



Is Your Criminal Background Check Policy Consistent with the EEOC's Updated Guidance?

**2013 Hospitality Law Conference
February 11-13, 2013**

Andria L. Ryan
Fisher & Phillips LLP
1075 Peachtree Street, NE
Suite 3500
Atlanta, Georgia 30309
(404) 240-4219
Aryan@laborlawyers.com

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at Work®

www.laborlawyers.com

Atlanta · Boston · Charlotte · Chicago · Cleveland · Columbia · Dallas · Denver · Fort Lauderdale · Houston · Irvine · Kansas City · Las Vegas · Los Angeles · Louisville
Memphis · New England · New Jersey · New Orleans · Orlando · Philadelphia · Phoenix · Portland · San Diego · San Francisco · Tampa · Washington, DC



Andria Lure Ryan

Partner

OVERVIEW

Andria Ryan is a partner in the Atlanta office and she serves as the chair of the firm's Hospitality Industry Practice Group. She represents employers in virtually every area of employment and labor law. She spends much of her time counseling employers in day to day employment and labor decisions and educating employers about prevention and practical solutions to workplace problems. She is a frequent speaker to industry groups and human resources professionals on such topics as avoiding harassment in the workplace, maintaining a union free workplace, avoiding discrimination claims, proper interviewing, and effective discipline and discharge techniques. In 2007 she received the Chairman's Award from the Colorado Hotel & Lodging Association for her development of the *Employment Compliance Guide for Colorado Hospitality Employers*. Andria is "AV" Peer Review Rated by Martindale-Hubbell.

OFFICE LOCATIONS

Atlanta

(404) 240-4219 phone

(404) 240-4249 fax

E-MAIL

aryan@laborlawyers.com

PRACTICES

Employment Discrimination and Harassment
Sexual Harassment
Compliance Audits and Counseling
Employment Policies and Procedures
Supervisor Training
Hospitality Law

EDUCATION

Catholic University of America,
Columbus School of Law, Washington,
DC
J.D. 1988
American University, Washington, DC
B.A. 1985

EXPERIENCE

Bar Admissions

Georgia

Professional Activities

Chair of the Labor and Employment Law Section of the State Bar of Georgia

RECENT - NEWS/MEDIA

Government Audits: How To Respond
3/7/2012

Government Audits: Get Your House In Order
3/6/2012

Quotes and Soundbites

How To Oversee Practice Staff's Appearance — Legally
5/7/2012

Newsletter Articles

Can You Refuse To Hire A Felon?
3/1/2012

TABLE OF CONTENTS

Is Your Criminal Background Check Policy Consistent with the EEOC's Updated Guidance?

2013 Hospitality Law Conference February 11-13, 2013

Making Sound Hiring Decisions	4
Question 1: Is all available information equally relevant in selecting a candidate?	5
Criminal History	5
Credit History	5
Sex Offender Registry	6
Arrest History	7
Question 2: Do you have reasons to order criminal background or credit checks that are appropriate in light of new regulatory challenges?	7
Question 3: Are you making appropriately tailored assessments of unsuitability based on the background information received?	8

Andria L. Ryan
Fisher & Phillips LLP
1075 Peachtree Street, NE
Suite 3500
Atlanta, Georgia 30309
(404) 240-4219
Aryan@laborlawyers.com

FISHER & PHILLIPS LLP
ATTORNEYS AT LAW

Solutions at Work®

Making Sound Hiring Decisions Through the Use of Well-Tailored Background Check Procedures in a Complex Business & Regulatory Environment

According to some studies, over 90 percent of employers conduct criminal background checks for some job applicants and over 70 percent of employers conduct background checks on all potential new hires. Many hospitality industry employers conduct some criminal background checks. Most decision-makers want information about criminal behavior and other related data before bringing a candidate into the organization. The rationale for seeking this information ranges from identifying candidates who are honest when filling out their applications, to finding those who display a history of good decision-making and judgment, to reducing the risk of criminal behavior in the workplace and related civil liability by excluding those applicants who may be most likely to (re)engage in criminal activity that could potentially pose a risk of harm to the organization and/or its employees. Hospitality employers also do so to avoid negligent hiring lawsuits – a lawsuit from a guest or customer, for example, based on a hotel’s failure to properly screen an employee who later does harm.

