

Seven Steps to Guide Employers on the EEOC's Guidance on Pre-Employment Background Checks

Since 1987, the Equal Employment Opportunity Commission (EEOC) has held the position that it is unlawful for employers to have a screening policy that disproportionately affects minorities unless there is a valid business reason to have that policy in place. This didn't mean much in practice while screening remained relegated to the upper echelons of management. But as screening has spread from upper management to the lowest of entry-level positions, the EEOC has revisited their position and expanded upon their guidance.

The Key to the EEOC's Criminal Background Check Policy

The EEOC's policy states, in part:

[A]n employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity.

The policy continues:

Where [an applicant or employee claims that the] employer failed to hire or terminated the employment of the [applicant or employee] as a result of a conviction policy or practice that has an adverse impact on the protected class to which the [applicant or employee] belongs, the [employer] must show that it considered these three factors to determine whether its decision was justified by business necessity:

- The nature and gravity of the offense or offenses;
- The time that has passed since the conviction and/or completion of the sentence; and
- The nature of the job held or sought.

The Commission continues to hold that, where there is evidence of adverse impact, an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful.

The focus in this is business necessity. Essentially, you should create a screening policy that reflects your consideration of the three factors and show that your policy satisfies your legitimate business interest while having less of an effect on the protected class. Of course, there are always exceptions, but that's basically it. Now for the real question: How on earth are you supposed to satisfy all of these conditions?

Now you know.

Creating Your Criminal Background Check Policy

In general, when you are creating your background screening policy, it should be written in plain English (as though to be presented to a jury) and you should document everything – if it's not written down, it may as well not exist. There are typically 7 major steps that should be taken to have a well-rounded and well-documented background screening policy, and deliverables associated with each step.

Step 1: Describe the overall approach

Every company that performs background checks should have a Master Screening Policy describing its screening approach. It should contain:

- a background that explains why you need a policy;
- a set of procedures that includes an extensive description of the master policy, and
- an easily memorized and incredibly simplistic summary of your policy – nothing more than that your goal is to abide by all laws without hiring those who pose an unacceptable level of risk.

The key in this step is to make your motives obvious, and to clearly state that your purpose is to protect your business, your customers and your employees.

Step 2: Per position, identify licenses and barriers

For each position, you should make a list of legal requirements, differentiating between federal requirements, and state, local and industry requirements. This is extremely important because, as far as the EEOC is concerned, Title VII comes after federal requirements but before all others. This means that only federal requirements are considered valid to them. If you are federally required to not hire a convicted fraudster, then it can automatically be included on the list of barriers. But if it is just your state that prohibits hiring a convicted fraudster, then according to the EEOC it doesn't matter.

Of course, a statement like that has to come with a few caveats. First of all, if you run into that situation, consider whether the state/local/industry regulation is job related and consistent with business necessity. Typically, if the state had a good enough reason to pass the requirement into law, you will probably find that the requirement is both job-related and necessary for your business. If that's the case here, put it on the job description. This leads to the next caveat: if you run into a situation where there is a state/local/industry regulation that isn't consistent with business necessity, consult a lawyer so you can determine what your next step should be.

Once all of the legal barriers are determined, put them aside until Step 4 where they'll come in to play again.

Step 3: Per position, identify job-based risks and mitigation

Here you will have to identify what risks are present for each position. Will the person have direct access to easily victimized people like children or the elderly? Will the person have access to easily stolen items like cash or trade secrets? Your best resource for this is likely the hiring manager. They will know exactly what the new employee is expected to do and the probable risks.

Once you have identified risks, move on to mitigation. There are generally two types of job-based mitigation, supervision and (for lack of a better word) publicness. For supervision, consider things like manager presence or whether there will be a camera always monitoring what's happening. For publicness, consider whether there will be anyone around – whether there will be customers present most times, whether they are in an office without co-workers, etc. Other mitigation is likely available, but that is up to you to determine as you know your business best.

Now you know.

Once you determine your risk and mitigation, you may want to create a Risk Scorecard like the one seen below which shows level of risk and mitigation, all expressed as a percentage of business hours. In the very least, you should document your decision-making process somehow – The EEOC will expect to be able to see some documentation.

Background Risk Scorecard		In each cell, fill in the amount of time expressed as a percent of the position's regular hours.					
a. Access to cash, medications, trade secrets, personal data, or easily stolen stuff							
b. Interaction with normal adults (including other employees)							
c. Access to kids, disabled, elderly, others easily victimized							
d. Use of a company car or other heavy equipment							
e. Access to bank accounts or financial controls							
f. Executive or national account interaction							
		↓	↓	↓	↓	↓	↓
1.	Risk present during on-hours +			90%			
2.	Risk present during off-hours +			5%			
3.	Other risk increase +			0%			
4.	Risk mitigated by supervision -			0%			
5.	Risk mitigated by publicness -			5%			
6.	Risk mitigated otherwise -			0%			
Total Risk Score		0%	0%	90%	0%	0%	0%

Once you've completed such a scorecard, the positive description of the required behavior should be added to the job description. In the example above, the description may read something to the effect of "Must have Commercial Driver's License (CDL)" as opposed to "Must not have been convicted of any DUIs."

