

Background Screening Results: Hiring Decisions and Compliance Considerations

Introduction

As an employer, it's extremely important to select the right people for your organization. With increased concern about workplace violence and negligent hiring liability, more and more organizations are performing background checks on applicants before hiring them. If you use background screening results as a part of your selection process, you need to use the reports in a compliant manner or risk possible litigation. In addition, there are federal and state laws that regulate the use of arrest, conviction and misdemeanor information for employment purposes. How can you comply with these laws to ensure applicants are given a fair employment opportunity?

This white paper provides you with essential information on how to compliantly use background screening results to lower your exposure to discrimination lawsuits and other litigation. Using the tips in this white paper, you can enhance your reputation as an employer of choice with upstanding employment practices.

Background screening results: One part of the selection process

The Equal Employment Opportunity Commission (EEOC) stipulates that employers can use arrest information, convictions and misdemeanor offenses in the selection process, but they cannot be the only criteria used to make a hiring decision. Rather, employers need to consider the whole picture about applicants when making selection decisions. An applicant's interview performance, education, experience, job fit assessment results, and other qualifications need to be considered as well as his/her background screening results.

Proper Use of Arrest and Misdemeanor Information

EEOC policy states, *"An arrest record may be used as evidence of conduct upon which an employer makes an employment decision. An employer may deny employment opportunities to people based on any prior conduct which indicates that they would be unfit for the*

position in question, whether that conduct is evidenced by an arrest, conviction or other information provided to the employer. It is the conduct, not the arrest per se, which the employer may consider in relation to the position being sought." (EEOC Policy Statement, N-915.061, II.B.2., September 7, 1990)

The EEOC also cautions employers when asking applicants to disclose arrest information on job applications that did not result in convictions because it may have a disparate, negative impact on the hiring of minorities. In addition, some states prohibit this practice all together.

Arrest information involves more analysis than convictions, but may play an important role in your selection process. Be sure to consider whether or not the applicant committed the offense and document your hiring practices to help combat possible discrimination charges.

EEOC Screening Criteria

The EEOC has developed four criteria to use when reviewing applicant background screening results.

EEOC Background Screening Considerations

- 1. Determine whether the applicant is likely to have committed the alleged conduct.**
- 2. Consider the nature of the offense(s).**
- 3. Consider the amount of time that has passed since the conviction occurred.**
- 4. Consider how the offenses relate to the nature of the job.**

1. Determine whether the applicant is likely to have committed the alleged conduct.

This requirement is critical when considering background screening results, but is the most difficult of the four EEOC criteria to determine. Many variables factor into deciding whether an applicant committed a crime. Factors such as status of the charge(s), plea agreement(s), sentence, and/or disposition all play a part in the decision.

Employers need to allow applicants a meaningful opportunity to explain circumstances surrounding their arrests. However, you are not required to conduct an extensive investigation into the charges. In addition, employers should make a reasonable effort to determine whether an applicant's explanation and the background screening evidence are credible before using that information to help make a hiring decision.

When an arrest results in a conviction, this EEOC criterion is not as critical. It can be inferred that an applicant actually committed the crime because a court of law convicted him/her of the crime.

2. Consider the nature of the offense(s).

Did you know that in some states bouncing a check and assault are both considered misdemeanor offenses? Yet, other misdemeanor crimes can be just as severe, if not more severe than felonies.

As a result, employers must consider the nature and gravity of the offense in addition to whether the applicant likely committed the alleged conduct. Depending on the type of crime the applicant committed, it may not be relevant to the position being sought.

3. Consider the amount of time that has passed since the conviction occurred.

The EEOC does not specify how much time must go by before convictions are no longer relevant. It is up to the discretion of employers. For example, suppose an individual was convicted of marijuana possession six years ago and now has a clean record. It's likely that she/he has changed since then and does not pose a threat to your company. However, certain crimes, such as assault, will carry more weight regardless of how much time has passed since they were committed.

In most cases, standard background screening reports cover the most recent seven years. Industries, such as aviation, are required by law to search an applicant's

criminal record for the last 10 years. As you make your selection decisions, carefully consider the whole picture about your applicants as well as how people often change for the better as time passes.

4. Consider how the offenses relate to the nature of the job.

Background screening results revealing an arrest or conviction must be relevant to the position the applicant applied for. If an individual has a driving offense, it does not necessarily disqualify him/her from being hired for a non-driving position.

It may be discriminatory to ask applicants about a conviction or court record which is not substantially related to his/her ability to perform job duties. A best practice is to only ask applicants about convictions that are related to the essential functions of the job and/or general workplace safety. Essential job functions are defined as the core tasks, duties and responsibilities that an individual must complete in order to be successful in a position. In addition, when making inquiries about convictions, you should ask every applicant the same questions to help you abide by Equal Opportunity Employment (EEO) laws.

2004 GIN Hiring Index Statistics

5%

of applicants had a criminal record in the last seven years

10%

of the total number of background checks GIN performed in 2004 contained a hit

Sample screening policy

One proactive approach employers can take to use background screening results correctly is to develop and implement a compliant background screening policy that establishes guidelines for reasonable background screening standards for a given position.

