Conducting Criminal Background Checks: Compliance Essentials and Policy Considerations

The law firm of Tucker Arensberg contributes this quarterly column focused on the legal issues that may impact our readers. Tucker Arensberg is a full-service law firm headquartered in Pittsburgh, Pa., USA. Servicing the legal needs of the iron and steel industry, Tucker Arensberg has also provided legal counsel to the Association for Iron & Steel Technology.

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For employers and human resources (HR) professionals, hiring decisions often involve conducting criminal background checks to make informed choices that balance identifying the right talent with maintaining workplace safety. However, these background checks are not without legal complexity. Employers must navigate and comply with a range of federal, state and local requirements that govern how criminal history may be considered in the hiring process.

This article provides an overview of key federal guidance and relevant state law considerations to help employers conduct criminal background checks thoughtfully, fairly and in compliance with applicable legal requirements.

Federal Law

Title VII Compliance and EEOC Enforcement Guidance

Title VII of the Civil Rights Act prohibits employment discrimination on the basis of race, color, religion, sex or national origin. While Title VII does not expressly prohibit employers from conducting criminal background checks, and having a criminal record is not a legally protected characteristic, an employer's use of criminal history when making hiring decisions can, in some cases, violate Title VII.

In 2012, the Equal Employment Opportunity Commission (EEOC) issued Enforcement Guidance addressing Title VII's application to the use of criminal history in employment decisions. The Enforcement Guidance advises employers that when an employer varies how it treats criminal history for different applicants based on legally protected characteristics, like race or sex, the employer may be in violation of Title VII. The Enforcement Guidance further advises that even an employer's neutral policy can violate Title VII where it has the effect of disproportionately screening out applicants of Title VII protected classes.

The Enforcement Guidance does not have the force and effect of law but does provide employers with direction regarding how to properly consider criminal history and what is or is not permissible when considering an applicant's criminal background during the hiring process. Specifically, the EEOC advises conducting an individualized assessment to consider the relevance of the applicant's conviction to the job in question by considering the following factors:

- The nature and gravity of the offense or conduct.
- The time that has passed since the offense, conduct and/or completion of the sentence.
- The nature of the job held or sought.

For example, when evaluating the nature of the conviction, if an

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employer is hiring an employee who handles money, it may be relevant for an employer to consider a theft or fraud conviction when deciding whether to hire the applicant.

Relevant Legal Challenge: The EEOC Sues Dollar General

In 2013, the EEOC filed suit against Dollar General and brought a race discrimination claim on behalf of the Charging Party and a class of black job applicants.[1] The EEOC alleged that Dollar General's use of criminal history during their hiring process had a disparate impact on black employees and was not justified by business necessity.

Dollar General maintained a pass/fail criminal background check policy. Under the policy, once an applicant was given a conditional offer of employment, the applicant's information was submitted by the store manager to a third-party vendor to conduct a background check. If the applicant passed the background check, the third-party vendor notified the store manager. If the applicant failed the background check, the third-party vendor notified the district manager, who then notified the store manager that the applicant could not be hired.

Dollar General worked with the third-party vendor to create a "matrix" to determine which convictions were disqualifying when conducting a background check. For example, the policy disqualified applicants convicted of possession of drug paraphernalia in the last ten years or illegal dumping within the last three years.

Per the EEOC's Complaint, one of their biggest concerns was not just the pass/fail background check policy, but the fact that Dollar General was not conducting an individualized assessment when an applicant failed.

The parties mediated the matter on 11 September 2019. On 28 October 2019, the parties submitted a Consent Decree to the federal court in Illinois for approval. The Consent Decree, which was effective for three years, required Dollar General to undertake significant policy changes and provide monetary relief. In relevant part, the Consent Decree required Dollar General to:

- Hire a consultant to evaluate the issue of criminal history information in their hiring decisions. The consultant would then make recommendations regarding how to ensure the use of criminal history related to the position. Dollar General was required to implement the recommendations within 180 days of the Consent Decree.
- Update its reconsideration process for individuals whose conditional offer was rescinded because of criminal history.
- Conduct trainings on its background check processes.
- Provide notice to conditional hires about its background check processes and that criminal history is not an automatic bar to employment.
- Pay US$6 million to the class members.

The Dollar General matter underscores that the EEOC actively monitors employers' use of criminal history in hiring decisions, reinforcing the need for thoughtful, well-crafted background check policies.

Fair Credit Reporting Act (FCRA)

If employers use a third-party service to run background checks, such as criminal, credit, etc., then they are also subject to FCRA requirements.

Under FCRA requirements, when employers use a consumer reporting agency to conduct a background check, the employer must:

- Provide a clear, stand-alone, written disclosure to the applicant stating that a consumer report may be obtained and information in the report may be used for decisions about employment.
- Obtain applicant's written authorization before requesting the report.
- If the report contains something that could negatively affect employment, provide the applicant with a "pre-adverse action notice" for review, which needs to include a copy of the consumer report. A pre-adverse action notice includes a copy of background check report, a written notice of intent to take adverse action and a summary of consumer rights under the FCRA.
- Send a final adverse action notice if the employer decides not to hire an applicant based on results of background check, which includes notice that the applicant was rejected because of the information in the report. Additionally, the notice must: provide the name, address and phone number of the company that sold the report; indicate that the company did not make a hiring decision; and notify the applicant of their right to dispute the accuracy or completeness of the report and retrieve an additional report from the company.

State Laws

In addition to the federal laws described earlier, many states have enacted laws regulating the use of background checks and criminal history in the hiring process. The number and terms of these laws is beyond the scope of this article. Each state law is different, so employers need to familiarize themselves with laws applicable to their businesses.

[1] EEOC v. Dolgencorp LLC d/b/a Dollar General, 1:13-cv-4307 (N.D. Ill. 2019).

Ban-the-Box Laws

Employers should also be cognizant of state and local "ban-the-box" laws when using an applicant's criminal history to make hiring decisions. The term refers to the practice of having a "box" on employment applications which is to be checked if the applicant has a criminal record.

States and cities across the country have implemented ban-the-box laws in recent years, which restrict employers from asking about an applicant's criminal history on a job application. Some of the most comprehensive ban-the-box laws prohibit employers from asking about an individual's criminal history until after a conditional offer of employment is made.

Employers should carefully evaluate state and local ban-the-box requirements when structuring and executing their hiring procedures.

Policy Proofing for Employees

In light of the evolving and sometimes overlapping federal, state and local requirements governing the use of criminal history in employment decisions, employers should take a proactive approach to compliance. This includes becoming familiar with the EEOC's Enforcement Guidance, as well as understanding and adhering to applicable state laws and state and local ban-the-box requirements. Employers should carefully review their existing criminal background check policies and practices to ensure they are compliant and consistently applied. For employers without a formal policy, now is the time to consider developing a compliant, well-crafted policy that balances workplace safety with federal, state and local requirements. ✦