An Insight on Credit Checks for Employment Purposes: The Numerous Issues Associated and the Comprehensive Credit Act of 2020

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Introduction

As a society, we are fixated upon forecasting the future. Whether it concerns sales, epidemiology models, or employees' behavior, we spend significant time and resources trying to predict what might happen in the near future. We do this to reduce conflicts, to make plans, and to assess risks. This societal penchant for forecasting future behavior becomes troubling, especially when employers use credit checks to help predict whether an employee might engage in risky financial behavior, embezzlement, or fraud.

In theory, there may be a remote, marginal connection between a poor credit history and a predilection to commit financial crimes. However, that connection is far too tenuous, too fatally flawed by a lack of substantial supporting evidence, and too biased to be practical, reliable, or even morally viable. In essence, there are too many variables and too little direct evidence to support an irrefutable connection between a potential employee's creditworthiness and their criminal inclination. For example, an honest and trustworthy individual might have a lower credit score because of financial burdens. Getting employed would certainly help this person. However, because of their low score resulting from missed payments or high medical debt, they might be deemed financially irresponsible and thus more likely to partake in fraud and embezzlement of a firm. As a result, it "impedes their chances of obtaining a new job to end their financial burden."[1]

Numerous issues surround the process of using credit checks for employment. Despite this, employers continue to use them, possibly with the intent of reducing the liability for negligent hiring. If no substantial evidence links credit checks and employee behavior, how can they be used as a reliable method for predicting employee behavior, let alone a defense for negligent hiring? The purpose of this article is to examine the practice of credit checks in employment with regard to the law and the implications it has on people. It makes sense to start a discussion with the Fair Credit Reporting Act (FCRA), which allows employers to use credit checks for employment purposes and to even reject an applicant who refuses to undergo a credit check.

Fair Credit Reporting Act (FCRA)

The Fair Credit Reporting Act (FCRA) was enacted in 1970 to promote the integrity and fairness of consumer reporting information.[2] 15 U.S Code §1681b directly establishes consumer's rights and the use of credit checks in employment. Simply, if an employer wishes to conduct a credit check on an applicant or employee, the employer may do so as long as it does not violate the consumer's rights. First, the employer must notify the applicant in writing of their intention to conduct an investigative consumer report and inform the applicant of the information they seek.[3]

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[1] Text - H.R.3621 - 116th Congress (2019-2020): Comprehensive CREDIT Act of 2020, CONGRESS.GOV (2020), https://www.congress.gov/bill/116th-congress/house-bill/3621/text.

[2] Julia Kagan, *Fair Credit Reporting Act (FCRA)*, INVESTOPEDIA (2020), https://www.investopedia.com/terms/f/fair-credit-reporting-act-fcra.asp.

[3] DAWN BENNETT-ALEXANDER & LAURA PINCUS HARTMAN, EMPLOYMENT LAW FOR BUSINESS (Irwin/McGraw-Hill 2001, 8th ed.) (2014).

Then the employer must seek written authorization from the applicant or employee to obtain the report. After the report is obtained, if the employer plans to take an adverse employment action, the employer must notify the employee and offer a copy of the credit report and a written summary of consumer's rights.[4] Applicants have a limited number of days to dispute any errors within the findings of the credit report. Employers can reject applicants who refuse a credit check, although some states have laws already enacted or pending approval that restrict this practice.[5] These laws commonly address multiple exceptions, such as if credit checks constitute Bona Fide Occupational Qualifications (BFOQ), usually in positions that involve financial decisions and sensitive information. Another exception exists if government agencies, state or federal laws, require the use of credit checks, usually when dealing with national security clearance.[6] Currently, ten states have implemented laws prohibiting the use of credit checks in employment with the exceptions noted.[7]

Disparate Impact

Disparate impact occurs when policies are facially neutral but have a disparate or an adverse impact on a protected group. "If such a policy impacts protected groups more harshly than others, illegal discrimination may be found if the employer cannot show that the requirement is a legitimate business necessity… Disparate impact is statistically

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[4] Amy Traub, *Discredited: How Employment Credit Checks Keep Qualified Workers Out of a Job Demos* (2014), https://www.demos.org/research/discredited-how-employment-credit-checks-keep-qualified-workers-out-job.

