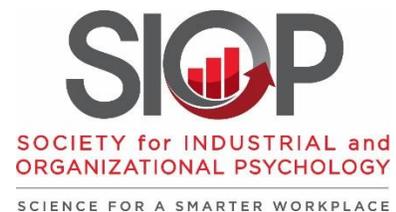


# Conducting Background Checks for Employee Selection

Michael G. Aamodt, Ph. D.  
DCI Consulting Group, Inc.  
[maamodt@dciconsult.com](mailto:maamodt@dciconsult.com)



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**Mike Aamodt** is a principal consultant for DCI Consulting Group. He spends most of his days conducting salary equity analyses, computing adverse impact statistics and helping develop employee selection systems for federal contractors and other organizations. Prior to working for DCI, Mike spent 26 years as a professor of industrial/organizational psychology at Radford University. He received his B.A. in psychology from Pepperdine University in Malibu, Calif., and both his M.A. and Ph.D. from the University of Arkansas. Mike has published several books in the human resource area, published many research articles/book chapters and presented over 130 papers at professional conferences. In more than 30 years as a trainer and consultant, Mike has helped a wide variety of organizations deal with such issues as compensation, employee selection, job analysis, performance evaluation and downsizing. He is considered one of the nation's experts in police psychology and in OFCCP/EEOC compliance. He can be contacted at [maamodt@dciconsult.com](mailto:maamodt@dciconsult.com) or 202-280-2172.

#### **Author Note**

This white paper is a short version of a more detailed chapter on background checks that can be found in:

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## ABSTRACT

Background investigations are used by 86% of organizations in the U.S. to determine if applicants have previously engaged in behaviors that suggest they might engage in future counterproductive behaviors on the job or be a threat to the safety of others. A background investigation might consider some or all of the following: reference checks, credit history, criminal record, driving record, work history, military service, education and personal references. This paper will discuss legal considerations in using two of the most controversial components of the background check: criminal history and credit history.

## Criminal and Credit History Checks

### *Criminal History Checks*

In considering an applicant's criminal history, employers typically gather information in one of two ways: applicant self-reports on a job application or a criminal history check conducted by an outside vendor. Employers using applicant self-reports include a section on the application in which applicants are asked if they have been convicted of a crime. The wording of this question varies across the time frame (e.g., ever been convicted, convicted in the past 10 years) as well as the type of crime (e.g., any crime, only felonies). The employer then uses this information to eliminate applicants whose criminal histories suggest that they would not be good employees, pose an increased risk to the safety of others or pose an increased risk to the economic well-being of the organization and its customers.

As of February 2016, 21 states and more than 100 cities and counties (NELP, 2016) have instituted what are known as "ban-the-box" policies that prohibit public employers from including criminal history questions on employment applications; instead, the employer must wait until a conditional offer of employment<sup>1</sup> before

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<sup>1</sup> A "conditional offer of employment" or a "conditional offer of hire" is a job offer with contingencies attached. Contingencies might include passing a background check, passing a medical exam, or the verifying of references.

checking the applicant's criminal history. Seven of these states—Hawaii, Illinois, Minnesota, New Jersey, Oregon, Rhode Island and Massachusetts—also cover private employers in their ban-the-box initiatives. In November of 2015, President Obama asked the Office of Personnel Management (OPM) to take action in “banning the box” on applications for jobs with the federal government.

### ***Credit History Checks***

Employers that consider an applicant's credit history provide an outside vendor with information similar to that provided for a criminal history check. The vendor then produces a report that includes an applicant's previous addresses, court-ordered judgments, list of revolving accounts (i.e., credit cards), including payment history and current balances, and a list of installment accounts (i.e., loans), including payment history and balances. Some employers will ask the vendor to do some prescreening such as only provide information on judgments, write offs and late payments over 90 days. Unlike a consumer credit report, the employment credit report does not contain a credit score.

### **The EEOC and Background Checks**

Although the Equal Employment Opportunity Commission (EEOC) has been concerned for almost three decades with employers' use of an applicant's criminal history, the Commission's enforcement guidance has increased dramatically in the past few years. In 2012, the EEOC issued *Enforcement Guidance in the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (hereafter referred to as the *Guidance*). This document provides employers with

guidance and best practices on when and how they should conduct criminal history checks. The *Guidance* was followed in 2013 by the Office of Federal Contract Compliance Programs' (OFCCP) Directive 306 in which OFCCP essentially stated its agreement with the EEOC *Guidance*.

