

Background Checks *How to Handle Arrest and Conviction Records*

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, 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, 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 article 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.

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 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.

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- ▲ 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.

Pre-Employment Inquiries and Arrest & Conviction

Federal law does not prohibit employers from asking about criminal history. However, 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.

Ban the Box States

15 states, including Washington, Oregon, and Colorado, have “ban the box” laws that makes it unlawful for an employer to ask about criminal history before the interview stage of hiring. Named for the criminal convictions check box found on many employment

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applications, “ban the box” laws target a range of hiring practices that tend to create barriers to employment for ex-offenders and extend the impacts of institutional racism from the justice system to the job search.

If you are in a “ban the box” state, make sure your applications do not contain arrest or conviction questions and take precautions before asking applicants about criminal histories.

Difference Between Arrest Records and Conviction Records

The fact that an individual was arrested is not proof that they 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 509-535-4646

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.

Bureau of Labor Statistics Employment Projections 2021-2031

The U.S. economy is projected to add 8.3 million jobs from 2021 to 2031, the U.S. Bureau of Labor Statistics (BLS) reported September 8, 2022. Total employment is projected to increase, from 158.1 million to 166.5 million, and grow 0.5 percent annually, which is slower than the 1.0 percent annual growth recorded over the 2011-21 decade.

The 2021-31 projections use 2021 annual average employment levels as the base year. The 2021 annual average levels do not reflect much of the employment recovery and reallocation that has already occurred in the aftermath of the COVID-19 pandemic and the accompanying recession (given total employment continued to grow rapidly through the first half of 2022). As a result, total employment for the 2021-31 projections, and projected growth in many sectors, reflects fast projected growth resulting from low base year employment levels. However, the pandemic also has been a catalyst for some structural changes in demand for certain goods and services, which are expected to affect long-term demand for employment in a select group of industries and occupations.

Effects of the COVID-19 pandemic on the 2021–31 projections

The COVID-19 pandemic prompted an economic recession from February 2020 to April 2020, leading to substantial declines in output and employment. While the recession only lasted a few months, the pandemic persisted through 2021, continuing to disrupt economic activity, prevent or discourage individuals from re-entering the labor force, and impacting other economic conditions that affect employment. The economy rebounded in 2021, regaining approximately 4.6 million jobs; however, this equates to only about half of the jobs that were lost from 2019 to 2020. As a result, the 2021 annual average employment level, which forms the baseline for the 2021–31 projections, remained well below pre-pandemic levels. Employment in a majority of sectors continued to recover through the first half of 2022. The 2021–31 projections do not reflect the employment recovery and reallocation that occurred during that time period.

Some industries that have been disproportionately affected by the COVID-19 pandemic have lower base-year values and are expected to experience cyclical recoveries in the early part of the 2021–31 decade – as industry output and employment normalize and return to their long-term growth trends, leading to higher projected employment growth.