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## Applicant Background Checks – How Much Is Too Much?

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BY DIANE KREBS

In this time of economic difficulty and layoffs, it may seem unusual to be reading about performing applicant background checks. It makes sense, however, if one considers that the current state of the economy has turned the employment arena into a "buyers' market," with a greater number of employees competing for fewer jobs. This means employers can set higher standards and be more selective. And, in furtherance of that goal, employers may decide to be more rigorous in conducting background checks, to make sure they have truly selected the best candidate.

Background checks, when used appropriately, can greatly help with the selection of a fitting candidate. Indeed, it is advisable for all employers to do some due diligence in the hiring process to protect against negligent hiring claims, and some industries are required to investigate prospective employees. Nevertheless, as with all personnel-related activities, there are guidelines and limits to what an employer may do. This article will explore those guidelines and limits in three main areas in which employers may seek to conduct inquiries beyond simply work experience or required degrees/certifications: criminal history; credit worthiness; and general character.<sup>1</sup>

### Criminal History

No federal law explicitly prohibits employers from inquiring into an applicant's past criminal history. The Equal Employment Opportunity Commission ("EEOC") has opined, however, that disqualifying an applicant because of an arrest or conviction record could violate the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* ("Title VII"), which prohibits employment discrimination based upon race, color, religion, sex and national origin, because such a blanket policy has a disparate impact on African-Americans and Latinos, who are arrested and convicted in higher proportions than whites.<sup>2</sup> According to recent statistics, African-Americans are 15 times more likely to be arrested for low-level offenses than, and are incarcerated at a rate six times that of, whites. Moreover, Latinos are three times more likely to be arrested than, and are incarcerated at a rate more than twice that of, whites.<sup>3</sup>

According to the EEOC, an employer may deny employment to an applicant with a criminal record only if the decision is job-related and justified by business necessity - the typical standard in disparate impact cases. The factors relevant to this determination include the nature and gravity of the offense(s), the time passed since the arrest or conviction, and the nature of the job sought. Moreover, for arrests, it must also appear that the applicant engaged in the conduct for which s/he was arrested, since "[i]t is the *conduct*, not the arrest or conviction *per se*, which the employer may consider in relation to the position sought." EEOC Arrest Guidance. An employer need not conduct an extensive investigation to determine an applicant's guilt or innocence but must give the person a meaningful opportunity to explain and make follow-up inquiries necessary to evaluate his/her credibility.

In contrast, New York State law contains specific statutes pertaining to both arrest and conviction records, which it treats quite differently. With respect to arrests, the New York State Human Rights Law, N.Y. Exec. Law §§ 296 *et seq.* ("HRL"), prohibits employers, unless specifically required or permitted by any other law, from inquiring (verbally or in writing) or taking any action against an applicant based on an arrest or criminal accusation "not then pending" that was terminated "in favor of" the applicant. *See also* N.Y.C. Admin. Code § 8-107.11 (incorporating state requirements into city law). Favorable disposition includes: dismissal of a charge at any stage; adjournment in contemplation of dismissal; acquittal; court order setting aside a guilty verdict or vacating a judgment; or a *habeas corpus* order of discharge. Of course, if an employer has learned of an arrest in a permissible manner (*e.g.*, through the media), the employer need not ignore it but rather may consider the underlying conduct that resulted in the arrest and/or conduct its own investigation. Notably, the state law has an exception for currently pending arrests; however, New York employers are still subject to federal parameters.

On the other hand, according to Article 23-A of the New York Corrections Law, §§ 750-55, an employer is entitled to inquire about criminal convictions. But because the HRL specifies employers cannot discriminate against former offenders, Article 23-A imposes restrictions. An employer may only inquire about "criminal" convictions, *i.e.*, misdemeanors or felonies; lesser offenses such as violations are off-limits. Moreover, to deny employment based on a criminal conviction, there must be either a "direct relationship" between the conviction and the job sought or employment of the applicant must pose an "unreasonable risk" to property or safety. "Unreasonable risk" is not defined, but "direct relationship" is defined in the Article 23-A as "the nature of criminal conduct for which the person was convicted [having] a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related" to the employment. Article 23-A requires

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<sup>1</sup> Please note that, if an employer uses a third party to perform its background checks, it is subject to additional procedural and substantive requirements pursuant to the federal Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* and the New York State Fair Credit Reporting Act, N.Y. Gen. Bus. L. §§ 380-a *et seq.* Those statutes, however, are outside the scope of this article.

<sup>2</sup> *Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)*, Notice No. N-915-061 (9/7/90) ("EEOC Arrest Guidance"); *EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982)* (2/4/87). *See also* EEOC Compliance Manual, Section 15, Race and Color Discrimination, Conviction and Arrest Records.