EEOC's concern, at least in part, is the widespread use by employers of an applicant's criminal and credit history. Surveys by the Society for Human Resource Management (SHRM) indicate that background checks are commonly used by employers (SHRM, 2012). In 2012, 86% of employers conducted criminal history checks for at least some jobs and 69% conducted criminal history checks on all of their job applicants (SHRM, 2012). The two primary reasons for these checks were to reduce the risk of a negligent hiring suit (52%) and to ensure that their employees will have a safe workplace (49%). Most employers (58%) provided applicants with criminal convictions the opportunity to explain why those convictions should not keep the applicant from being hired.

In 2012, 47% of employers conducted credit checks for at least some jobs. On the basis of the SHRM survey results as well as discussions with employers, there seem to be five main reasons they consider an applicant's credit history:

1. A requirement by an external agency (e.g., a bonding company, a state government) to conduct credit checks. Thus, the employer is not using the credit check as a means to predict performance but, instead, as a means to fulfill a requirement by the bonding agency.
2. A desire to reduce potential legal liability due to negligent hiring.
3. A belief that employees who are in financial distress might have an increased likelihood to steal or accept bribes.

4. A belief that bad credit history might suggest that the applicant is irresponsible and is not conscientious and thus will be a bad employee. Employers relying on this belief are, in essence, using a credit check to replace or enhance a personality inventory.
5. A belief that employees with financial problems will be stressed due to the financial burden and thus will either perform more poorly at work or will miss work to deal with their financial issues.

According to the SHRM (2012) survey, most employers (58%) conduct the credit check after a contingent job offer or after the employment interview but prior to the job offer (33%). About two-thirds of employers allow applicants who “fail” the credit check to explain any negative information found in the credit history (SHRM, 2012). For example, a loan default may have been due to a medical emergency rather than a person irresponsibly running up credit card debt.

Perhaps due at least in part to EEOC's increased activity, employers' use of credit and criminal histories has declined slightly since 2010. Criminal convictions were used by 93% of organizations in 2010 compared to 86% in 2012 and credit history was considered by 60% of organizations in 2010 compared to 47% in 2012. Furthermore, one survey found that 88% of employers have adopted the EEOC's guidance in 2014 compared to just 32% the previous year (EmployeeScreenIQ, 2014).

EEOC's primary concern about employers' widespread use of applicants' criminal and credit history is based on national statistics indicating that black and Hispanic populations are more likely to have criminal convictions and lower credit scores than are white and Asians populations. Furthermore, it has been estimated that more than

65 million Americans have a criminal record (Rodriguez & Emsellem, 2011). The large number of Americans with criminal records is compounded by the finding that many criminal and credit history records contain errors or are incomplete.

## **Legality of Background Checks**

In the pages ahead, the legal issues involved in using an applicant's criminal and credit history to select or promote employees will be discussed. To help focus the discussion, a flow chart has been included in Figure 1. The next nine sections of this paper correspond to each of the nine decision points in the flow chart.

### **1. Is there a federal law or regulation that requires the exclusion of applicants with a particular conviction?**

The 2012 EEOC *Guidance* clearly acknowledges that there are federal laws and regulations that require employers to conduct criminal history checks for certain jobs and forbid employers from hiring applicants convicted of particular crimes for those jobs. For example, federal regulations prohibit individuals found guilty of abusing, neglecting or mistreating residents of nursing facilities from being employed in Medicare and Medicaid nursing facilities (42 CFR §483.13c(ii)(A)). In such cases, the use of criminal history will be legal, even if the use of criminal history results in adverse impact.

**Figure 1. Legality of Background Checks: Flowchart**



## **2. Did plaintiffs demonstrate that a particular aspect of the background check resulted in adverse impact?**

As with other selection tests, the legality of using background checks depends on the extent to which the background check results in adverse impact<sup>2</sup> on the basis of gender or race/ethnicity. If there is no adverse impact, use of background checks will be considered legal, as long as the use of the background check is applied consistently and is not a pretext for discrimination. If adverse impact occurs, the employer must demonstrate that the background check is job related.