Keep in mind that the EEOC forbids blanket policies that bar employment to individuals who were arrested or convicted of a crime. Screening policies help the members of your organization understand your company's selection process. The sample policy below addresses EEOC regulations.

Sample Background Screening Policy

As part of the process of weighing applicant qualifications and determining his/her suitability for open positions, <Company Name> requires background checks for all finalists for a position. These background checks are conducted by <Consumer Reporting Agency Name>.

All applicants for employment with <Company Name> are asked to sign a release form authorizing the appropriate background checks. Any applicant who refuses to sign a release form is no longer considered eligible for employment.

Applicants are also expected to provide references from their former employers as well as educational reference information that can be used to verify academic accomplishments and records. The background check will include verification of information provided on the completed application for employment, the applicant's resume or on other forms used in the hiring process. Information to be verified includes, but is not limited to, social security number and previous addresses. <Company Name> will also conduct a reference check and verification of the applicant's education and employment background as stated on the employment application or other documents listed above.

The background check may also include criminal court record searches. If a conviction is discovered, a determination will be made whether the conviction is related to the position for which the individual is applying or presents safety or security risks before an employment decision is made.

Additional checks such as a driving record or credit record may be made on applicants for particular job categories if appropriate and job-related. If an applicant is denied employment in whole or in part because of information obtained in his/her background check, the applicant will be informed of this and given the name, address and phone number of the screening provider to contact if s/he has specific questions about the result of the check or wants to dispute its accuracy.

Any applicant who provides misleading, erroneous or willfully deceptive information to <Company Name> on an employment form or resume or in a selection interview is immediately eliminated from further consideration for employment with <Company Name>.

State compliance considerations

Laws vary greatly from state-to-state as to how background screening results can be used in the selection process. For instance, some state laws require employers to run criminal court record checks before hiring applicants as prison guards, law enforcement agents, security workers, public school employees, healthcare workers, day care professionals and more.

Other states, such as California and Colorado, forbid employers from inquiring about arrests that did not result in a conviction. In addition, state laws may be more rigid than EEO regulations in governing how background screening results may be used. In the cases where state laws are more strict than EEO regulations, the state laws take precedence over the more lenient EEO rules. Be sure to research your state regulations and take necessary steps to help ensure compliance with all the provisions.

Adverse Action

In addition to EEO laws, the federal Fair Credit Reporting Act (FCRA) also regulates background screening for employment purposes. If employers take an adverse action against applicants by denying employment based in whole or in part on their background screening results, the FCRA requires employers to meet specific applicant notification requirements.

There are several steps involved in the FCRA notification process. First, a pre-adverse action letter must be sent to an applicant. This is a preliminary notice indicating that information contained in an applicant's background screening report, if correct, may cause employment to be denied. It also explains what course of action an applicant can take if s/he believes that the background screening results are incorrect and gives him/her the opportunity to dispute and correct any inaccuracies. In addition to the pre-adverse action letter, employers must also include copies of the applicant's background screening results and a "Summary of your rights under the FCRA" document.

If, after providing the pre-adverse action letter, employers still wish to deny employment based on an applicant's background screening results, they must send an adverse action letter. The same points covered in the pre-adverse action letter need to be reiterated in the adverse action letter. To minimize confusion, employers may omit the background screening results and the "Summary of your rights under the FCRA" document citing that they were already sent with the pre-adverse action letter.

The FCRA does not specify the amount of time that must elapse between sending the pre-adverse action and adverse action letters. However, government sources unofficially suggest that adverse action letters should be sent five days after pre-adverse action letters.

Due to the complicated nature of the adverse action process, having outside compliance experts or in-house HR professionals handle FCRA required applicant correspondence is one of the best ways to meet the requirements of this law. The vendor or staff member who oversee this process should also be proficient at handling applicant disputes should they arise.

Take Away Compliance Tips

Below are strategies that you can implement to reduce your company's liability.

Compliance Tips

- 1. Develop compliant pre-employment screening policies that abide by all state and federal laws.**
- 2. Do not implement a blanket policy barring employment to applicants who have been arrested or convicted of a crime.**
- 3. When asking applicants to list arrest information or convictions on your company's application form, include a note that states that your company will not exclude applicants who have a criminal history from your hiring process.**
- 4. Refer hiring decisions based in part on arrest or conviction information to qualified, senior human resource personnel who understand EEO and state regulations.**

Conclusion

Employers have a high level of responsibility when using background screening results in their selection process. Selecting the best people for your organization doesn't mean disqualifying individuals on the sole basis of their background screening results. Rather, background screening results should constitute only one portion of your selection process.

As previously outlined in this white paper, federal EEOC regulations require employers to consider four criteria when reviewing applicant background screening results: 1) Whether the applicant committed the crime; 2) Nature of the offense; 3) Amount of time since the crime was committed; and 4) Job relatedness of the offense.

Bottom Line

When used compliantly, background screening results can help your organization hire safe, honest and qualified employees, and reduce your exposure to potential liabilities.

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