<sup>3</sup> Statement of Laura Moskowitz, <http://www.EEOC.gov/abouteeoc/meetings/11-20-08/moskowitz.html>.

consideration of the following factors to determine whether the conviction precludes employing the applicant:

- the policy of New York State to encourage the employment of former offenders;
- the specific duties and responsibilities necessarily related to the employment sought;
- the bearing, if any, the criminal offense(s) for which the person was convicted will have on his fitness or ability to perform one or more of such duties or responsibilities;
- the time elapsed since the criminal offense(s);
- the person's age at the time of the criminal offense(s);
- the severity of the criminal offense(s);
- any information regarding rehabilitation and good conduct of the person, and
- the legitimate interest of the employer to protect property, and the safety and welfare of specific individuals or the general public.

In addition, an ex-offender who is denied employment is entitled to, upon request, a written statement from the employer stating the reasons for the denial, within 30 days of the request.

The law regarding convictions was recently changed in several important respects. First, the legislature added a new statute, Labor Law § 201-f, which requires every employer to post Article 23-A and any regulations promulgated pursuant to it "in a place accessible to his or her employees and in a visually conspicuous manner."<sup>4</sup> Second, the HRL was recently amended to increase protections for employers who strictly follow Article 23-A. Specifically, if an employer hires someone with a criminal conviction after it weighed the factors listed above and "made a reasonable, good faith determination that such factors militate in favor of hire ... of that applicant," the employer is then entitled to "a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction" in a negligent hiring case. This is a powerful tool for employers that actually encourages companies to perform due diligence on applicants with respect to their criminal histories.

However, employers should be cautious regarding the manner in which they check criminal history. Under New York law, a private employer is prohibited from requiring prospective employees to be fingerprinted as a condition of obtaining or continuing employment, unless "otherwise provided by law." N.Y. Labor Law § 201-a. Governmental entities, hospitals and medical colleges affiliated with hospitals are exempt under the statute, as are any professions for which fingerprinting is required by other statute.<sup>5</sup>

## Financial and Credit Checks

Some employers conduct background checks on the credit-worthiness of their applicants, especially financial institutions or those hiring for positions involving money handling or decision-making – the theory being that, if the person has had personal money woes, they should not be trusted to handle the money of the company and/or clients. But there are pitfalls in such inquiries.

First, federal law prohibits private employers from "terminat[ing] the employment of, or discriminat[ing] with respect to employment against, an individual who is or has been a debtor" solely because of their debtor or insolvency status. 11 U.S.C. § 525(b). This statute mirrors 11 U.S.C. § 525(a), an earlier-promulgated section applicable to government employers. However, the two statutes differ in one important respect: 525(a) also includes the explicit prohibition against "deny[ing] employment to" an individual because of their debtor status. Its private employer counterpart contains no such clause. Most courts that have interpreted 525(b) have therefore held that the prohibition does not apply to hiring decisions of private employers, because the absence of hiring language appears to be intentional. Unfortunately, the one New York federal court weighing in on this subject held to the contrary. *Leary v. Warnaco, Inc.*, 251 B.R. 656, 658 (S.D.N.Y. 2000) ("Section 525(b) prohibits an employer from discriminating 'with respect to employment.' Such language is clearly broad enough to extend to discriminating with respect to extending an offer of employment"). Therefore, employers in New York must be concerned about relying on bankruptcy status as a reason not to hire.<sup>6</sup>

Second, although Title VII does not specify debtor status or financial problems as creating a protected class, the EEOC has opined that disqualifying an applicant because of this could have a disparate impact on minority applicants, who are more likely to suffer financial difficulties than whites (a disproportionate number of non-whites are below the poverty level).<sup>7</sup> Thus, if an applicant can show that an employer's practice of screening applicants based upon their credit or financial status results in a racial disparity of employment opportunities, the EEOC has taken the position that the practice must be justified by "business necessity."

Finally, no New York State law specifically prohibits relying on debtor status. However, because the HRL is often interpreted similarly to Title VII, it is likely that the same standard applicable to Title VII would apply under New York law as well.

## Character

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<sup>4</sup> The state legislature also created additional notice obligations with respect to conviction checks if the employer uses an outside agency and is thus covered by the New York State Fair Credit Reporting Act. As stated earlier, that is outside the scope of this article.

<sup>5</sup> For example, security guards must be fingerprinted (N.Y. Gen. Bus. L. § 72), as must be securities brokers and dealers (N.Y. Gen. Bus. L. § 359-e).

<sup>6</sup> However, even the *Leary* court recognized that there could be many legitimate reasons associated with a person's debtor status that could contribute to a decision not to hire. "Obviously, the mere ordering of a credit report or a review of the bankruptcy file followed by rejection of the applicant, does not compel an inference of discrimination. Often a bankruptcy file may reveal a material character defect or problem, such as a history of profligate living, a gambling habit, or drug usage, by a job applicant seeking a fiduciary position or a policy position dealing with government or the public. Other possible reasons may exist for failure to hire in a particular case." *Id.* at 659.