[5] Id.

[6] John Atkins, *Can An Employer Deny You A Job Based On Your Credit?*, SELF (2015), https://www.self.inc/blog/can-an-employer-not-hire-me-based-on-my-credit.

[7] Roy Maurer, *House Committee Passes Bill to Ban Employment Credit Checks SHRM* (2019), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/house-maxine-waters-passes-bill-ban-employment-credit-checks.aspx.

demonstrated when the selection rate for groups protected by the law is less than 80 percent, or four-fifths, that of the higher-scoring majority group."[8]

The Equal Employment Opportunity Commission (EEOC) has stated that credit checks create a disparate impact on minorities as minorities are reported to have lower credit scores due to medical debt or other financial burdens.[9] In fact, "sixty-five percent of white households describe their credit scores as good or excellent, much higher than the 44 percent of African American households who identify in the good or excellent categories. In contrast, over half of African American households fall into the range of fair and poor credit."[10] What contributes to these findings is the large wealth gap between whites and minorities. The median wealth of white households is 20 times that of black households and 18 times that of Hispanic households, according to a Pew Research Center analysis of newly available government data from 2009.[11] The evident wealth gap contributes to an increase in debt as minority households take out loans or use credit cards to pay for medical emergencies or other urgent needs.

As the debt to income ratio increases, credit scores are largely affected by this practice. "Households that report low credit scores are more likely to have medical debt on their credit cards than those with good credit."[12] Below is a graph of the findings gathered by a survey conducted by

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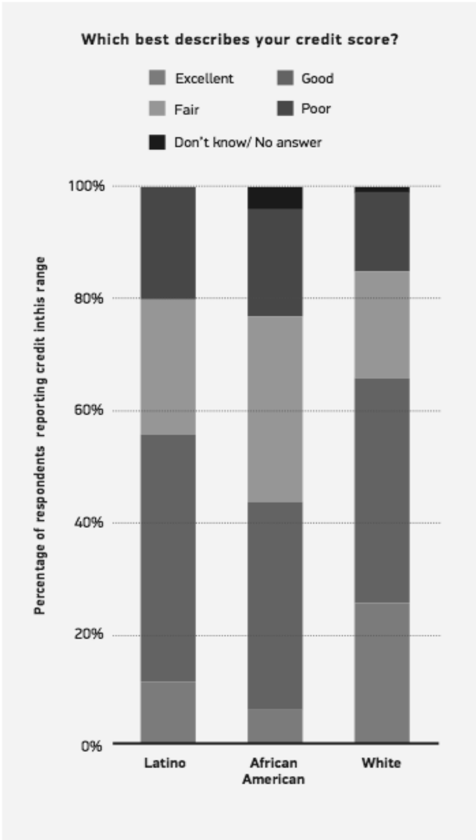
[8] BENNETT-ALEXANDER, et al., *supra* note 3.
[9] Maurer, *supra* note 7.
[10] Traub, *supra* note 4.
[11] Wealth Gaps Rise to Record Highs Between Whites, Blacks, Hispanics, Pew Research Center's Social & Demographic Trends Project (2011), https://www.pewsocialtrends.org/2011/07/26/wealth-gaps-rise-to-record-highs-between-whites-blacks-hispanics/.
[12] Traub, *supra* note 4.

Demos in the report titled "Discredited: How Employment Credit Checks Keep Out Qualified Workers Out of a Job." It supports the conclusion that people of color are disproportionately likely to report poor credit.

