

Background checks: How safe is too safe?

Q. We are considering instituting a criminal background check policy for all employee positions. We've heard scary stories of lawsuits regarding negligent hiring, and we'd really like to avoid that sort of litigation, not to mention the negative media attention. Is there any downside to having an "across the board" criminal background check policy?

A. The EEOC issued new guidance in spring 2012 on this issue. The short answer is that having a rigid, universal background check policy could open your company up to charges of disparate impact discrimination.

Because arrest and incarceration rates are significantly higher among minority groups, instituting a criminal background check will likely have a disproportionate impact on these job applicants. Such policies are not lawful unless an employer can demonstrate that they are job-related and consistent with business necessity.

The EEOC recommends that criminal background checks be tailored on a case-by-case basis, taking into account the specific nature of the job; the nature of the crime; and the time that has elapsed since individual's conviction or release.

In addition to considering these factors, the EEOC suggests that employers must engage in an individual assessment that permits employees or applicants an opportunity to explain their record and any mitigating circumstances.

Not doing so could have dire consequences. In January 2010, Pepsi paid over \$3 million to settle an EEOC claim of disparate impact discrimination.

While criminal background checks are an important part in selecting employees and protecting your clients and staff, be careful in your implementation. You could be so "safe" that you're ultimately "sorry."