

CAPLAW_{update}



After Health Care Reform Upheld, What's Next for CAAs?

By Riley Lovendale and Eleanor Evans, Esq., CAPLAW

With its landmark decision in June, the U.S. Supreme Court left intact all the provisions of the 2010 federal health care reform law that affect Community Action Agencies (CAAs) as employers. Many commentators had expected the Court to specifically strike down the mandate in the law requiring all individuals to carry health insurance that meets certain minimum requirements or else pay a penalty, and possibly even to invalidate the entire Patient Protection and Affordable Care Act (ACA). However, the Court upheld the individual mandate based on it being a valid exercise of Congress's taxing power and did not strike down the ACA.

Now that the uncertainty surrounding the ACA's constitutionality has been resolved, CAAs can focus on taking the steps necessary to comply with the ACA's requirements. This article summarizes some of the more important items CAAs should be prepared to address in the coming years.

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Safely Using Criminal Background Information

By Merrily Acher, Esq., EEO Legal Solutions

Helping (and never harming) is the most basic tenet of every Community Action Agency's mission. Like all employers, however, Community Action Agencies (CAAs) have some positions in which the job duties *themselves* create a risk of harm to the general public, the served population, or the agency itself.

For example, accounting positions afford access to confidential financial and personnel information, thereby creating the opportunity for an unscrupulous person to

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Background Checks (continued from cover)

steal and misuse it for personal gain. Likewise, positions involving even limited driving create substantial liability risks for employers and their insurance carriers. As a result, employers from both the nonprofit and for-profit sectors have used criminal background information to screen out candidates who, because of their past criminal conduct, may expose others to any increased risk harm in their performance of certain jobs.

In April 2012, the EEOC clarified the impermissible and permissible use of criminal background information in employment decisions, cautioning against the use of automatic, blanket disqualifications based on a candidate's criminal history.¹ Since the EEOC's release of this enforcement guidance, CAAs have become understandably concerned that their compliance with state and/or federal criminal background check laws, their state's licensure requirements, and their own internal safety policies could constitute unlawful discrimination and land them in trouble with the EEOC. This article will explore the *risks* of overbroad criminal background exclusions, as well as the *remedy* of "targeted screening" and "individualized assessments." When done properly, CAAs can balance their objective of full equal employment opportunity compliance with the overarching necessity of avoiding harm to the populations they serve.

EEO Risks of Automatic Disqualifications

By now, most everyone knows that Title VII prohibits employers from intentionally discriminating against employees because of their race, gender, ethnicity, religion, etc. Title VII, however, also prohibits employers from using a test or hiring criterion (e.g., no felonies, good credit) that disproportionately screens out any racial or ethnic

group, or men over women. Studies have generally shown that employers' use of criminal background information disproportionately and unintentionally purges otherwise qualified African-American, Latino, and male candidates from the applicant pool. In specific cases, the EEOC uses simple statistical tests to figure out if the selection rates for the minority group, compared to other groups, could have occurred by chance. In many cases, these statistical tests can help employers show that their criminal background screening does not, in fact, have an adverse impact on any protected group. If, however, these tests show statistically significantly adverse impact in the selection rates of the minority and non-minority groups, Title VII requires the employer to demonstrate that the criterion is "job related and consistent with a business necessity."

Whether a criminal record criterion is "job related and consistent with a business necessary" involves consideration of several factors:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

In many cases, analysis of these factors will help the employer show that the criminal background criterion is "job related and consistent with a business necessity." For example, as the EEOC Guidance recognizes, federal law excludes applicants with specified crimes over the past 10 years from working as an airport screener, with equivalent requirements for federal law enforcement officers, child care workers in federal agencies or facilities, bank employees and port workers, among numerous others. In these situations, employers must comply with these federal criminal background check requirements. Likewise, though the EEOC claims that that Title VII "preempts" (or trumps) conflicting state laws, its recent enforcement guidance suggests that the EEOC will defer to state childcare certification standards so long as the state's standards are narrowly tailored to be job related and the employer's screening practices are not more restrictive than these standards require.

