

Investigating Prospective Employees in the Information Age

Can employers still do background checks? If so, what sort of information can they uncover without violating an employee's rights?

One question that employers like to ask is what type of investigation they can do regarding a potential employee. Generally, employers can conduct whatever investigation the potential employee authorizes them to conduct. However, employers still need to be careful when using background checks that reveal a potential employees' credit history or criminal background. Two recent class actions alleging that employers' use of background checks violated the Civil Rights Act highlight the importance of creating policies to ensure that background checks are not used in a discriminatory manner.

In November 2010, a class action was filed against the University of Miami alleging that it conducts background checks that discriminate against African Americans and Latinos. The lead plaintiff, Loudy Appolon, interviewed for a senior medical collector position with the University of Miami, Miller School of Medicine in June 2009. She was offered the position, but the day before she started her new job, the university informed her that she would not be hired because of her credit history. The lawsuit alleges that the university violated Title VII of the Civil Rights Act by rejecting or firing qualified individuals because of their credit background, even though credit history does not predict employment performance.

The plaintiffs claim that there is no correlation between credit history and job performance or trustworthiness and that credit reports are often inaccurate. Sarah Crawford, an attorney from the Lawyers' Committee for Civil Rights Under Law, has stated that "[t]he University of Miami's policies and practices are illegal because they adopt and perpetuate the racial disparities in the credit system. We see this problem occurring in private and public employment across the country, despite the fact that employers, credit reporting agencies and researchers have found no link between credit history and job performance." Crawford testified about the discriminatory effects of credit checks at an Oct. 20, 2010 hearing before the Equal Employment Opportunity Commission.

In April of this year, a separate class action was filed in a New York federal court against management consulting firm, Accenture, alleging that the company's practice of conducting background checks discriminated against African Americans and Latinos. This lawsuit involves investigating potential employees' criminal histories. The lead plaintiff, Robert J. Arroyo, alleges that he worked as a contract technical support employee for Accenture for nearly a year and a half until the company offered him a permanent position subject to the results of a background check. The background check revealed that Arroyo had been convicted a decade earlier of a vehicular homicide while driving intoxicated. Accenture withdrew its offer and terminated Arroyo.

The plaintiffs argue that Accenture violated Title VII of the Civil Rights Act of 1964 by rejecting or firing qualified individuals who have criminal records even when the criminal history has no bearing on the

individual's fitness or ability to perform the job in question. The plaintiffs claim that according to the U.S. Department of Justice, about 17 percent of adult black males and almost 8 percent of Latino males have been incarcerated, compared with only 2.6 percent of white males. The complaint alleges that because of the statistical disparities, restrictions on hiring individuals with criminal records have a far more severe effect on African-Americans and Latinos than on whites. The complaint further alleges that under the Civil Rights Act, the use of criminal history can be considered only where the employer can prove that the particular crime at issue is related to the particular job in question and that denial of a position is necessary for the employer to conduct its business.

The question remains as to what an employer may utilize when testing and selecting employees. For now, it is best to follow the guidelines provided by the EEOC, which include the following:

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability.
- Employers should ensure that employment tests and other selection procedures are properly validated for the positions and purposes for which they are used. The test or selection procedure must be job-related and its results appropriate for the employer's purpose. While a test vendor's documentation supporting the validity of a test may be helpful, the employer is still responsible for ensuring that its tests are valid under the Uniform Guidelines on Employee Selection Procedures.
- If a selection procedure screens out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure. For example, if the selection procedure is a test, the employer should determine whether another test would predict job performance but not disproportionately exclude the protected group.
- To ensure that a test or selection procedure remains predictive of success in a job, employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly.
- Employers should ensure that tests and selection procedures are not adopted casually by managers who know little about these processes. A test or selection procedure can be an effective management tool, but no test or selection procedure should be implemented without an understanding of its effectiveness and limitations for the organization, its appropriateness for a specific job, and whether it can be appropriately administered and scored.



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