

Beware: EEOC Focusing on Criminal Checks

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More than 70 percent of employers conduct criminal background checks, and as many as 90 percent check the criminal background of employees applying for certain positions. The rationale for conducting background checks ranges from identifying candidates who are honest on their applications and display a history of good decision-making to reducing the risk of criminal behavior in the workplace and related civil liability by excluding those who may be likely to engage – or re-engage – in criminal activity.

Despite these important business concerns, the current regulatory climate has changed. On April 25, 2012, the Equal Employment Opportunity Commission issued *Enforcement Guidance on the Considerations of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* to address concerns that employers could use arrest and conviction records to unlawfully discriminate against job applicants based on their race or national origin. In addition to concerns about what the EEOC refers to at the “important Issue” of reintegrating criminal databases which the agency contends contain incomplete criminal records and mismatched reports. Although not binding on employers, the EEOC will enforce Title VII with the guidance in mind.

As a result, employers must rethink the wisdom of broad background check policies and instead decide whether, on a position by position basis, background information is relevant, helpful, and non-discriminatory when is used to assess a candidate’s suitability for employment. Adopting the right background check procedures is a critical risk management practice to avoid EEOC claims, individual lawsuits and even the prospect of class action-based lawsuits.

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