

Lawyers' Committee Credit Convening Summary

On October 28, 2010, the Lawyers' Committee hosted a convening of experts to discuss the use of credit histories in employment decision-making and strategies to combat the growing trend. The experts present represented government agencies, including the Equal Employment Opportunity Commission, Department of Labor, Department of Justice, and the Federal Trade Commission, as well as nonprofit organizations including the National Employment Lawyers Association, NAACP LDF, Demos, American Association of People with Disabilities, AARP, and UNITE HERE.

Summary of Discussions

The Credit Check Convening began with a presentation by Sarah Crawford, Senior Counsel for the Employment Discrimination Project at the Lawyers' Committee, on the growing use of credit history by employers¹. Recent surveys of employers have shown that 60% of employers run credit check on job applicants. Employers are increasingly turning to this type of background check, citing the fear of negligent hiring liability and the desire to prevent fraud and theft in the workplace. Sarah explained that this growing trend has a disparate impact on minority individuals because of the racial disparities of credit histories: she noted that 1 in 2 African American and 1 in 3 Latinos have poor credit, while 1 in 4 Caucasians has poor credit. Poor credit can exist through no fault of the individual at issue; life events like major uninsured medical costs due to illness or injury, the loss of a job, or divorce can all negatively impact a person's credit even if their bills and payments are made on time. Finally, Sarah highlighted the failure of employers and credit reporting agencies to offer any proof that credit histories can predict success on the job and noted that independent studies have shown that credit history does not predict job success.

Sarah next turned to the legal protections currently in place regarding the use of credit history. First, Sarah discussed Title VII of the Civil Rights Act, which requires an employer have a business need and to explore "less discriminatory alternatives" if a credit check or other employment practice screens out a markedly disproportionate number of minorities. Sarah also discussed the Fair Credit Reporting Act, which generally requires employers to obtain written authorization before accessing a consumer report and, before taking adverse employment action based on information in a consumer report, to provide the affected individual (i) a copy of the report and (ii) a written description of their rights under the FCRA. As an exception to the general rule, in cases where the only interaction between the employer and the prospective employee has been by mail, telephone, computer, or similar means, the applicant's consent to the employers use of a credit report may be oral, written, or electronic, and the employer is allowed

¹ The slideshow Sarah presented is available here: http://www.lawyerscommittee.org/admin/employment_discrimination/documents/files/Credit-Checks-Power-Point-with-copyright.pdf.

up to three business days after taking adverse action based upon a credit report to inform the applicant (orally, in writing, or electronically) that adverse action has been taken based on information in a consumer report, the contact information for the reporting agency, and that the applicant has the right to obtain a free copy of the consumer report and to dispute the accuracy or completeness of information in the report. In addition, Sarah briefly discussed state laws prohibiting employers from using credit reports in hiring decisions. Such laws exist in Hawaii, Washington, Illinois, and Oregon. Sarah highlighted the Washington law, which provides that consumer reports not be procured unless the information is substantially job related and the employer's reasons for using the information are disclosed in writing.

Finally, Sarah discussed the Lawyers' Committee's litigation strategy to challenge the use of background checks. First, she noted the two lawsuits that the Lawyer's Committee has filed regarding the use of criminal records in background checks: *Arroyo v. Accenture*², which challenges a private employer's blanket policy against hiring individuals with criminal records, and *Johnson v. Locke*³, which challenges the U.S. Census's arbitrary process of screening applicants with arrest and conviction records. Sarah also discussed *Appolon v. University of Miami*⁴, which was recently filed by the Lawyers' Committee and Outten & Golden LLP and alleges that the University's use of credit checks in hiring has a disparate impact on people of color.

Nat Lippert, of UNITE HERE, followed Sarah with a discussion of proposed federal legislation that would prohibit employers from using credit checks in connection with certain employment actions. He also described a number of additional state and local legislative initiatives. Nat first presented on the Equal Employment for All Act⁵, which would amend the Fair Credit Reporting Act to prohibit employers from using credit checks when making adverse employment decisions. The bill was proposed last year by U.S. Representative Steve Cohen and has several dozen co-sponsors. Karl Haddeland, of the House Committee on Financial Services, also spoke about the Equal Employment for All Act and discussed some of the broad exemptions that the federal government has requested from the bill's coverage. Karl stated that exemptions should only be given if an employer can prove the correlation between the information contained in credit history and the task to be performed by the prospective employee.

² The complaint in this case is available at: http://www.lawyerscommittee.org/admin/employment_discrimination/documents/files/Docket-1-Complaint.pdf

³ This First Amended Class Action Complaint is available at: http://www.lawyerscommittee.org/admin/employment_discrimination/documents/files/Docket-1-Complaint.pdf

⁴ The complaint is available at: http://www.lawyerscommittee.org/admin/employment_discrimination/documents/files/Appolon-v.-University-of-Miami-Complaint.pdf

⁵ Text of the bill is available at: <http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.3149>:

Jose Garcia, of Demos, also spoke regarding research that shows the ways that medical debt can contribute to poor credit history.⁶ Many employers claim that they do not make employment decisions based on medical debt, but Jose emphasized that often employers are unaware exactly what factors have contributed to an individual's poor credit.