Based on national statistics, the EEOC and OFCCP presume that use of criminal convictions and financial history will result in adverse impact. Unlike the EEOC, the courts do not make such a presumption about adverse impact. Instead, as with any selection test, the courts require the plaintiff to not only establish that the background check has adverse impact for the jobs in question, but to identify the specific element of the background check that is causing the adverse impact (*EEOC v. Freeman*, 2013; *EEOC v. Carolina Freight*, 1989; *Craig v. Department of Health, Education, and Welfare*, 1981).

In three cases, the courts ruled that the use of national data or simple comparisons of the employer's workforce representation with Census or similar data is not sufficient (*EEOC v. Carolina Freight*, 1989; *EEOC v. Freeman*, 2013; *Reynolds v. Sheet Metal Workers Local 102*, 1981). That is, merely showing race or gender differences in national conviction rates is not enough to establish adverse impact in a given case. Instead, the

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<sup>2</sup> Adverse impact occurs when a facially neutral selection practice such as a background screen or a personality inventory results in a higher percentage of members of one group (e.g., men) being hired than members of another group (e.g., women). For adverse impact to occur, the differences in the selection rates must, at a minimum, be statistically significant.

plaintiffs must establish that a significantly higher percentage of actual job applicants of one race/gender passed the criminal history check than did another race/gender.

For three reasons, national race/ethnicity differences in criminal convictions and credit scores do not always result in adverse impact in a given employment context:

- Applicants with criminal convictions or credit problems may not apply for jobs in which they suspect they would fail a background check.
- Census or similar data may be based on a metric that does not represent how an organization uses the background check. For example, although national data demonstrate that there are race/ethnicity and gender differences in credit scores, credit reports for employment purposes do not contain a credit score. Instead, they contain such information as credit balances, court awarded judgments and payment histories.
- The proportion of applicants with credit problems or criminal records will differ by job level. That is, individuals applying for upper management positions are probably less likely to have credit and criminal history issues than are applicants applying for low-paying positions. The *Kaplan* case underscores this point; when the data were broken down by managerial/professional jobs and lower-paying hourly jobs, there was no adverse impact. Thus, when conducting adverse impact analyses, it is essential to not aggregate jobs with dissimilar rates of financial problems or criminal history.

### **3. What is being considered?**

The next step in determining the legality of a criminal conviction policy is to determine whether the employer bases its decisions on arrests rather than convictions. Although the consideration of arrests is not by itself illegal, at least three court decisions have found the use of arrests to not be job-related (*Schware v. Board of Examiners, 1957; Gregory v. Litton, 1972; Reynolds v. Sheet Metal Workers Local 102,*

1981). Employers may legally base selection decisions on convictions when certain conditions are met. Some of those conditions are discussed in the following sections.

#### **4. Is the policy a blanket policy of no convictions ever?**

Neither the EEOC nor the courts look positively at policies in which any criminal conviction (misdemeanors or felonies of any type), regardless of when it occurred, results in an applicant not being hired (*Carter v. Gallagher*, 1971; *Butts v. Nichols*, 1974; *Green v. Missouri Pacific Railroad*, 1975; *Field v. Orkin Extermination*, 2002). For example, in *Butts v. Nichols* (1974), a three-judge panel stated:

There is no doubt that the State could logically prohibit and refuse employment in certain positions where the felony conviction would directly reflect on the felon's qualifications for the job (e.g., conviction of embezzlement and a job requiring the handling of large sums of money). The Iowa statutory scheme, however, has an across-the-board prohibition against the employment of felons in civil service positions. There is simply no tailoring in an effort to limit these statutes to conform to what might be legitimate state interests.

In *Green v. Missouri Pacific Railroad* (1975), the 8<sup>th</sup> Circuit Court of Appeals stated:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except a minor traffic offense, in the permanent ranks of the unemployed.

#### **5. Can the employer demonstrate a link between the criminal check and the requirements of the job?**

The courts seem to be clear in their opinions that criminal history checks are a reasonable employment practice. For example, the courts have stated:

- It is exceedingly reasonable for an employer to rely upon an applicant's past criminal history in predicting trustworthiness (EEOC v. Carolina Freight, 1989).
- For many employers, conducting a criminal history or credit record background check on a potential employee is a rational and legitimate component of a reasonable hiring process. The reasons for conducting such checks are obvious. Employers have a clear incentive to avoid hiring employees who have a proven tendency to defraud or steal from their employers, engage in workplace violence or who otherwise appear to be untrustworthy and unreliable (EEOC v. Freeman, 2013).

