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The Matrix Quandary

By Frederick G. Giles, CPP,
and Pamela Q. Devata

If asked, Hamlet might ponder aloud, “Employment background report decision matrices: To use or not to use? That is the question.”

Used properly, decision or hiring matrices can help a company make good employment decisions, but misuse can land companies in legal hot water. As Hamlet might opine: “Ay, there’s the rub.”

The key is for employers to use such tools only after careful thought and legal review.

Here is what must be considered: Forty years ago, in the case *Griggs v. Duke Power Company*, the U.S. Supreme Court ruled that any preemployment test must measure the candidate for the job and not the person in the abstract. Otherwise, protected groups of individuals could adversely be affected. Under this ruling, these so-called “bright line” tests that eliminate a

candidate from consideration for hire, promotion, or retention without regard to a bona fide occupational qualification (BFOQ) are not allowed if proven to have a disproportionate impact on a protected group.

Human resource and security professionals tasked with vetting job candidates must ensure that any use of decision matrices for employment background report evaluation does not violate the principles laid out in *Griggs*.

Anyone developing a hiring policy must understand what a decision matrix is, what the risks of using it are, and how an appropriate matrix can be developed to facilitate fair hiring of qualified employees without increasing liability.

Concept and Caveat

A decision matrix is a framework that a hiring authority can use to evaluate information in an employment background report. It consists of a set of business rules that, after undergoing legal review, can be used to make an initial employment decision when applied against each critical data point in a background investigation.

Companies get into trouble when the rules they use are not well-conceived. For example, some companies have tried to standardize their hiring practices with one simple decision matrix rule: no ex-convicts need apply. Such a matrix is problematic, because it does not consider severity of the crime or whether it is even related to the position. It also does not factor in how long ago the crime occurred or whether there is evidence of rehabilitation.

It's easy to see how a company would fall prey to the allure of such a simple rule. "Human resource professionals are understandably reluctant to hire someone with a criminal record, even if the offense is minor and long in the past," says Lewis Maltby, president of the National Workrights Institute in Princeton, New Jersey. "If the person becomes a good employee, no one gives HR a pat on the back; HR is expected to hire good employees. But if an employee with a criminal record commits an offense against the company or another employee, the Monday morning quarterbacking can sabotage the career of the HR professional that hired them. Why take the chance?"

But what seems like a play-it-safe approach may be bad for society and for the company. If universally adopted, this matrix could result in a permanent criminal underclass.

Moreover, because African-Americans and Hispanics are arrested and convicted at higher rates than other groups, a matrix that counts criminal history records in employment decisions without due consideration of the BFOQs and reasonable tests for relevancy will likely be judged discriminatory, thereby creating liability for the company. Of equal concern is that the use of criminal histories without a plan can lead to poor hiring decisions.

A properly developed decision matrix ensures that hiring decisions about appli-

cants with criminal records are made according to a legally defensible policy, Maltby states. Generally, the company's legal counsel can help ensure that the matrix achieves this objective.

Tailor Made

There is rarely a single decision matrix that will work for an entire company.

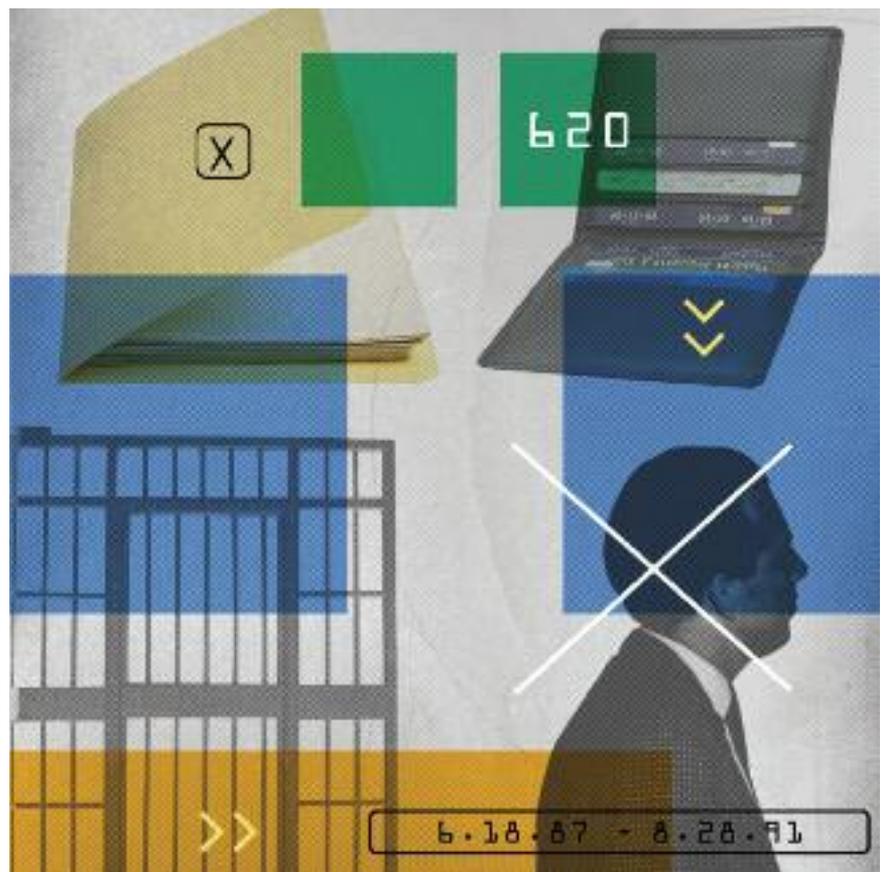
"A decision matrix, like any other tool, needs to be well designed. Every company is different. Every job is different. To be effective, and withstand legal scrutiny, decision matrices need to be carefully tailored to the specific requirements of the job. One size does not fit all," says Maltby.

