Use of Criminal Background and Credit Checks in Employment

Federal courts and the U.S. Equal Employment Opportunity Commission (“EEOC”) are doing battle over the proper standards to apply when a company used an individual’s arrest and conviction record in employment decisions. While this creates an interesting legal discussion, companies are left with little to no new guidance on how to mitigate the legal risks associated with common use of criminal and credit checks in making a wide range of employment decisions.

This CHRO guide provides a summary of the positions taken by the EEOC and the litigation claims that the EEOC has filed against employers in the Federal courts. We also provide practical guidance to assist companies in developing and implementing compliant policies and procedures for using criminal background and credit investigations in employment decisions.

BACKGROUND DISCUSSION
Use of Criminal History Information May Violate Title VII. There are two ways in which an employer’s use of criminal and credit check information may violate Title VII of the Civil Rights Act (“Title VII”), which prohibits discrimination in employment.

1. Title VII prohibits the disparate treatment of job applicants and employees by prohibiting differential use of criminal records because of an individual’s race, color, religion, sex, or national origin.

2. Title VII prohibits disparate impact discrimination which results from generally facially neutral policies that have a disparate impact on a particular protected class.

Most of the EEOC’s recent enforcement focus has been on systemic, “pattern and practice” disparate impact discrimination. Because the statistics show that criminal background checks may disproportionately affect minorities—typically African Americans or Hispanics—EEOC is taking the position that exclusions based on criminal records operate to disproportionately and unjustifiably exclude people of a particular protected class (disparate impact discrimination), even where employers apply criminal record and credit history exclusions uniformly.

Renewed Agency Interest in Background Checks. In April 2012, EEOC published updated guidance (note, that the guidance was not a regulation) for employers on using arrest and conviction records in employment decisions, stressing that the use of such information should be job-related and consistent with business necessity. The U.S. Department of Labor’s Office of Federal Contract Compliance Programs (“OFCCP”)—which enforces federal contractors’ nondiscrimination and affirmative action obligations—then issued Directive 306 in January 2013, largely mirroring the EEOC guidance. The guidance from both Agencies adopts very narrow interpretations on when employers properly can consider arrest records. For example, the Agencies state that an arrest record standing alone may not be used to deny an employment opportunity, and that the employer must examine the conduct underlying the arrest in making any employment decision.
The EEOC began its campaign against the use of criminal background checks in the hiring process long before issuing the revised guidance. In 2009, the EEOC brought suit in federal court in Maryland against the Freeman Co., a nationwide event planning company, claiming that its use of criminal background and credit checks resulted in a disparate impact against protected class members in violation of Title VII. In December 2010, EEOC brought a similar lawsuit against Kaplan, an educational and training company, in federal district court in Ohio, alleging that Kaplan’s use of pre-employment credit checks had an unlawful disparate impact on protected class members in violation of Title VII.

In an effort to step up its enforcement focus, the EEOC recently made extensive announcements that it was filing additional litigation claims, including most recently two suits against “household name” companies—Dollar General and BMW Manufacturing Company (“BMW”). In both cases, EEOC claims that the companies’ use of criminal background checks has disproportionately screened out African-American job applicants. Each lawsuit alleges that the criminal background check policy of the company has a disparate impact on African-Americans in violation of Title VII, and in each EEOC seeks back pay and injunctive relief to prevent future discrimination of employees and applicants.

Federal Courts Doubt Validity of EEOC Restrictions. To date, the federal courts, however, have not been impressed by the EEOC’s litigation claims. Issuing a significant blow to the EEOC, on August 9, 2013, U.S. District Judge Roger W. Titus (District of Maryland) dismissed the Freeman case holding that the EEOC did not establish that the company discriminated against African-American applicants by using criminal background or credit checks in its hiring process. After several years of litigation, Judge Titus ruled for the employer and concluded that EEOC did not show that Freeman discriminated against black applicants or other protected individuals. The court was clearly frustrated by the EEOC’s over reach in its litigation claims, concluding that “[t]he story of the present action has been that of a theory in search of facts to support it.” The Judge found that Freeman’s use of criminal checks “appears reasonable and suitably tailored to its purpose of ensuring an honest workforce,” and he was very critical of the government’s expert testimony, whose conclusions were “completely unreliable.”

The Freeman ruling is the latest in a series of rulings chipping away at the EEOC guidance. In the Kaplan case, the district court granted Kaplan’s motion to strike EEOC’s expert opinion as inadmissible under federal guidelines and then dismissed the EEOC’s lawsuit in its entirety in January 2013 without the case having to go to trial. In both Freeman and Kaplan, federal courts ruled that the EEOC was not able to make its case because, among other reasons, the Agency’s expert testimony was flawed and unreliable.

