

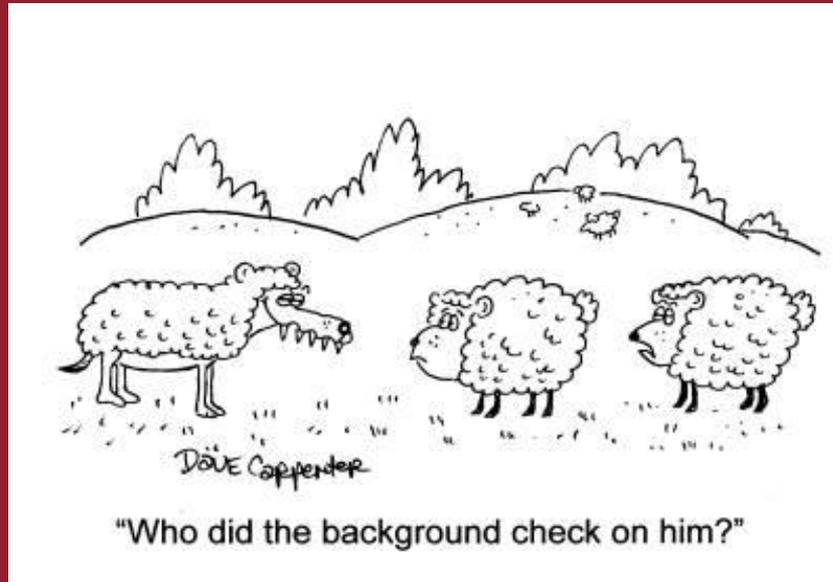
EMPLOYEE BACKGROUND CHECKS

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WHY SHOULD EMPLOYERS CONDUCT BACKGROUND CHECKS?



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WE CONDUCT BACKGROUND CHECKS TO...

- To comply with state or local law
- To avoid theft, fraud, embezzlement, and workplace violence
- To avoid negligent hiring claims
- To detect résumé fraud



"I did have a question regarding your career history. Under 'Strengths,' you listed 'Never convicted.' Would you mind elaborating on that?"

NEGLIGENT HIRING/RETENTION

- Employer breaches a duty of care if he hires or retains an employee he knew or should have known was incompetent or a threat
- To prevent a negligent hiring or retention claim, employers are expected to make a reasonable inquiry or investigation into an applicant's background



" You knew I was a lawyer when you hired me. "

PREVALENCE OF BACKGROUND CHECKS

- In the past two decades technology has made it easier to conduct pre-employment screening
- 92% of employers conduct criminal background checks on applicants
- It is estimated that over 80% of employers use social media to recruit job candidates and conduct background checks



EEOC STATISTICS

- EEOC hiring bias charges spiked last year to 7,359 (an increase of nearly 500 from 2015)
- Just over ½ of the charges were filed under Title VII
- Charges filed under the ADEA were the second most prevalent, with charges filed under the ADA ranking third

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"And, assuming your golf handicap checks out, the job is yours!"

PROHIBITED EMPLOYMENT POLICIES/PRACTICES

- Under the laws enforced by EEOC, it is illegal to discriminate against
 - An applicant
 - An employee
- Protected class:
 - Race
 - Color
 - Religion
 - Sex (including gender identity, sexual orientation, and pregnancy)
 - National origin
 - Age (40 or older)
 - Disability
 - Genetic information
- Having a criminal record is **NOT** a protected status under Title VII

EEOC CRIMINAL BACKGROUND CHECK GUIDANCE

- 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.
- Guidance does not have force of law. However, it outlines conduct that the EEOC considers unlawful under VII.
- Guidance shows “best practices” for using background checks in employment decisions
- Guidance addresses disparate treatment and disparate impact

DISPARATE TREATMENT

- What is it?
 - Employer treats similarly situated applicant with criminal record differently based upon race, national origin, sex, or other legally protected characteristic
- How is it proven?
 - Biased statements from employer or decision maker
 - Inconsistencies in the hiring process (requesting criminal background check more often for individuals of certain race or ethnic backgrounds, or allowing certain ethnicities more opportunity to explain their history)
 - Similarly situated comparators
 - Statistical evidence (does employer place more weight on criminal history for members of a protected group?)

