

Background Checks: Who, What, Where, When, Why, and How

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FIVE W'S AND ONE H OF BACKGROUND CHECKS

- WHY should employers conduct background checks?
- WHAT should employers do with the results of a background check?
- WHEN should employers run a background check?
- WHO should run the background check?
- HOW should an employer run a background check?



WHY SHOULD EMPLOYERS CONDUCT BACKGROUND CHECKS?

- To comply with state statutes mandating background checks for public safety reasons
- To avoid theft, fraud, embezzlement, accidents, etc.
- To avoid negligent hiring claims
- To detect résumé fraud
- To manage public relations

OVERVIEW OF LEGAL RISKS

- The “Catch-22” – Employers may be sued for bad employees’ conduct, and by employees for not complying with background check laws
- Federal and state discrimination laws
- “Ban the Box” laws
- Fair Credit Reporting Act



EEOC CRIMINAL BACKGROUND CHECK GUIDANCE

- In April 2012, the EEOC issued *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.*
- Part of EEOC's E-RACE (Eradicating Racism and Colorism from Employment) initiative
- Guidance does not have force of law. However, it outlines conduct that the EEOC considers unlawful under Title VII
- Guidance shows “best practices” for using background checks in employment decisions
- Guidance addresses disparate treatment and disparate impact

EEOC GUIDANCE – DISPARATE TREATMENT

- Employer treats criminal history information differently for different applicants or employees, based on their protected class
- Employers should be consistent in conducting background checks and using information collected from background checks
- Employees may have viable claims where employer:
 - Rejects an applicant in a protected class based on criminal record but hired a similarly situated applicant outside of protected class with a comparable criminal record;
 - Makes biased statement;
 - Conducts background tests only on members of protected class; or
 - Allows only certain individuals to explain criminal history

EEOC GUIDANCE – DISPARATE IMPACT

- EEOC argues that certain minority groups have higher statistical rates of arrests and convictions, and, therefore, employers' use of criminal history information has a disparate impact on those minority groups
- A covered employer is liable for violating Title VII when the plaintiff demonstrates that:
 - The employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group, and
 - The employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity
- EEOC has clarified that guidance encourages, but does not require, a two-step process for determining legality of background check:
 1. Use a “targeted” screen of criminal records
 2. Provide opportunities for individualized assessment for those people who are screened out

POLICIES WITH BLANKET EXCLUSIONS

Southeastern Pennsylvania Retirement Homes, Inc. conducts criminal background checks on all van driver job applicants once they have been offered a position with the company. Its has a bright-line policy disqualifying all applicants convicted of murder.

M. Potimore, a 55-year old African-American male, applied for and was offered a position as a van driver with the company. M. Potimore worked for 20 years as a bus driver for an elementary school at a church and received excellent recommendations from the pastor, the principal, and numerous parents. His background check revealed a 40 year old second-degree murder conviction. Can the nursing home withdraw its job offer based upon these findings?

- A. Yes, the nursing home has a policy.
- B. Yes, M. Potimore's convictions directly related to the job he was offered and the conduct in question poses an unacceptable risk for the position at issue.
- C. Maybe, but first the nursing home needs to provide M. Potimore with an opportunity to explain the criminal record.
- D. No. M. Potimore served his time and should be given a second chance.

TARGETED SCREEN

Equal Opportunity Air Conditioning (EEAC) is a start-up HVAC contractor that seeks to revolutionize the industry through its social media driven, smartphone app. It fears that one bad technician will ruin its online reputation and drive it out of business. How should EEAC screen out criminal technicians?

- A. EEAC should not even try to screen out criminals from its job applicant pool. State laws do not require HVAC contractors to complete background checks.
- B. EEAC should require all applicants to answer the question “have you ever been convicted of a crime?” on its online job applications system, and automatically reject any applicant that answers “yes.”
- C. EEAC should run background checks on all applicants after the first interview and develop an internal policy regarding the types of convictions that will automatically disqualify an individual from employment.
- D. EEAC should run background checks on all applicants after the first interview, and, regardless of the results, conduct an individualized assessment.

TARGETED SCREEN

- A "targeted" screen considers at least the nature of the crime, the time elapsed, and the nature of the job.
- Cannot automatically disqualify all applicants who have been arrested or convicted of any crime.
- An employer may decide never to conduct an individualized assessment if it can demonstrate that its targeted screen is always job related and consistent with business necessity.
- Such a screen would need to be narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question.

INDIVIDUAL ASSESSMENT

- The individualized assessment avoids liability when employer cannot demonstrate that using only its targeted screen would always be job related and consistent with business necessity.
- Individualized assessment generally means that:
 - An employer informs the individual that he may be excluded because of past criminal conduct;
 - Provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and
 - Considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

INDIVIDUAL ASSESSMENT

- Factors to consider include:
 - Individual not correctly identified in the criminal record, or that the record is otherwise inaccurate;
 - The facts or circumstances surrounding the offense or conduct;
 - The number of offenses for which the individual was convicted;
 - Older 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.