Despite these important business concerns, the current regulatory climate has changed. It is moving toward limited inquiry into only certain aspects of a candidate’s background, and then only when the information sought is relevant to the position. For example, the Equal Employment Opportunity Commission (“EEOC”) and some states¹ are taking the position that, given the disproportionate rate of minorities that are arrested and convicted of crimes, an employer’s policy of disqualifying all applicants with criminal history can have a discriminatory impact on minority candidates and thereby violate Title VII’s discrimination laws. As a result, employers must rethink the wisdom of broad background check policies that are one size fits all regardless of the job classification and instead, decide whether, on a job position by job position basis, background information is relevant, helpful, and non-discriminatory when it is used to assess a candidate’s suitability for employment. Adopting the right background check procedures is a critical risk management practice to avoid EEOC claims, claims of individual litigants and even the prospect of class action-based lawsuits.

In light of this regulatory shift, in formulating your company’s background check procedures we suggest asking three key questions to ensure your hiring and screening practices are appropriately tailored, based in sound reasoning, and able to survive claims of discrimination from the EEOC, individual litigants and potential class action claims:

- Is all available information equally relevant in assessing your candidate?
- Do you have a reason to order background checks that is appropriate in light of new regulatory challenges?
- Are you making appropriately tailored assessments of unsuitability based on the background information received?

Once you know the answer to these questions, you will be better equipped to navigate the regulatory challenges and make the best decisions for your business regarding your initial

¹ See, [Exhibit 1](#) for a summary of state “job-relatedness” and other restrictions on employer consideration of arrest and conviction history.

decision of what kind of background check to order, as well as what kind of updated background check for your employees, post-hire.²

Question No. 1: Is all available information equally relevant in selecting a candidate?

The scope of a background screen can be as narrow as reviewing driving history or as broad as reviewing all information contained in any public and educational record. As you peruse the menu of screening choices you should ask yourself “What are we going to do with the results?” As you answer that question, it is important to also remember the EEOC’s announced suspicions about over-emphasizing the value of criminal history information during hiring as well as consider that there may be other information you are using that regulators consider to be discriminatory and only marginally relevant to your hiring decision.

Criminal History

As identified in the detailed chart in Exhibit 1, each state has its own position on the use of arrest and conviction records. However, even when abiding by those parameters, there is still the need for a comprehensive, consistent set of procedures regarding the use of criminal history to avoid claims of discrimination. The key here is to identify by job description prior to hiring candidates what kind of criminal background information (including how many years back) the company will look for and to ensure that the same level of background check is done for every applicant for that position. Additionally, for each job description, you should have a memo that describes the relevance of, and need for, such information as being job-related to the particular job description. Remember, it is inconsistency in the selection of what type of background check each applicant gets that can often get employers sued for discrimination. Establishing a policy and procedure to make sure each applicant for a job description gets the same background check and having a defensible job-related justification for the relevancy and need for the information for each job position is critical to defending against future discrimination claims.

Credit History

Like criminal history, the EEOC has raised concerns about the relevance of credit history information during hiring and its potential to inject an element of discrimination into this process. While the EEOC has yet to publish comprehensive guidance on the use of credit checks, it has cautioned that:

[i]nquiry into an applicant’s current or past assets, liabilities, or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because they tend to impact more adversely on minorities and females.³

² Updated checks are appropriate when they are regularly ordered for all or a certain group of employees, such as annually, bi-annually, or every three years, in cases of promotions or transfers to positions of increasing responsibility or liability-risk for the company, and if there is a reasonable suspicion that an employee may have engaged in criminal conduct or had a significant negative change in his or her financial situation.

³ In the case of a credit check, some states require an even more direct correlation than the EEOC has suggested between the duties of the position and the risk of harm or loss to the company or its customers. See, Exhibit 2.

U.S. Equal Employment Opportunity Commission, *Pre-Employment Inquiries and Credit Rating or Economic Status*, available at www.eeoc.gov/laws/practices/inquiries_credit.cfm. (emphasis added). Thankfully, the EEOC does recognize that credit history is properly considered where such information is essential to the particular job in question. Certain positions at financial institutions, or positions that provide access to financial assets or confidential information are examples of jobs for which a credit check may be supported by business necessity.

