



Labor & Employment ADVISORY ■

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EEOC and FTC Issue Joint Guidance on Employment Background Checks

Last week, the Equal Employment Opportunity Commission (EEOC), which is responsible for enforcing federal antidiscrimination laws, and the Federal Trade Commission (FTC), which is responsible for enforcing the Fair Credit Reporting Act (FCRA), jointly published two guides on conducting background checks for employment purposes. The publications are an attempt by the agencies to apprise employees of their rights and educate employers on their responsibilities under the laws enforced by the agencies.

The EEOC issued similar guidance in April 2012, discussed in a prior [advisory](#), regarding employers' compliance with federal antidiscrimination laws in the use of arrest and conviction records in personnel decisions. Similarly, the FTC issued guidance in January 2012, located [here](#), regarding employers' use of consumer reports in personnel decisions under the FCRA, the federal law that protects the privacy and accuracy of information in credit reports. However, the publications issued last week mark the first joint effort by the agencies to issue consolidated and technical guidance on the use of background checks in the workplace.

The joint guidance is comprised of two documents—one entitled "[Background Checks: What Employers Need to Know](#)" and the other entitled "[Background Checks: What Job Applicants and Employees Should Know](#)." While the guidance documents do not address some of the more difficult issues that employers face with respect to the use of background checks—such as potential conflicts between minimizing exposure under federal antidiscrimination laws, on the one hand, and complying with stringent state regulations and negligent hiring laws on the other—they do provide discrete steps employers should take to ensure compliance under the FCRA. Given the increasing amount of litigation brought by employees under the FCRA, the guidance from the FTC on this emerging issue is noteworthy.

The guidance explains that generally it is not illegal for an employer to inquire about an employee or applicant's background or to require a background check. However, the nature of a background check and the use and retention of background information must comply with applicable laws, including antidiscrimination laws and the FCRA. Based on the joint guidance, the following are important reminders and recommended practices for employers using or considering implementing background checks:

- Background checks can include, but are not limited to, screens of an applicant or employee's criminal history, credit record, medical information or social media use.
- A decision to perform a background check on an applicant or employee based on a person's race, national origin,

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color, sex, religion, disability, genetic information or age is illegal. Employers should thoughtfully and consistently implement background checks for legitimate business reasons only.

- Employers should avoid asking applicants and employees questions that may elicit information about their medical or genetic history. If an employer has concerns regarding workplace safety or an individual's ability to perform the job, it should contact counsel for advice on how to proceed lawfully.
- When using a third party to obtain a background report on an applicant or employee, employers must get the applicant or employee's written permission. Additionally, employers must certify to the third party that (1) the individual was notified, (2) the individual gave the employer written permission to conduct the background check, (3) the employer complied with the requirements of the FCRA and (4) the employer will not discriminate against the individual in violation of federal or state equal opportunity laws.

Before taking an adverse action based on the results of a background check conducted by a third party, the employer must provide the employee or applicant with a copy of the report and a notice of rights under the FCRA.

Before disposing of any background reports, employers should ensure that they have complied with applicable recordkeeping requirements and only dispose of reports in a secure manner. Secure disposal may include burning, pulverizing or shredding paper documents and disposing electronic information so that it cannot be read or reconstructed.

Additionally, it is also a good idea for employers to review the laws regarding background checks and information in the states and municipalities in which they have employees. Some states regulate the use of background check information for employment purposes. To ensure compliance with state and federal laws, including antidiscrimination laws and the FCRA, employers should consult with counsel for advice on how to effectively and lawfully use background checks in the applicant and employee screening process.

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