

Be Careful When Conducting Credit Checks

EMPLOYERS LOOKING INTO APPLICANTS' PAST CAN RUN AFOUL OF EEOC

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In our digital world, obtaining a person's credit history is an easy and inexpensive undertaking. Thus, it is unsurprising that more employers are running credit checks on job applicants as part of their screening process – 60 percent, according to the Society for Human Resource Management.

Credit checks are often used to confirm information contained in a résumé, or to gauge a candidate's anticipated trustworthiness. There is also a perception, particularly within the financial sector, that given financial pressures, an employee with a poor credit history is more likely to commit fraud or theft on the job.

This theory is not unfounded. The Association of Certified Fraud Examiners has found that fraud in the workplace is most often committed by employees living beyond their means or with financial difficulties.

Meanwhile, our faltering economy has had a detrimental impact on people's credit histories. Due to late payments or inactivity, banks and lenders are closing credit card accounts and reducing credit lines at historic rates. Widespread foreclosures have also taken a toll on consumers' credit. Even those with a history of good credit are now facing declining credit scores because of a few occasional missed payments.

There is a perception that many of these financial troubles are consequences of uncontrollable economic circumstances, causing some to question the fairness of

the use of this information in employment decisions. Responding to these concerns, governmental entities have recently taken measures to prevent companies from relying too heavily on credit reports.

Disparate Impact

For years, the Equal Employment Opportunity Commission has taken the position that the use of credit checks in employment decisions has a disparate impact on African Americans. Once the economy began to decline, the agency became more aggressive in trying to curb this inequity. At a public meeting within the last couple of years, there was testimony that questioned the efficacy of using credit checks as a screening tool, and suggested that alternative tests, like personality tests, could provide the same information. In December, the commission filed a highly publicized discrimination action against Kaplan Higher Education Corp. for denying applicants for employment based on credit checks.

State legislators have also taken action. Four states – Washington, Oregon, Hawaii, and, most recently, Illinois – have enacted laws restricting employers' use of credit checks. The laws generally prohibit covered employers from inquiring about the credit history of an applicant or an employee, or obtaining their credit reports.

Most of the laws include exceptions; under the new Illinois law, for example, employers may obtain credit reports for positions in which the employee has unsupervised access to \$2,500 in cash or equivalent

assets, management and control of the business, or signatory power over business assets. At least a dozen other states, including Connecticut, have introduced (but have not yet passed) similar legislation, as has the U.S. House of Representatives.

Beyond these new initiatives, there are several other laws employers must consider when using information obtained from credit reports to make employment decisions. For example, the Fair Credit Reporting Act requires consent and disclosure before taking an employment action based on information contained in a credit report, and the Bankruptcy Code prohibits employers from discriminating against employees who file for bankruptcy.

Business Necessity

In light of the government's increased scrutiny, employers should proceed with caution when making employment decisions based on credit histories. The EEOC has said that an employer taking action must demonstrate that a credit check is job related for the position in question and



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consistent with business necessity, and must validate the connection between the credit report and the position in question.

It appears the EEOC considers this a high burden to meet. Several courts, however, have recognized that credit checks are appropriate for certain positions, for example those in which handling money is integral to the job.

What measures should employers take to avoid being targeted by the EEOC or running afoul of the law? If a credit check discloses problematic information, an employer should ensure that no decision is made based on an impermissible reason.

For example, employers should be careful when making decisions based on information that has been found to have a disparate impact on minorities, and no employment decisions should be based on bankruptcy filings. It should be noted, however, that individuals who file for bankruptcy may have other information in their credit histories on which decisions can be made.

Employers should also carefully evaluate whether the credit information bears a relationship to the position being filled. If an employee does not have access to cash or other valuables, there may be no legitimate basis for relying on negative credit history.

On the other hand, if poor credit or financial pressures could put the organization at risk, it would be helpful to create a job description that makes the risk clear.

Finally, employers should consider speaking directly to the applicant or employee about the problematic credit report. A conversation might shed light on whether the problem is a result of an isolated incident relating to the economy or symptomatic of a larger issue relating to the employee's character. Additionally, as with many employment matters, a well-documented investigation is always a good defense in litigation. ■