would be found in the financial background check.

These steps will reduce the risk of regulatory challenge and will go a long way to ensure that you are using credit-history information only where it is critical and relevant to your organization.

SEX OFFENDER REGISTRY

The National Sex Offender Registry is a database that contains information about every person who has been convicted of a sexually-violent offense, or a crime against a victim who is a minor, or who is a sexually-violent predator. Because of this, employers may understandably have an immediate and negative reaction when they learn a candidate is listed on the registry.

Information provided on the registry varies greatly in terms of quality and consistency. It is submitted based on the rules of each state's program and, as a result, offenders remain on the registry, often indefinitely, and sometimes for very minor offenses.

The EEOC has not specifically commented on the Sex Offender Registry, but because it is a database comprised of criminal-history information, we recommend that you follow the same process with this information as you do with your consideration of other criminal history. At a minimum, evaluate the type of crime committed, how long ago it occurred, and what, if anything, has happened since the conviction (both good and bad).

ARREST HISTORY

When a job candidate is arrested for a crime and then not convicted (or only convicted of a less serious crime), both state and federal regulators have warned employers to either ignore this information altogether or to use it merely as a basis to ask an applicant for more detail about the events surrounding the arrest. This is because the fact that an arrest occurred, without more, is not evidence of criminal conduct. Carefully consider the value of arrest records as part of your hiring assessment against the risk of misuse of this information.

QUESTION NO. 2: DO YOU HAVE VALID REASONS TO ORDER BACKGROUND CHECKS?

With regard to criminal background and credit checks, the EEOC's guidance does not prohibit consideration of such history, but does suggest that screening may not be appropriate for all positions within an organization. As you make your assessment of positions for which screening should be pursued, consider whether the job is one where: 1) the **nature** of duties; 2) the **environment** where the work is performed; or 3) the **exposure** to certain types of customers or clients, makes it important to know and be able to evaluate a candidate's criminal history or current financial position as part of the suitability assessment? For example:

- do particular employees have unsupervised access to guest rooms, guest property or work with guests in sensitive situations (such as a spa)?
- are there specific state or federal standards that prohibit you from hiring individuals with a certain criminal history, such as may exist for babysitting services?
- do employees make decisions about or have access to company (non-public) financial information, confidential guest information, inventory, cash or an equivalent, or company credit?

If the answer to any of these questions is yes, then the duties, environment, or clientele that are unique to these positions may create a need to protect the company, employees, volunteers, guests, and the public from workplace violence, injury, abuse, fraud and theft. While not exhaustive, these questions should help guide you as you review your positions and assess which ones will have an underlying business concern that would be informed by a criminal background or credit screen.

QUESTION NO. 3: ARE YOU MAKING APPROPRIATELY TAILORED ASSESSMENTS OF UNSUITABILITY?

In the background-check world, negative information that comes back to the employer puts the employer in the position of having to make a "negative adjudication:" (or no-hire decision) based on the information obtained. Consistency in the negative-adjudication process is a critical litmus test of whether there is discrimination in the

workplace – the greater the consistency, the less likely that discrimination is present.

While consistency remains important in the hiring-decision process, the EEOC's new guidelines caution against rigidity and broad-based rules for screening candidates that are companywide as opposed to job-position specific. For example, a hiring decision matrix that screens out a front desk clerk candidate because of a DUI could be challenged for a lack of connection between the screening criteria and appropriate suitability factors for this particular job position. Given this, you should place greater emphasis on criminal (or credit) history that makes a candidate unsuitable for a particular job position by considering factors such as:

- the nature of the job sought;
- the number, nature and gravity of offense(s), as well as surrounding facts such as age at the time of conviction;
- the passage of time since the offense and/or completion of the sentence, and any evidence of rehabilitation efforts, employment history, or compelling references; and
- other evidence of suitability, such as successful prior employment in a similar role or bonding under a federal, state, or local bonding program.

Consider developing a comprehensive matrix of consistent negative adjudication standards that are job position by job position. These matrices should assist you to:

Shift your paradigm

Suspend any blanket hiring policy that has rigid disqualification requirements related to criminal or credit history, and advise your managers and decision-makers that the old policy is being revised in favor of more precise disqualification standards;

ASSESS YOUR NEEDS

Work with your leadership to determine which departments and jobs have duties, environment and/or exposure factors that make it important to assess suitability through a background (criminal and/or credit history) screen by reviewing the essential functions of each position;

DEFINE JOB-RELATEDNESS AND SUITABILITY

- record the duties, environment and/or exposure considerations that drive the need for careful assessment;
- identify crimes, re-offense rates, or credit data that demonstrate a concern related to the above, and look to (and keep records of) outside research to see if your assessment can be confirmed;
- decide how old information can be and still be relevant

Build your screening and hiring policy

Using the job-relatedness and suitability assessment as the foundation, develop your written policy to help guide those who have involvement in hiring. If you decide to consider individualized factors, such as successful post-conviction employment history, rehabilitation efforts such as education or training, or personal references, build in best practices addressing how to ask for information about these issues, how to assess them, and how to properly differentiate unique and individualized factors; and

TRAIN, TRAIN, TRAIN

A policy is great, but compliance requires understanding of the reason for the change, clarity about what is now different, and buy-in for new practices. Training is your best tool to move the organization forward and reduce risk of misunderstanding or intentional non-compliance with your new policy.

In addition to properly training your hiring managers and decision-makers about the new policy, consistent implementation of your policy is critical. When determining whether to grant a waiver to a particular applicant based on information that explains the circumstances, it's important to maintain a record of the decision. When a subsequent applicant provides similar information, you should refer to any prior waiver requests to ensure that you are treating all applicants similarly.

SUMMING IT ALL UP

The EEOC's new focus on potential discriminatory impact of neutral pre-employment policies and practices is requiring hospitality employers to think about these issues in a new way and to assess policies and practices that may be longstanding or withstood prior challenge.

Hospitality employers have found themselves the target of some of the EEOC's systemic investigations of criminal-background check policies. This is all part of the EEOC's E-RACE (Eradicating Racism and Colorism from Employment) initiative, a program dedicated to strengthening the "EEOC's efforts to ensure workplaces are free of race and color discrimination." One of the EEOC's specific goals for the E-RACE initiative is to develop strategies for addressing "21st Century manifestations of discrimination," which the EEOC identifies as including arrest and conviction records, as well as other pre-employment hiring practices.

Employers in the hospitality industry will likely continue to conduct criminal-background checks on applicants. These potential employees have access to your guests and customers, their personal belongings, and often credit card information. Prudent hotel employers use criminal-background information to guard against hiring employees with criminal histories that may place your guests in harm's way.

In light of the EEOC's focus on the use of criminal-background checks in hiring decisions, hospitality employers must strike a balance – protecting your guests, customers, and employees and maintaining a meaningful and legally-defensible criminal-background check policy.

This article is adapted from a white paper delivered by Ms. Ryan at the 11th Annual Hospitality Law Conference. For more information contact the author at ALureRyan@laborlawyers.com or (404) 231-1400.

[1] Updated checks are appropriate when they are regularly ordered for all or a certain group of employees, such as annually, biannually, or every three years, in cases of promotions or transfers to positions of increasing responsibility or liability risk for the company, and if there is a reasonable suspicion that an employee may have engaged in criminal conduct or had a significant negative change in his or her financial situation.

