

Practical Guidance for Conducting Background Checks

By Maureen E. Carr, Esq.

The federal government has recently taken several steps to provide guidance to employers who conduct background checks for employment-related purposes. In April 2012, the Equal Employment Opportunity Commission (EEOC), the agency responsible for enforcing federal anti-discrimination laws, issued its “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” (http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm), a comprehensive statement of the EEOC’s background check policies. In March 2014, the EEOC and the Federal Trade Commission (FTC), the agency responsible for enforcing the Fair Credit Reporting Act (FCRA), issued a joint publication on employment-based background checks (http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm). Collectively, these publications offer valuable direction to employers who utilize background checks, including criminal background checks and consumer reports.

Significantly, the publications clarify that it is *not unlawful* for employers to utilize background checks, provided that such use does not violate anti-discrimination laws, the FCRA, or other applicable law. First, employers must not use background checks in a discriminatory manner, either by virtue of disparate *treatment* (i.e. cannot require background checks only of black employees) or disparate *impact* (i.e. if a policy of excluding applicants with criminal records operates to disproportionately exclude blacks from employment, the employer must demonstrate that the exclusions are job related and consistent with business necessity).

Second, employers must comply with the procedural requirements of the FCRA when obtaining background information from a company in the business of providing such information. Prior to conducting a background check, the employer must provide written notice to the applicant/employee and obtain the individual’s written consent. Before taking any adverse employment action based on the results of a background check, the employer must provide the individual with a disclosure that includes a copy of the report and a summary of his rights under the FCRA. After taking any adverse employment action based on the results of a background check, the employer must inform the individual that he was rejected because of information in the report, provide contact information for the company that provided the report (with the disclaimer that that company didn’t make the adverse employment decision), and advise the individual of his right to dispute the accuracy or completeness of the report.

Third, employers are cautioned against inquiring about an applicant or employee’s medical and genetic information, including family medical history, to ensure compliance with the federal Genetic Information Nondiscrimination Act (GINA).

The following are tips to ensure compliance with federal law and agency guidance on conducting employment-based background checks:

- Apply the same standards to all applicants/employees regardless of any protected class (i.e. race, national origin, religion, age, disability);

- Exercise caution when basing employment decisions on background problems that may be more common among a certain protected class;
- Do not inquire about medical or genetic information, including family medical history (unless there is objective evidence that the applicant/employee cannot do the job or poses a safety risk because of a medical condition);
- Obtain applicant/employee's written consent prior to conducting a background check;
- Provide the notices required by the FRCA (notice of intent to conduct background check, pre-adverse action notice, and adverse action notice); and
- Associate with a reputable background check company that can help you comply with the FRCA.

As always, the guidance provided in this article is general. In light of the recent guidance issued by the EEOC and FTC, employers are encouraged to review their background check policies and consult with their counsel to ensure full compliance with applicable law.

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