FIGURE 4. | AFRICAN AMERICAN & LATINO HOUSEHOLDS ARE MORE LIKELY TO REPORT WORSE CREDIT THAN WHITE HOUSEHOLDS



[13]

13 Id.

The use of credit checks in employment has the potential to create a disparate impact on minorities. Despite this, in many cases, credit checks could be seen as a business necessity or a Bona Fide Occupational Qualification, especially when the position the applicant is seeking handles financial matters. Therefore, this may make credit checks acceptable.

To prove a disparate impact case, the intent to discriminate does not have to be present. So even though employers usually request credit checks after the interviews, therefore, reducing their inference of discrimination, the policies could still be affecting one or more members of a protected class. There are multiple cases filed regarding the issue of disparate impact and credit checks. They are often, however, dismissed with prejudice as disparate impact in itself is difficult to prove. The plaintiffs need to offer statistical evidence as one of the requirements in making a prima facie case suggesting that the facially neutral policies significantly affected members of the protected class more than non-minority class members.

A case in point, filed by the EEOC against the commercial test preparation company, Kaplan, highlights the uncertainty present in the EEOC's stance against credit checks. As mentioned, the EEOC has taken a stance against the use of credit checks for employment unless it's a business necessity. However, the EEOC applied the same rationale to Kaplan "alleging that defendants' use of credit reports in the hiring process has an unlawful disparate impact on Black applicants."[14] Sixth Circuit Judge Kethledge, stated that the "EEOC sued the defendants for using the same type of background check that the EEOC itself uses. The

[14] Equal Opportunity Employment Com'n v. Kaplan Higher Learning Edu. Corp, No. 1:10 CV 2882, 2013 WL 322116, at *1 (N.D. Ohio Jan. 28, 2013).

EEOC's personnel handbook recites that "[o]verdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations." Because of that concern, the EEOC runs credit checks on applicants for 84 of the agency's 97 positions. The defendants (collectively, "Kaplan") have the same concern; and thus, Kaplan runs credit checks on applicants for positions that provide access to students' financial-loan information, among other positions. For that practice, the EEOC sued Kaplan."[15] This case was a big win for employers as the court dismissed the EEOC's case, and it comes to show the uncertainty and complexity that surrounds this issue.

Link to Performance

This case also highlights the connection between "overdue debts" and the "increase temptation to commit illegal or unethical acts."[16] Employers frequently have justified the reason for conducting credit checks was to eliminate the possibility of hiring applicants who are more likely to engage in embezzlement and fraud due to their financial hardships or irresponsibility, which can harm clients, the firm, and other employees.[17] In theory, this conclusion is coherent, understandable, and reasonable. Employers want to protect themselves and their businesses from negligent hiring and reduce the likelihood of fraud. Similar to instances where background checks are conducted, conducting a credit check would not hurt. As evidence to support this claim, a link must exist between credit checks and an employee's performance. However, a study titled "Do Job Applicants Credit Histories Predict Job Performance Appraisal Ratings or Termination Decision?" suggests otherwise. The

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[15] Equal Employment Opportunity Commission v. Kaplan Higher Education Corporation, Findlaw, https://caselaw.findlaw.com/us-6th-circuit/1663154.html.
[16] Id.
[17] Text - H.R.3621 - 116th Congress (2019-2020): Comprehensive CREDIT Act of 2020, *supra* note 1.

study analyzed 178 employees at a large financial services corporation and used predictors such as late payments and accounts with collections to analyze whether it correlated with performance appraisal ratings or termination decisions. "In the present sample, credit history data had no criterion validity in predicting either performance ratings or termination."[18] The researchers noted, "we caution that credit history data should not be used to select employees unless the company demonstrates evidence that such data have validity for predicting employee behavior."[19] There is limited research available regarding the correlation, if any, between credit history to an employee's performance.

