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**Richard D. Alaniz** • Mar. 10, 2014



One of 2013's hallmarks in the labor and employment field is the aggressive stance taken by the Equal Employment Opportunity Commission ("EEOC"), which enforces federal anti-discrimination laws. The EEOC's Strategic Enforcement Plan ("SEP"),

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One of the EEOC's areas of focus has been the use of background checks, especially criminal history, and the barriers such policies pose to employment. In April 2012, the EEOC updated its guidance on the use of criminal background checks for the first time in more than 20 years. And over the last year, the EEOC has brought suit against a number of employers based on their use of criminal background checks in the hiring process. The EEOC has taken the position that use of criminal background checks in hiring has a disparate impact on African-American and Hispanic male applicants.

Now is the time for employers to review their use of criminal background checks in light of the recent EEOC activity. By following several key recommendations, employers can shore up the defensibility of their use of the background checks, while at the same time improving the quality of their hiring decisions.

### ***Criminal Background Checks are Important Tools***

Employers make use of criminal background checks because they have a significant impact in helping employers make smart hiring decisions. Using criminal background checks effectively can have a significant impact on five key areas:

- Help avoid exposure to negligent hiring / retention lawsuits.
- Increase the security of your company's assets and employees.
- Reduce liability from inconsistent hiring or screening practices.
- Proactively reduce the risk of employee-related loss.
- Lower the likelihood that an adverse incident will occur on your company's property that could jeopardize customers or employees.

Employers use criminal background checks because they need to know the character of the employee they are hiring. In addition, merely having a criminal background check policy can help your employees feel safer and more secure in the workplace.

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- The number of offenses for which the individual was convicted.
- Age at the time of conviction or release from prison.
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct.
- The length and consistency of employment history before and after the offense or conduct.
- Rehabilitation efforts, e.g., education and training.
- Employment or character references and any other information regarding fitness for the particular position.
- Whether the individual is bonded under a federal, state, or local bonding program.

The EEOC's preferred method of conducting and using criminal history background checks in employment would create burdensome requirements for employers. In addition, the Agency has even gone so far as to state that it will not defer to state and local laws that require inquiry into criminal histories for certain employees.

### *Recent EEOC Cases*

The EEOC has been aggressively pursuing its position on how criminal background checks should be run. However, in a number of cases, the Agency has suffered some significant defeats. For example, in November 2013, the Sixth Circuit handed the agency a bill for over \$750,000, in a case where the Agency claimed the company had a policy of rejecting applicants with felonies, even after it became apparent the company had no such policy. In another recent case, the District of Maryland rejected the EEOC's claims that criminal background checks had a disparate impact on African-American males, finding that it had not made its case.

These cases notwithstanding, the EEOC has continued to push ahead with its opposition to many employers' standard usage of such background checks, recently

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- Ensure that the employment application asks the following question: “Have you ever pleaded guilty to, or been convicted of, a criminal offense?”
- Adopt a bright-line rule that an applicant who fails to disclose a conviction, seriously misrepresents the circumstances of a criminal offense, or makes any other materially dishonest statement on the application, is automatically disqualified.
- Include the following notice on the employment application or the background check authorization page:

A conviction does not automatically mean you will not be offered a job. What you were convicted of, the circumstances surrounding the conviction, and how long ago the conviction occurred are important considerations in determining your eligibility. Give all the facts so that a fair decision can be made.

- Limit consideration of convictions to those that occurred within seven years of the application date. This helps tie consideration to the more recent past, and courts have often cited to such a limitation in upholding the reasonableness of an employer's policy.
- Some convictions will normally be cause for disqualification due to the nature of the underlying conduct. Such convictions include violent offenses, destruction of private property, sexual misconduct, felony drug convictions, or any job-related misdemeanors.
- Designate a senior manager to review a decision not to hire an applicant because of a particular conviction.
- Limit credit checks or credit history review only to those positions that are truly “credit sensitive,” i.e., access to client or company credit card information or positions that handle money, checks, or have authority to make agreements or purchases on behalf of the company.

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reports from third parties. In addition, if the employer relies on information obtained through the background check when taking employment action, the employer must provide notice to the applicant or employee and go through a series of steps to properly comply with the law.

In addition, many states have state-specific laws governing the use of background check information. For example, Pennsylvania state law provides: "Felony and misdemeanor convictions may be considered by the employer only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." Furthermore, sometimes even cities have more stringent requirements; take Newark, N.J., which recently passed a law which "prevents employers with five or more employees who do business, employ persons or take applications for employment in the City of Newark, from asking applicants about their criminal history."

Employers need to be aware of the specific requirements of their state and location, as well as being aware of the recent trends at the national level with the EEOC. By understanding the stances and positions of the federal government and implementing the tips and recommendations laid out above, employers can place themselves in a better position in the event their background checks policies are challenged, while at the same time getting better results from their background checks and improving their hiring decisions.

\* \* \*

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