December 3, 2010

VIA electronic mail: Commissionmeetingcomments@eeoc.gov

EEOC Executive Officer
131 M Street, N.W.
Washington D.C. 20507


Dear Commissioners,

Thank you for the opportunity to comment on a possible alternative to obtaining credit history reports for employment purposes. The membership of the Society for Human Resource Management is comprised of more than 250,000 HR professionals who are responsible for developing and administering organizations’ human resource policies and practices, including policies and practices relating to hiring, promotion, training and termination of employees.

SHRM was privileged to have one of its members serve as a witness at the October 20, 2010, meeting discussing the use of credit checks in employment. At that meeting, it was suggested that obtaining the answers to the following three questions from an applicant’s prior employer would obviate the need to obtain a credit report on the applicant:

1) Did the employee perform adequately?
2) Did you have any concerns about the employee's integrity or reliability?
3) Would you re-hire this employee?

The request for public comment asks “whether employers who provide honest answers to these questions would be subjecting themselves to legal liability, and why or why not.”

We commend the EEOC for recognizing that employers could benefit from receiving additional reference information about prospective employees and for exploring ways to improve job-related information sharing in the employment process. Using this three-question construct as an alternative to credit reports, however, raises both practical and legal issues. First, most employers will not answer these types of “opinion” questions because they are concerned about exposure to legal liability. Second, while having honest answers to the three questions posed may provide useful information for the prospective employer, these questions do not fully cover information of interest to a subsequent employer nor do they serve as an adequate substitute, in all instances, for information gained through a credit check. Third, they do not address the use of credit information for the retention or termination of a current employee. Finally, many
organizations centralize the reference function within the HR department and it may not be feasible, in large organizations, to efficiently process this type of reference request.

**Employer Concerns About Legal Liability**

Employers adopt policies and practices to comply with federal, state and local law and revise those practices in response to court interpretation of both statutory and common law. They also adopt policies that go beyond minimum compliance requirements to avoid the mere threat of litigation.

Based on law and legal decisions, employers may be subject to legal liability if they provide a negative reference for discriminatory reasons, in retaliation for the former employee complaining of an illegal activity, or if they give a defamatory reference or disclose confidential facts that constitute an invasion of privacy. Although some of these lawsuits might be avoided by properly training those who may be contacted to provide a reference, others pose a trickier balance. Defamation, for example, occurs when one person makes false written or oral statements that harm another person’s reputation. For a former employee to prove a defamation case, that employee must prove that false statements were made, communicated to a third party and that injury occurred as a result of the false statement. Injury in employment reference cases usually takes the form of a job opportunity lost because of reliance on the defamatory statement. Any less than satisfactory referral carries with it the threat of a defamation suit by the affected employee, as illustrated by Noonan v. Staples Inc., 1st Cir., No. 07-2159 (Feb. 13, 2009). In this case, the First Circuit held that even factually accurate statements about a former employee can form the basis of a defamation suit if the plaintiff can prove malice.

Another pitfall of providing character or personality-based references is a negligent referral lawsuit. This type of suit may be brought by a subsequent employer if the former employer withholds or misrepresents information on the former employee’s behavior that would pose a foreseeable risk of harm to others.

Due to a handful of highly-publicized defamation cases brought against employers during the 1980s, many employers have adopted policies restricting the type of job reference information they will give. Although defamation cases are relatively rare, many organizations indicate that they decline to comment on employee job performance or personality traits because even the defense of an ultimately unsuccessful lawsuit is costly in both time and money.

In addition, some states have enacted special laws addressing references. The California Labor Code, for example, provides that any person—including a manager, supervisor or other employee—who prevents a former employee from gaining subsequent employment by making a factual misrepresentation or misleading statement about the employee is guilty of a misdemeanor. In addition, both the individual who made the statement and the employer can be required to pay the former employee treble damages for the lost opportunity.
For these reasons, employers are consistently counseled by their lawyers to consider certain protective measures, the most common of which are:

- Implementing a neutral reference policy where the organization only confirms objective information that can be documented: the employee’s dates of employment, job titles, and final salary. By providing the same neutral information for all employees, organizations avoid allegations that misrepresentations were made.
- Requiring all managers and supervisors to refer requests for references to the human resource department. Human resources may not have specific information about the former employee’s characteristics but will be able to verify the neutral information.
- Avoiding making any statements about the employee’s character or personality, even when the employee was terminated for misconduct.
- Requiring signed releases, including what information the company is allowed to disclose, from the former employee.

