

KD Alert: EEOC and FTC Get Aggressive on Employment Background Checks

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Critical personnel decisions, including hiring, retention, promotion, reassignment, and firing, often have complex legal consequences for employers. On March 10, 2014, the Federal Trade Commission (“FTC”) and the Equal Employment Opportunity Commission (“EEOC”) co-published two short guides on employment background checks. The publications do not make any substantive changes to the law, but rather are a joint effort to ensure that employers and potential employees have a solid understanding of their rights and responsibilities. The FTC enforces the Fair Credit Reporting Act (“FCRA”), the law that protects the privacy and accuracy of the information in credit reports. The EEOC enforces laws against employment discrimination, including in particular Title VII of the Civil Rights Act of 1964, as amended (“Title VII”).

WHAT SHOULD EMPLOYERS KNOW? The FTC and EEOC emphasize that while ~~it is~~ **illegal** for an employer to ask questions about an applicant’s or employee’s background, or to require a background check, employers need written permission from job applicants before getting reports from companies in the business of compiling background information. ~~It is also~~ **illegal** for employers to discriminate based on a person’s race, national origin, sex, religion, disability, genetic information (including family medical history), or age (40 or older) when requesting or using background information for employment purposes, regardless of how the information is obtained. All applicants and employees must be treated equally—for example, asking only people of a certain race about their financial histories or criminal records is evidence of discrimination.

Except in rare circumstances, employers should not ask about an applicant’s or employee’s genetic information, which includes family medical history, and may reveal genetic traits that in the employer’s view, impacts job performance. If an employer has such information, it is unlawful to use it in making an employment decision.

The FTC and EEOC advise employers to be prepared to make exceptions for disability-related issues revealed during a background check. For example, employers should allow candidates, who the employer would be inclined not to hire because of a disability, to demonstrate his or her ability to do the job, unless doing so would cause significant financial or operational difficulty or pose a safety risk.

The FCRA requires employers obtaining credit or criminal background reports to inform the applicant or employee that the information may be used for employment decisions. The notice must be in writing and in a stand-alone format – i.e., it cannot be attached to an employment application or other questionnaire. Job applicants may refuse to give written permission for employers to receive background information, but doing so gives the employer permission to reject their application.

Generally, any personnel or employment records made or kept (including all application forms, regardless of whether the applicant was hired) must be preserved for 1 year after the records were made, or after a personnel action was taken, whichever comes later. Job applicants who have been turned down for a job, or denied a promotion, based on information in a background report, have a right to review the report for accuracy. Once all applicable recordkeeping requirements are satisfied, employers may securely dispose of any background reports received.

KD provides employers with guidance in formulating and implementing employment practices and decisions to stay ahead of new and complex statutory regulations and to minimize their potential liability exposure. If you have questions pertaining to lawfully conducting background checks, please contact Philip R. Voluck, Esq. or Irina V. Rabovetsky, Esq. at 215-461-1100.