

“DO I HAVE TO HIRE A CRIMINAL WITH BAD CREDIT?”

Publication
Aug 1, 2013

(DEALERSHIP UPDATE, NO. 3, AUGUST 2013)

The answer to whether an employer may refuse to hire someone with a criminal record or bad credit is not as simple as you might think. Two recently-filed lawsuits by the EEOC alleging that employers' criminal-conviction policies resulted in race discrimination are just the most recent reminder that using a one-size-fits-all approach to criminal backgrounds is risky.

THE LAY OF THE LAND

After reluctance by some dealerships to devote time and resources to conducting criminal-background checks for potential new hires, most now have joined the vast majority of employers doing so. With many dealership employees having access to customers' personal and financial information, access to customer and employee property, and regular contact with the public, it's difficult to imagine an industry where criminal history information would be more important.

In addition to providing the obvious information, conducting comprehensive background checks often reveals information about an applicant or employee's truthfulness, decision-making ability, and judgment, and may help to avoid negligent-hiring claims – a claim by a customer, employee or other third party alleging injury based on the dealership's failure to properly screen an employee who later does harm.

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In recent years many dealerships that were concerned about their applicants' and employees' criminal histories and, in some cases, credit history, implemented blanket policies that excluded from employment *all* applicants and employees with a criminal history based on some predetermined threshold, such as any felony conviction. What could be more equal or fair than to include or exclude *everybody* based on the same pass/fail criteria?

Somewhat ironically, these very one-size-fits-all policies are the ones under attack by the EEOC and some state regulators. In fact, in the EEOC's two recently-filed lawsuits based on criminal-background policies, the basic allegation is that the employers' facially-neutral policies violated federal discrimination law because the policies excluded more minority candidates based on their disproportionately higher rate of arrests and convictions. The EEOC's position is that the use of criminal-background information should be used to exclude applicants and employees only if the employer conducts an individualized assessment of the information gathered. According to the EEOC, that individual assessment should include consideration of the nature and gravity of the crimes, the age of the convictions, and the nature of the applicant's or employee's position.

Obviously, a policy that treats all convictions for all employees the same will not pass muster in the eyes of the EEOC. Therefore, employers would be wise to consider the wisdom of their 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.

The same rationale applies to credit checks. Adopting the right background-check procedures is a critical risk-management practice to avoid EEOC claims, claims by individual litigants and even the prospect of class-action lawsuits.

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

QUESTION NO. 1: IS ALL AVAILABLE INFORMATION EQUALLY RELEVANT?

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 education record. When perusing the menu of screening choices, ask yourself: "What are we going to do with the results?" When asking this question keep in mind 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, the need still exists for a comprehensive, consistent set of procedures regarding the use of criminal history to avoid claims of discrimination. The key is to identify for each job position the kind of criminal background information (including how many years back) the company will seek and use, and then ensure that the dealership uses the same level of background check for every applicant for that position.

One alternative is to prepare a short memorandum for each job position that describes the need for such information and how it's related to the particular job description. Remember, inconsistency in the method of background checking creates legal risks before the issue of how the information was used even arises. 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 need for the information is critical to defending against future discrimination claims.

ARREST HISTORY

Both state and federal regulators have warned employers to either ignore arrest information altogether or to use it merely as a basis to ask applicants for more detail about the events surrounding the arrest. That an arrest occurred, without more, is not evidence of criminal conduct. The EEOC has long cautioned that the use of arrest information to screen applicants may have a discriminatory impact because minorities are arrested at a disproportionately higher rate. In short, carefully consider the value of arrest records as part of the hiring assessment against the risk of misuse of this information.

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.

The EEOC and a number of states have set a high bar for employers who wish to consider credit history during the hiring process. For those employers that decide to begin or continue using credit history information during hiring, we recommend the following steps:

- 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.

QUESTION NO. 2: DO YOU HAVE VALID REASONS TO CONDUCT 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: 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 customer property or to customers in an unsupervised setting such as a test or demo ride?
- are there specific state or federal standards that prohibit you from hiring individuals with a certain criminal history?
- do employees make decisions about or have access to confidential customer, employee, or company (non-public) information, including financial information, inventory, cash or an equivalent, or company credit?

If the answer to any of these questions is yes, then the duties, environment, or customers that are unique to these positions may create a need to protect the customer, employees, the public and the company from workplace violence, injury, abuse, fraud and theft. While not exhaustive, these questions should be a guide for reviewing each job position and assessing which ones will have an underlying business reason for conducting a criminal-background or credit screen.

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

In the background-check world, negative information that comes back puts you 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 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 receptionist 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 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; and
- 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 the 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 are part of its E-RACE (Eradicating Racism and Colorism from Employment) initiative. The E-RACE initiative is a program dedicated to strengthening the "EEOC's efforts to ensure workplaces are free of race and color discrimination." One of its specific goals is the development of 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.

Dealerships and other employers likely will and should continue to conduct criminal-background checks on applicants. With the E-RACE initiative and other enforcement actions, dealerships and other employers must strike a balance between protecting their customers, employees, the public, and the company and maintaining a meaningful and legally-defensible criminal-background check policy. With a little effort, that balance can be reached.

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