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PERSPECTIVE

# The Tricky Business of Background Checks

Twenty-three years ago, the Equal Employment Opportunity Commission issued two policy statements addressing this issue: Can employers conduct criminal background investigations without violating their non-discrimination policies?

The answer presents few bright lines. However, the potential discriminatory effect of background investigations is litigated now more than ever, boosted by the post-9/11 real or perceived need for heightened security and the increasing threat of workplace violence. The U.S. Supreme Court may soon decide a case involving the scope of permissible background investigations, and there are numerous pending lawsuits alleging that background investigations are inherently discriminatory against Latinos and African Americans.

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In February 1987, the EEOC issued its *"Policy Statement on the Issue of Conviction Records."* It explained the agency's basic position "that an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population." The Commission concluded that such a policy or practice is unlawful under Title VII in the absence of a "justifying business necessity."

The Commission put the burden on employers to show that it considered three factors in a justifying business necessity: The nature and gravity of the offense(s); the time that has passed since the conviction and/or completion of the sentence; and the nature of the job held or sought.

Thus was born the employment law mantra that criminal history investigations must be "job-related and consistent with a business necessity" (a rule now expanded to include credit checks). For example, a Pennsylvania statute permits rejection of applicants for felony and misdemeanor convictions "only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." Applying the law, a federal court held that a Pennsylvania public transit employer could automatically disqualify candidates for driver positions convicted of violent crimes who would routinely interact with disabled people, because the employer was obliged to ensure the safety of its passengers. Nothing in the mantra, however, is meant to preclude employers from checking criminal and other records. In fact, employers in some sectors, such as health care, financial services, child care, public schools and security guard services, are typically required by state law to conduct criminal history checks.

In July 1987, the Commission issued a related *"Policy Statement on the Use of Statistics in Charges Involving the Exclusion of Individuals with Conviction Records from Employment."* It provided employers with the opportunity to present statistics to show that either Blacks or Hispanics are not convicted at a disproportionately greater rate than non-minorities, or that there is no adverse impact in their hiring process resulting from a convictions policy.

In contrast to the Commission's assumptions, the *Journal of Law and Economics* published a recent study finding that employers who consistently perform criminal background checks are more likely to hire African American applicants than those who do not. The study found that, absent the criminal background check, employers adverse to hiring convicted offenders may use race to infer criminal activity and are reassured when they do not find it.

Whether intentionally or not, the Fair Credit Reporting Act and its state counterparts have assisted minority applicants by requiring that employers give prior notice of background checks and obtain the applicant's consent before relying on the report to take adverse action; provide the applicant with a copy of the report; and give the applicant the opportunity to dispute information contained in the report with the reporting agency. However, there are unresolved questions relating to the application of the FCRA requirement to searches conducted on the Internet.

Let's assume Human Resources receives a job application. The candidate looks great. What better way to get more details - good and bad - about the applicant than to use the vast resources of the Internet. Google, Facebook, MySpace - all of these are great data banks at your command! A June 2010 survey by JobVite reported that 92 percent of companies hiring in 2010 currently use, or plan to recruit through, social media sites.

Problems posed by such searches are serious. For example, the information posted on such sites typically is intended only for social, not business, purposes because false and misleading information can be posted, its reliability can be questionable at best; and even if the posted information is true (e.g., historical information about Nazism), someone other than the applicant might have been responsible for posting it.

In addition, Internet searches can be used to support claims of discrimination or invasion of privacy if they reveal information that a prospective employer is not legally permitted to explore, such as arrest records, gender, gender identity, genetic information, sexual orientation, race, color, national origin, marital status, and disability. California law prohibits asking an applicant about arrest records and specifically prohibits getting such information "from any source whatsoever" — a prohibition apparently so broad that it would appear to include Internet searches. To complicate matters further, many states including California, have laws that protect individuals against adverse action based on certain types of lawful conduct, such as political activity or consumption of tobacco products.

The FCRA and comparable state laws pose other potential Internet search problems. While it is clear that the FCRA requires employers to

obtain written consent from applicants before hiring a background check company to conduct background checks, no court has yet addressed whether the FCRA applies to a recruiting company's checking out a candidate's social networking pages.

So, given the lack of clarity in the law, how can employers fulfill their responsibility to provide a safe, secure workplace and protect their own business interests, while at the same time avoid discrimination claims (and others, such as defamation and invasion of privacy)?

One suggestion is to secure the written authorization for Internet searches on the job application. Employers may want to add a disclaimer to the effect that refusing to authorize an Internet/electronic media search will not result in the automatic rejection of a candidate's application, as well as a confirmation of their firm commitment to nondiscrimination and equal employment opportunity. In addition, an employer should be consistent in conducting Internet searches — picking and choosing among applicants for any reason could expose the employer to a discrimination claim.

Even these precautions may not save the day in every case for employers who "back door" their investigations through the Internet. California law prohibits employers from searching sex-offender registers for the purpose of making employment decisions, except to protect a "person at risk," which is not clearly defined in the law. Also, background check companies in California may not report felony convictions more than seven years old. It is unclear whether these prohibitions may be waived.

"Ban-the-box" legislation — prohibiting employers from requiring applicants to check a box if they have, for example, a criminal history — is becoming more prevalent. In 1998, Hawaii became the first state to "ban the box" by prohibiting both public and private employers from asking about an applicant's criminal history until after a conditional offer of employment has been made. In August 2010, Massachusetts followed suit with certain exceptions, but it applies only to the initial written application form. (Some states, such as Oregon and Illinois, are expanding the ban-the-box to credit histories.)

Many cities are going beyond ban-the-box to actually promote hiring people with criminal records (with certain exceptions). In their July 2, 2010 report, *"Cities Pave the Way: Promising Reentry Policies that Promote Local Hiring of People with Criminal Records,"* the National Employment Law Project and the National League of Cities cited a particularly comprehensive project labor agreement negotiated by the Los Angeles' Community Redevelopment Agency that promotes hiring disadvantaged workers, including those with criminal records, on development projects subsidized by public funds.

On the other hand, a relatively new issue for minorities is the increasing demand by businesses — especially in highly regulated industries — to require their vendors to certify that employees who work on their accounts have successfully completed a background check and even a drug test. Such requirements can be a nightmare for vendors who want to keep their customers but who may never have conducted a background check on any of their employees, let alone subjected them to drug testing.

Performing background investigations has become a billion dollar industry, presenting very disparate levels of quality and professionalism, which may translate into relaxed vigilance regarding potential illegal or discriminatory practices by background companies to the detriment of both applicants and employers. The National Association of Professional Background Screeners can now certify background investigation companies and it may be worthwhile in the long run for employers to use only certified screeners.