

Hiring Procedures and Background Checks : How to Avoid EEOC Scrutiny

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OVERVIEW

- The EEOC's Strategic Enforcement Plan
- Fair Credit Reporting Act
- Eliminating Barriers in Recruitment and Hiring
- Recruiting Issues
- Employment Applications
- Pre-Employment Tests and Screening Tools
- Recent EEOC Cases Regarding Hiring Practices
- Recordkeeping Requirements
- Practical Tips to Avoid EEOC Scrutiny

IN GENERAL

- Hiring employees is a big investment
 - Recruiting costs
 - HR time
 - Productivity/ Learning curve
 - Potential liability
- Want to get it right
- Resume fraud is real
- Employers can be liable for negligent hiring

Strong Incentive for quality background checks

COMMON METHODS FOR BACKGROUND CHECKS

- Verifying resume representations
- Reference checks
- Credit checks
- Criminal history checks
- Internet research
- Professional background check services

ISSUES

- EEOC concerned about possible discrimination
- FTC concerned about compliance with Fair Credit Reporting Act
- NLRB concerned with interference with concerted activity
- Public policy claims

THE FAIR CREDIT REPORTING ACT

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FAIR CREDIT REPORTING ACT - BASICS

- The FCRA generally requires:
 - A disclosure to the applicant/employee that a consumer report or investigative consumer report will be obtained for employment purposes
 - Authorization by the applicant/employee for a consumer report or investigative consumer report to be obtained
 - Certifications to Consumer Reporting Agency
 - Pre-adverse action notification
 - Adverse action notification
- The disclosure and authorization may be combined
 - Do not include any other extraneous information in the disclosure

THE EEOC'S STRATEGIC ENFORCEMENT PLAN

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THE EEOC'S STRATEGIC PLAN: 2012-2016 ("SEP")

- Approved by the EEOC on December 17, 2012
- Designed to identify EEOC's focus
- EEOC sending employees around to discuss

THE EEOC'S STRATEGIC PLAN: 2012-2016 ("SEP")

1. Eliminating Barriers in Recruitment and Hiring
2. Protecting Immigrant, Migrant and Other Vulnerable Workers
3. Addressing Emerging and Developing Issues
4. Enforcing Equal Pay Laws
5. Preserving Access to the Legal Systems
6. Preventing Harassment Through Systemic Enforcement and Targeted Outreach

ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

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ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

- Vulnerable Groups:
 - Racial, ethnic and religious groups,
 - Older workers, and
 - People with disabilities
- EEOC Target
 - Class-based intentional recruitment and hiring discrimination
 - Racially neutral recruitment and hiring practices with discriminatory impact

ELIMINATING BARRIERS IN RECRUITMENT AND HIRING

EEOC focus:

- Exclusionary policies
- Channeling/Steering of individuals into specific jobs due to their status in a particular group
- Restrictive application processes
- The Use of Screening Tools
 - Certain kinds of background checks
 - Zero tolerance policies
 - Pre-employment physicals

MAIN ISSUES

Disparate Treatment:

- Checking criminal records of Hispanics, but not whites
- Only asking older workers about credit history
- Excluding African-Americans, not whites, who have criminal history
- Targeted advertising
- Only putting women in certain positions

MAIN ISSUES CONT.

Disparate Impact

- Use of criteria that affect some racial groups more than others.
- Example: Griggs v Duke Power high school diploma requirement invalid where
 - It had disparate impact on African-Americans
 - It was unrelated to job and disproportionately excluded African-Americans

5 RECRUITMENT PRACTICES THAT MAY BE GIVEN PARTICULARLY CAREFUL SCRUTINY BY THE EEOC

- Illegal use of job advertisements and recruitment agencies
- Word-of-mouth recruiting
- Homogenous recruiting
- Use of stereotyping in decision-making
- Discriminatory screening of applicants

EMPLOYMENT APPLICATIONS

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EMPLOYMENT APPLICATIONS

- Background check authorizations
- Acknowledgement regarding false statements
- Reducing limitations period
- Arbitration
- Restrictive covenant clearance

USE OF ARRESTS AND CRIMINAL CONVICTIONS

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EEOC POSITION

- Federal law prohibits employers from treating people with similar criminal records differently because of a protected class
- Title VII prohibits employers from using policies or practices that screen individuals based on criminal history if:
 - They significantly disadvantage Title VII protected people
 - They do not help the employer accurately decide who is likely to be a responsible, reliable or safe employee

ARREST RECORDS

- Arrest
 - No proof of criminal activity
 - Many states preclude use of arrest records
 - Should only be done with approval of counsel
- Data shows disproportionate impact
 - EEOC claims that, proportionally, African Americans arrested more often than whites
- Michigan prohibits use in hiring (with some exceptions)
- Possible to base decisions on conduct that prompted the arrest

CONVICTIONS

- Conviction records available from numerous sources
 - Court records
 - Police records
 - Registries and watch lists
 - Interstate identification index, etc.
- EEOC contends sources can be inaccurate and incomplete

CONVICTIONS CONT.

