

Another Reason to Tread Carefully When Using Criminal Backgrounds Checks in Hiring Decisions

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A recent consent decree between the U.S. Equal Employment Opportunity Commission (EEOC) and a southeastern Pennsylvania company is a reminder for employers to keep employment records regarding the use of criminal background information in hiring decisions.

Crothall Services Group, a janitorial and facilities management company in Wayne, Pa., admitted it had used criminal history background assessments in their hiring decisions. However, it hadn't kept adequate records on the impact those assessments had on applicants' race, sex, or ethnic groups, according to the U.S. Equal Opportunity Commission (EEOC). The agency claimed that failure violated [Title VII of the Civil Rights Act of 1964](#), as well as the [Uniform Guidelines on Employee Selection Procedures](#) (UGESP).

After the federal court in the Eastern District of Pennsylvania ruled that UGESP's record-keeping requirement is not permissive but mandatory and enforceable in a court of law, the two sides entered into a four-year consent decree and agreed to settle the case. "Employers should take note that if they choose to rely on a selection procedure such as criminal background screening, they are required to create and maintain records that allow an assessment of whether the selection procedure has a disparate impact based on race, national origin or sex," EEOC General Counsel David Lopez said in a [news release](#).

In the resulting consent decree, Crothall Services Group agreed to change its record keeping and reporting procedures when it uses criminal background information. The company will now:

- Make and keep records identifying the person's gender, race, and ethnicity;
- Once the company has reviewed any person's criminal history information or conducted any criminal history assessment, keep records of the criminal history information, the results of any criminal history assessment, and any employment decision made based on any criminal history assessment;
- Keep records on complaints about the company's use of criminal history information and assessments, including complaints of discrimination, and regularly report to the EEOC.

This case marks a trend in recent litigation against employers that use criminal background history in the hiring process—or engage third parties to screen out applicants with a criminal background. Companies recently have become embroiled in class action litigation over the failure to provide required disclosures and the impact that screening practices have on minority and female applicants.

For employers choosing to use criminal background history information as part of the hiring process, the EEOC's victory and consent decree in this case underscore waiting until later in the interview process to consider criminal background history, when an individualized assessment of the job relatedness and business necessity of a candidate's criminal history can be made, and the information required under the record keeping requirement can be gathered. This individualized assessment should consider:

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

Any employer with questions on the use of criminal background history information in hiring and record keeping should reach out to Barley Snyder's [Employment Law Group](#), which assists companies in this area.

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