Unlike such selection methods as cognitive ability tests, personality inventories or assessment centers, the courts, to date, have not required employers to demonstrate a statistical relationship between prior criminal history and future problems on the job. Instead, the courts seem to use the standard of a reasonable link between the consideration of criminal history and the job in question. In so doing, the courts have considered the reason behind the employer's use of criminal history as well as the extent to which the use of criminal history is limited to certain jobs. For example, in *Richardson v. Hotel Corporation of America* (1971), the court stated:

The evidence here shows that the hotel rejects applicants for employment in positions it considers "security sensitive" if they have been convicted of a serious crime. Bellmen occupy one of the several positions that the hotel considers "security sensitive." They have access to guests' luggage and to guests' rooms. They are permitted to obtain room keys from the desk clerk, and even to go behind the desk for keys. They may go through hotel corridors unaccompanied without provoking inquiry. They may enter and leave the hotel by any exit during the day, carrying parcels, while most employees must use a special employees' entrance where they are subject to scrutiny by a guard, and

packages are subject to inspection. Some effort is made by the Head Bellman to be aware of the whereabouts of bellmen during the day. Bellmen are expected to keep time records showing their activities. But these are not carefully scrutinized and they can of course be easily evaded: a bellman going to any specified room on a real errand might stop by another room en route without making any entry on his duty sheet.... It is reasonable for management of a hotel to require that persons employed in positions where they have access to valuable property of others have a record reasonably free from convictions for serious property related crimes.

The EEOC's Guidance states that there are two ways in which an employer can establish the job relatedness of a criminal history check. It can either conduct a traditional criterion validation study in which it shows a statistical relationship between criminal history and a relevant aspect of job performance (e.g., theft, employee violence) or it can use a targeted approach with an individualized assessment.

#### ***Traditional Criterion Validity Study***

There have been no cases in which an organization tried, or the court required, a demonstration of a statistical link between the background check and employee behavior. In fact, in its *Guidance*, the EEOC acknowledged that such a criterion validity study would be difficult to conduct. This difficulty is due, in part, to the huge sample sizes that would be needed to predict a low baserate event, such as employee violence, or a higher baserate event, such as employee theft in a retail environment in which it is difficult to identify the person responsible for the theft.

Based on a meta-analysis<sup>3</sup> of a small number of studies, there are some small, but statistically significant, relationships between background information and employee behavior (Aamodt, 2015). Furthermore, research suggests that the background check as a whole is a better predictor of employee behavior than are the individual parts. For example, Mealia (1990) found that the overall background rating correlated more highly with police performance than did such individual components as traffic tickets, misdemeanor arrests and discipline problems in the military.

### ***Targeted Approach***

Because of the difficulty in conducting a traditional criterion validity study, most employers will choose to validate their background investigations using a targeted approach that logically links their policy to the jobs in question. Essentially the employer would be using a content validity approach with a "job analysis" that focuses more on an incumbent's opportunity to engage in counterproductive or illegal behavior (risk analysis) rather than on the tasks performed by the employee and the competencies needed to perform those tasks.

The basic validation steps in a targeted approach are:

1. Identify the extent to which employees in a particular job are exposed to such things as money, merchandise, drugs/alcohol, sensitive information (e.g., credit card numbers, personal data) and people (i.e., customer, co-workers, vendors).
2. Develop a list of crimes that can be used in the linkage phase of the risk analysis. Although established lists such as the Uniform Crime Index can be used, for employment purposes it makes more sense to group crimes based on exposure

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<sup>3</sup> A meta-analysis is a statistical method in which the results of multiple studies are combined to yield an overall correlation. Thus, rather than discussing each study separately, a meta-analysis allows for one "bottom line" number that summarizes the findings of all of the studies.

- types (e.g., crimes against people, motor vehicle crimes) than by type of crime (e.g., violence, property, moral).
3. Link types of crimes to areas of exposure/opportunity. This linkage would probably be accomplished by having a committee of subject matter experts (SME) meet to discuss the areas of exposure and crime types to determine which crimes would be considered in the employment process for each area of exposure.

