

Legislative #

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Background Checks: What Employers Need to Know

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Background Checks: What Employers Need to Know

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Applications, Qualification Standards, Race, Color, Sex, National Origin, Religion, Age, Disability, Genetic Information

Summary:

This document, drafted in collaboration with the Federal Trade Commission, provides information on how background checks are used in employment and when such use may implicate laws enforced by the EEOC or FTC.

Citation:

Title VII, EPA, ADEA, Rehabilitation Act, ADA, GINA, 29 CFR Part 1601, 29 CFR Part 1620, 29 CFR Part 1621, 29 CFR Part 1625, 29 CFR Part 1626, 29 CFR Part 1630, 29 CFR Part 1635

Document Applicant:

Employers, HR Practitioners

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No

The contents of this document do not have the force and effect of law and are not meant to bind the public in any way. This document is intended only to provide clarity to the public regarding existing requirements under the law or agency policies.

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When making personnel decisions - including hiring, retention, promotion, and reassignment - employers sometimes want to consider the backgrounds of applicants and employees. For example, some employers might try to find out about the person's work history, education, criminal record, financial history, medical history, or use of social media. Except for certain restrictions related to medical and genetic information (see below), it's not illegal for an employer to ask questions about an applicant's or employee's background, or to require a background check.

However, any time you use an applicant's or employee's background information to make an employment decision, regardless of how you got the information, you must comply with federal laws that protect applicants and employees from discrimination. That includes discrimination based on race, color, national origin, sex, or religion; disability; genetic information (including family medical history); and age (40 or older). These laws are enforced by the Equal Employment Opportunity Commission (EEOC).

In addition, when you run background checks through a company in the business of compiling background information, you must comply with the Fair Credit Reporting Act (FCRA). The Federal Trade Commission (FTC) enforces the FCRA. This publication explains how to comply with both the federal nondiscrimination laws and the FCRA. It's also a good idea to review the laws of your state and municipality regarding background reports or information because some states and municipalities regulate the use of that information for employment purposes.

Before You Get Background Information

EEOC

In all cases, make sure that you're treating everyone equally. It's illegal to check the background of applicants and employees when that decision is based on a person's race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, asking only people of a certain race about their financial histories or criminal records is evidence of discrimination.

Except in rare circumstances, don't try to get an applicant's or employee's genetic information, which includes family medical history. Even if you have that information, don't use it to make an employment decision. (For more information about this law, see the EEOC's publications explaining the Genetic Information Nondiscrimination Act, or GINA.) Don't ask any medical questions before a conditional job offer has been made. If the person has already started the job, don't ask medical questions unless you have objective evidence that he or she is unable to do the job or poses a safety risk because of a medical condition.

FTC

If you get background information (for example, a credit or criminal background report) from a company in the business of compiling background information, there are additional procedures the FCRA requires beforehand:

- Tell the applicant or employee you might use the information for decisions about his or her employment. This notice must be in writing and in a stand-alone format. The notice can't be in an employment application. You can include some minor additional information in the notice (like a brief description of the nature of consumer reports), but only if it doesn't confuse or detract from the notice.
- If you are asking a company to provide an "investigative report" - a report based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle - you must also tell the

applicant or employee of his or her right to a description of the nature and scope of the investigation.

- Get the applicant's or employee's written permission to do the background check. This can be part of the document you use to notify the person that you will get the report. If you want the authorization to allow you to get background reports throughout the person's employment, make sure you say so clearly and conspicuously.
- Certify to the company from which you are getting the report that you:
 - notified the applicant and got their permission to get a background report;
 - complied with all of the FCRA requirements; and
 - won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

Using Background Information

EEOC

Any background information you receive from any source must not be used to discriminate in violation of federal law. This means that you should:

- Apply the same standards to everyone, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, if you don't reject applicants of one ethnicity with certain financial histories or criminal records, you can't reject applicants of other ethnicities because they have the same or similar financial histories or criminal records.
- Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or

another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, the policy or practice has a "disparate impact" and is not "job related and consistent with business necessity."

- Be prepared to make exceptions for problems revealed during a background check that were caused by a disability. For example, if you are inclined not to hire a person because of a problem caused by a disability, you should allow the person to demonstrate his or her ability to do the job - despite the negative background information - unless doing so would cause significant financial or operational difficulty.

FTC

When taking an adverse action (for example, not hiring an applicant or firing an employee) **based on background information obtained through a company in the business of compiling background information**, the FCRA has additional requirements:

- Before you take an adverse employment action, you must give the applicant or employee:
 - a notice that includes a copy of the consumer report you relied on to make your decision; and
 - a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which you should have received from the company that sold you the report.