DISPARATE TREATMENT

- How to avoid it?
 - Ensure decision makers and interviewers are properly trained in the law and what factors can and cannot go into their decision making process
 - If applicants are rejected based on a background check, make sure that policy is consistent among all classes and all applicants with a comparable criminal records are rejected as well
 - Avoid conducting background checks only on members of a protected class
 - Provide all applicants with the same opportunity to explain criminal history

DISPARATE IMPACT

- Neutral employment practices or policies may adversely impact one protected group
- 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 racially balanced workforce is not enough to disprove disparate impact

DISPARATE IMPACT

- McDonnell-Douglas burden-shifting under Title VII:
 - Employer's application of neutral criminal background check policy/practice disproportionately disqualifies a legally protected group from consideration for hire
 - Employer is not liable if can show its criminal background check policy is **job-related and consistent with business necessity** for position in question
 - Plaintiff must then show less discriminatory alternative employment practice exists that serves employer's legitimate hiring goals as effectively as challenged policy/practice

DISPARATE IMPACT

- Three factors (“Green Factors”) to determine whether an exclusion is job related and consistent with business necessity:
 - The nature and gravity of the offense or conduct
 - The time that has passed since the offense or conduct and/or completion of the sentence
 - The nature of the job held or sought

ARREST RECORDS

- EEOC describes arrest records as having limited value because they are not proof that criminal conduct has occurred
 - Presumption of innocence in criminal justice system until individual is convicted or pleads guilty
 - Arrested individuals are sometimes never charged and criminal charges are often dismissed without a trial or have been expunged
- EEOC's enforcement position is exclusion of applicant based on arrest record alone is not job-related and consistent with business necessity
- Policies which are based on the conduct underlying the arrest, and not the arrest, will not violate Title VII

CRIMINAL CONVICTIONS

- EEOC:
 - “A record of conviction will usually serve as sufficient evidence that a person engaged in particular conduct”
 - “EEOC recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job-related for the position and consistent with business necessity”
 - Or, include a disclaimer from the EEOC
 - Example: “Answering ‘yes’ to this question is not an automatic bar to employment. Factors such as how this conviction would relate to the position, age and time of occurrence, and the services and nature of the circumstances will be considered.”

CRIMINAL CONVICTIONS

- Two-step process
 - Targeted screen: A “targeted” screen considers at least the nature of the crime, the time elapsed, and the nature of the job
 - Individual assessment: Provide an opportunity to the individual to demonstrate that the exclusion does not properly apply to him or her



TARGETED SCREENS

- A targeted screen 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

INDIVIDUALIZED 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
 - Considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity

INDIVIDUALIZED ASSESSMENT

- Factors to consider:
 - 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 no known incidents of criminal conduct
 - The length and consistency of employment history before and after the offense or criminal conduct
 - Rehabilitation efforts, e.g. education/training
 - Employment or character references and any other information regarding fitness for the particular position

CRIMINAL CONVICTION BEST PRACTICES

- Eliminate policies which exclude from employment people with *any* criminal record
- Train managers, hiring officials and decision makers about Title VII and its prohibition on employment discrimination
- Develop narrowly tailored written policies for screening applicants and employees for criminal conduct
 - Determine specific offenses that may demonstrate unfitness for performing such jobs
 - Determine duration of exclusions based on all available evidence
 - Include an individualized assessment
- When asking about criminal records, limit inquiries to records for which the exclusion would be job related and consistent with business necessity

EMERGING TRENDS IN HIRING

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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 (i.e. first interview)
- Total of 29 states (including California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia and Wisconsin) and countless cities have ban the box legislation
- Nine states (including Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island and Vermont) have removed the conviction history question on job applications for private employers completely (which advocates consider the next step in the process)

EMPLOYERS BEWARE – NEW LEGISLATION

- Even if you are not in a state or city that currently has ban the box, that could change. This is a trend that has taken root and there is pending legislation in many jurisdictions.
- New legal trend – pay equity laws (Massachusetts law signed August 1, 2016 and will be effective in 2018; Philadelphia law signed but pending legal challenge, other states and cities have pending legislation)
 - Goal of these new laws is to close gender gap and make it unlawful for employers to pay men and women different rates for “comparable work”
 - Prohibit employers from screening job candidates based on previous salary, asking salary-related questions on applications or contacting prior employers to confirm wages



FAIR CREDIT REPORTING ACT

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FAIR CREDIT REPORTING ACT

- 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

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 applicant
- Employers may reject application if employee refuses to give consent

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
 - It will not discriminate against the applicant or otherwise misuse the information, as provided by any applicable federal or state EEO laws or regulations

STEP 3: PRE-ADVERSE ACTION

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

STEP 4: POST-ADVERSE ACTION

- 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
 - Include notice of right to dispute accuracy of the report and request an additional free report from the agency within 60 days

TOP FIVE TIPS FOR CONDUCTING APPLICANT INQUIRIES AND BACKGROUND CHECKS

1. Establish uniform policies and procedures for gathering background information
2. Train employees and decision makers to consider the disparate impact potential
3. Follow the requirements of the FCRA
4. Know the laws that apply to your company – city, county, state, multi-state
5. Avoid obtaining unnecessary information or information which should not be considered (i.e. medical information, criminal arrests not resulting in a conviction)

QUESTIONS?



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THANK YOU

Legal Disclaimer: 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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