As an aside, while it is plausible that you could use outside help to fill in such a risk scorecard, this is really something that is best done internally – only the people at your organization can know your exact risks and the exact measures you've taken to mitigate the risk.

Step 4: Group similar positions

Once you have completed the Risk Scorecard, you'll need to group similar positions based both on similar risk profiles, similar license and barrier requirements, and similar mitigation. These are typically going to be loose groupings. For example, a big box retailer might reasonably conclude that the same regulatory requirements and business risks exist for everyone working in its stores, with the exception of its pharmacy (where employees have access to drugs and medical information) and the store manager (who has much wider access to security systems).

Once the similar positions are grouped, again determine what the necessary behaviors/licenses are and include them in your job description with a positive spin.

Step 5: Identify checks to run and grading criteria per group

Because the groups have similar positions with similar risks, you should be able to run the same checks and use the same disqualification criteria within each group. If you can't run the same checks with the same disqualifiers, you need to go back and adjust your groups – otherwise the whole purpose of having a group is defeated.

Now you know.

The checks that you select should meet the regulatory requirements you've identified and should be able to single out employees (or potential employees) that pose the business risks that you previously identified for the group. Similarly, the disqualification criteria you create should meet the regulatory requirements and reduce the business risks that you previously identified.

Once you have completed this process for every group, go back and compare the checks and disqualifiers to the scorecards you used to evaluate where your risk is across the groups. In general, if the scorecard identifies less risk, then the checks should be fewer, the periods for which you exclude applicants should be shorter, and the level of severity of any disqualifying offenses should be higher. Put another way, you shouldn't have a group with a lower risk score have more stringent screening criteria than a group with a higher risk score.

It may also be a good idea to include guidelines based on the Risk Scorecard in your Master Screening Policy. For instance, you could state that if the scorecard shows a risk score of 75% or higher for X crime, the group should require A, B and C searches. While you're identifying what checks to run per group, you also need to define what constitutes an acceptable background check result or an unacceptable background check result and how you would handle borderline cases.

Step 6: Create a method to allow individualized assessment

Once you have determined all of this, you need to determine how you will proceed if an applicant fails their background check.

To start with, the FCRA (which governs the use of pre-employment background reports) requires that you provide all applicants with a set of adverse-action notices when you have done a background check that resulted in adverse findings. The first is the pre-adverse-action notice, which informs the candidate that negative information has been found and that they may not receive the job based on that information. According to the FCRA, the candidate must have time to dispute the report (typically 5 days), at which point a second notice, the adverse-action notice, should be sent. This notice officially informs the candidate that they have not filed a dispute, and you will not be offering them a job, which may be due in whole or in part to the adverse information.

The EEOC guidance strongly urges an additional piece to this adverse-action process. Instead of merely giving candidates the opportunity to dispute a report, candidates should also be given the opportunity to submit additional information to show that they do not pose a level of risk that your policy identifies as unacceptable. They can do this by providing evidence of rehabilitation, showing that they've taken steps to avoid the issue, admitting fault, etc.

Giving them this chance should be fairly simple. By simply adding an explanation to your pre-adverse-action letter and attaching another piece of paper that applicants can fill out and send in, you have fulfilled your duty. Of course, when you do this, you actually have to consider any responses you receive.

Step 7: Consider applicant-submitted information/rehabilitation evidence

If you get any responses back in the individualized assessment, you have to consider them, no matter what the provided evidence is. The only exception to this is if there is a "demonstrably tight nexus." Ideally, a demonstrably tight nexus is one where just about 100% of Americans would agree that this is a bad idea, like having a child predator work in a daycare. You may also want to utilize multiple reviewers, especially because individualized assessments are, by their very nature, highly subjective.

The EEOC defines a number of factors you need to consider during individualized assessment reviews, including:

- Whether the applicant self-reported his or her criminal history when requested to do so.
- Whether the applicant has taken responsibility for his or her criminal actions, by way of apology or amends.
- Whether the applicant has undergone rehabilitation efforts other than vocational training, such as substance abuse counseling or anger management.

The Takeaway

Be careful when defining your criminal background check policy. Make sure that you can prove that each check is a business necessity and that there is nothing less stringent that you could've done to satisfy your business necessity. Involve a lawyer if you have questions, and be straightforward in your documents. This is the best way to lower your risk of negligent hiring while following the EEOC's guidance on criminal background checks.

Now you know.