Once these steps have been completed, the organization is ready to apply the system to applicants with criminal convictions. For example, if an individual applied for a job as a street paver, a criminal history would not be considered because that position has no key exposures. If, however, an applicant with a history of theft applied for a position as a teller, money is an area of exposure for the teller position, theft is a crime of trust, and crimes of trust are linked to exposure to money. As a result, the theft conviction would bar the applicant for employment in the teller position for the time period established by the organization in a later step.

**6. Did the employer search for alternatives with equal validity but less adverse impact?**

If a selection procedure results in adverse impact but is found to be job related, the *Uniform Guidelines on Employee Selection and Placement* (UGESP) still requires employers to search for an alternative method that would have equal validity but less adverse impact. Theoretically, this alternative could be a different test measuring the same construct or a test measuring a completely different construct.

It is difficult to imagine what a reasonable alternative would be to a criminal history. That is, if a person was convicted of murder and spent 20 years in prison, what employment test could substitute for the criminal history in predicting whether the person might kill again? What about a theft conviction? Would an integrity test be a substitute? It wouldn't seem so as we already know the person has a history of being dishonest. For selection procedures such as criminal history checks and credit checks, it seems that the search for alternatives will probably involve alternative procedures, cutoffs and time frames within the method rather than a search for a different method. That is, rather than replacing the criminal history check with a personality inventory, the employer would explore whether a five-year waiting period might reduce adverse impact but still offer the protection (i.e., business necessity) of a seven-year waiting period.

**7. Was employer's criteria for the length of time since conviction or release reasonable?**

The standards set in *Green v. Missouri Pacific Railroad* (the "Green Standards") as well as the EEOC Guidance require an employer to consider the time that has elapsed since the offense was committed or the applicant was released from incarceration. Unfortunately, there is little guidance for an employer to use when determining these waiting periods. Although there is little formal guidance, there are five sources of information that might be useful in determining waiting periods: court decisions, recidivism research, professional judgment, federal law and state standards for expunging criminal records.

Although there is no “right” answer regarding waiting periods, when case law, recidivism research, professional judgment and state expungement laws are taken together, it seems that waiting periods of 7-10 years for serious crimes and 3-7 years for less serious crimes are reasonable starting places for discussion.

**8. Was a credit reporting agency (CRA) used to conduct the background check?**

As shown in Decision Point 8 in the flowchart in Figure 1, if the employer used the information on the employment application to determine an applicant’s criminal history, the use of criminal history is probably legal. If, however, the employer used an outside agency considered to be a credit reporting agency, we must proceed to Decision Point 9 in the flowchart.

**9. Were applicants who were rejected as a result of their criminal history notified and given the opportunity to explain?**

The Fair Credit Reporting Act (FCRA) places certain requirements on employers that outsource their criminal history and credit history checks to a Credit Reporting Agency (CRA). The FCRA requires employers to:

- Notify applicants in writing that the employer might use information from a consumer report (e.g., credit history, criminal record) to make employment decisions.
- Obtain written permission from the employee to request the consumer report.
- Certify to the CRA that the employer will comply with FCRA requirements
- Notify the applicant if something in the consumer report will adversely affect the hiring decision and then provide the applicant with a copy of the consumer report.

- Provide the applicant with a copy of *A Summary of Your Rights Under the Fair Credit Reporting Act*.
- Allow the applicant the opportunity to correct or explain incorrect or incomplete information on the consumer report prior to the employer making the final hiring decision.

In a 2014 settlement, Dollar General agreed to pay \$4 million to a class of job applicants because it violated the FCRA by not notifying applicants that their background check resulted in adverse employment decisions (*Marcum v. Dolgencorp, Inc.*, 2014).

## **Best Practices**

In the previous section, the criteria considered by the courts in determining the legality of using an applicant's criminal and credit history were discussed. In this section, the discussion will be expanded to include factors that move a background check policy from being "legal" to being "legal and a best practice." Most of the recommendations contained in the checklist in Table 1 can also be found in the EEOC *Guidance* document.

