

Client Alert

EEOC and FTC Issue New Guidance on Background Checks

March 17, 2014. The U.S. Equal Employment Opportunity Commission (“EEOC”) and the U.S. Federal Trade Commission (“FTC”) have jointly issued two publications on the appropriate use of background checks by employers when making employment-related decisions. Since the EEOC issued its often criticized *“Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964”* (available [here](#)), in 2012, that agency has remained focused on two major issues: (1) ensuring that background checks are conducted in a non-discriminatory manner; and (2) ensuring that the use of background checks does not have a disparate impact on individuals of a particular race, national origin, or other protected characteristic. Similarly, the FTC, which enforces the Fair Credit Reporting Act, has been focused on ensuring that employers comply with that Act’s stringent notice requirements prior to conducting a background check.

Although two new publications — ***Background Checks: What Job Applicants and Employees Should Know*** (available [here](#)) and ***Background Checks: What Employers Need to Know*** (available [here](#)) — do not reflect any changes in these agencies’ regulations or policies, they do provide additional clarity for employers. Indeed, the publications are intended to provide specific practical advice to employers who use background checks and to employees and applicants who are subject to them.

Some of the key requirements highlighted in these publications that all employers should follow include:

- ensuring that all job applicants or employees are given the appropriate notifications in the form of a stand-alone document, separate from any job application, prior to any outside organization conducting a background check;
- applying uniform standards in determining who will be subject to background checks and how that information will be used in making employment decisions;

- providing employees or applicants with a copy of the report if any employment decision is being made based upon the information contained in the report;
- taking care that the employer's policy or practice is not excluding individuals of a particular race, national origin, or other protected category at significantly higher rates than individuals not in those protected categories;
- considering whether there is a business reason for running background checks for each particular position for which they are used;
- being flexible and allowing for a case-by-case analysis to account for negative background information that was caused by an individual's disability.

If you require any additional information about the use of background checks, or about any other employment-related issue, please contact:

Jeffrey P. Englander
(212) 735-8720

jenglander@morricohen.com

Keith A. Markel
(212) 735-8736

kmarkel@morricohen.com

Evan S. Lupion
(212) 735-8853

elupion@morricohen.com