

How to Gather, Use, and Dispose of Background Information in Compliance with Federal Law— Helpful Guidance for Employers from the EEOC and FTC

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The decision whether to hire or promote a particular job candidate is no small matter for employers, particularly in a climate where there are often numerous applicants for limited positions. To assist in this decision-making process, many employers obtain and analyze an applicant's background information, such as financial or criminal history. It is essential, however, that employers comply with a variety of applicable local, state, and federal laws when procuring such background information. On the federal front, employers now have a handy guide summarizing the important considerations related to background checks titled "[Background Checks: What Employers Need to Know](#)" ("Guidance"), which was jointly published by the two agencies that are charged with enforcing laws related to employment-related background checks—the Equal Employment Opportunity Commission ("EEOC") and the Federal Trade Commission ("FTC").¹ (The EEOC and FTC also published a companion guide on the same topic for job applicants and employees titled "[Background Checks: What Job Applicants and Employees Should Know](#)."²)

Gathering Background Information

When gathering background information, the Guidance notes that employers must remember the following:

- Under discrimination laws enforced by the EEOC:
 - Treat all employees (or applicants, as the case may be) equally when deciding whether to gather background information. You cannot ask only a certain protected group of individuals (for example, those of a particular race) about their criminal and/or credit background, and not ask others.

¹ In addition to the FTC, the Consumer Financial Protection Bureau also provides oversight over the Fair Credit Reporting Act.

² It is also important for employers to consider state and local laws governing background checks (e.g., state and local "ban the box" laws that prohibit employers from including questions about criminal history on employment applications), since they may restrict whether and when an employer can ask about certain background information in ways that federal law does not.

- Except in “rare circumstances,” do not try to get an applicant’s or employee’s genetic information, which includes family medical history, and, if such information is known, do not use it when making employment decisions.
- Do not ask any medical questions before a conditional job offer has been made. If the person has already started the job, do not 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.
- According to the FTC, if you obtain background information from a company in the business of compiling such information, the federal Fair Credit Reporting Act (“FCRA”) requires you to do the following:
 - Inform the applicant or employee (in writing and in a stand-alone document not within the application) that you might use the information for decisions about his or her employment.
 - Inform applicants or employees 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—and also tell the applicant or employee that he or she has a 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.
 - Certify to the company from which you are getting the report that you: (i) notified the applicant and got his or her permission to get a background report; (ii) complied with all of the FCRA requirements; and (iii) 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

After you have obtained the background information of an applicant or employee, the Guidance advises you to do the following when using that information to make employment decisions:

- Under discrimination laws:
 - 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), because any background information that you receive from any source must not be used to discriminate in violation of federal law.

- Avoid using 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.
- Do not simply reject an applicant because of problems revealed during a background check that were caused by a disability. Instead, 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.
- According to the FTC, if you decide to take 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, you must follow these rules:
 - Before taking the adverse employment action, give the applicant or employee a notice that includes a copy of the consumer report that 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 the report. This notice allows the person an opportunity to review the report and explain any negative information.
 - After taking an adverse employment action, 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 get an additional free report from the reporting company within 60 days.

Disposing of Background Information

The EEOC and FTC also enforce rules regarding disposal of background information, as follows:

- **EEOC:** Any personnel or employment records that you make or keep (regardless of whether the applicant was hired) must be preserved for one year after the records were made, or after a personnel action was taken, whichever comes later. (This period is longer for some entities, such as educational institution, state and local governments, and 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 has concluded.

- **FTC:** Once you have satisfied all applicable recordkeeping requirements, you may dispose of any background reports received. The law requires, however, 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.

What Employers Should Do Now

- Review the Guidance provided by the EEOC and FTC.
- Be mindful of the EEOC's and FTC's advice when obtaining background information and/or using it as the basis for an adverse employment action.
- Take into consideration any state or local laws applicable to these decisions.
- Train hiring managers and human resource representatives on how to comply with the Guidance.
- Confirm that you are utilizing the proper procedures and paperwork in connection with obtaining and using background information in employment decisions.

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