A New York Times article states "Kristine Snyder, a spokeswoman for Experian, said the ability to assess risk was important for business owners, particularly those running small companies, given the level of employee fraud. She said the Association of Certified Fraud Examiners found that important indicators of potential fraud were employees living above their means and those experiencing financial difficulties. "Employers should have information available to them that protects their businesses from catastrophic losses so that workers can continue to stay employed and remain productive," she said."[20] This recommendation by the Association of Certified Fraud Examiners suggests that employees who commit financial fraud, are likely to have financial difficulties as well as living above their means, which would put them at a high probability of having lower credit scores as well as questionable credit checks. It is evident that the research available is limited and that drawing

[18] Laura Bryan & Jerry Palmer, *Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?*, https://psycnet-apa-org.ezproxy.fau.edu/fulltext/2012-12067-003.html.
[19] Id.
[20] Andrew Martin, *As a Hiring Filter, Credit Checks Draw Questions,* N.Y. TIMES (2010), https://www.nytimes.com/2010/04/10/business/10credit.html.

further conclusions would be flawed without multiple studies confirming whether or not there is a direct link between credit history and an employee's performance without having the need to theorize or make far-reaching conditional statements.

Credit Errors

The three major consumer credit reporting agencies are Equifax, Transunion, and Experian. They collect information on consumers and businesses regarding their credit and possible collections as it pertains to student loans, medical, auto loans, and credit cards. The issue here is the likelihood of credit errors that can exist on these credit checks. A study conducted by the Federal Trade Commission found that "one in four consumers identified errors on their credit reports that might affect their credit scores."[21] "The study also found that about 20 percent of consumers who identified errors on one of their three major credit reports experienced an increase in their credit score that resulted in a decrease in their credit risk tier, making them more likely to be offered a lower auto loan interest rate."[22] Employers conduct credit checks for the benefit of the business, but now there is a possibility that these credit reports are flawed and might contain errors. If these credit errors are significant enough to affect loan interest rates, then using them for hiring or for promotions might lower job applicants' chances of receiving job offers even though it was a reporting error. Along with the likelihood of errors found on credit reports, these agencies have been subject to lawsuits and

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[21] *In FTC Study, Five Percent of Consumers Had Errors on Their Credit Reports That Could Result in Less Favorable Terms for Loans*, Federal Trade Commission (2013), https://www.ftc.gov/news-events/press-releases/2013/02/ftc-study-five-percent-consumers-had-errors-their-credit-reports.

[22] *FTC Issues Follow-Up Study on Credit Report Accuracy*, Federal Trade Commission (2015), https://www.ftc.gov/news-events/press-releases/2015/01/ftc-issues-follow-study-credit-report-accuracy.

fines pertaining to consumer data breach, deception, and illegal advertisements.[23] For example, “In January 2017, the Consumer Bureau fined TransUnion and Equifax for deceptively marketing credit scores for purchase by consumers as the same credit scores typically used by lenders to determine creditworthiness and for luring consumers into costly subscription services that were advertised as “free” or “$1” that automatically charged recurring fees unless canceled by consumers. The Consumer Bureau also found that Equifax was illegally advertising its products on webpages that consumers accessed through AnnualCreditReport.com before consumers obtained their free disclosures. Because of these troubling practices, TransUnion was ordered to pay $13.9 million in restitution to harmed consumers and a civil penalty of $3 million to the Consumer Bureau. Equifax was ordered to pay more than $3.7 million to affected consumers as well as a civil money penalty of $2.5 million to the Consumer Bureau. As part of the consent orders, the (Consumer Reporting Agencies) CRAs are also supposed to change the way that they sell their products to consumers. The CRAs must also obtain consumers’ express consent before enrolling them into subscription services as well as make it easier for consumers to cancel these programs.”[24] This is only one of the instances where the Consumer Bureau has fined these CRAs. It is evident that these CRAs need to be further regulated to ensure that consumer identity is protected, credit errors are minimal, and that consumer deception that frequently occurs comes to a halt.