In addition to looking at the relevance of credit information to a particular job, it is important to assess whether the credit history discovered is indicative of the kind of financial stress that may lead to theft, embezzlement or other workplace problems. For instance, certain collection and charge-off accounts may be appropriately considered, but medical collection accounts may not, as they may indicate an emergency situation that does not pose the same risk of financial pressure and mismanagement.

As you can see, the EEOC has set a high bar for employers who wish to consider credit history during the hiring process. If you decide to begin or continue using credit history information during hiring, we recommend the following:

- Ensure the information is sought only for positions where the correlation between job duties and risk created by financial stress is clear, such as CFO, Controller, etc., or where the position provides unsupervised access to your company's financial assets;
- Provide an opportunity for applicants to explain their situation and the negative credit history information and consider granting waivers based on information provided;
- Add language to your Fair Credit Reporting Act ("FCRA") notice that informs the applicant that he or she should contact your Company if there are circumstances that may explain the information contained in his or her credit report;
- Maintain consistency by setting up the specific kind of financial background check that will be used on a job description by job description basis and make sure that the agreed-upon kind of financial background check is consistently used for every applicant for each applicable position; and
- Living memos should be created on a job description by job description basis that identify the agreed-upon kind of background check that will be used and the legitimate business rationale justifying why the company needs the particular kind of credit information for the particular job position because of the business risks associated with the applicant's financial stress that would be found in the financial background check.

These steps will reduce the risk of regulatory challenge and will go a long way to ensure that you are using credit history information only where it is critical and relevant to your organization.

Sex Offender Registry

The National Sex Offender Registry is a database that contains information about every person who has been convicted of a sexually violent offense or a crime against a victim who is a minor, or who is a sexually violent predator. Because of this, employers may understandably have an immediate and negative reaction when they learn a candidate is listed on the registry.

Information provided on the registry varies greatly in terms of quality and consistency. It is submitted based on the rules of each state's program and, as a result, offenders remain on the registry, often indefinitely, and sometimes for very minor offenses. The EEOC has not specifically commented on the Sex Offender Registry, but because it is a database comprised of criminal history information, we recommend you follow the same process with this information as you do with your consideration of other criminal history. We recommend that, at a minimum, you evaluate the type of crime committed, how long ago it occurred, and what, if anything, has happened since the conviction (both good and bad).

Arrest History

When a job candidate is arrested for a crime and then not convicted (or only convicted of a less serious crime), both state and federal regulators have warned employers to either ignore this information altogether or to use it merely as a basis to ask an applicant for more detail about the events surrounding the arrest. This is because the fact that an arrest occurred, without more, is not evidence of criminal conduct. We recommend that you carefully consider the value of arrest records as part of your hiring assessment against the risk of misuse of this information.

Question No. 2: Do you have reasons to order criminal background or credit checks that are appropriate in light of new regulatory challenges?

With regard to criminal background and credit checks, the EEOC's guidance does not prohibit consideration of such history, but does suggest that screening may not be appropriate for all positions within an organization. As you make your assessment of positions for which screening should be pursued, consider whether the job is one where: (1) the **nature** of duties; (2) the **environment** where the work is performed; or (3) the **exposure** to certain types of customers or clients, makes it important to know and be able to evaluate a candidate's criminal history or current financial position as part of the suitability assessment? For example:

- Do particular employees have unsupervised access to guest rooms, guest property or work with guests in sensitive situations (such as a spa)?
- Are there specific state or federal standards that prohibit you from hiring individuals with a certain criminal history, such as exist may exist for babysitting services?
- Do employees make decisions about or have access to company (non-public) financial information, confidential guest information, inventory, cash or an equivalent, or company credit?

If the answer to any of these questions is yes, then the duties, environment or clientele that are unique to these positions may create a need to protect the company, employees, volunteers, guests and the public from workplace violence, injury, abuse, fraud and theft. While not exhaustive, these questions should help guide you as you review your positions and assess which ones will have an underlying business concern that would be informed by a criminal background or credit screen.

