



How forward-thinking employers should view background checks



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Many employers use background checks. Along with ensuring job qualifications, background checks can help protect an employer against liability for negligent hiring, supervision or retention. However, background check policies, practices and procedures may also expose an employer to liability. This can happen if, among other things, the use of the background check results in a disparate impact on identifiable groups of applicants or employees.

Negligent hiring and supervision

The most common rationale for background checks, especially criminal background checks, is that employers face liability if not performed. If a business engages someone, and that person harms someone else, e.g., steals from them, assaults them, or injures them, there is potential liability. Liability depends on whether the business was negligent. Did it do something it should not have done, or fail to do something it should have done? The Minnesota Supreme Court explained the doctrine of negligent hiring and negligent retention:

The origin of the doctrine making an employer liable for negligent hiring, as well as negligent retention, arose out of the common law fellow-servant law, which imposed a duty on employers to select employees who would not endanger fellow employees by their presence on the job.

The concept was later expanded to include a duty to “exercise reasonable care for the safety of members of the general public,” to the point that (the Court notes) the theory is “the rule in the majority of jurisdictions.” The Court explained:

Liability is predicated on the negligence of an employer in placing a person with known propensities, or propensities which should have been discovered by reasonable investigation, in an employment position in which, because of the circumstance of the employment, it should have been foreseeable that the hired individual posed a threat of injury to others.

Courts disagree regarding whether a background check, and especially a criminal background check, is required in any particular case. The answer depends on the jurisdiction, the facts of the employee’s conviction or other background, the employee’s job, and the co-workers, members of the public, or others, with whom an employee would foreseeably come into contact. Employers are thus presented with a conundrum: Whether to conduct a (criminal) background check and when and whether to exclude based on particular information obtained.

Federal law: Adverse impact discrimination theory

Title VII of the Civil Rights Act of 1964 is the main federal law barring discrimination based on race, religion and sex, among other things. It is clearly unlawful for employers to deny employment because of race. The Supreme Court has held, however, that it is also unlawful to exclude applicants (or terminate or otherwise act against current employees) due to a facially neutral employment practice that has a significantly disproportionate impact on a group protected by Title VII.

In one case, the Eighth Circuit Court of Appeals held that an across-the-board ban on hiring individuals convicted of “any offense, except the minor traffic offense,” is unlawful race discrimination. The Court held:

We cannot conceive of any business necessity that would automatically place every individual convicted of any offense, except the minor traffic offense, in the permanent ranks of the unemployed.

The Court of Appeals held that the plaintiff “and all other blacks who have been similarly denied employment on the basis of conviction records have been discriminated against on the basis of race in violation of Title VII ...”

A plaintiff alleging that an employer’s facially-neutral practice is unlawful must first show that a specific employment policy or practice has a “significant adverse impact on a protected group” of which the plaintiff is a member. Normally, the proof offered is statistical: Is there a statistically significant adverse impact or bias against any particular protected group (usually racial minorities)? While there is no legally required method of statistical proof, courts normally require statistical evidence showing that a statistical disparity is so large that it is highly unlikely to have occurred at random.

Courts typically (although not always) find a 5 percent probability level, or “two standard deviations,” to be statistically significant evidence of discrimination. The bottom-line analysis: Does the policy or practice in question operate to eliminate one group (minorities) at a higher rate than it screens out other groups (non-minorities)? If so, the plaintiff has made an initial showing of adverse impact.

In response, a defendant may challenge the statistical evidence, or offer alternative evidence, to show that there really is no statistically significant adverse impact. The employer may also defend itself by showing that its policy/practice is “job related for the position in question and consistent with business necessity.”

In the case of criminal records, and other data obtained through a background check, the question is: Is the information used to screen applicants or employees really related to the job in question? Does the employer really have a “business need” to exclude? To the extent that employers tailor background checks and screening methods to the particular job in question, employers have a lesser likelihood of adverse impact claims, and a greater opportunity to defend against such claims.

Current EEOC guidance and recent EEOC litigation

The EEOC enforces Title VII and reviews discrimination claims. The EEOC provides guidance on the laws it enforces, and the EEOC guidance includes a detailed discussion of the three factors relevant to the job-related/business necessity defense — the nature of the offense, the amount of time since the offense was committed, and the nature of the job.

The EEOC recommends that employers implement a “narrowly tailored” written policy and procedures for screening applicants and employees for criminal conduct, based in part on the three factors noted above. The EEOC also recommends recording justifications for the policies and procedures that are implemented, and recording “consultations and research considered in crafting the policy and procedures.”

Based on the aforementioned factors, in addition to compliance with the Fair Credit Reporting Act in conducting a background check, employers should review whether or not a background check is warranted and how it should be used.

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