Privacy and Employment

Under the FCRA, if employers are going to take an adverse employment action against an applicant, then they must offer a copy of the credit

[23] Text - H.R.3621 - 116th Congress (2019-2020): Comprehensive CREDIT Act of 2020, *supra* note 1.
[24] Id.

report along with a written summary of consumer rights. In addition, they must also allow applicants to dispute the validity of the error, if applicable, or explain the reason behind the collections or bankruptcy present on the credit report. For an applicant to dispute or at least explain the findings in the credit report, they must reveal usually sensitive and personal information that may compromise the privacy of the applicant. This may also lead to a back-door entry to employment questions that open businesses up to a lawsuit if directly asked, but may be answered in this disputing/explaining process voluntarily by the applicant. For example, medical debt is typically existent on credit reports, and if collections are present, then applicants might be obliged to explain the situation in order to not get rejected or passed over for the job. Questions regarding marital status, previous medical conditions, spouse and family issues, might all be discussed as applicants try to answer these questions, therefore, resulting in an invasion of privacy. Additionally, "since divorce and domestic abuse are other leading causes of credit struggles, a discussion of these often painful and deeply private personal issues can also become compulsory if a job-seeker is asked to "explain" their poor credit to a prospective employer."[25] However, this information even though it affects an applicant's privacy, can help employers make holistic decisions on whether or not to move forth with the applicant. At the same time, it leads to unfair practices as applicants with good credit might not need to explain personal and sensitive details, and as a result, this contributes to the disparate impact argument.

[25] Amy Traub & Sean McElwee, *Bad Credit Shouldn't Block Employment: How to Make State Bans on Employment Credit Checks More Effective Demos,* (2016), https://www.demos.org/research/bad-credit-shouldnt-block-employment-how-make-state-bans-employment-credit-checks-more.

H.R 3621 – Comprehensive Credit Act of 2020

The House introduced and passed a bill that drastically amends the Fair Credit Reporting Act. The bill was received in the Senate on the 30th of January, 2020, and is still pending approval. To start, under this bill, using credit checks for "employment purposes, including for the purpose of denying employment" is prohibited.[26] The exception to this would be if "the person is required to obtain the report by a Federal, State, or local law or regulation; the information contained in the report is being used with respect to a national security investigation, or the report is necessary for a background check or related investigation of financial information that is required by a Federal, State, or local law or regulation."[27] Additionally, "none of the cost associated with obtaining the consumer report will be passed on to the consumer to whom the report relates."[28] The person must also disclose to the consumer an explanation as to why the consumer report is being obtained for employment purposes, the reasons for obtaining such a report, and the citation to the applicable Federal, State, or local law or regulation.[29]

If a person is then going to take adverse actions against an applicant after the exceptions noted, then they must do so by providing the "name, address, and telephone number of the consumer reporting agency that furnished the report (including, for a consumer reporting agency that compiles and maintains files on consumers on a nationwide basis, a toll-free telephone number established by such agency), the date on which the report was furnished, and the specific factors from the report upon which the adverse action was based." Furthermore, "a person may not,

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[26] Text - H.R.3621 - 116th Congress (2019-2020): Comprehensive CREDIT Act of 2020, *supra* note 1.
[27] Id.
[28] Id.
[29] Id.

directly or indirectly, either orally or in writing, require, request, suggest, or cause any employee or prospective employee to submit such information to the person as a condition of employment."[30] The bill also includes an interesting section titled the "non-waiver," "consumers may not waive the requirement of this paragraph with respect to a consumer report."[31] This bill would completely change the rules for employers and even go as far as making it unlawful for consumers to waive their requirements for an employer to conduct a credit check.