The Remedy of Targeted Exclusions and Individual Assessments

Although the EEOC strongly disfavors automatic disqualifications, it allows employers to establish "targeted exclusions" for particular positions regarding specified criminal conduct within a defined time period. For example, the Head Start Act² and regulations³ require grantees or delegate agencies to conduct a criminal record check prior to employment and to compel current and prospective employees to sign a declaration disclosing (a) all pending and prior criminal arrests and charges related to child sexual abuse, (b) all convictions related to other forms of child abuse and neglect; and (c) all convictions for violent felonies.⁴ Although the Head Start regulations also require employers to assess the relevancy of an arrest, a pending

criminal charge or a conviction, the initial information gathered closely resembles a lawful “targeted exclusion” given its focus on avoiding a specific harm posed by the job duties themselves: child sexual abuse, child abuse and neglect, and violent crime.

As the Head Start example shows, numerous federal and state laws require CAAs to perform criminal background checks for certain positions. Nevertheless, “targeted exclusions” need not derive from federal or state law in order to be “job related and consistent with a business necessity.” On the contrary, so long as the CAA narrowly tailors the “targeted exclusion” to specific positions to avoid foreseeable harm, the targeted exclusion stands on reasonably safe ground.

For example, residential plumbers, “cable guys” and weatherization technicians enter people’s homes to perform their work. This access alone creates numerous risks associated with hiring someone with certain criminal propensities into this position—e.g., burglary, rape, even identity theft. For that reason, a CAA could reasonably develop a narrowly tailored criminal background screen to weed out applicants whose criminal convictions strongly suggest any increased opportunity for recidivism while on the job and by extension, any increased risk of harm to others. Likewise, CAAs with elderly clients could develop a targeted screen for criminal convictions related to theft, violence, and fraud, in light of the opportunity to harm posed by the job duties themselves and the serious consequences to a vulnerable population. By contrast, if a CAA automatically disqualifies every applicant with any type of drug conviction for all positions (even the janitor), the EEOC will likely find that this exclusion is substantially overbroad and is not “job related and consistent with a business necessity.”

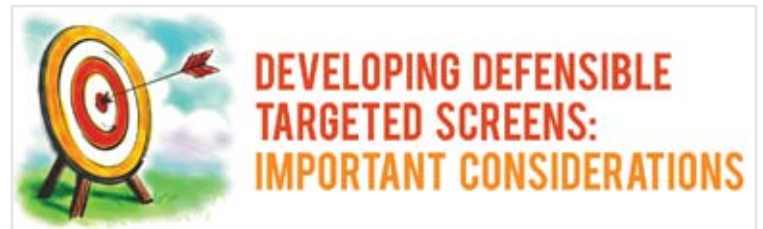
Even with a valid “targeted exclusion,” however, the EEOC’s guidance requires an “individualized assessment” of the relevancy of the arrest, pending charge or conviction.

The EEOC also encourages employers to evaluate the:

- 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, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- the length and consistency of employment history before and after the offense or conduct;
- rehabilitation efforts, e.g., education/training;
- employment or character references and any other information regarding fitness for the particular position; and.

- whether the individual is bonded under a federal, state, or local bonding program.

In the end, CAAs must place safety first, especially given the risks to the populations they serve and the magnitude of the organization’s liability if a recidivist perpetrates a crime on the job. Although the EEOC’s new guidance cautions employers to avoid overbroad reliance on criminal background information to screen out otherwise qualified applicants, the nature of CAAs work presents a mighty strong case for validating targeted screens. Nevertheless, even with the EEOC’s new enforcement guidance, CAAs will continue to make tough decisions regarding particular applicants. And when decisions get tough, the best defense is always good documentation demonstrating a thoughtful, deliberative hiring decision. (See end notes on page 13)



POSITION/ JOB DUTIES:

Access: What access would the employee have to: money; confidential information of employees or third parties that could be used in identity theft; or vulnerable populations like young children or the severe elderly?

