

Criminal Background Checks: EEOC Position Presents A Legal Quandary

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A recent survey conducted by the Society of Human Resources Management (SHRM) indicated that more than 90% of employers use criminal background checks to screen applicants or current employees. Taking notice of this trend, the EEOC issued Enforcement Guidance (Guidance) on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1954, as amended (Title VII). To maintain or establish a compliant program, an employer must avoid policies or practices that might be considered a violation of Title VII under “disparate treatment” or “disparate impact” theories. Attorneys advising affected employers should take note of several best practices drawn from the EEOC’s Guidance.

- Be aware of applicable laws
- Do not use a blanket policy
- Revise your employment application
- Do not consider arrest records
- Assess each person’s individual situation
- Develop a written policy for conducting criminal background checks
- Maintain Confidentiality

To say that the EEOC take a suspicious view of the use of criminal background checks in employment would be an understatement. The agency’s new guidance leaves employers facing an uncomfortable tension: either blindly hire someone who could do harm in the workplace or continue to require criminal background checks at their peril. While criminal background checks can be an effective risk management tool, they must be used carefully and in compliance with the EEOC’s current position.

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