While this bill would address the major concerns with credit checks for employment purposes, such as disparate impact, credit errors, privacy concerns, and the lack of link between credit checks and an employee's performance, it "puts restrictive prohibitions on companies who may be using credit checks in a correct, limited manner for a job-related purpose," said Pamela Devata, a partner in the Chicago office of Seyfarth Shaw. "Many employers don't use credit checks for their entire workplace, but potentially would use it for certain positions—executive-level positions or for people who have unfettered access to a company's finances in accounting and finance roles."[32] Further, "SHRM [Society for Human Resource Managers] believes employers must have the ability to enact policies and procedures that best meet the needs of their individual organizations, said Johnny C. Taylor, Jr., SHRM-SCP, president and CEO of SHRM."[33] This bill only allows credit checks for employment purposes if it's a federal, state, or local law and/or a matter of national security. If the bill is made law, employers will no longer be able to

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[30] Id.
[31] Id.
[32] Roy Maurer, *House Approves Ban on Most Employment Credit Checks SHRM* (2020), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/house-approves-ban-most-employment-credit-checks.aspx.
[33] Id.

justify their use of credit checks as a Bona Fide Occupational Qualification or as a business necessity.

This bill would certainly help level the playing field between minorities and non-minorities in regard to the statistics mentioned and how disparate impact is an outcome of credit checks for employment purposes. However, employers looking to fill positions that directly deal with financial responsibilities and information, might not be able to obtain this extra information on potential employees. While there was no link to credit checks and an employee’s performance, “Employer groups such as the U.S. Chamber of Commerce and the Society for Human Resource Management (SHRM) oppose the bill, arguing that the information in a credit report is an indicator of a person's judgment and potential risk to an organization, especially for certain positions involving finances and accounting.”[34] Furthermore, credit reports display whether or not an applicant has repeatedly engaged in risky financial behavior and this information could be of use as it pertains to a person’s judgment, especially in positions involving financial decisions and responsibility. Restricting the use of credit checks in employment should include an exception to positions directly dealing with financial responsibilities and accounting, if this bill were to get approved by the Senate and if further research directly establishes a link between credit checks and an employee’s performance as well as judgment. Meanwhile, there are no regulations on the use of credit checks for employment purposes, except for the ones mentioned in FCRA, and this leads to an ample amount of concerns, such as the many discussed above. It seems reasonable to make amendments to the FCRA in a way that serves the people, businesses, and employers, and in order to do this, further research is required to assess the current condition and to directly link credit checks and an employee’s performance.

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[34] Id.

Financial Literacy

One would assume that given the importance of credit and financial responsibility in America, students would be taught basic financial practices, such as filing taxes, understanding the components of a credit score, or to even dispute a credit error that may compromise their ability to get the best interest rates in regard to student loans or getting employed. In reality, "more than half of states do not require high school students to take an economics class."[35] As of February 2020, only "21 states require high school students to take a course in personal finance, a net increase of four states, with five adding requirements since the last survey in 2018 and one state dropping its requirement."[36] Furthermore, "Studies show that students without a financial education are more likely to have low credit scores and other financial problems."[37] If credit scores and checks will continue to be used for loans, interest rates, risk assessment, mortgage rates, and now employment, the least we could do is encourage states to pass laws that require schools to incorporate personal finance classes with testing to ensure that personal finance is as important as other common core classes.

Conclusion

Businesses need genuine employees with adequate ethical and moral standards to reduce the potential legal liability associated with negligent hiring and the risk of embezzlement and fraudulent activities. Unfortunately, using credit checks as a way to predict an employee's behavior is not the solution given the limited research available linking

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[35] Tracy East, *Why Financial Education Should Be Taught in Schools*, CESI (2019), https://www.cesisolutions.org/2019/03/should-financial-education-be-taught-in-schools/.

[36] Survey of the States by CEE, COUNCIL FOR ECONOMIC EDUCATION, https://www.councilforeconed.org/survey-of-the-states-2020/.

[37] East, *supra* note 35.

credit checks and an employee's performance. If bill H.R. 3621 is enacted and if a link is established between credit checks and employee's performance, then businesses will not be able to use credit checks if and when it is considered a business necessity as it pertains to positions that involve financial decisions. However, by continuing to allow the use of credit checks in employment with minimal regulation, all sorts of issues begin to arise from privacy to socio-economical concerns. Taking a moderate approach to this issue, and addressing the research gaps, will allow employers and potential employees to feel that their interests have been served.