

CRIMINAL BACKGROUND CHECKS: PROCEED WITH CAUTION

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In 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued its Enforcement Guidance (Guidance) on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964 report, as amended (Title VII). Construction owners need to review this guidance and potentially revise their current policies and procedures regarding criminal background checks.

According to one survey, 90 percent of employers perform criminal background checks on job applicants. The risk management reasons asserted for reviewing criminal background information are to prevent theft, fraud and workplace violence and to avoid liability for negligent hiring. Construction employers may also be required to perform background checks to comply with owner or general contractor requirements or state and local laws and regulations.

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex or national origin. Having a criminal record is not specifically listed as a protected basis characteristic. Therefore, whether an employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of discrimination based on one of the protected categories. Title VII liability can arise from one of two types of liability: "disparate treatment" or "disparate impact."

Disparate treatment occurs when an employer treats a person in a protected category differently from someone who is not in that category. On the other hand, disparate

Related People



D. Albert Brannen

Partner

404.240.4235

impact liability arises when an employer maintains an apparently neutral policy or practice that has the effect of disproportionately screening out a group protected by Title VII. This becomes an issue if the employer fails to demonstrate that the policy or practice is job-related for the position in question and consistent with business necessity. To maintain a successful program of conducting criminal background checks, an employer must avoid policies or practices that might be considered a violation of Title VII under either of these two legal theories.

Over the past 25 years, courts and the EEOC have provided guidelines on employer use of criminal background employment decisions under Title VII. The EEOC's recent Guidance restates the Commission's position and supersedes its previous policy statements on this issue.

The EEOC's new Guidance forces construction employers to maintain a precise balance of caution and compliance. While the use of criminal background checks can be an effective risk management tool, they must be conducted carefully.

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