- Conviction
 - Usually sufficient to prove criminal activity
 - May or may not be legitimate basis for excluding a candidate
- But it still presents a risk of disparate impact
 - EEOC Report claims 1 in every 31 adults are under some form of correctional control (probation, parole, prison or jail)
 - EEOC claims 1 in 6 Hispanic men, and 1 in 3 African American men expected to fall in this class

CONVICTIONS (CONT.)

Two circumstances where EEOC believes employers can use convictions:

1. Employer validates criminal conduct exclusion for the position - i.e., if data supports job-relatedness
2. Employer develops a targeted screen considering at least:
 - The nature of the crime
 - The time elapsed
 - The nature of the position sought
 - Opportunity for individualized assessment

PRE-EMPLOYMENT TESTS AND SCREENING TOOLS

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PRE-EMPLOYMENT TESTING

- Employers should administer tests and other selection procedures without regard to race, color, national origin, sex, religion, age (40 or older), or disability
- Validate
- Must be job-related

PRE-EMPLOYMENT TESTING (CONT.)

- If a selection procedure has the effect of screening out a protected group, the employer should determine whether there is an equally effective alternative selection procedure that has less adverse impact and, if so, adopt the alternative procedure.
- Employers should keep abreast of changes in job requirements and should update the test specifications or selection procedures accordingly

PHYSICAL EXAMINATIONS

- Must be post-offer
- Exam must be related to job (Validated)
- Must consider possible accommodations

SOCIAL MEDIA RESEARCH

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RISKS OF USING SOCIAL MEDIA

- Uncovering membership in protected categories
 - Church groups
 - Political affiliations
 - Advocacy groups
 - Medical information
 - Family medical history
- Uncovering and acting on the basis of protected concerted activity
- Uncovering other protected activity
 - Workers' Compensation claims
 - Lawsuits or EEOC charges
- Unequal treatment

BEST PRACTICES

- Search only the public content about a candidate
- Separate the social media research from the decision maker
- Search public content in a uniform manner
- Notify candidate
- Comply with terms of service on each social media site
- Do not coerce candidates to provide the company access to social media sites
- Base hiring decisions only on acceptable information
- Document the legitimate, nondiscriminatory reason for the hiring decision

EEOC'S RECENT CASES REGARDING HIRING PRACTICES

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EEOC v. KAPLAN HIGHER LEARNING EDUC. CORP

- EEOC sued claiming use of credit checks were unlawful because they disproportionately excluded African-Americans
- Outcome:
 - Case thrown out due to faulty statistics
 - EEOC likely to try again

EEOC v. PIGGLY WIGGLY (M.D. TENN)

- EEOC alleged that Piggly Wiggly failed to hire African-Americans and exclusively hired women for cashier positions
- Outcome:
 - Settled for \$40,000
 - 4 year consent decree entered by the Court

EEOC v. MAVIS DISCOUNT TIRE, INC. ET AL.

- EEOC pursuing claim because statistics show women were underrepresented in the workplace
- Possible Damages:
 - Past and future wages for all women applicants harmed by Mavis' actions,
 - Instatement in the jobs Mavis wrongfully denied them
 - Injunctive relief

RECORDKEEPING REQUIREMENTS

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RECORDKEEPING REQUIREMENTS

- EEOC says information must be kept for a year after records, or personnel decision, was made – whichever is later
- Time extends to 2 years for most federal contractors
- States have different requirements
- Three year statute of limitation in Michigan

BEST PRACTICES

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BEST PRACTICES

Train managers, hiring officials and decision makers about Title VII

Treat similarly situated people equally

Avoid Blanket Policies: Develop policies that narrowly tailors to specific needs which identifies both essential job requirements and offenses that may demonstrate unfitness

Have your policies and procedures reviewed to assess compliance and to determine whether there are potential disparate impact issues

Know and follow the FCRA rules if you have a third party perform a background search

Do not have a decision maker do internet research on candidates

BEST PRACTICES CONT.

Develop a quality employment application

Ask about restrictive covenants

Evaluate internally to look for disparate job placements

Document reasons for decisions

Do not use arrest records unless legal counsel approves (Know the state and local laws concerning use)

Perform a targeted screen when reviewing employees criminal record (Individual assessment on nature of crime, nature of job, time elapsed, and role of any disability)

BEST PRACTICES CONT.

Validate your tests

Confidentiality

Be aware of duty to accommodate

Be aware of NLRB provision on
concerted activity

QUESTIONS?



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THANK YOU!

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

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