

Best Practices for Employers Conducting Background Checks *By Carrie Zochert, Berens & Miller, P.A., Minneapolis, MN*

Over 675,000 persons are released from prisons in the U.S. each year. According to the Bureau of Justice Statistics, as of 2011, nearly one in 50 adults was on probation or parole, or approximately 4,814,200 people. Not surprisingly, it is common practice for employers to conduct background screening of job applicants. Employers do so for a number of legitimate reasons, such as reducing theft, embezzlement and fraud, avoiding risks related to workplace violence, and verifying the accuracy of information on an application and/or resume.

In some instances, employers are required to conduct criminal or credit background checks under federal or state law. With increasing legislation and regulatory guidelines and directives pertaining to such checks, however, employers must carefully balance the risks associated with negligent hiring and the risks of litigation and/or penalties for non-compliance with applicable laws.

All employers conducting background checks via a third-party consumer reporting agency must adhere to the requirements of the Fair Credit Reporting Act (“FCRA”).¹ In addition, over the last few years, a number of states have enacted legislation prohibiting criminal history questions from job applications—so called “ban the box” legislation. These laws prohibit public and/or private employers from making any criminal record inquiries until after an applicant has been selected for an interview, or after an applicant is determined to be otherwise qualified for the position, and a conditional job offer is made. *See e.g.*, Minn. Stat. § 181.53 (2013) (applying to public and private employers); Mass. G.L. c. 151B, § 4(9½) (2012) (same). Many cities have passed similar ordinances, some of which apply to both public and private employers. *See e.g.*, Austin, Tex., Resolution 20081016-012 (Oct. 16, 2008) (applies to city positions); Philadelphia, PA, Code ch. 9-3000 (2011) (applies to city and private employers); Atlantic City, N.J., Ordinance #83 (Dec. 23, 2011) (applies to city and vendors). Because these state laws and city ordinances vary across the U.S., employers must be vigilant in keeping abreast of legislative changes to remain compliant. Additionally, last year the Equal Employment Opportunity Commission (“EEOC”) issued new Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions, available [here](#).¹

While persons who have a criminal record are not a protected class under Title VII of the Civil Rights Act, the EEOC Guidance makes clear that an employer is liable for violating federal discrimination laws when a plaintiff demonstrates that the employer’s neutral policy or practice has a disproportionate effect of screening out a protected group, and the employer fails to demonstrate that the policy or practice is job related and consistent with business necessity. *See EEOC Enforcement Guidance* at 8. The Guidance encourages employers to eliminate blanket exclusions based on criminal records and to limit inquiries to records for which exclusion would be job-related and consistent with business necessity. *See EEOC Enforcement Guidance* at 25. More specifically, the EEOC urges employers to make an individual assessment of each applicant with a criminal background, and consider the nature and gravity of the offense or conduct, the age of the applicant and the amount of time that has passed since the offense took place, any rehabilitation efforts, and the nature of the job held and/or sought. *See EEOC Enforcement Guidance* at 10-11. Although the EEOC Guidance does not have the force or effect of law, it is an indication of the agency’s intention as to how it will enforce existing law. *Id.* at 3.

To guard against an EEOC enforcement action, employers may want to consider, among other things, adapting their employment applications to *exclude* inquiries about the applicant’s criminal history, but *include* a disclaimer that any falsification, misrepresentation, or omission in the application, resume, or during an interview may be justification for

¹ Formerly, the FCRA was enforced by the Federal Trade Commission, but that role was transferred to the Consumer Financial Protection Bureau (“CFPB”) as of January 2013. *See* 12 C.F.R. § 1022. The CFPB issued updated notices that employers and consumer reporting agencies must provide to consumers when a consumer report is used in employment decisions. *Id.* Employers should be using the updated notices to remain compliant with the law.

refusing to hire, or if employed, discharged, regardless of the length of employment or when the misrepresentation or omission is discovered. Drafting job descriptions that include the qualifications and essential functions of the job may also strengthen an employer's business necessity defense in a discrimination suit. Employers must secure and keep confidential all criminal history records obtained.

If faced with an EEOC enforcement action, employers can take some comfort in knowing that courts have consistently found that careful and appropriate use of criminal history information is an important part of the employment process. *See e.g., NASA v. Nelson*, 562 U.S. ____; 131 S. Ct. 746 (2011) (recognizing background checks serve legitimate business purposes); *EEOC v. Freeman*, No. 09-cv-2573, 2013 WL 4464553, at *1 (D. Md. Aug. 9, 2013) (slip copy) (recognizing same). Indeed, even the EEOC conducts criminal background investigations as a condition of employment for all employees. *See Freeman*, 2013 WL 4464553, at *1. Nonetheless the use of criminal history records in hiring decisions is just beginning to be litigated, with both the EEOC and individual employees pursuing claims and seeking damages. To avoid costly claims, employers should, at a minimum, adopt a policy and practice that includes an individualized assessment of any criminal conduct in light of the essential requirements of the position being sought, and train hiring managers on how best to implement the policy consistent with civil rights laws.



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