When making personnel decisions—such as 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, 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 a protected class: these classes include: 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 protected class. 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.

**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 protected class. 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 protected class. 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.

**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 regarding “Pre-Employment Inquiries and Arrest/Conviction,” please see the Counsel’s Corner on the next page.
Federal law does not prohibit employers from asking about criminal history. But, federal EEO laws do prohibit employers from discriminating when they use criminal history information. Using criminal history information to make employment decisions may violate Title VII of the Civil Rights Act of 1964, as amended (Title VII).

1. Title VII prohibits employers from treating people with similar criminal records differently because of their race, national origin, or another Title VII-protected characteristic (which includes color, sex, and religion).

2. Title VII prohibits employers from using policies or practices that screen individuals based on criminal history information if:
   - They significantly disadvantage Title VII-protected individuals such as African Americans and Hispanics; AND
   - They do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

**Difference Between Arrest Records and Conviction Records**

The fact that an individual was arrested is not proof that he engaged in criminal conduct. Therefore, an individual’s arrest record standing alone may not be used by an employer to take a negative employment action (e.g., not hiring, firing or suspending an applicant or employee). However, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies such action.

In contrast, a conviction record will usually be sufficient to demonstrate that a person engaged in particular criminal conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

Several states’ laws limit employers’ use of arrest and conviction records to make employment decisions – within the TPM membership, these include OR, WA, MI, WI and CO. These laws may prohibit employers from asking about arrest records or require employers to wait until late in the hiring process to ask about conviction records. For detailed information on state laws, please contact the TPM office at 877-535-4646.

**Consumer Protections and Criminal Background Checks**

Employers that obtain an applicant’s or employee’s criminal history information from consumer reporting agencies (CRAs) also must follow the Fair Credit Reporting Act (FCRA). For example, FCRA requires employers to:

- Get your permission before asking a CRA for a criminal history report;
- Give you a copy of the report and a summary of your rights under FCRA before taking a negative employment action based on information in the report.
- Send you certain notices if it decides not to hire or promote you based on the information in the CRA report.