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Background Check Guidance from the FTC and EEOC

March 12, 2014

On March 10, 2014, the Federal Trade Commission ("FTC") and the Equal Employment Opportunity Commission ("EEOC") jointly issued two short guides on the use of background checks in hiring and personnel decisions. Generally speaking, these guides do not break new ground, but serve more as reminders to employers of their existing obligations under federal law when inquiring into or otherwise considering an applicant's or employee's background information.

The first brochure—*Background Checks: What Employers Need to Know*—advises employers on their existing legal obligations under federal nondiscrimination laws and the Fair Credit Reporting Act (FCRA) when obtaining, using, and disposing of background information. The second brochure—*Background Checks: What Job Applicants and Employees Should Know*—walks applicants and employees through their rights under federal law when an employer runs a background check.

Within the last few years, both the EEOC and FTC have faced challenges to their traditional roles of monitoring employment-related background checks and enforcing applicable laws. Indeed, several months ago the EEOC waged an unsuccessful court challenge to an employer's background check policy(*EEOC v. Freeman,* RWT 09cv2573, 2013 WL 4464553 (D. Md. Aug. 9, 2013)). Moreover, under the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, the FTC has seen its rulemaking authority under FCRA shift to the new Consumer Financial Protection Bureau.

Nevertheless, these brochures indicate that the EEOC and FTC have a continued interest in policing employer background checks. Given this sustained scrutiny, employers should review the new guides and make sure that their practices and policies are in compliance with federal law. Employers also should remember that there are a host of other state and local requirements that may be applicable to running a background check and taking an adverse action based on the results.

If you have any questions or concerns regarding these developments, please contact your Proskauer lawyer.

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