Opportunity: What opportunities to offend or re-offend would the job duties themselves pose? Would the employee enter people’s homes? How much supervision would be provided in the position?

Risk: What is the worst thing an employee could do to others in this position?

CRIMINAL CONVICTIONS:

Nature: What logical nexus does the criminal conviction have to the risk you’re trying to avoid? For example, a conviction for embezzlement bears a direct relationship to the risk of financial theft associated with accounting, payroll, and fundraising positions, whereas a conviction for vandalism long ago has no direct bearing on that kind of job.

Evidence of Rehabilitation: How long ago did the most recent conviction occur? How old was the applicant when the crime occurred? Has the applicant been involved in a treatment or rehabilitation program? What is the applicant’s track record since the conviction?

Article End Notes

After Health Care Reform Upheld, What's Next for CAAs?

1. Patient Protection and Affordable Care Act (ACA), P.L. 111-148, Section 9002 (amending 26 U.S.C. § 6051(a)(14)).
2. ACA, Section 2715(d)(4) (amending 42 U.S.C. § 300gg-15).
3. ACA, Section 2718 (amending 42 U.S.C. § 300gg-18).
4. Group health plans subject to ERISA are those sponsored by entities other than state or local governments or churches.
5. ACA, Section 937 (amending 42 U.S.C. § 299b-37).
6. ACA, Section 9005 (amending 26 U.S.C. § 125).
7. ACA, Section 1511 (amending Fair Labor Standards Act (FLSA), 29 U.S.C. § 218a).
8. See U.S. Department of Labor [FAQs About Affordable Care Act Implementation Part V and Mental Health Parity Implementation](#).
9. See 2 CFR Part 230, App. B, ¶ 8.g.(2) (OMB Circular A-122, which applies to nonprofits) and 2 CFR Part 225, App. B, ¶ 8.d.(5) (OMB Circular A-87, which applies to state, local and tribal governments).
10. See *National Federation of Independent Business v. Sebelius*, 567 U.S. ___, 132 S. Ct. 2566, 2595 – 98 (2012).
11. See 2 C.F.R. Part 230, ¶147a; see also 2 C.F.R. Part 225, App. B, ¶140.
12. See 2 C.F.R. Part 230, App. B, ¶16. See similar provision in 2 C.F.R. Part 225, App. B, ¶16.
13. ACA Section 2716 (stating group health plans shall satisfy the requirements of section 105(h)(2) of the Internal Revenue Code). The Obama Administration estimates that the majority of group health plans will be non-grandfathered by 2014.
14. ACA, Section 2708 (amending 42 U.S.C. § 300gg-7).

Safely Using Criminal Background Information

1. Enforcement guidance on the consideration of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C § 2000e et seq., No. 915.002, 4/25/12.

2. 42 U.S.C. § 9843a(g)(3)
3. 45 C.F.R. § 1301.31(b)(2) –(3)
4. Id.

NLRB Focuses on Workplace Practices

1. 353 NLRB 93 (July 30, 2012).
2. 358 NLRB 106 (September 7, 2012).

Lack of Competition and Credit Card Interest Payments Result in Head Start Disallowances

1. *Beaver County Head Start, Decision No. 2441*, February 14, 2012
2. 45 C.F.R. § 74.43.
3. 45 C.F.R. § 74.43.
4. 45 C.F.R. § 1301.10(a).
5. 45 C.F.R. § 74.62(a)(2).
6. 2 C.F.R. Part 230, App. B, ¶ 23. (OMB Circular A-122).
7. 45 C.F.R. § 74.27.
8. 45 C.F.R. § 74.43.
9. 45 C.F.R. § 74.43.
10. *Value Behavioral Health, Inc. v. Ohio Dept. of Mental Health*, 966 F. Supp. 557, at 569 (S.D. Ohio 1997).
11. 45 C.F.R. § 74.43.
12. 2 C.F.R. Part 230, App. A ¶ A.2.
13. 2 C.F.R. Part 230, App. A ¶ A.3.
14. 45 C.F.R. § 74.43.
15. 45 C.F.R. § 74.43.