A Fifth Circuit case confirms the wisdom behind this advice. In *Kadlec Medical Center v. Lakeview Medical Center, 527 F.3d 412 (5th Cir. La. 2008)*, a negligent referral suit, the 5th Circuit Court of Appeals ruled that because the previous employer had only provided neutral information about its former employee, Dr. Robert Berry, rather than a reference, it could not be held liable for not disclosing performance issues related to drug use.

In this case, Kadlec, the subsequent employer, began its credentialing process by sending a request to Lakeview, the previous employer, for information about Berry. Although the request included a detailed questionnaire and a signed consent for release of information, the hospital responded with a short letter that stated, “Our records indicate that Dr. Robert L. Berry was on the active medical staff of [Lakeview] in the field of anesthesiology from March 4, 1997, through Sept. 4, 2001” without disclosing any information about Berry’s on-duty drug use, the investigation, or his termination. Individual doctors who were members of Louisiana Anesthesia Associates (LAA) wrote favorable reference letters.

When, in 2002, a patient for whom Berry acted as anesthesiologist at Kadlec suffered complications related to anesthesia resulting in a permanent vegetative state, the patient’s family sued Kadlec and Berry, and the case was settled for more than $7 million. Kadlec and its insurer then filed a lawsuit against Lakeview, LAA and individual doctors who supplied favorable reference letters. A jury awarded $8.24 million to the plaintiffs, and judgment was entered against Lakeview and LAA. On appeal, the 5th Circuit upheld the judgment against LAA but reversed it as to Lakeview. The appeals court held that by choosing to write referral letters, the defendants “assumed a duty not to make affirmative misrepresentations” in their letters. It concluded that the LAA defendants did, in fact, make misleading statements, while Lakeview did not because it only confirmed dates of employment.
Against this litigation backdrop, several states have passed job reference immunity statutes. Employer experience with these statutes, however, has been mixed. The vast majority of the state statutes do not grant a guarantee of immunity—with many doing little more than codifying common law protections by providing immunity for inaccurate job reference information disclosed in good faith. Just as employers have been reluctant to provide extensive reference information even though common law provides qualified immunity, most employers continue to minimize the risk of liability simply by withholding information rather than risk the threat and expense of litigation.

Focus of Employer Inquiries

Background investigations and reference checks are considered different, but complementary approaches to screening applicants for job openings. A background investigation generally involves determining whether an applicant may be unqualified for a position due to a record of criminal conviction, motor vehicle violations, or poor credit history. A reference check generally involves contacting applicants’ former employers and supervisor to verify previous employment and to obtain information about the individual’s knowledge, skills and abilities.

Under the questions posed by EEOC, prior employers would answer three questions regarding whether the employee performed adequately, concerns about the employee’s integrity or reliability, and whether the employer would re-hire the individual if given the opportunity. These questions pose practical challenges. As discussed earlier, it is not clear that employers will answer them. Even if employers were assured that they would not be sued, current practice indicates that employers are likely to provide limited yes or no answers without elaboration.

In addition, the questions themselves are not particularly illuminating. The fact that an employee has performed “adequately” in one position will not necessarily result in adequate performance in a new or different position. Further, questions focusing on adequacy, integrity and reliability do not address the information potential employers hope to obtain from previous supervisors—information about the individual’s knowledge, skills and abilities.

The three-question test also fails to address the type of information needed by employers seeking to fill a fiduciary or money-handling position. As mentioned during SHRM’s October 20 testimony, SHRM’s recent study of employer background screening practices revealed that most employers that consider credit history do so only for candidates for select jobs—those with fiduciary or money-handling responsibilities. These checks alert a potential employer to possible issues with money management skills and whether the candidate shows a lack of financial competency over time.

The suggested three-question test asking about performance, integrity and reliability, and potential for re-hire, will not provide the same information for those employers seeking to fill a financial position. The previous employer, for example, may not be aware of any improper financial activity either because the activity was hidden during employment or because the
employee’s financial troubles started after separation from the previous employer. In addition, the employee may have performed adequately and reliably in the position held but may now be under consideration for a money-handling position making previous performance only one aspect of issues that should be considered in the new fiduciary role.

In conclusion, asking previous employers the three suggested questions is not a realistic substitute for employer use of other available information, including credit reports. In the wake of defamation and related lawsuits, many employers have adopted a standard practice of providing only basic, objectively verifiable information in response to a request for a reference. Even if we could magically remove employers’ fear of legitimate and illegitimate lawsuits and even if they were able to answer the questions completely and honestly, the information gained does not provide subsequent employers with the type of information they seek when hiring employees in positions requiring financial trust and competency. Without absolute protection against lawsuits related to referrals, the three-question approach is not useful as a safe harbor for employers nor does it serve as a substitute for comprehensive background checks.

Again, thank you for the opportunity to provide feedback on this idea.

Yours truly,

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Society for Human Resource Management