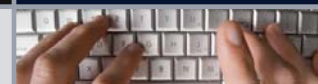




Labor & Employment

Alert



The EEOC's Renewed Interest in Applicant Screening on the Basis of Credit and Criminal Histories

BY MICHAEL C. LORD

Employers have legitimate concerns about workplace security, safety, violence, and liability. In the absence of a clear federal prohibition, many prospective employers ask job candidates to either disclose their arrests and criminal convictions, or permit a criminal background search as part of the application process and consistent with the requirements of the Fair Credit Reporting Act. The request is usually accompanied with the disclaimer that any arrest or conviction will not automatically disqualify the applicant for the position. Rather, an employer should reject an applicant who cannot be trusted to perform the duties of the position when considering the nature of the job, the nature and seriousness of the offense, and the time that has passed since either the arrest or the conviction. In addition, many prospective employees are asked to allow a background investigation into their credit and financial histories.



Michael C. Lord

The EEOC has recently turned to litigation as a means to supplement its power to issue guidance on the use of these neutral selection tools. In a federal lawsuit filed in October 2009, the EEOC charged that a nationwide convention, exhibition and corporate events marketing company had engaged in a pattern or practice of unlawful

discrimination by refusing to hire a class of African American, Hispanic, and male job applicants across the United States. The agency took issue with the company's practice of rejecting job applicants based on their credit history, and if they have had one or more of various types of criminal charges or convictions. According to the allegations, the selection criteria has an unlawful discriminatory impact because of race, national origin, and sex, which are not job-related and consistent with business necessity, and for which there exist less-discriminatory alternative selection procedures. In order to prove its allegations of "disparate impact" discrimination, the EEOC will have to show through statistical analysis that the practice disproportionately excludes African American, Hispanic and male applicants. If the EEOC meets this evidentiary hurdle, then the company must justify the selection criteria as "job-related and consistent with business necessity" with proof, such as the qualification standards are accurate predictors of the safe and efficient performance of the jobs.

As the need for labor increases, employers must be mindful of relying on criminal and credit histories when making hiring decisions. The prudent employer will anticipate and define what type of results from these histories would disqualify an applicant for a given position, and record the rationale for that assessment. For example, a ten-year old moving violation should not necessarily disqualify an applicant for a data

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entry job. Conversely, a three-year old conviction for embezzlement should raise a red flag about a candidate for a controller position. Once both the selection criteria and cutoffs are established, the employer should narrow the scope of the information requested as part of the background investigation. Then the employer should follow the policy during the recruitment process. In the perfect world, the employer will effectively identify which applicants are most qualified for a particular job and avoid litigation.

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