When Are Background Checks Discriminatory?

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With the economy in disarray, employers increasingly are using criminal background checks and credit reports to narrow their application pools. Approximately three out of four U.S. businesses perform background checks, both criminal checks and credit reports, as part of their preemployment screening process, according to a series of surveys from the Society for Human Resource Management. This increased use of criminal background checks and credit reports has peaked the interest of the Equal Employment Opportunity Commission (EEOC), and not in a good way.

In an effort to combat racial discrimination in the workplace, the EEOC launched its E-Race Initiative in February, 2007. Through E-Race (Eradicating Racism & Colorism from Employment), the EEOC sought to identify criteria that contribute to race and color discrimination in employment. The EEOC has found that these facially neutral employment criteria may significantly disadvantage applicants and employees on the basis of race, in violation of Title VII of the Civil Rights Act of 1964.

Indeed, the EEOC has filed at least three notable actions against employers based on their use of criminal background checks and credit reports during the hiring process. In 2008, the EEOC filed suit against Peoplemark, Inc., in the U.S. District Court for the Western District of Michigan, claiming that Peoplemark's policy against hiring individuals with criminal records had a disparate impact on African-American applicants. One year later, the EEOC sued Freeman Companies in Maryland for the same reason, adding that the checks also had a disparate impact on Hispanic and male employees.

And most recently, the EEOC sued Kaplan Higher Education Corp. in December for race discrimination, accusing the company of using a "selection criterion for hiring and discharge, namely, credit history information, that has had, and continued to have, a significant disparate impact on Black job applicants . . ." The EEOC claimed that by using the credit histories as a criterion in hiring, Kaplan was engaging in race discrimination that was "not job related and consistent with business necessity, and for which there are appropriate, less-discriminatory alternative selection procedures." Setting the merits of these cases aside, it is clear that the EEOC has taken a keen interest in the use of criminal background checks and credit reports.

Title VII prohibits facially neutral selection procedures that have the unintentional effect, or disparate impact, of disproportionately excluding applicants of a particular protected class — race, gender, national origin, color or religion. Consequently, even though your use of criminal background checks and credit reports is not intended to screen out members of racial minorities, that might be the result. And if it is, your practices violate Title VII.

To avoid this pitfall, it is critical that you tailor screening procedures to fit the specific requirements of the position. There must be a job-related justification and a business necessity for your pre-employment screening practices. A job involving a high degree of trust with access to highly confidential business information may warrant consideration of the applicant's criminal background. Credit reports should be used when hiring for positions that require financial responsibility. In these instances, the use of preselection screening procedures is lawful because the requirements are tailored to the job descriptions and have a valid business justification. But this is not always going to be the case.

In light of the EEOC's recent scrutiny of criminal background checks and credit reports, give thought to your use of prescreening mechanisms. Ensure that you have job-related justifications for the practices and criteria used. Undoubtedly, this will help you avoid unlawful discriminatory effects on workers.