

# Is the Past Really Past? Tips for Employers on Background Checks

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In the quest to hire the best employees, employers often look at an employee's past — past jobs, credit history, and criminal history. If you are conducting background checks, you know you have to comply with the Fair Credit Reporting Act (FCRA), but what other federal, state, and local laws are out there? Below are some key points to remember and consider:

## When can employers perform background checks?

With the exception of certain [prohibitions on federal contractors](#) performing pre-offer criminal background checks, federal law does not generally bar criminal background checks. State and local laws, however, may limit when you may conduct a criminal background check on applicants or employees and how you can use this information. For example, some states allow background checks only after you have made a conditional job offer. These laws may also limit how and when you can use a potential employee's criminal history.

## What notices do you have to give when conducting background checks?

If you use a third-party agency (a screening agency, private investigator, or other third party), you must comply with the requirements of the [Fair Credit Reporting Act](#) (FCRA). If FCRA applies, then you must provide a disclosure and receive an authorization prior to conducting any background check. Additional requirements apply if you make a negative employment decision based on the background check. For example, before you make a decision, you have to provide the applicant a pre-adverse action notice, a copy of the background report, and an opportunity to rebut the contents of the background report. The FCRA does not limit your ability to make an adverse decision — it simply requires you to provide the notice before you make it.

The Equal Employment Opportunity Commission also has [non-binding guidance](#) that addresses how employers should use criminal background information in making hiring decisions. This guidance notes that an employer should generally not screen out applicants based on prior arrest(s) or convictions (e.g., eliminating anyone with a felony conviction). Instead, the EEOC advises employers to create a targeted screening process to allow for individualized assessment based on an applicant's convictions. For example, you would consider the nature of the offense and the time elapsed, along with the nature of the position for which the applicant is applying to determine whether

this particular arrest or conviction would preclude hiring.

## Takeaways

Here are some things to keep in mind if you are doing background checks:

- As always, treat everyone in the same position equally; do not pick and choose what individuals receive a background check as that may result in charges of discrimination.
- Consult any applicable federal, state, and local laws to confirm what background information you can collect and how you can use the information. For example, New York prohibits inquiries into an arrest that is not pending or did not lead to a conviction and requires that you conduct an individualized assessment using eight different factors (for example, time elapsed since the offense, age at time of the offense, severity of the offense, etc.) prior to denying employment or taking any adverse employment action based on a prior criminal conviction.
- If you use a third party for background checks, be sure to comply with FCRA requirements.
- Distinguish between arrests and convictions and, as a best practice, develop a process that allows for individualized review based on the position and any potential convictions.

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