ARRESTS

PVC, a pharmacy, conducts criminal background checks on all pharmacist job applicants once they have been offered a position with the company. W. White applied for and was offered a position as a pharmacist with the company. His background check revealed a five year old arrest on suspicion of drug possession (prescription medicine) as well as a 10 year old arrest for shoplifting. Can PVC withdraw its job offer based upon these findings?

- A. Yes, W. White is a bad man.
- B. Yes, W. White's arrests directly related to the job he was offered and the conduct in question poses an unacceptable risk for the position at issue.
- C. Maybe, but first PVC needs to provide W. White with an opportunity to explain the criminal record.
- D. No. the arrests don't prove anything. W. White is a family man that just needs adequate healthcare, and a group life insurance plan.

CONVICTIONS

- Employers may request criminal conviction records and records of pending felony charges.
- The employer should provide an opportunity for the excluded person to explain.
- Employer may only reject applicants on the basis of conviction records if employer takes into account the nature of the crime, the amount of time elapsed since it occurred, and the nature of the job.



WHEN SHOULD EMPLOYERS RUN A BACKGROUND CHECK?

- Job applications
- Before the first interview
- After the first interview
- After conditional offer of employment
- During employment



WHEN TO RUN BACKGROUND CHECKS

- Ban The Box Legislation
 - Bans employers from asking about an applicant's criminal history at the beginning of the job application process.
 - Allows criminal background searches only after the applicant has passed an initial employment screening.
 - Applicable to Private Employers – Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon and Rhode Island. Baltimore, Chicago, New York City, Newark, Philadelphia, San Francisco, Seattle, and Washington D.C., among others.
- EEOC recommends that employers not ask about convictions on job applications.

WHO SHOULD RUN THE BACKGROUND CHECK?

- Employer – Human Resources/Hiring Authority
 - Disparate treatment claim waiting to happen
 - Careful of false information!
 - Same Name, Different Person (Joe Smith)
 - Impersonators/Fake Blogs and Postings
 - Careful of inconsistent search methodology!
- Third party
 - Fair Credit Reporting Act

HOW SHOULD YOU RUN A BACKGROUND CHECK?

- Criminal Background Check
- Credit Report
- DMV Check
- Reference Checks
- Internet Searches



REFERENCE CHECKS

- Job related
- Written consent from employee with release for former and prospective employers
- Defamation/invasion of privacy issues
- Caution in releasing personnel files
 - Written notice requirement
 - Remove disciplinary reports more than four years old



FAIR CREDIT REPORTING ACT – APPLICABILITY

- The FCRA generally applies when a “Consumer Report” or an “Investigative Consumer Report” is prepared at your request by a third party, usually for a fee.
- Consumer Report
 - Written or oral report that bears on an individual’s character, general reputation, personal characteristics, or mode of living that is used or could be used to establish eligibility for employment.
 - Examples: Driving record, credit checks, criminal background checks, drug tests, etc.
- Investigative Consumer Report
 - Information obtained through interviews with neighbors, friends, associates, or others.

FAIR CREDIT REPORTING ACT STEP 1: DISCLOSURE AND AUTHORIZATION

- Disclosure notifies employee that you may obtain a “consumer report.”
- Disclosure should be provided in a stand-alone document.
- The notice cannot be in an employment application.
- Obtain written consent from the employee.
- Employers may reject application if employee refuses to give consent.

FAIR CREDIT REPORTING ACT STEP 2: CERTIFICATIONS TO CONSUMER REPORTING AGENCY

- Employer must certify to the company from which the employer is getting the applicant's information:
 - That it notified the applicant or employee and got their permission to get a consumer report;
 - It complied with all of the FCRA requirements; and
 - It will not discriminate against the applicant or otherwise misuse the information, as provided by any applicable federal or state EEO laws or regulations.

FAIR CREDIT REPORTING ACT STEP 3: PRIOR TO ADVERSE ACTION BASED ON REPORT

- Employer must:
 - Send applicant/employee “pre-adverse” action notice; and
 - Include a copy of the report and *A Summary of Your Rights Under the Fair Credit Reporting Act* (Available on the FTC website).

FAIR CREDIT REPORTING ACT STEP 4: AFTER ADVERSE ACTION IS TAKEN

- Notice of adverse action, which must include:
 - Include name, address, and phone number of consumer reporting agency that supplied the report;
 - Include a statement that the agency did not make the decision to take adverse action and cannot give specific reasons for it; and
 - Include notice of right to dispute accuracy of the report and request an addition free report from the agency within 60 days.

QUESTIONS?



THANK YOU



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DISCLAIMER

Note: This document is not intended to give legal advice. It is comprised of general information. Employees facing specific issues should seek the assistance of an attorney.