Question No. 3: Are you making appropriately tailored assessments of unsuitability based on the background information received?

In the background check world, negative information that comes back to the employer puts the employer in the position of having to make a “negative adjudication:” (or no hire decision) based on the information obtained. Consistency in the negative adjudication process is a critical litmus test of whether there is discrimination in the workplace – the greater the consistency, the less likely that discrimination is present. While consistency remains important in the hiring decision process, the EEOC’s new guidelines caution against rigidity and broad-based rules for screening candidates that are company-wide as opposed to job position specific. For example, a hiring decision matrix that screens out a front desk clerk candidate because of a DUI could be challenged for a lack of connection between the screening criteria and appropriate suitability factors for this particular job position.

Given this, employers should place greater emphasis on criminal (or credit) history that makes a candidate unsuitable for a particular job position by considering factors such as:

- The **nature** of the job sought;
- The **number, nature and gravity** of offense(s), as well as surrounding facts such as age at the time of conviction;
- The passage of **time since the offense** and/or completion of the sentence, and any evidence of **rehabilitation** efforts, employment history, or compelling references; and
- Other evidence of **suitability**, such as successful prior employment in a similar role or bonding under a federal, state, or local bonding program.

Consider developing a comprehensive matrix of consistent negative adjudication standards that are job position by job position. These matrices should assist you to:

1. **Shift your paradigm** – suspend any blanket hiring policy that has rigid disqualification requirements related to criminal or credit history, and advise your managers and decision-makers that the old policy is being revised in favor of more precise disqualification standards;
2. **Assess your needs** – work with your leadership to determine which departments and jobs have duties, environment and/or exposure factors that make it important to assess suitability through a background (criminal and/or credit history) screen by reviewing the essential functions of each position;
3. **Define job-relatedness and suitability** –
 - record the duties, environment and/or exposure considerations that drive the need for careful assessment
 - identify crimes, re-offense rates, or credit data that demonstrate a concern related to the above, and look to (and keep records of) outside research to see if your assessment can be confirmed
 - decide how old information can be and still be relevant

4. **Build your screening and hiring policy** – using the job-relatedness and suitability assessment as the foundation, develop your written policy to help guide those who have involvement in hiring. If you decide to consider individualized factors, such as successful post-conviction employment history, rehabilitation efforts such as education or training, or personal reference, build in best practices addressing how to ask for information about these issues, how to assess them, and how to properly differentiate unique and individualized factors; and
5. **Train, train, train** – a policy is great, but compliance requires understanding of the reason for the change, clarity about what is now different, and buy-in for new practices. Training is your best tool to move the organization forward and reduce risk of misunderstanding or intentional non-compliance with your new policy.

In addition to properly training your hiring managers and decision-makers about the new policy, consistent implementation of your policy is critical. When determining whether to grant a waiver to a particular applicant based on information that explains the circumstances, it is important to maintain a record of the decision. When a subsequent applicant provides similar information, you should refer to any prior waiver request(s) to ensure that you are treating all applicants similarly.

The EEOC's new focus on potential discriminatory impact of neutral pre-employment policies and practices is requiring hospitality employers to think about these issues in a new way and to assess policies and practices that may be longstanding or withstood prior challenge. Employers in the hospitality industry have found themselves the target of some of the EEOC's systemic investigations of criminal background check policies. This is all part of the EEOC's E-RACE (Eradicating Racism and Colorism from Employment) initiative, a program dedicated to strengthening the "EEOC's efforts to ensure workplaces are free of race and color discrimination." One of the EEOC's specific goals for the E-RACE initiative is to develop strategies for addressing "21st Century manifestations of discrimination," which the EEOC identifies as including arrest and conviction records, as well as others pre-employment hiring practices.

Employers in the hospitality industry will likely continue to conduct criminal background checks on applicants. These potential employees have access to your guests and customers, their personal belongings and often credit card information. Prudent hotels employers use criminal background information to guard against hiring employees with criminal histories that may place your guests in harm's way. In light of the EEOC's focus on the use of criminal background checks in hiring decisions, hospitality employers must strike a balance – protecting your guests, customers and employees and maintaining a meaningful and legally defensible criminal background check policy.