

Special Report on Background Checking— Burden of Proof

Employers will soon be asked to provide empirical evidence for screening and hiring practices based on assumptions about workplace criminality—but they'll be hard-pressed to find it.

By Fay Hansen

EmploymentGroup's December job postings included a "trial hire" for a small assembly job, paying \$9 per hour, the equivalent of \$17,550 a year. The Michigan staffing firm listed requirements for the position: a high school education or general equivalency diploma, small assembly experience and "no convictions."

Virtually all of EmploymentGroup's client companies have a blanket "no felons" policy.

"It's about keeping the workplace safe, and about those lawsuits we all read about," CEO Mark Lancaster says. In Michigan, a state that spends more on corrections than on higher education, smoking pot in a park or bouncing a \$500 check can produce a felony conviction.

Like most employers, EmploymentGroup doesn't have any empirical evidence that the "no convictions" policy helps keep the workplace safe. And screening vendors, who routinely claim that criminal checks reduce workplace violence, theft and fraud, don't have any meaningful empirical evidence either. In addition, the actual probability of a negligent-hiring lawsuit—a perceived risk that often drives criminal screening practices—remains undocumented.

Employers spend billions on criminal checks and often base hiring decisions on the results without evidence of the return on the investment or the efficacy of the decisions. The absence of empirical evidence will soon become more than a question of effective screening and hiring practices.

Within the next 12 to 18 months, employers can expect to see the U.S. Equal Employment Opportunity Commission issue new guidelines that require empirical evidence for the "business necessity" defense in racial discrimination cases that arise from screening and hiring practices, according to Rod Fliegel, a partner at Littler Mendelson in San Francisco. The new guidelines are likely to upend hiring policies based on untested assumptions about criminality and workplace behaviors.

Employers stand to benefit from the new guidelines, which may bring greater clarity to what is now a legal quagmire. In addition to the new guidelines, in September 2009 the EEOC filed the first lawsuit in what experts believe will be a new series of court actions on screening and hiring practices that may help define the empirical evidence federal courts will require.

Perhaps more important, the legal scuffle over empirical evidence will continue to kick up questions about the role of criminal screening in hiring and the extent to which employers find false comfort in a relatively cheap and easy—but unproven—risk management tool while neglecting more effective measures to reduce workplace violence, theft, fraud and employment-related lawsuits. While the screening industry continues to play to employer concerns about criminality and promote criminal checks as an effective countermeasure, broader forces are challenging those assumptions.

Evidence lacking

Sensationalized headlines about workplace homicides and inflated vendor claims paint a dramatic picture of workforce criminality and criminal screening as an effective risk-reduction practice. But when the EEOC demands that employers produce empirical evidence to support hiring practices based on these claims, the screening industry will not be in a position to assist.

“Background screening can create a safer workplace,” says Theresa Preg, director of marketing development for LexisNexis Screening Solutions, also known as ChoicePoint, which runs 12 million employment-related screens a year. But the company has no empirical evidence to back up the statement.

Vendors frequently cite statistics on workplace violence but fail to note that the vast majority of incidents are not perpetrated by employees but by criminals unconnected to the workplace, clients or customers, or outsiders who have a personal relationship with an employee. They also don’t say that there is no research indicating that employees with criminal records are more likely to commit acts of workplace violence. Another common vendor claim is that employee theft causes 30 percent of all business failures. Although the number has been reiterated in marketing materials for two decades, there’s no substantiation for it.



Jason Morris, president and COO,
EmployeeScreenIQ

“I don’t know of any actual studies or evidence of a

decrease in fraud or theft tied to criminal checks,” says Jason Morris, president and COO of EmployeeScreenIQ, which runs more than half a million employment screens each year. “There are no hard reports or case studies, and the National Association of Professional Background Screeners hasn’t produced any.”

