



Adjudication Modules and the EEOC: **When Consistency Becomes Liability**

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Adjudication modules are designed to apply consistency and objectivity in the hiring process, but as the government cracks down on discriminatory hiring practices, a slavish devotion to these modules can leave companies exposed to significant liability. This article will review some of the challenges organizations may face when employing their use.

For the unfamiliar, adjudication modules are matrices, grids or charts that dictate specific reactions to applicants convicted of crimes, as well as those with poor credit and other adverse information found on a background check. Some modules are as basic as directing a hiring manager not to hire any applicant with a felony conviction, while others attempt to identify the entire spectrum of crimes and stage specific scenarios – i.e., whether the applicant has been convicted of multiple crimes or convicted within a certain timeframe – to determine if the individual is eligible for employment.

However, these perceived benefits can quickly become a liability. In recent years, the Equal Employment Opportunity Commission (EEOC) has stepped up its scrutiny of hiring policies that can harm minorities or other job seekers in protected classes. The chief targets: companies that screen out job applicants based on blanket policies (sometimes referred to as “bright line” hiring decisions) to screen out all applicants with criminal records or bad credit reports even when the adverse information has no bearing on the person’s ability to perform the given job responsibilities.

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In September 2009, the EEOC sent a sharp message to employers when it filed a class-action lawsuit against Freeman Companies, a Dallas-based corporate event-planning company. The EEOC claimed that Freeman used credit histories and criminal background checks to unlawfully “deprive a class of black, Hispanic and male job applicants of equal employment opportunities and otherwise adversely affect their status as applicants because of their race, national origin and sex.”

The EEOC’s position in Freeman is consistent with informal guidance the agency issued in 2005: that an employer who uses a “blanket” policy of not hiring any applicant with a history of arrest or convictions violates Title VII of the Civil Rights Act because such a policy “disproportionately excludes members of certain racial and ethnic groups, unless the employer can demonstrate a business need for use of this criteria.”

Adding fuel to the controversy, a single mother recently launched a lawsuit against First Transit, Inc., a bus transportation provider in Oakland, Calif., when the company fired her after learning she had been convicted seven years earlier for welfare fraud. Her suit alleges the company’s hiring practice discriminates against black and Latino job seekers, whose arrest and conviction rates are far greater than whites.

A Legal Slippery Slope

Adjudication modules are designed to bring clarity to a law or regulation that could be read in different ways. They're intended to provide employers with what's intended to be a simple guide for making complicated decisions. Yet life, and especially the hiring process, is rarely simple. What seems like a great way to eliminate a manager's ability to make the "wrong" decision can quickly become a slippery slope.

Discrimination issues loom when companies "weed out" applicants based on credit reports and criminal history that have no bearing on their job performance. This practice is increasingly coming under fire from a myriad of federal, state and local legislation; a growing number of states now restrict the number and type of criminal offenses that can be considered in making employment decisions:

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In August, Illinois enacted a new state law called the "Employee Credit Privacy Act" that will take effect January 1, 2011. This new law generally prohibits employers from making any employment decision (e.g., to hire or recruit, discharge, or modify compensation) based upon an individual's credit report or credit history. The act also prohibits employers from obtaining a credit report regarding an applicant or employee, and from asking an applicant about the individual's credit history. Illinois is now the fourth state – following Hawaii, Oregon, and Washington – to enact restrictions on the use of credit history in employment decisions. Nearly one dozen other states have similar legislation pending.

Also, several cities and states – most recently Massachusetts, Connecticut and New Mexico – have passed "ban the box" laws that prohibit public employers from asking about the criminal history of jobseekers on initial applications. Massachusetts has gone a step further and slapped the ban on private employers as well. Of course, employers in those states can still inquire about "priors" (arrests and convictions) when they interview the strongest candidates for openings. Studies have shown, however, that ex-offenders stand a much better chance of getting hired if they reach that stage, when they can explain their past problems in person.

In any event, the blanket application of adjudication modules can be extremely challenging. Another key problem is that different jurisdictions define similar crimes differently. Thus, different states (or counties for that matter) may view similar crimes by different names or may ascribe different legal weight to similarly named crimes. For instance, the act of knowingly or unknowingly bouncing a check for more than \$5 is considered theft by check in the state of Texas. The general reaction of an employer is to consider "theft by check" as serious and exclude any applicants with this conviction on their record.

A matrix that doesn't distinguish between local charges such as these, nor consider the differences among conviction reporting restrictions or the relevance of job responsibilities, can expose the employer to significant liability.

Many states have similarly legislated (or have included in regulations or guidance) that the elements of a crime for which an individual was convicted must be "substantially related" or "directly related" to the job duties of the position sought. Unfortunately, matrices do not allow for such distinctions, nor do they provide for extenuating circumstances, deviations or mistakes that often occur when evaluating a person's employability.

Moreover, matrices by definition preclude the detailed case-by-case analysis often required to overcome the disparate impact on minority groups that inevitably results from criminal background screening. Thus, the employment of an adjudication module created to apply consistency and objectivity may actually backfire.

Worse, some employers request their employment screening providers interpret such modules and make hiring decisions on their behalf. By doing so, companies are effectively ceding control of their hiring decisions to a third party. This is ill-advised and has potential legal risks. Employers will not escape liability by ceding the hiring decision to a third party by virtue of a matrix. In fact, the screening provider will likely seek indemnification from the employer for any potential liability, and will resist extending indemnification to the employer. This adds a level of complexity that many employers would rather avoid, but will do so at their peril.

What Can an Employer Do?

Clients often ask what elements of a background check deserve the most attention. The answer is to **review everything** and be careful in making **every** hiring decision. Every organization is unique in their hiring needs and practices.

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Adjudication modules carry liabilities; however, for companies that employ them we urge the following:

- Instead of a blanket "pass-or-fail" approach, consider a "pass-or-review" system. Evaluate any applicants with adverse information on a case-by-case basis.
- Never employ an "off the rack" adjudication module. Every organization should develop its own module (with input from legal counsel).
- Don't ever cede the decision-making responsibilities to a third-party provider.

Most companies tend to be nuanced when they look at credit reports, weeding out applicants with bad credit only if they seek senior positions or jobs dealing with money. But if the screening process weeds out more minority applicants than whites, the EEOC mandates that employers must show how that credit information is related to the job. If criminal histories are taken into account, the EEOC says employers must also consider the nature of the job, the seriousness of the offense, and how long ago it occurred. For example, it may make sense to disqualify a bank employee with a past conviction for embezzlement, but not necessarily for a DUI.

Hiring managers should know what is important to their organization and ensure that both their background screening process and criteria are aligned with each position and the organization's overall goals. People should be evaluated by their resume, interviews, test results, and their assertion of skills, experience, aptitudes, character traits, and moral compass.

Once you've decided an applicant is the prime candidate to fill the position, use a background check to ensure they withstand impartial scrutiny. If a criminal record or negative credit information surfaces, consider the following questions:

- Is the screening criteria properly aligned to the position?
- How is the adverse information job-related?
- How long ago did the offense occur?
- Did the arrest records actually result in a conviction?
- Is the person a repeat offender?

People should always be judged on their own strengths and weaknesses by someone within the hiring organization. Only then can you be sure that the *complete* individual is being evaluated.

EmployeeScreenIQ is a Cleveland, Ohio-based employment screening company offering a variety of employment screening services to mid- and large-cap organizations throughout the world, including those in North and South America, Europe and East Asia. For more information visit www.employeescreen.com.