To build a matrix, the hiring authority should get answers to the following questions: Which job positions are open for applications? What are the essential job functions and BFOQs for each of these positions as they relate to the background report? What are the appropriate background elements and what is the scope for each position? How should each lead type be evaluated for each position? Who will be applying the matrix business rules?

What is the appeals process for the decisions made using a matrix? Have all hiring managers been trained to address or refer applicant questions or concerns? Has this plan been evaluated by legal counsel for fair treatment, risk mitigation, and consistency issues? What is the plan for periodic or event specific review and analysis of the business rules in the decision matrix?

When evaluating open positions, keep in mind that many jobs share the same basic background BFOQs. In a retail environment, for example, the background requirements for a sales clerk and a customer service clerk may be similar, but a delivery driver would have a different set of requirements.

In evaluating the background-related BFOQs for each position, it is important to consider those with whom the hired employee will interact, the level of supervision, and specific risk issues that may be unique to a company. If, for example, an organization has recently been found liable in a negligent hiring action wherein an employee assaulted a customer or



coworker, it would be reasonable to be concerned about convictions for crimes of violence when filling a similar position.

But background-related BFOQs are not only about criminal history. They may also relate to education and experience, driving history, professional credentials, past employment, and even credit history.

Once the background BFOQ is defined for a position, the background check requirements can be determined. For example, it is not appropriate to require a

motor vehicle records check for most positions, but it is certainly appropriate if the position requires driving. Similarly, a degree in accounting should not be a requirement for mail room staff, but the CFO would be expected to have one.

Each position may require specific guidelines regarding how to evaluate leads even if the package of leads in the background is similar. Returning to the example of criminal background, child neglect may sound like a heinous offense,

but one may be hard pressed to find the BFOQ for a warehouse job that would eliminate a person with that record. If, however, that same person were applying for a daycare position, it would certainly be relevant. The seriousness of the offense and the time that has passed since the offense also need to be considered.

Another example of how the matrix must be tailored to the job is the use of a credit report. A check of the applicant's credit history may be appropriate for a CFO position or other jobs that include handling cash or access to personal or confidential information, but as part of a general decision matrix, it may be legally challenged.

Employers and courts may not be clear whether credit history information really leads to a better hiring decision. Proponents of using credit history may reason that an applicant with poor credit may be more likely to steal from a company or may exhibit poor judgment. Opponents of using credit may respond that such persons are simply the victims of circumstances, such as having been laid off from a previous employer during the most severe recession since the 1930s and unemployed for as long as two years or more. Applicants would be in an untenable position if the mere fact of poor credit due to long-term unemployment disqualified them from any future employment.

Partly in response to that economic reality, the issue of credit reports as a factor in hiring is under scrutiny by the Equal Employment Opportunity Commission (EEOC) and both federal and state lawmakers. As of this writing, Hawaii, Illinois, Oregon, and Washington have passed laws restricting the use of credit reports, and more cities and states are likely to follow.

Legal review. Perhaps the most important step in building a decision matrix is to have it reviewed by an attorney. Counsel will be able to advise the company about any potential legal pitfalls. For example, with regard to the credit report issue, companies should consult with counsel to be sure that the open position has a BFOQ relating to the credit report if it is included in the scope of the matrix for a position. They should also consult coun-

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sel about how credit check results should be used once obtained.

Matrix Loaded

A decision matrix for entry-level office staff may generally be broken down into two top-level sections: “Criminal” and “Additional Leads.” Under the Criminal section header, there may be three columns: “Felony and Misdemeanor Offenses,” “Convictions,” and “Deferred Adjudication.”

Offenses. Various types of crime will be subheaded beneath the Felony and Misdemeanor Offenses:

- Substance abuse crimes—such as unlawful possession or sale; driving while intoxicated and driving under the influence; public intoxication; unlawful possession, use, or distribution of drugs; and possession of drug paraphernalia.

- Dishonesty crimes—including forgery, fraud, or deceptive practices; theft of fences such as shoplifting, embezzlement,

burglary, robbery, buying or receiving stolen property; and larceny;

- Sexual crimes—including sexual assault; incest; sex abuse; solicitation; lewdness; indecent exposure; and prostitution.

- Violent crimes—including stalking; harassment; intimidation; menacing; murder and other death-related offenses; making terrorist threats; causing bodily harm; and fighting and affray.

