

HOW MUCH INFORMATION IS TOO MUCH?

Use of Credit and Background Checks in Employment Decision-Making

By Colleen Zahn

Many employers, as part of their regular hiring process, obtain an applicant's authorization to allow the employer to obtain a copy of the applicant's credit report at any time during the application process or subsequent employment. Employer use of credit reports when making employment decisions is an area of increased scrutiny by the EEOC. The EEOC has conducted hearings on the use of credit reports and is examining whether additional federal regulations should be adopted restricting the use of such background checks in the employment context. Knowing the required disclosures, lawful uses and limitations on the use of credit reports will help you avoid at least one potential basis for a possible discrimination claim.

What types of reports are covered by federal law?

The Fair Credit Reporting Act ("FCRA") regulates the use of credit reports and investigative credit reports, including in connection with employment. To understand how this law applies to your business, you first have to understand the two types of reports covered by the Act.

The first type is a "consumer report." It includes any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used, or expected to be used, or collected in whole or in part for the purpose of serving as a factor and establishing the consumer's eligibility for employment-related purposes.

The second type is an "investigative consumer report." It is only slightly different. While it includes primarily the same information as a consumer report, additional information is obtained through personal interviews with neighbors, friends or associates of the consumer, or others with whom the consumer is acquainted or who may have knowledge concerning any such items of information. Information in consumer reports, on the other hand, is primarily gathered through public records and reports received from creditors.

It is important to note for purposes of federal liability that the definitions of consumer report and investigative consumer report are broad enough to include both credit information and criminal history information relating to a consumer's character or reputation.

When does the Fair Credit Reporting Act apply in employment situations?

The FCRA only applies when you obtain information from a "consumer reporting agency." A consumer reporting agency includes any person who, for monetary fees, dues or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of

assembling or evaluating consumer credit information or other information for the purpose of furnishing consumer reports to third parties. The Act applies when a consumer report is used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

Federal law requires disclosures and written authorization be obtained from the consumer before obtaining a report.

The FCRA provides that a consumer reporting agency may furnish you with a consumer report for employment purposes only if you made a clear and conspicuous disclosure in writing to the applicant before the report is obtained. The disclosure must be provided in a document consisting solely of the disclosure and stating the consumer report may be obtained for employment purposes. The consumer must also give written authorization to the employer to obtain the report. The written authorization may be on the same form as the disclosure.

If you intend to take any adverse action based on information contained in the report, you must, before taking any adverse action, provide the applicant a copy of the report and a description in writing of the consumer's rights under the FCRA. A copy of the written description of rights should be provided to you, the employer, by the credit reporting agency that provided the consumer report. The Act defines adverse action to include a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

Further, after adverse action is taken based on information contained in a consumer report, you must provide oral, written or electronic notice of the adverse action to the applicant and to provide the consumer the name, address and telephone number of the consumer reporting agency that furnished the report and a statement that a consumer reporting agency did not make the decision to take adverse action and is unable to provide the applicant the specific reasons why the action was taken. This disclosure can be made orally, in writing or electronically,

The Act also addresses the inclusion of medical information in consumer reports for employment purposes. Medical information may not be in a report for employment purposes unless the information is relevant to the employment and the applicant provides specific written consent for the disclosure of medical information. The written consent must describe in clear and conspicuous language how the medical information will be used.

A consumer report provided to an employer in connection with an investigation of suspected misconduct relating to employment, is not considered a "consumer report" under the Act if: (1) the report is not used for the purpose of investigating the consumer's creditworthiness, and (2) the report is not provided to any person except the employer, the agent of the employer, or several other limited categories of individuals. If you take adverse action based in whole or in part on a consumer report provided in connection with an employment investigation, you are required to disclose to the applicant a summary containing the nature and substance of the information upon which the adverse action is

based, except that the sources of information for an investigative consumer report need not be disclosed.

The Federal Trade Commission has its own regulations governing destruction of credit reports.