Finally, Employment Discrimination Project Director Audrey Wiggins and Lawyers' Committee Board Member Adam Klein discussed government efforts to sue employers for the use of credit checks. Audrey and Adam first discussed *EEOC v. Freeman*⁷, in which the EEOC filed a suit against a Maryland employer claiming that the use of credit history and criminal justice history information resulted in a disparate impact on black and Hispanic job applicants. During this conversation, those present also discussed the additional problem of the role of employment agencies, which often run credit checks and deny applicants based on those credit checks without forwarding information on to employers. Audrey and Adam then discussed *OFCCP v. Bank of America*⁸, in which an administrative law judge held that Bank of America intentionally discriminated against black applicants for clerical, administrative and teller positions because of its use of pre-employment credit checks.

In addition, Audrey and Adam discussed the current use of credit checks. One primary reason for the growth of the use of credit history in recent years is that consumer credit agencies have been marketing their services heavily to employers. Audrey also discussed the ESTEEM database, a new service being marketed by Lexis to retailers, which claims to assist employers in quickly identifying applicants with a history of theft or fraud in the workplace. Audrey expressed concern with the anecdotal nature of the database and the inability to check the accuracy of such allegations.

Next Steps

The other primary purpose of the Credit Convening was to brainstorm next steps as an advocacy community. The following are steps identified through discussion as necessary to continue the fight against credit checks:

1) Need for Additional Research

Over the course of the convening, it became clear that the campaign against the use of credit checks needs clear data supporting its arguments in order to advance. The primary deficiency is lack of research and information regarding credit checks and how they are used. It

⁶ Research conducted by Demos on this topic is available at: http://www.demos.org/pubs/medicaldebt_factsheet.pdf and http://www.demos.org/pubs/healthy_web.pdf

⁷ The docket for this case is available at: <http://dockets.justia.com/docket/maryland/mddce/8:2009cv02573/172257/>

⁸ The Recommended Decision and Order in the case is available at: [http://op.bna.com/dlrcases.nsf/id/kmgn-82dlq7/\\$File/bankamerica.pdf](http://op.bna.com/dlrcases.nsf/id/kmgn-82dlq7/$File/bankamerica.pdf).

was noted that there are very few studies that identify how many employers use credit information, what type of information is used, and how that information is used. Further, it is problematic that majority of the research currently available has been produced by human resources organization and credit reporting agencies that stand to benefit from the use of credit checks. The lack of specific information regarding how employers use credit information has made it difficult to ascertain how the use of this information impacts job applicants.

Another area of concern identified is the lack of information that shows the impact of credit checks on various groups, including racial minorities, women, and individuals with disabilities, as well as the lack of studies show the connection between different groups and credit history.

2) Need to Identify Biggest Offenders

Another difficulty facing advocates is the inability to identify the employers that tend to be the biggest offenders when it comes to using credit checks for employment decisions. Because those rejected from jobs are seldom informed of the factors that led to their rejection, it is unclear which employers fall within the 60% of employers using credit history. One suggestion to identify these employers is to look at job postings and to search for those that explicitly require a credit check as a job qualification. The Lawyers' Committee has already done preliminary research into this suggestion and has identified several national organizations requiring credit checks for entry-level positions.

3) Identification of Lesser Discriminatory Alternatives and Best Practices

After the need for more information, those present at the convening agreed on the need to brainstorm and identify alternatives that employers can use to evaluate job applicants in a manner that does not have a disparate impact on vulnerable populations and to disseminate a best practices guide. A first step toward brainstorming lesser discriminatory alternatives is identifying the 40% of employers that do not use credit checks in their hiring process and determining what methods those employers use to evaluate prospective employees. Another option identified is to approach government agencies that have stated publicly that credit checks are not used and to determine what methods those agencies use.

Once lesser discriminatory alternatives have been identified, advocates can take steps to educate employers regarding the alternatives. The Office of Personnel Management may be a good place to begin this education, as OPM's policies may influence a large number of agencies and government contractors. Additional education outreach should be conducted with human resources lobbyists and major employers.

4) Policy Changes

Another crucial need identified at the convening is a continued push for policy advocacy to fight the use of credit checks in hiring. Some job applicants presently benefit from the fact that the FCRA provisions make it somewhat cumbersome for employers to comply with their statutory procedural requirements, but when an employer chooses to follow FCRA, the current statutory provisions intended to allow an applicant to correct adverse information appear to be of little benefit to any job applicant whose credit report has blemishes. Advocates at the convening discussed whether amending FCRA's consent and notification requirements would better protect workers in the real world. Presently, under the FCRA's current structure, it is very difficult to determine from an external perspective whether employers are meeting its requirements. In addition to a push at the federal level, advocates also discussed the need to continue to push states to adopt credit check legislation to protect employees.

In addition to legislation, advocates identified the need for further administrative guidance on the use of credit checks, particularly from the EEOC. Those present from the EEOC could not speak as to whether such guidance is forthcoming, but the advocates at the convening agreed that EEOC guidance on the use of credit checks could go a long way in reducing employer reliance on credit information.

5) Organizing

Finally, those at the convening identified the need for better organization of advocates on this issue. Several suggestions were made to keep those who are committed to preventing the use of credit information in employment better connected. Suggestions included creating a listserv to share information and research as it develops, as well as the creation of a website to serve similar functions. The group also discussed the broad need to garner media coverage and communications support as a means to further public education on credit checks. Finally, it was noted that social media may be another useful tool for organizing support and that there is a Facebook group⁹ dedicated to the passage of the Equal Employment for All Act, which had nearly 3,900 members at the time of the convening.

⁹ To join the Facebook group, go here: <http://www.facebook.com/group.php?gid=186365853370>.