- Judgment crimes—including aiding and abetting; trespass and loitering; disorderly conduct; contributing to the delinquency of a minor; child abuse, endangerment, and neglect; corruption of minors; vandalism; resisting arrest; disturbing the peace; evading arrest; reckless endangerment; and weapons offenses.

Convictions. As the results of the criminal background check come in, the “Convictions” column can be filled in for each offense. Prosecution-pending results should generally not be noted, nor should any case that is more than seven years old

unless jail time served occurred within that time frame, unless otherwise required by law.

If there is no conviction for that crime, or group of crimes, “Proceed” or a similar type of cue could be noted, indicating that in this respect, the applicant is cleared to be hired if selected by the company managers who are trying to fill the job.

If there are gray areas requiring a more careful review, the column could be marked “Call HR,” ceding to that department the decision on whether or not the criminal background lead disqualifies the applicant for employment.

For example, a retail employer may be wary of hiring an applicant as a clerk dealing with customers in a retail store if that person has a recent assault conviction. Based on the decision matrix for this employer and position, the conviction is an indication that this applicant has engaged in behavior that may present a threat to the company or its customers. However,



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what if a particular applicant was convicted of an assault where the crime was committed five years previously with no indication of bad behavior since that time?

For this employer and this position, disqualifying the candidate for this crime falls into a gray area. A trained human resources staffer should review the applicant's history since conviction and make a hiring decision based on the totality of the individual's background, behavior, and evidence of rehabilitation.

When the criminal history check uncovers convictions for serious felony crimes—such as those involving violence, sexual assault, theft, or weapons—the column should be marked “Needs Senior Review,” indicating the lead must be investigated by senior designated staff before any hiring decision can be made.

Additional leads. The “Additional Leads” section should be structured in the same format as the “Criminal Offenses” section, with subheads for employment and education verification, as well as motor vehicle, credit, and professional credentials, if applicable. It should also include whether or not the job applicant may appear on the Global Terrorism Watch List.

Appeals

Once an employment decision is made based on the business rules in the decision matrix and the information contained in the background report, either a hiring manager or an applicant may want to appeal that decision. It is important, therefore, that an appeals process be clearly documented.

To avoid conflicts of interest at the hiring-manager level, the appeal should generally be directed to a senior individual or panel in the security or human resource department.

It should be noted that an appeal of a hiring decision is different from a factual dispute. A factual dispute should be handled as required under Section 611 of the Fair Credit Reporting Act (FCRA) and applicable law. An appeal of the hiring decision does not involve a dispute of any facts in the report but may be generated by the first-level interviewer arguing that the applicant's unique experience is essential and should be given more weight in the decision, or the applicant may present a case that strong evidence of rehabilitation should be given more consideration. In any case, even with a well-constructed decision matrix, it is critical that there is an exception path to consider an

applicant's unique circumstances as part of the hiring decision process.

The decision matrix and appeals process will not work unless front-line managers are trained to respond to applicant questions about the process. The FCRA requires that if an adverse decision is made based on information contained in a consumer report, the applicant should receive a copy of the report, the U.S. Federal Trade Commission's Summary of Rights, and a pre-adverse action notification. Then they should be allowed ample time to dispute any information contained in the report before a final adverse action notification is delivered to them.

Additionally, the applicant should be told that even if they do not dispute the facts contained in the report, they have the right to appeal the hiring decision if they can produce information that they feel might help decision makers to reconsider their background. It is not necessary to provide the applicant with any of the business rules contained in the decision matrix, but neither should a company be reluctant to encourage an applicant to review the background report both for factual accuracy and context as it relates to the position for which they are applying.

Finally, companies should consider the decision matrix a living document. Statutes are constantly under review, amendments and new laws are passed, and court decisions bring new case law on a regular basis. An annual formal, periodic review of decision matrices should also be undertaken.

A matrix cannot mitigate all of a company's hiring risks, says Maltby. “But,” he notes, “if I were still a corporate general counsel, I'd rather see my client use a carefully designed decision matrix than leave every employment decision to the discretion of an HR professional whose personal incentives may not be synonymous with those of the company.” ■

Frederick G. Giles, CPP, is senior vice president, research division, of CARCO Group, Inc., and a member of the ASIS International Leadership and Management Practices Council. Pamela Q. Devata is a partner in the labor and employment practice group of Seyfarth Shaw LLP.

» SYNOPSIS

There has been an increased focus by the Equal Employment Opportunity Commission (EEOC) and private litigants concerning the use of background reports generally, and of hiring matrices in particular. The majority of this focus has centered on an employer's evaluation of criminal history and credit information.

With regard to criminal history, the EEOC has opined that an employer's preemployment selection criteria should take into consideration factors such as the nature and seriousness of the offense, the length of time since the offense occurred, and the nature of the job. Instead of having “bright line” rules, employers should evaluate applicants on a case-by-case basis.

In addition to the EEOC, state attorneys general have also targeted employers' use of hiring matrices when the matrices fail to comply with state law restrictions. Some states require that before an employer can use criminal history, there must be a relationship between the criminal history or credit history and the position sought.

Another caution for employers is not to use one decision matrix for their entire workforce. Just as one would not use one job description for all positions, one decision matrix is not advisable for all positions.