<sup>7</sup> For a relatively recent discussion of the disparate effect of financial woes on minorities, see, e.g., Statement of Adam Klein, Esq., <http://www.eeoc.gov/abouteeoc/meetings/5-16-07/klein.html>.

"Character" is a very amorphous category of background investigations, since it begs two key questions: (a) how important is general "character" to the performance of one's job duties; and (b) how exactly does one measure "character"? Yet there are certain themes that emerge when seeing the kinds of tests employers perform in furtherance of this inquiry.

The first is drug testing. The vast majority of employers - 84%, according to a March 2006 poll conducted by the Society for Human Resource Management - require pre-employment drug tests. 73 DLR A-9 (4/17/06). But New York employers need to be aware of the potential discrimination pitfalls in the disability area. The danger derives more from state than federal law. Under the federal Americans with Disabilities Act ("ADA"), the term "qualified individual with a disability" does not include "any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a). Moreover, the ADA states that "a test to determine the illegal use of drugs shall not be considered a medical examination." 42 U.S.C. § 12114(d). Thus, employers may test for drugs without worrying about the strictures of the ADA. However, while the HRL similarly does not protect current users of illegal drugs, courts and administrative bodies have also recognized a claim of *perceived* disability discrimination by a rejected applicant, where the testing method is inaccurate and results in a false positive. See, e.g., *Doe v. Roe, Inc.*, 553 N.Y.S.2d 364 (1st Dep't 1990) (denying motion to dismiss HRL claim for alleged false positive; a private employer "may be legitimately entitled to discriminate against users of controlled narcotic substances," but "must come forward with evidence establishing that its testing method accurately distinguishes between opiate users and consumers of lawful foodstuffs or medications").

A second topic that could fall under the category of character investigation is polygraph testing. After all, what better way to see if an applicant is trustworthy than to test their truth-telling? However, the current legal landscape precludes the use of lie detectors on applicants for private employment. The federal Employee Polygraph Protection Act of 1988, 29 U.S.C. §§ 2001 *et seq.* prohibits private employers from allowing a lie detector test to in any way figure into the hiring process, including even knowing about results of any such test.<sup>8</sup> Moreover, New York Labor Law §§ 733 *et seq.* has a similar prohibition, but only for "psychological stress evaluator examinations" (*i.e.*, voice stress analysis).

A final area of caution pertains to inquiring into how an applicant spends his or her free time. While employers may think this reveals something about a person's character, it is illegal in New York to base a negative employment decision, including a failure to hire, on a person's recreational activity (leisure-time activity for which no compensation is received), political activity, use of consumable products, or membership in a union. Known as the "Legal Activities Law," New York Labor Law § 201-d entitles an applicant to engage in all these types of activities without fear of it impacting his/her job opportunities, provided the activity is legal and occurs outside of working hours, off the employer's premises and without use of the employer's equipment/property (this last aspect is not usually a factor for applicants). There are certain exceptions, the most common of which for applicants is if the activity creates a material conflict of interest related to the employer's trade secrets, proprietary information, or other proprietary or business interest.

## Conclusion

The background check route is filled with potential hazards. However, employers should not let that stop them from performing their due diligence on potential hires; rather, the existence of those hazards should simply cause employers to negotiate the route with care. Some practice pointers are as follows:

- Select background checks based on a realistic assessment of what is pertinent to the job at hand. Thus, for example, it may make sense to do a credit check for a potential CFO but not for a school janitor. Moreover, a company should be prepared to substantiate the need for each type of check, in case they are challenged under a disparate impact theory.
- If an employer is going to engage in drug testing, it is extremely important to utilize a reputable company with careful testing procedures, to avoid perceived disability discrimination claims arising out of a false positive.
- It makes more sense than ever to perform a criminal convictions check, in light of the new rebuttable presumption under the HRL. But remember – to take advantage of it and to avoid claims of discrimination, an *individualized assessment* that takes all required factors into account must be performed each time a criminal conviction is discovered.
- As an accompaniment to a convictions check, it is advisable to ask on a job application (which makes truthfulness a pre-condition to obtaining and maintaining employment) whether applicants have ever been convicted of a crime. If they say "no" and then the check turns up a conviction, an employer can legally deny them the job for lying on an application without ever performing the Article 23-A balancing test.



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Diane Krebs is a partner at Gordon & Rees in the New York office. She can be reached at [dkrebs@gordonrees.com](mailto:dkrebs@gordonrees.com).

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<sup>8</sup> There are exceptions for applicants to certain jobs in the security industry and for employers authorized to manufacture, distribute or dispense "controlled substance[s]," though there are numerous substantive and procedural requirements even for those employers.