

## Growing backlash to background checks

By Katharine H. Parker

*Critics argue that they can run afoul of discrimination laws, be contrary to public policy and violate individual privacy rights.*

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On March 9, the nation was reminded yet again of the sad reality of workplace violence. That day, a janitor at Ohio State University shot two supervisors, killing one, and then killed himself after receiving a poor performance evaluation. In fact, homicides are among the top four causes of workplace deaths, and millions of people are injured each year due to workplace violence. See Bureau of Labor Statistics, [www.bls.gov/iif/oshwc/osh/os/osnr0032.txt](http://www.bls.gov/iif/oshwc/osh/os/osnr0032.txt).

Workplace violence is not the only concern of businesses. Various surveys indicate that theft by employees is widespread. One recent survey revealed that retailers nationwide suffered total losses in excess of \$36 billion in 2008, with 44% of the losses attributable to employee theft. See National Retail Federation, [www.nrf.com/modules.php?name=News&op=viewlive&sp\\_id=746](http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=746).

In an effort to prevent these risks, more businesses are reviewing the credit and conviction histories of applicants as part of a background check. Such screening can be a useful tool in the hiring process, revealing information about an applicant's honesty, integrity, reliability, responsibility and propensity for violence.

Risk prevention is not the only motive for conducting background checks. In some states, employers that fail to conduct appropriate background checks may find themselves liable under tort theories such as negligent hiring. For example, in *Morris v. JTM Materials Inc.*, 78 S.W.3d 28 (Texas App. – Fort Worth 2002), a Texas court found that the employer's failure to conduct an appropriate criminal background check that would have revealed driving and drug-related convictions created an issue of fact as to whether it exercised reasonable care in hiring him as a driver.

### QUESTIONING BACKGROUND CHECKS

Notwithstanding the legitimate reasons for conducting them, employers' use of credit and criminal background checks in hiring has been questioned recently. Though long permitted by the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681, and analogous state laws, and even required in many instances, critics argue that these checks can run afoul of discrimination laws, be contrary to public policy and violate individual privacy rights.

The U.S. Equal Employment Opportunity Commission (EEOC) has expressed concern that consideration of conviction and credit history sometimes can be discriminatory on the basis of race. It has held meetings with employee rights advocates on this issue and posted information on its Web site, [www.eeoc.gov](http://www.eeoc.gov), about the disparate impact this type of screening can have on minorities. It has even begun prosecuting employers in this area. See, e.g., *EEOC v. DolgenCorp.*, 2008 WL 4542973 (N.D. Ill. April 15, 2008); *EEOC v. Von Maur Inc.*, 2007 WL 3503435 (S.D. Iowa Oct. 22, 2007). Plaintiffs' attorneys have likewise begun suing employers on this basis. See e.g., *Jackson v. Southeastern Pa. Transp. Auth.*, 260 F.R.D. 168 (E.D. Pa. 2009); *Ganzy v. Sun Chem. Corp.*, 2008 WL 3286262 (E.D.N.Y. Aug. 8, 2008).

In addition to discrimination concerns, multiple news agencies have reported that victims of corporate downsizing, the mortgage crisis and crushing medical bills are being unfairly thwarted in their legitimate quest for employment because of their credit history. See, e.g., Jonathan Glater, "Another Hurdle for the Jobless: Credit Inquiries," N.Y. Times, Aug. 6, 2009,

at A1. These concerns have caused state legislatures to reconsider the fairness of credit checks to working Americans who have fallen behind on their bills through no fault of their own.

Washington and Hawaii have led the way, recently passing laws that limit the extent to which employers may consider credit history. Washington's law restricts credit checks on applicants and employees unless they are "substantially job related" or required by law, or done in connection with an investigation of an employee's possible illegal acts. It also contains an exception for employer investigations of employees' possible illegal acts. Wash. Rev. Code § 19.182.020. Hawaii's law similarly restricts such checks unless they are "directly related to a bona fide occupational qualification." However, Hawaii's ban does not apply to managerial or supervisory employees, to certain financial institutions or when a credit check is expressly permitted or required by law. Haw. Rev. Stat. § 378-2.7.

