

Employers Beware: Use of Background Checks in the Hiring Process

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Background checks in the employment context have increasingly come under fire. In April, an applicant for a bus driver position filed a class action lawsuit against Southeastern Pennsylvania Transportation Authority (SEPTA) after he was disqualified due to a 20-year-old drug conviction. The lawsuit, *Long v. Southeastern Pennsylvania Transportation Authority*, 2:16-cv-01991 (E.D.Pa. April 27), reenergized the debate about the legality of background checks and the relevance of an applicant's criminal history.

The U.S. Equal Employment Opportunity Commission (EEOC) has addressed the issue at length, including most recently in 2012, when it issued guidance for employers in response to alarming statistics that conviction and incarceration rates were disproportionately high for certain protected classes. The guidance addresses Title VII implications on the usage of criminal history and provides employers with best practices for complying with the law and avoiding liability.

The city of Philadelphia has taken affirmative steps to address the propriety of background checks in its "Ban the Box" ordinance, which was amended effective this year. Ban the Box provides that employers cannot inquire into an applicant's criminal history until after a conditional offer of employment has been made. Unless the criminal history report reveals actual convictions for a misdemeanor or felony that would impact the essential duties of the job at issue, the employer cannot rescind the offer.

The city has also recently adopted measures to restrict the use of credit reports in the hiring process by amending the "Fair Practices Ordinance: Protections against Unlawful Discrimination," to impose additional requirements on employers regarding the use of credit reports in assessing job applicants. The amendments to the Fair Practices Ordinance intersect with the requirements set forth in the federal Fair Credit Reporting Act (FCRA), which is at the heart of Long.

Other restrictions on using the information obtained during a background investigation can be found in Pennsylvania's Criminal History Record and Information Act (CHRIA).

EEOC Guidance

In April 2012, the EEOC issued enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e. Title VII prohibits employment discrimination based on race, color, religion, sex, or national origin. The guidance focuses on discrimination based on race and national origin in response to statistics that reveal "particularly high" arrest and incarceration rates for African-American and Hispanic men. The guidance identifies two prohibited types of discrimination: disparate treatment and disparate impact. Disparate treatment occurs when an employer demonstrates that the employer treated an individual differently because of race, national origin, or another protected class.

Disparate impact is where an employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with an identifiable

business necessity. The first step in disparate impact analysis is to identify the particular policy or practice that causes the unlawful disparate impact. For criminal background checks, relevant information includes applicant data, general workforce data, criminal history check data, demographic statistics, incarceration or conviction data, and relevant labor market statistics. Employers should be consistent in conducting background checks and using information collected from background checks, otherwise employers can be found liable for discrimination under Title VII.

Once a plaintiff establishes disparate impact, the burden shifts to the employer to "demonstrate that the challenged practice is job related for the position in question and consistent with business necessity," as in *El v. Southeastern Pennsylvania Transportation Authority*, 479 F.3d 232 (3d. Cir. 2007).

The EEOC identifies two circumstances in which employers "consistently" meet the business necessity defense: where the employer utilizes the uniform guidelines on employee selection procedures to validate criminal background checks and considers the nature of the crime, the time elapsed from the conviction and the nature of the job being sought to determine whether the policy is job related and consistent with business necessity.

Ban the Box

The current Philadelphia ordinance "bans the box" by prohibiting any questions about criminal records on job applications. However, an employer may give notice, to prospective applicants or during the application process, of its intent to conduct a criminal background check after any conditional offer is made, provided that such notice shall be concise, accurate, made in good faith, and shall state that any consideration of the background check will be tailored to the requirements of the job. The ordinance does not apply to "membership in any law enforcement agency" or employment with a "criminal justice agency," which is defined as "organized state and municipal police departments, local detention facilities, correctional facilities, probation agencies, district or prosecuting attorneys, parole boards, pardon boards, and public agencies that provide care, guidance and control to adjudicated delinquents."

Employers are permitted to run a criminal background check only after making a conditional offer of employment. "Conditional offer of employment" means an offer by an employer to hire an applicant, which may be withdrawn only if the employer subsequently determines that the applicant has a conviction record which, based on an individualized assessment, would reasonably lead an employer to conclude that the applicant would pose an unacceptable risk in the position applied for; or does not meet other legal or physical requirements of the job. Employers are allowed to reject applicants based on a criminal record only if the employer concludes that the person would be an unacceptable risk to the operation of the business or to co-workers or customers, and that exclusion of the applicant is compelled by business necessity.

Federal FCRA and Philadelphia Fair Practice Ordinance

The Fair Credit Reporting Act was passed by Congress to address the related concerns: that consumer reports were playing a central role in people's lives at crucial moments, such as when they applied for a job or credit, or when they applied for housing; and that despite their significance, consumer reports were unregulated and prone to widespread errors and inaccuracies. Normally, background checks procured for employment purposes fall within the FCRA's definition of "consumer report," 15 U.S.C. Section 1681b(B)(2)(A)(i). The recently filed class action, Long, uses FCRA to bring a fresh challenge to the propriety of background checks in the hiring process.

On June 7, Philadelphia Mayor Jim Kenney signed Philadelphia Bill No. 160072, which amends the Philadelphia "Fair Practices Ordinance: Protections Against Unlawful Discrimination," making it unlawful, for employers to procure or use an applicant's or employee's credit history for employment purposes. This includes any decisions made in connection to an applicant's hiring.

The ordinance provides for limited exemptions on using credit information for employment purposes. The prohibition on credit reports does not apply to law enforcement agencies, financial institutions, or the city of Philadelphia when it is collecting taxes or other debts owed to the city. Additionally employers may take adverse action against an individual in the following job categories: jobs requiring the employee to be bonded under city, state, or federal law; jobs that are supervisory or managerial in nature and involve setting the direction or policies of a business or a division, unit or similar part of a business; jobs involving significant financial responsibility to the employer, including the authority to make payments, transfer money, collect debts, or enter into contracts, but excluding jobs that involve handling retail transactions; jobs requiring access to financial information pertaining to customers, other employees, or the employer, other than information customarily provided in a retail transaction; jobs requiring access to confidential or proprietary information that derives substantial value from secrecy. Employers that take adverse action under the preceding categories must provide the individual, in writing, of the reason for use of credit information and the specific credit information relied upon by the employer. Then, the employer must allow the individual to explain the circumstances of the information at issue.

Criminal History Record Information Act

Pennsylvania's Criminal History Record Information Act (CHRIA), 18 Pa. Cons. Stat. Ann. Section 9125(b), provides that "felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." CHRIA only applies to hiring decisions, not the termination of a permanent employee. CHRIA requires that the "employer shall notify in writing the applicant if the decision not to hire the applicant is based in whole or in part on criminal history record information," 18 Pa. Cons. Stat. Ann. Section 9125(c).

With the use of background checks in the employment process under increased scrutiny, employers should proceed cautiously and ensure that background checks are conducted consistently and utilized as the result of legitimate business necessity.

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