To construct new guidelines for screening and hiring, the EEOC will draw from testimony given in its November 2008 hearings and from the 3rd U.S. Circuit Court of Appeals’ 2007 decision in the case of *El v. SEPTA*, according to Fliegel, who represents employers and screening vendors. “The EEOC will look to the hearings and *El*, which talked about an empirical basis for comparing an applicant with a record with an applicant without a record,” he says. “Some scholarship is now focusing on this.”

Fliegel cites the work of Shawn Bushway, a criminologist at the University at Albany, who testified at the EEOC hearings that employers have elevated criminal-history records as the “trump card” in hiring decisions, instead of using more responsible statistical risk assessments. Increasingly, employers focus less on direct job-related employment and reference checks and skills evaluations and more on criminal records and credit checks.

Bushway’s research and other significant studies also indicate that criminal checks produce numerous false positives and false negatives, which is another issue of concern for the EEOC. In addition, new studies on recidivism challenge blanket policies that impose untested time frames, such as screening records for the previous seven years or barring employment for any conviction within the past five or 10 years.

In HireRight’s 2009 survey of screening practices, employers most frequently cited workplace safety as their motivation for screening. Almost half say they screen to reduce theft and fraud. But no research suggests that criminal checks can predict an employee’s propensity for workplace violence, and there is no evidence that criminal screening reduces theft or fraud.

Most fraud perpetrators, for example, do not have a record because they are first offenders, according to the Association of Certified Fraud Examiners. In addition, U.S. retailers commonly respond to incidents of employee theft by simply firing the employee, so no criminal record is generated.

To avoid hiring unprosecuted thieves, many retailers now pay to access private member-only databases, but these databases do not represent criminal adjudications and dwell in a gray area of the law.

“This is a cutting-edge issue,” says Scott Paler, a labor and employment attorney at Seyfarth Shaw in Chicago. “These databases are a collection of individual opinions about incidents. Legal issues about using these databases in hiring decisions hinge on individual state laws.”

Proxy for discrimination

While pressure is mounting at the federal level, the recession has forced state governments to take a closer look at the role employers play in the revolving door of recidivism that keeps prisons full and places already stretched state budgets in even greater peril. A number of states, including New York, Massachusetts and California, are tightening restrictions on screening practices and hiring bars.

At the EEOC hearings, experts reported that recidivism drops to extremely low levels for people who have stable employment during their first year out of prison. Employers that construct hiring barriers for millions of marginal nonviolent ex-offenders will find it increasingly difficult to remain compliant with federal and state regulations.

At both the federal and the state level, the issue centers on criminal checks and hiring bars as a proxy for employment discrimination against black men. Major studies have found that employers treat white job candidates with convictions differently from blacks with convictions. Morris is not surprised. "I'm sure it's happening," he says. "We always tell employers to make sure that they do the same screen with the same treatment for every candidate, but it's happening out there."

The 10 largest screening companies alone screen more than 40 million job candidates each year. Many invite employers to use grids or preset hiring criteria for processing criminal record results. "There are companies using a criminal check to screen all candidates and eliminate all those with a record," Morris says.

At Administaff Inc., director of recruiting Mary Massad takes a far more measured approach. Administaff, based in Houston, is a heavyweight in the professional-employer-organization industry, with 110,000 work-site employees at 5,900 client companies. Screening candidates for client companies varies by industry and position, but Administaff counsels clients carefully about the process for making adverse hiring decisions. "We will not support a program that does not consider convictions on a case-by-case basis," Massad says. "We do a lot of consulting with clients."

The growing trend at the state level is to require screening and hiring bars for specific jobs, including many caregiver positions, and restrict screening and hiring bars in all others. Greater clarity in state legislation is likely to reduce the small but highly publicized number of negligent-hiring lawsuits that are filed each year, and minimize the even smaller number that center on criminal records.

New EEOC regulations demanding an evidence-based approach to screening may help hone more effective hiring practices and provide a safe harbor from negligent-hiring lawsuits. The criminal screening process now in place at many companies may be an expedient method for culling candidates, but employers with hiring bars may soon have to rely more on proven methods for mitigating risk: job-specific hiring policies, proper supervision and effective performance management.

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