Similar bills have been proposed in at least 17 states. A bill to amend the FCRA also has been proposed. This bill would prohibit employers from requesting or using a credit report, except if required by law, for national security or for managerial and professional employees of financial institutions. H.R. 3149, 111th Congress. The bill has 53 sponsors and is now in committee.

Additionally, there is growing recognition of the relationship between unemployment and recidivism. Studies show that a high percentage of individuals who violate the terms of their probation are unemployed at the time of the violation. Center For Employment Opportunities, *The Facts: Unemployment and Recidivism*, [www.ceoworks.org/images/CEObreaksincarcerationcycle\\_nyc.pdf](http://www.ceoworks.org/images/CEObreaksincarcerationcycle_nyc.pdf). Advocacy groups point to the unfairness of an ex-offender having paid his or her debt to society continuing to be punished for past conduct in his or her job search. See Ex-Prisoners and Prisoners Organizing for Community Advancement, <http://exprisoners.org>. Many states, due to the above concerns, have restricted the extent to which an employer may make decisions based on conviction history. See, e.g., N.Y. Exec. Law § 296(15) and N.Y. Correct. Law §§ 750-53; Mass. Gen. L.C. 276 100A, 151B § 4(9); Wis. Stat. § 111.335. .

In New York, for example, employers are restricted from inquiring about youthful-offender and sealed convictions. Further, New York employers may take an adverse action against an applicant or employee on the basis of a past conviction only if a direct relationship exists between the conviction and the prospective job or if employment would pose an unreasonable risk to persons or property. New York law requires employers to evaluate a number of factors in determining whether a direct relationship or threat exists and provides some protection from negligent hire suits to employers that have evaluated these factors. N.Y. Correct. Law §§ 750-53.

## **PRIVACY CONCERNS**

Some critics of background checks also have raised privacy concerns. Recently, the federal government itself has come under attack for the background checks it requires of contract employees. In *Nelson v. National Aeronautics & Space Admin.*, 530 F.3d 865 (9th Cir. 2008), a group of contract workers at NASA's Jet Propulsion Laboratory, operated by the California Institute of Technology under a contract with the federal government, asserted that background checks required by NASA violate their constitutional right to informational privacy. The background checks include questions about criminal history, financial integrity, drug use and treatment and other personal matters. The plaintiffs sought an injunction to stop the checks, which the U.S. District Court for the Central District of California denied.

The U.S. Court of Appeals for the 9th Circuit reversed that decision and issued a preliminary injunction. It found that the plaintiffs had posed serious questions as to the lawfulness of the background checks and whether they were narrowly tailored to meet the government's legitimate interests. NASA filed a petition for certiorari with the U.S. Supreme Court, which was granted on March 8, 2010 WL 757694 (U.S. March 8, 2010). Oral argument is scheduled for the October 2010 term. The Supreme Court's decision may provide guidance not just to government contractors, but to all employers, about

the extent to which background checks should be tailored for particular jobs and individual privacy rights outweigh an employer's interests in gathering information on applicants and employees.

Background checks remain a lawful and useful tool in the hiring process. But given the conflicting and changing legal considerations in this area, employers should make it a priority this year to perform an audit of their background screening procedures and forms to ensure they are fully compliant. Employers should ensure that their procedures are nondiscriminatory, and assess whether they have value as a screening tool. An audit should include a review of laws, regulations or contracts that may require background screening of applicants or employees as well as those that may restrict screening. If using third-party vendors for screening, employers should review applicable credit-reporting laws to ensure that they and their vendors are providing the necessary disclosures and notices to and obtaining consent from the individuals to be screened, and otherwise conducting screening in accordance with law. Finally, employers should update and tailor notices, forms and procedures as needed based on this review and stay current on legal developments in this area. Although employers are in the eye of a storm of competing laws and interests, a careful review and update of background screening practices will ensure smooth sailing.

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