

THE UNIVERSITY OF TEXAS SCHOOL OF LAW
2016 Annual Labor and Employment Law Conference

MISTAKES TO AVOID IN MODERN HIRING

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TEXAS PROTECTS THE BACKGROUND CHECK PROCESS

1. *Employers have protection from civil liability when responding to reference background checks.*
2. *Information protected- analysis of the employee's attendance at work, attitudes, effort, knowledge, behavior and skills.*
3. *No civil liability unless there is clear and convincing evidence that the information was*
 - (a) *known by employer to be false at the time it was disclosed or*
 - (b) *made with malice or in reckless disregard for the truth or falsity of the information. Texas Lab. Code Sec. 103*

What's Required Under Texas Law?

GENERAL RULE: Criminal background checks can go back 7 years for most jobs.

EXCEPTIONS:

- If hiring for an insurance job **or** a job that pays more than \$75,000, the employer can look for convictions that go back farther than 7 years.
 - How far back? Employers may reach back to the applicant's 18th birthday.



When are Background Checks Unlawful Under Title VII?

1. **DISPARATE TREATMENT** – Arises if employer uses criminal or background history information differently depending on applicant's race, age or other protected traits.
2. **DISPARATE IMPACT** – Arises if employer uses “**neutral**” background check policy that disproportionately excludes people of a particular protected characteristic and the exclusion is not:
 - ***Job related*** to the position and
 - Consistent with ***business necessity***.

When are Background Checks Unlawful Under Title VII?

EEOC GUIDELINES RECOMMEND TWO STEP PROCESS:

1. Create a “TARGET SCREEN” which factors in:
 - Nature of the crime;
 - Time elapsed since crime was committed; and
 - Nature of the job.
2. Provide deeper individualized assessment:
 - Consider more complete information regarding applicant;
 - Make sure exclusion of applicant is truly job related and consistent with business necessity.

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Title search: Mistakes to Avoid in Modern Hiring

Also available as part of the eCourse

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"Modern Hiring"