



New Informal Guidance from EEOC & FTC on Background Checks

03.14.2014

As we recently reported at our annual employment law update, additional restrictions are being placed on the use of background checks in light of the potential for disparate impact and invasion of the right to privacy.

Recently, the EEOC and FTC** issued joint informal guidance concerning the issues employers may face when consulting background checks into a worker's criminal record, financial history, medical history or use of social media. You can access the guidance here for employers and here for employees.

Some key points underscored in the guidance:

1. It is not illegal for an employer to ask questions about an applicant's or employee's background except with respect to certain restrictions related to medical and genetic information or to require a background check.
2. When an employer uses a background check, the employer must be sure to remain in compliance with laws prohibiting discrimination based on the protected categories; i.e., race, color, national origin, sex, religion, disability, genetic information, and age.
3. When an employer gets a background report from an outside agency it must comply with the Fair Credit Reporting Act [and in California also with the Investigative Consumer Reporting Act].
4. Employers should ensure that they are seeking the same background information from all individuals, rather than only checking the background of employees or applicants of a certain race or background.
5. Employers should not request an applicant's or employee's genetic information which includes family medical history. And if they do have that information, they should not use it to make an employment decision.
6. Employers are not to ask any medical questions before a conditional job offer has been made, and only to ask current employees medical questions if there is objective evidence that the employee is unable to do the job or poses a safety risk because of a medical condition.

7. The EEOC requires employers to preserve records created for one year after the records were made, or after a personnel action was taken, whichever comes later.

It is critical to be certain that as employers you are compliant with both federal, state and local laws regarding obtaining background information with respect to employees and applicants.

**The EEOC enforces the anti-discrimination laws and the FTC addresses background checks under the Fair Credit Reporting Act.