

Criminal background checks

A job applicant's past can haunt you

Criminal background checks are vital to the hiring process. If performed correctly, they can serve as a valuable tool to assess the suitability of current employees and job applicants. However, the process is often done improperly, which can lead to liability for the employer.

“Federal, state and local laws place a variety of restrictions on an employer’s ability to gather and use information regarding an individual’s criminal background,” says Stephen C. Goldblum, a member at Semanoff Ormsby Greenberg & Torchia, LLC. “That’s why employers should consult with legal counsel prior to obtaining criminal background information to identify the laws that impact how the information can be gathered and used.”

Smart Business spoke with Goldblum about criminal background checks and best practices for screening candidates.

How are criminal background checks regulated?

It’s not illegal for an employer to ask questions about an applicant’s criminal background or to require a criminal background check. However, any time an employer uses this information to make an employment decision it must comply with federal anti-discrimination and credit reporting laws as well as state and local restrictions. Two federal agencies that regulate criminal background checks are the U.S. Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC).

How is the EEOC involved in criminal background checks?

The EEOC enforces Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex,

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race, color, national origin and religion. Title VII also protects against disparate impact discrimination, which is any practice that is non-discriminatory on its face, but has a disparate effect on certain protected classes.

The EEOC takes the position that the blanket exclusion by an employer of all applicants with a criminal history violates federal anti-discrimination law. Therefore, an employer needs to carefully consider the circumstances of each applicant’s criminal background and determine whether the candidate’s suitability is consistent with the company’s legitimate business justifications.

According to the EEOC, there are three factors that determine if an employer’s reliance on a criminal background check is related to a particular job and consistent with business necessities:

- The nature and gravity of the offense.
- The time that has passed since the offense.
- The nature of the job.

Employers must analyze these criteria when deciding whether or not to hire an applicant for a position based upon the applicant’s criminal background.

How is the FTC involved with criminal background checks?

The FTC enforces the Fair Credit Reporting Act (FCRA), which places restrictions on employers that obtain background information from consumer

reporting agencies, which are referred to as consumer reports and include criminal background checks. An employer that uses consumer reports to make employment decisions must comply with the FCRA.

Before obtaining a consumer report, written permission must be obtained from the applicant. If the consumer report reveals something that causes an employer not to hire the applicant, the FCRA requires the employer to notify the applicant and provide a copy of the report as well as a document issued by the FTC titled, ‘A Summary of Your Rights Under the Fair Credit Reporting Act.’ This enables the applicant to correct any inaccurate information in the consumer report.

What recent developments impact the use of criminal background checks?

Many state and local jurisdictions, including Philadelphia, have laws referred to as, ‘Ban the Box.’ This legislation may prohibit employers from inquiring about criminal convictions or arrests during the application process.

It’s important for employers to be familiar with the laws in the municipalities in which they operate and ensure that the personnel responsible for interviewing and making hiring decisions are knowledgeable regarding the applicable federal, state and local laws. ●