

## Best Practices for Employer Background Checks

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There are many clear benefits in performing background checks, such as screening out candidates who give incomplete or inaccurate information on their application, or are not suitable for the job due to relevant criminal convictions. However, notwithstanding these benefits, some employer background checks have been challenged as discriminatory under Title VII of the Civil Rights Act of 1964 because they disproportionately screen out particular racial, ethnic or gender groups.

A case in point is the U.S. Equal Employment Opportunity Commission's ("EEOC") lawsuit against BMW Manufacturing Co. LLC ("BMW") claiming that BMW's criminal background check policy is discriminatory. In this ongoing litigation, the EEOC has questioned the legality of BMW's policy because it allegedly has resulted in the termination of a large number of employees – many of whom were black. Several of those employees had been employed as contractors providing services to BMW for many years without any problems. These same employees had previously passed the contracting company's criminal background check and were re-screened as a result of BMW changing contracting companies. The EEOC has alleged that BMW's criminal conviction policy considers all past crimes, no matter how long ago they occurred and made no distinction between misdemeanor and felony convictions.

As a result of the EEOC's aggressive litigation posture, as illustrated by the BMW case, prudent employers should consider the following when implementing background checks:

- Do not use existing background check policies that exclude people from employment based on any criminal record no matter how remote in time or no matter what the crime. Rather, think about the specific offenses that may impact the person's ability to perform the job duties and ensure that the policies are narrowly tailored to meet those ends.
- Do not conduct background checks on a selective basis; if a background check is conducted on behalf of any applicants for a specific type of position then it should be done for all applicants who receive an offer for that position.
- Do not conduct background checks on only those applicants who appear to have something suspect on their applications.
- On a regular basis, review the results of the company's background checks process to analyze whether the background checks as currently conducted have the effect of screening out a certain group of individuals. If so, consult legal counsel.
- In conducting background checks, make sure that all of the requirements of the Fair Credit Reporting Act are satisfied.

The results of the background checks and the information requested should be kept confidential at all times, should only be used for the limited and intended purpose, and should only be distributed to the proper human resources manager or individual who maintains all such records.

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National Law Review, Volume V, Number 160

Source URL: <https://natlawreview.com/article/best-practices-employer-background-checks>