While these two recent defeats are certainly significant setbacks for EEOC, the government is clearly still focused on pursuing their aggressive enforcement agenda targeting allegedly discriminatory background check policies, as is evidenced by EEOC’s recent filings in Dollar General and BMW, both of which are still pending. Notwithstanding the two recent victories for employers, there is no indication that EEOC will ease up on its effort to attack the use of criminal and credit checks in hiring. On the contrary, these cases will likely educate EEOC in how to better pursue these litigation claims through more effective pre-litigation investigation and preparation. Ironically, the initial employer wins may result in the EEOC learning from some mistakes, and result in the Agency being capable of filing more effective challenges to companies’ use of background check in hiring. Employers must, therefore, likewise use these decisions to educate themselves on how to properly utilize criminal background investigations to minimize the risks of enforcement actions by the EEOC, OFCCP, or private class action claims.
COMPLIANCE ADVICE FOR EMPLOYERS – LESSONS LEARNED FROM RECENT DEVELOPMENTS

**A Targeted Screen Will Provide Companies With Better Candidates.** The Agencies have stated that they will consider whether the employer has developed a targeted screen that considers at least the nature of the crime, the time elapsed, and the nature of the job. The policy must provide an opportunity for an individualized assessment for those people identified by the screen, and the exclusion must be job-related and consistent with business necessity. Companies should be aware that a program focused on real business concerns will survive this standard, and will provide the employer with a slate of strong applicants and new hires since highly qualified applicants will not be erroneously screened out under a one-size-fits-all policy. Thieves can still be barred from money-handling jobs, those with DUIs can be excluded from driving positions, but a blanket policy that bars all applicants with criminal records must be examined carefully, and probably eliminated.

**Pre-employment Credit Checks Are Covered As Well.** While the Agencies’ updated guidance from 2012 and 2013 did not specifically discuss the use of credit history in hiring, the government has consistently applied the same standards to these pre-employment inquiries. Several of the litigation challenges have included claims of disparate impact against protected individuals based upon the use of credit history, and therefore the same targeted screen and individualized assessment must apply to these background checks as to those based on criminal records.

**Be Mindful of Other Laws.** Title VII does not regulate the acquisition of criminal and credit history information. However, the federal Fair Credit Reporting Act (“FCRA”) establishes several procedures employers must follow when obtaining criminal and credit history information from third-party consumer reporting agencies. In addition, state laws and local municipalities vary widely in providing additional protections to individuals related to background check inquiries by employers. Some bar questions about convictions on applications—the “ban the box” requirements that prohibit a box on the employment application asking about background information, others prohibit background checks pre-offer or impose restrictions limiting the use of such information unless the conviction “substantially relates” or bears a “direct relationship” to the job. Finally, many states require consideration of criminal records for certain jobs (e.g. police, caregivers, school teachers), so companies must be mindful of these statutes as well.

**Considerations Specific to Federal Contractors.** Federal contractors are required to collect race and national origin data as part of their compliance obligations under Executive Order 11246. Because OFCCP has easy access to this data, the government’s burden of establishing a case of disparate impact discrimination is simplified, and therefore federal contractors must be even more mindful that their policies and practices are in order. One significant issue in the Kaplan case was that the government did not have access to applicant race information because Kaplan was not a government contractor. It is certainly possible that the case would have had a very different outcome if Kaplan had been obligated to collect and produce such information. While the government has not had much recent success in establishing a disparate impact case, if it is able to do so, mounting a defense may be difficult, costly and time-consuming.

On the other hand, in certain situations government contractors have more flexibility than those companies not receiving federal funds. For example, if a government contractor is providing services on a government site that requires applicants to fulfill certain background requirements, those requirements can be incorporated into the targeted screen as a basic qualification for the position.
CONCLUSION: CHECK-LIST FOR RESPONDING TO THE GOVERNMENT’S RENEWED FOCUS ON BACKGROUND CHECKS IN HIRING

1. Blanket one-size-fits-all policies barring applicants with criminal records will not stand up to scrutiny except where authorized by federal law. Therefore companies typically should eliminate policies that automatically exclude individuals with a criminal record and must replace them with policies where the use of such information is job-related and consistent with business necessity.

2. Companies must create a sophisticated, targeted screen that considers at least the nature and gravity of the crime, the time elapsed and the nature of the job. The policy must provide an opportunity for an individualized assessment for those people identified by the screen, which must include notice to the individual that he/she was screened out because of a criminal conviction and an opportunity for the individual to demonstrate that the exclusion should not be applied due to his/her particular circumstance.

3. A centralized decision-making body must be created that makes uniform, consistent and well-documented decisions about whether a particular applicant falls within an exclusion. Determinations about how specific offenses may demonstrate unfitness for performing certain jobs, the duration of exclusions for criminal conduct, and other relevant factors for the screen may be made in advance with the assistance of a social scientist or criminologist.

4. Employers should not mention criminal history in recruitment ads/materials and should indicate on applications that a conviction will not automatically bar an applicant from employment, though employers operating in multiple states should determine whether there is local “ban the box” legislation that precludes even asking about convictions on an application.

5. Policies and procedures should be reviewed to determine whether criminal history information can be sought after a conditional offer of employment. Some states and municipalities bar background checks pre-offer and/or impose other requirements on the use of such information, and as a general rule post-offer checks appear to be more thoughtful and narrowly-tailored.

6. Government contractors must be even more mindful that their procedures are in order because OFCCP has easy access to their race and national origin data and therefore the government’s burden of establishing a case of disparate impact discrimination is simplified.