

## What's New with the EEOC?

The Equal Employment Opportunity Commission (EEOC) has issued two new Guidance documents in March.

### Use of Background Checks

The EEOC and the Federal Trade Commission (FTC), which enforces the Fair Credit Reporting Act (FCRA), teamed up last week to issue a joint Guidance on using background checks, particularly in the employee hiring process.

Some takeaways from this short Guidance, which is available in its entirety on either the EEOC's website homepage [www.eeoc.gov](http://www.eeoc.gov) or under "Press Releases" on the FTC's homepage [www.ftc.gov](http://www.ftc.gov), are:

(1) Be sure if you are using an outside company (including on-line background check services) to perform your background checks (whether on new hires or current employees), that you receive the applicant or employee's express written permission to obtain the background check (unless the background check is being done on a current employee in connection with a misconduct investigation).

(2) You also must inform the applicant or employee that you may use information from the background check to make decisions concerning their hiring or employment.

(3) You also must inform the applicant or employee, if the background check performed by the outside company will or could involve investigative reports, which are based on interviews with their past employers or other references, friends or associates, that they have the right to obtain a description of the nature and scope of these reports.

(4) Items (1) - (3) must be on a separate document – not merely part of your application, an employee handbook, etc.

(5) Before taking an adverse action based on information obtained through a background check which was performed by or through an outside company, you must provide the applicant or employee with a copy of the background check report upon which the adverse action is going to be based (either in whole or in part) and an FTC "Summary of Your Rights" notice.

(6) After taking an adverse action based on information obtained through a background check which was performed by or through an outside company, you must provide the applicant or employee with the following information in writing:

(a) a statement that the adverse action was taken in whole or in part based on the information reflected in the background check report (which you should have provided them a copy of previously as part of complying with item (5) above);

(b) the name, address and telephone number of the outside company which provided the report;

(c) a statement that this outside company did not make the adverse action decision and cannot tell the applicant or employee why it was made; and

(d) a statement that the applicant or employee has the right to dispute the accuracy or completeness of the background check report and/or to obtain another copy of the report by contacting the outside company who provided the report within 60 days.

(7) Be sure you are not choosing to perform background checks on only those of certain races, age, gender, religion or national origin. (*Miller & Martin tip: If you decide only to perform background checks on certain positions or individuals, create a dated internal memo as to why this decision was made in case you must defend it against a discrimination claim*)

later.)

(8) Background checks should not involve medical information at the pre-offer stage or family history or other genetic information even at the post-offer stage.

(9) Decisions to disqualify an applicant or employee from a new position or promotion, transfer, etc. based on information learned in a background check must have an actual relationship – not merely a suspected or possible one – to the specific job in question. This is particularly true regarding "absolute disqualifiers" which the EEOC can statistically show have a disparate impact (e.g., have the effect of disproportionately screening out minorities and non-U.S. born candidates), such as refusing to hire or promote "anyone who has ever been arrested" or "convicted of any crime" or "convicted of a felony."

(10) Compliance with item (9) often will necessitate obtaining some follow-up information from the applicant or employee concerning their criminal history, as revealed through a background check, before disqualifying them from the job in question. In a previous Guidance on this topic, the EEOC has indicated that factors such as what the candidate has been doing since the arrest or conviction should be considered along with the nature of the crime and how long ago it occurred.

### **Religious Clothing and Grooming Discrimination**

This is an area that many employers do not run into that often, such that when they do, they often make legally-costly mistakes. This Guidance thus contains 21 examples of some of the more common misconceptions which can lead to such mistakes. The entire nine-page Guidance again is available on the EEOC's homepage at [www.eeoc.gov](http://www.eeoc.gov). A few common misconceptions dealt with in the Guidance are:

(1) Customer preferences (even if they are documented) do not justify religious discrimination (unless you are a church or other religious organization/institution).

(2) The fact that an employee has been working for you for several years and suddenly says he/she needs a religious accommodation is not a basis to ignore or deny the request.

(3) Asking an employee to cover up a yarmulke, headscarf, or other religious clothing, hairstyle, piercing or tattoo is not a "reasonable accommodation," unless doing so will not violate the employee's religious beliefs.

(4) It is also not a reasonable accommodation to hire those with outward displays of a religious practice or belief to work only in positions where they work away from your customers and/or the public.

(5) Individuals who have no religious beliefs also are protected from religious discrimination (e.g., from being forced to recognize certain religious practices, etc.) again, unless you are a church or other religious organization/institution.

(6) The fact that an employee is granted a certain accommodation based on a religious practice/belief does not "open the door" to you having to grant the same accommodation to others who request similar treatment based on non-religious reasons.

(7) A couple of examples illustrate the importance of the applicant or employee putting the employer on notice that the need for accommodation/exception to its policies is religion-based in order to trigger the employer's duty to accommodate. (These were no doubt inspired by the current *EEOC v. Abercrombie & Fitch* 10th Circuit Court of Appeals case which some are projecting the Supreme Court may agree to hear.)

Employers still are permitted to require compliance with a company dress code or other grooming, etc. policy where the code or policy is safety-related. The safety concern must be an actual one, however, not merely "possible." Employers also must consider whether an alternative to the dress code, etc. can be safely offered which also allows the employee to comply with his/her religious practice/belief.

The standard for refusing to grant a religious accommodation of any kind is still "is it related to a sincerely-held core religious belief or practice" and "does it pose more than a de minimis burden on the employer." This is a lower standard for employers to meet than the "undue burden" standard provided under the Americans with Disabilities Act (ADA).

As always, should you have questions about using background checks, offering (or denying) religious accommodations or any other labor or employment law-related topic, please feel free to contact [Stacie Caraway](#) or any other member of our [Labor & Employment Law Practice Group](#).

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**ATLANTA**

1170 Peachtree Street N.E.  
Suite 800  
Atlanta, GA 30309

**CHATTANOOGA**

832 Georgia Avenue  
Suite 1000 Volunteer Building  
Chattanooga, TN 37402

**NASHVILLE**

401 Commerce Street, Suite 720  
Nashville, TN 37219-2449

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