



News & Trending

PUBLICATIONS & ALERTS

ETRENDS – EEOC AND FTC ISSUE JOINT GUIDANCE ON THE USE OF BACKGROUND CHECKS FOR EMPLOYMENT PURPOSES

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The Equal Employment Opportunity Commission (“EEOC”) and the Federal Trade Commission (“FTC”) issued joint guidance last month on the use of background checks for employment purposes. Two publications were released. One offers guidance to employers and the other, to job applicants and employees. This is the first time the agencies have partnered to offer consolidated interpretation assistance on the use of background checks in the employment setting. EEOC Legal Counsel Peggy Mastroianni was quoted in a press release issued by the EEOC as saying, “The laws enforced by the EEOC and the FTC intersect on the issue of employment background checks, so this was a unique opportunity for the agencies to work together to provide user-friendly technical assistance to our stakeholders.”

The first publication, *Background Checks: What Employers Need to Know*, contains information in three topic areas, “Before You Get Background Information,” “Using Background Information,” and “Disposing of Background Information.” This publication includes the following advice for employers:

- Treat everyone equally when it comes to background checks. Do not check the background of some applicants but not others, particularly with regard to the same job;
- Avoid asking questions of applicants and employees that may obtain genetic information, including family medical history;
- If you decide to obtain a background check from a credit reporting agency, be sure that you are giving proper notice and certifications to the applicant/employee and to the company performing the check. Obtain the employee’s written permission for the check;
- When using background information, apply the same standards to everyone;
- Be careful when making employment decisions based on background information that may be more common among a certain race, color, national origin, sex, or religion or among people who are disabled or who are age 40 or older;
- Before taking an adverse employment action based on background information, give the applicant/employee the required notice and information. This notice ensures the applicant/employee has the opportunity to review the report for accuracy. After taking an adverse employment action, ensure the requisite disclosures are given to the applicant/employee; and
- Preserve all employment records for at least one year (check different standards for some federal contractors and government employees) or longer if a discrimination charge is filed. After meeting all recordkeeping requirements, disposal of the reports must be done securely and in such a manner that the reports cannot be read or reconstructed.

The second publication, *Background Checks: What Job Applicants and Employees Should Know*, offers guidance to job applicants and employees regarding background checks, including allowable background questions that an employer may ask, applicant/employee rights regarding background checks, steps to take if information contained in a background report is inaccurate, permissible ways an employer may use background information, and guidance for an applicant/employee who feels that he or she experienced discrimination.

Although the publications highlight potential concerns that arise in the use of background checks by employers, they also confirm that the use of such information, in general, is not illegal. Employers should not be reluctant to use background checks when the information will be helpful in making employment decisions, but should confirm that their background check and decision-making procedures are compliant with applicable laws, including applicable state and local laws.

PROFESSIONALS

Susan Milner Parrott

PRACTICE AREAS

Employment, Labor and Human Resources