### ***Conduct the Background Check Following a Conditional Offer of Hire***

EEOC recommends that the background check be conducted after a conditional offer of hire is made. Though such a practice is not required, it is probably a best practice when there is sufficient time between the job offer and when the organization needs the employee to start the job. Although conducting the background check after a conditional offer of hire may be a best practice, it is certainly not the norm. The 2014

survey by EmployeeScreenIQ found that 66% of employers ask about convictions on their job applications, 4% ask during the interview and 8% ask following a conditional offer of hire (13% don't ask about conviction and 9% say "other").

### ***Have Multiple Levels of Review***

Another way to ensure the accuracy and fairness of a background check is to have multiple levels of review. That is, if an applicant is screened out on the basis of previous convictions or financial problems, the decision to not hire is reviewed by multiple people. In *Freeman* (2013), the office manager's decisions were reviewed by either the senior vice president for human resources or the vice president of benefits and compliance. In *Kaplan* (2013), the initial "flag" was reviewed by the business unit controller and then by the vice president. A best practice would include monitoring that the multiple levels are not just "rubber stamps" and that at least some initial decisions were changed as a result of the review.

### ***Include an Application Statement***

EEOC recommends that employers include a statement on their application informing applicants that a criminal conviction will not necessarily keep them from getting a job. In *Freeman* (2013), the application form stated:

A conviction does not automatically mean you will not be offered a job. What you were convicted of, the circumstances surrounding the conviction and how long ago the conviction occurred are important considerations in determining your eligibility. Give all the facts, so that a fair decision can be made.

### ***Train Managers***

The EEOC *Guidance* suggests that individuals involved in the hiring process receive training on EEO laws. Given that OFCCP has also recommended training regarding the hiring of veterans and the disabled, it certainly seems that training managers on a variety of employment law topics would be a best practice. Regarding background checks, the managers should be made aware of the potential for adverse impact, the importance of equally applying the background check policy, as well as the specifics of the organization's policy.

### ***Consider Individualized Assessments When Appropriate***

Although the courts have not required individualized assessments, they are a central part of the EEOC *Guidance*. According to the *Guidance*, the individualized assessment would include:

- Notice to the individual that he or she was screened out because of a criminal conviction.
- An opportunity for the individual to demonstrate that the exclusion should not be applied due to his or her particular circumstance.
- Consideration by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.
- The EEOC *Guidance* further recommends that the employer also consider:
  - The facts or circumstances surrounding the offense or conduct.
  - The number of offenses for which the individual was convicted.
  - Age at the time of conviction or release from prison.

- Evidence that the individual performed the same type of work with no known incidents of criminal conduct.
- The length and consistency of employment history before and after the offense or conduct.
- Rehabilitation efforts.
- Employment or character references.
- Whether the individual is bonded under a federal, state or local bonding program.

Although individualized assessments provide ex-offenders with the opportunity to explain why their convictions should be overlooked, they potentially increase an employer's legal risk. If an employer uses a targeted approach as discussed in this paper and consistently adheres to its own background check policy, the only legal risk is adverse impact, which the employer can defend through its targeted approach. If, however, the employer also conducts individualized assessments in which it can make exceptions for some applicants, it runs the risk of a disparate treatment or a pattern or practice claim if those exceptions occur more frequently for a particular gender or race/ethnicity. Thus, it is essential that an organization seek legal counsel before implementing individualized assessments as part of the criminal history or credit history screen.

## **Table 1. Best Practice Checklist**

### ***Criminal History and Credit History***

- Background check is in response to an actual problem or a probable potential problem
- Reasonable search for suitable alternatives with less adverse impact were considered
- Managers and hiring officials have been trained on EEO law
- Background check is conducted post-offer
- There are multiple levels of review if an applicant is screened out on the basis of background information
- Applicants who are screened out by the background check are notified and given a chance to explain

### ***Criminal History***

- Employer conducted a study to link crime type and severity to each type of job
- Employer limited consideration to crimes occurring within a reasonable period
- Convictions, rather than arrests, were considered
- Employer included a statement on the application form that a criminal conviction will not necessarily keep an applicant from being offered the job

### ***Credit History***

- Employer conducted a study to link financial behaviors to type of job
- Employer limited consideration of financial behaviors occurring within a reasonable period
- Goal of credit check is clear: responsibility v. temptation
- Policy is consistent with goal

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