The Federal Trade Commission (“FTC”) adopted rules governing the disposal of consumer report information. They apply to employers and require disposal practices that are reasonable and appropriate to prevent the unauthorized access to or use of information in a consumer report. Employers may meet their obligations under this rule by either: (1) burning, pulverizing or shredding papers themselves; (2) destroying or erasing electronic files or media containing consumer report information; or (3) conducting due diligence **and** hiring a document destruction contractor to dispose of the material specifically identified as consumer report information. According to the FTC, due diligence when hiring a document destruction contractor could include reviewing the contractor’s operations and/or its policies for compliance with the rule, consulting references for the Company, requiring the Company to be certified by a recognized trade association, or reviewing and evaluating the Company’s information security policies or procedures.

States are also beginning to regulate employer use of credit reports.

Although Idaho has not yet adopted statutes or regulations governing employer use of consumer reports, several surrounding states have. This is an increasing trend. Last year over eighteen (18) states introduced legislation to regulate employer use of credit reports in employment decisions. Not all passed, but a number of states have passed such laws, including Oregon and Washington. Given the large number of states introducing legislation to regulate employer use of consumer reports and credit histories, employers should keep a close watch on the state legislatures where they do business to ensure there are no laws passed that affect their use of such information for employment-related purposes.

Federal limitations on employer use of criminal history information in employment decision-making.

There are no federal laws that expressly prohibit employer use of criminal history information in connection with employment-related decisions. However, the EEOC has issued policy guidance concerning the consideration of arrest records and employment decisions under Title VII of the Civil Rights Act of 1964. In that guidance, the EEOC stated that using arrest records as an absolute bar to employment has a disparate impact on some protected groups, and such records alone cannot be used as the basis to routinely exclude persons from employment. However, conduct which indicates unsuitability for a particular position is a basis for exclusion. This is due to the fact that statistics have indicated that bright line rules excluding individuals from consideration based on arrest and conviction information tend to adversely affect blacks and Hispanics in numbers disproportionate to whites.

The EEOC also drew a distinction between conviction and arrest records. The EEOC stated conviction records are reliable evidence that a person engaged in the conduct alleged since the criminal justice system requires proof beyond a reasonable doubt for a conviction. In contrast however, arrest records are not reliable evidence that a person actually committed a crime. Therefore, in order to justify the use of arrest records in an employment-related decision, you must make additional inquiries.

According to the EEOC guidance, even where the conduct alleged in the arrest record is related to the job at issue, you must evaluate whether the arrest record reflects the applicant's conduct. You should therefore make additional inquiries into the circumstances surrounding the arrest, including offering the applicant or employee an opportunity to explain the arrest. If he or she denies engaging in the conduct for which he or she was arrested, you must make follow-up inquiries as necessary to evaluate the individual's credibility. Although you do not need to conduct an extensive investigation to determine guilt or innocence, you may not refuse to permit the individual a meaningful opportunity to explain the arrest. Nor may you otherwise ignore the explanation provided by the individual where the individual's claims could be easily verified by a telephone call.

You also may not routinely exclude persons with arrest records based on the assumption that an arrest record will prevent an applicant from obtaining necessary credentials to perform a job. Instead, you must give the applicant an opportunity to obtain those credentials, and not exclude the individual from consideration because of the concern that the individual may not be able to obtain the credentials.

When evaluating whether a conviction or arrest impacts the individual's suitability for a position, you must focus on the conduct, not the fact of the arrest or conviction itself. When determining whether alleged conduct demonstrates unfitness for a particular job, three factors should be considered: (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the conviction or arrest; and (3) the nature of the job held or sought. In lawsuits alleging race discrimination based on the use of arrest records as opposed to convictions, courts have also generally required a showing that the alleged conduct was actually committed, so keep in mind it will be difficult to defend an employment decision based solely on an arrest that did not result in a conviction.

The EEOC points out in its policy guidance that the Ninth Circuit and other federal courts generally presume that an employer only asks questions and seeks information which it deems relevant to the employment decision. Courts likewise presume that information obtained by the employer during the employment-related decision-making process was actually used in that process. Accordingly, you will have a difficult time arguing that criminal history information you collected was not used in the employment decision-making process.