By giving the person the notice in advance, the person has an opportunity to review the report and explain any negative information.

- After you take an adverse employment action, you must tell the applicant or employee (orally, in writing, or electronically):
 - that he or she was rejected because of information in the report;
 - the name, address, and phone number of the company that sold the report;
 - that the company selling the report didn't make the hiring decision, and can't give specific reasons for it; and

- that he or she has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.

Disposing of Background Information

EEOC

Any personnel or employment records you make or keep (including all application forms, regardless of whether the applicant was hired, and other records related to hiring) must be preserved for one year after the records were made, or after a personnel action was taken, whichever comes later. (The EEOC extends this requirement to two years for educational institutions and for state and local governments. The Department of Labor also extends this requirement to two years for federal contractors that have at least 150 employees and a government contract of at least \$150,000.) If the applicant or employee files a charge of discrimination, you must maintain the records until the case is concluded.

FTC

Once you've satisfied all applicable recordkeeping requirements, you may dispose of any background reports you received. However, the law requires that you dispose of the reports - and any information gathered from them - securely. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed. For more information, see "Disposing of Consumer Report Information? Rule Tells How" at <http://www.business.ftc.gov/documents/alt152-disposing-consumer-report-information-rule-tells-how> (<http://www.business.ftc.gov/documents/alt152-disposing-consumer-report-information-rule-tells-how>).

Further Information

EEOC

To find out more about federal antidiscrimination laws, visit www.eeoc.gov (<http://www.eeoc.gov>), or call the EEOC toll-free, 800-669-4000 (voice); TTY: 800-669-6820. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. The EEOC investigates, conciliates, and mediates charges of employment discrimination, and also files lawsuits in the public interest. For specific information on:

- **Preemployment medical inquiries:** see *Preemployment Disability-Related Questions and Medical Examinations* at www.eeoc.gov/policy/docs/preemp.html (<https://www.eeoc.gov/policy/docs/preemp.html>).
- **Medical inquiries during employment:** see *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* at www.eeoc.gov/policy/docs/qanda-inquiries.html (<https://www.eeoc.gov/policy/docs/qanda-inquiries.html>).
- **Genetic inquiries, including inquiries about family medical history:** see *Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008* at www.eeoc.gov/laws/regulations/gina-background.cfm (<https://www.eeoc.gov/laws/regulations/gina-background.cfm>).
- **EEOC recordkeeping requirements:** see *Summary of Selected Recordkeeping Obligations in 29 C.F.R. Part 1602* at www.eeoc.gov/employers/recordkeeping_obligations.cfm (https://www.eeoc.gov/employers/recordkeeping_obligations.cfm).
- **Using arrest and conviction records to make employment decisions:** see *Questions and Answers about EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII* at www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm (https://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm).
- **Whether arrest and conviction records act as an automatic bar to all employment:** see *Reentry Myth Buster: On Hiring/Criminal Records Guidance* at

https://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_att5.pdf
(https://wdr.doleta.gov/directives/attach/TEGL/TEGL_31_11_att5.pdf).

- **Background on the EEOC for small businesses:** see Get the Facts Series: Small Business Information, www.eeoc.gov/eeoc/publications/smallbusiness.cfm
(<https://www.eeoc.gov/eeoc/publications/smallbusiness.cfm>).

FTC

To find out more about federal laws relating to background reports, visit www.business.ftc.gov (<http://www.business.ftc.gov>), or call the FTC toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. For specific information on employment background reports, see:

- **Using Consumer Reports: What Employers Need to Know** at www.business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know (<http://www.business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>)
- **The Fair Credit Reporting Act & social media: What businesses should know** at www.business.ftc.gov/blog/2011/06/fair-credit-reporting-act-social-media-what-businesses-should-know
(<http://www.business.ftc.gov/blog/2011/06/fair-credit-reporting-act-social-media-what-businesses-should-know>)
- **Background screening reports and the FCRA: Just saying you're not a consumer reporting agency isn't enough** at www.business.ftc.gov/blog/2013/01/background-screening-reports-and-fcra-just-saying-youre-not-consumer-reporting-agency-i
(<http://www.business.ftc.gov/blog/2013/01/background-screening-reports-and-fcra-just-saying-youre-not-consumer-reporting-agency-i>)
- **Reentry Myth Buster: Criminal Histories and Employment Background Checks** at <https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/federal-hiring-mythbusters-criminal-record>
(<https://www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/federal-hiring-mythbusters-criminal-records.pdf>).

The FTC works to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to businesses to help them comply with the law.



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