

## **CRIMINAL AND CREDIT BACKGROUND CHECKS**

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Employers conduct criminal and credit background checks for many reasons when hiring employees. Clear criminal background checks and strong credit reports are reliable indicators of an employee's being productive and reliable in the workplace. However, an employer's use of this information can expose an employer to liability. An employer should be aware that the Equal Employment Opportunity Commission ("EEOC") has provided guidance on avoiding discrimination in utilizing criminal record checking. If an employer credit checks an employee, it is bound by the Fair Credit Reporting Act if it uses a third-party to perform the credit check.

### **Criminal Background Checking**

The EEOC enforces Title VII as it relates to employment discrimination based on race, religion, national origin, gender, age, or disability. Among other claims, the EEOC investigates disparate treatment and disparate impact claims as related to the use of criminal background checking. Disparate treatment means an employer intentionally treats minority candidates differently. If the EEOC were to investigate a disparate treatment claim related to criminal background checking, it would be looking for evidence that criminal history was used against these minorities in hiring or promotion. Use of criminal background checks could also show disparate impact. Disparate impact means an employer has a procedure regarding background screening that, while unintentional, results in a negative impact on hiring or promotion of minorities.

Therefore, the EEOC provides guidance to help employers prevent disparate treatment or disparate impact issues in hiring decisions. First, the EEOC makes a distinction between an arrest and a conviction on a criminal record. Both appear on criminal background checks. The EEOC opines that an arrest does not establish criminal conduct; however, the conduct related to the arrest may justify the decision not to hire. Therefore, for any arrest appearing on a criminal record, an employer should conduct a fact-based investigation regarding that conduct. A conviction on a criminal record check, however, means that the charges have resulted in a finding of guilty on the criminal charge.

The EEOC provides the following factors for assessment of an arrest or conviction: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and the completion of any sentence; and (3) the nature of the job sought as related to the offense or the conduct. If there is a close connection between the job sought and the nature and gravity of the offense, it is reasonable to not to hire the prospective employee. For example, it is a completely reasonable to refuse to hire a person who has a theft conviction for a bookkeeping position.

### **Credit Report Checking**

When using a credit check in hiring decisions, the employer must follow the Fair Credit Reporting Act (the “Act”). In the Act, a “consumer” is defined as a job applicant or an employee. The Consumer Reporting Agency (“CRA”) is the third-party who, for a fee, provides credit information.

If the employer utilizes a CRA to obtain a credit report, the employer must follow certain steps: (1) the credit check must be for a permissible purpose, an employment purpose; (2) the employer must make disclosures to the employee and obtain a signed consent to perform the credit check; (3) the employer must be notify the employee of any pre-adverse action; (4) the employee must be given a reasonable time to explain the negative information on the report; and (5) the employer must provide a final adverse action notice to the employee.

The disclosure must be in writing and given to the consumer in a clear and conspicuous manner before the report is obtained. The disclosure must contain the statement, “If the employer takes adverse action based in whole or part on the report it will provide the consumer with a copy of the report and a summary of rights.” The disclosure must further state that the employer will not use the information obtained in violation of equal employment opportunity laws or regulations. The consent has to be signed by the employee before the report is obtained and the consent can be part of the written disclosure.

If the credit report has negative information and the employer is contemplating refusing to hire the employee based on the information, then the employer must provide the employee a pre-adverse action notification. The pre-adverse action notification must include a copy of the report, a summary of rights, and an opportunity for the employee to dispute, correct and explain the negative information. The employee has five (5) business days to dispute, correct or explain

the negative information to the employer. If, after the explanation, the employer ultimately decides not to hire the employee, the employer must provide a final adverse action notice. The final adverse action must have the following contents: (1) the name, address and phone number of the CRA who provided the report, including a toll-free number if a nationwide agency; (2) the CRA did not make the adverse employment decision; (3) the CRA cannot give specific reasons why the adverse action was taken; (4) the consumer has the right to dispute the information in the CRA; and (5) the consumer, within sixty (60) days, has a right to obtain a free copy of the entire report from the CRA.