The EEOC advises an employer may not use the fact of an arrest or a conviction as a bar to employment or promotion without further evaluating the circumstances of the conviction or arrest and how those circumstances relate to the position at issue. As such, employers should eliminate any across-the-board requirements for a clean criminal history

unless there is a compelling reason otherwise, *i.e.* many law enforcement agencies are entitled to require no felony convictions for individuals applying for law enforcement officer positions. In the absence of a compelling reason, such a qualification is likely to result in a finding of disparate impact if examined by the EEOC. Additionally, a recent conviction or arrest alone is not a sufficient reason to deny employment or a promotion to an individual. Several federal lawsuits were filed in 2010 and 2011, challenging rejection of applicants on the basis of criminal background checks, including one lawsuit filed by the EEOC, so this appears to be an area of increased scrutiny by the EEOC. Better to revise your employment policies than become the next “poster child” for an EEOC enforcement action.

You should also exercise caution if you currently use criminal history information in connection with investigation of internal policy violations. As stated previously, courts presume that employers considered and based the ultimate employment decision on all information in their possession or which was otherwise gathered during the course of the investigation. Significant concerns exist if you make decisions about internal policy violations based at least in part on an individual’s arrest and/or conviction record. A tendency to rely on this information could be seen as having a disparate impact on black and Hispanic employees. In the event the EEOC, IHRC or another state Fair Employment Practice agency investigated a charge of discrimination. It is difficult to conceive of a situation where an individual’s arrest or conviction record would have any significance unless the arrest or conviction was for the same conduct alleged to constitute the policy violation.

State law limitations on the use of criminal history information in employment-related decision-making.

Many states have adopted either state laws or policy statements restricting employer use of criminal history information in connection with employment-related decisions. In Idaho, no specific state laws have been passed, but the Idaho Human Rights Commission has issued policy guidance indicating a *per se* rejection of applicants on the basis of an arrest or conviction is unlawful. The IHRC also indicated that when evaluating criminal history information, employers need to use a three-pronged analysis similar to that adopted by the EEOC. Many other states have passed laws prohibiting the use of expunged or juvenile records in employment decision-making. As with consumer reports, employers should take care to become familiar with the state laws governing their different worksites so they take care not to unwittingly run afoul of state law.

Implementation of best practices can help avoid inadvertent discrimination and state law violations.

If employers do background checks that include credit checks, they should take care to ensure that the job position for which consumer information is being sought is a position that actually involves access to sensitive financial information. With increased scrutiny by the EEOC and increased state legislation, employers should carefully consider which positions they require consumer reports for.

Going a step further, employers would also be wise to evaluate whether it even wants to request authorization from applicants to obtain consumer reports. The concern is that if an individual authorizes such disclosure, and the employer obtains that information, there will be a presumption that the employer relied on that information in making employment-related decisions. If the applicant authorized the collection of information of which state law prohibits consideration, the employer could find itself facing an inadvertent violation of state law. Employers should avoid creating an opportunity to obtain a credit report when there's no valid reason to obtain a credit report for the job at issue.

Employers should also develop a checklist to ensure that when consumer report information is requested and obtained, that the proper disclosures are given and the proper written authorizations obtained. Employers should also develop checklists and processes for the proper destruction of consumer information obtained concerning current or prospective employees.

With regard to criminal history information, there is no federal prohibition against collecting this information, except in the instance of sealed or expunged criminal records, and only then in certain states. However, employers should discontinue internal policies requiring a clean criminal history as a requirement for promotion or hiring. Instead, employers should conduct a case-by-case inquiry in the instance of an arrest or conviction, and determine whether the arrest or conviction is reasonably related to the position at issue. This analysis needs to take into account a recent arrest or conviction, the nature and gravity of the arrest or conviction, and the nature of the position held or sought.

By taking the time to really think about whether you need consumer information as part of your hiring process, you may be able to eliminate a potentially significant area of liability. If you do determine you wish to continue using consumer reports in your decision-making process, taking the time to develop standard practices will be time well spent. By minimizing or perhaps even eliminating liability for unwitting violations of federal and state law, you can save your business valuable time and resources.