



Statement of Concern

The Texas Advisory Committee to the U.S. Commission on Civil Rights Civil Rights Implications of Arrest Information Included in Background Checks June 2024

The Texas Advisory Committee to the U.S. Commission on Civil Rights voted on February 5, 2024, to begin an investigation of the civil rights implications of arrest information appearing in background checks. While Commission staff began to do further research to develop a full project proposal, the Committee decided that while they think this is an issue that is likely impacting some, there is not enough research or information to pursue it as a project at this time. Consequently, to address the fact that arrest information contained in background checks does likely impact the civil rights of people in Texas, the Committee is issuing this Statement of Concern in lieu of a full report and may address this important issue in the future.

Background Information

Background checks in both the employment and housing application process are ubiquitous. For example, in the United States, 96% of employers conduct background checks for employee applicants.¹ As of 2022, the background check services industry recorded \$4.3 billion dollars in revenue and continues to grow.²

Distinguishing between arrest and conviction is crucial, as the two represent distinct stages in the criminal justice process with different legal implications. An arrest merely signifies that an individual has been taken into custody by law enforcement based on suspicion of involvement in a crime, whereas a conviction occurs when a court finds the individual guilty of the alleged offense beyond a reasonable doubt.³ Failing to differentiate between the two in background

¹ Raj Vardhman. "Latest Background Check Statistics (And Why They Matter)." *Legaljobs*. June 10, 2023. Found at: <https://legaljobs.io/blog/background-check-statistics>.

² *Ibid*.

³ *In re Winship*, 397 U.S. 358 (1970).

checks can have detrimental consequences for individuals, as it may inaccurately portray them as having committed a crime when, in fact, they have not been convicted of any wrongdoing.

All background checks are regulated by the Fair Credit Reporting Act (FCRA). And while the FCRA limits what information can be shared and how that information may inform decisions, there is also a lot of discretion left to both state regulations and employer discretion.⁴ There remains a lack of transparency from many background check companies about what information is shared and how employers and landlords are supposed to use that information in their hiring decisions.

Each state has different regulations on what an employer or landlord can consider when making hiring choices. Although an employer or landlord may receive more information on a background check, they must consider their state regulations on which information they can use in their decisions. In Texas, employers are restricted from considering certain types of criminal history information, including arrests that did not result in a conviction, if the annual salary of the vacant position is \$75,000 or less and the employer can only consider arrests or convictions from the past seven years. Employers can consider arrests or convictions older than seven years if the job pays more than \$75,000 per year.⁵

Studies have shown that people of color, particularly Black and Hispanic individuals, are disproportionately arrested compared to their White counterparts.⁶ In addition to known racial disparities in arrests, there are demonstrated disparities in other at-risk populations including the LGBT+ community and people with mental health issues. For example, it is estimated that 50 to 80 percent of police encounters involve people with some type of disability.⁷

It is because of these disparities that the U.S. Equal Employment Opportunity Commission (EEOC) has issued guidance advising employers to omit arrest information in their hiring decision, *regardless of their state's regulations*.⁸ Even if an employer has a “neutral policy” regarding disqualifying candidates based on arrests, it may disproportionately impact some individuals protected under Title VII and may violate the law if not job-related and consistent with business necessity.⁹

⁴ Fair Credit Reporting Act, 15 U.S.C. §§ 1681-1681x (2012).

⁵ Texas Bus. & Com. Code Ann. § 20.05.

⁶ Nazgol Ghandnoosh, Ph.D. and Celeste Barry. “One in Five: Disparities in Crime and Policing.” *The Sentencing Project*. November 2, 2023. Found at: <https://www.sentencingproject.org/reports/one-in-five-disparities-in-crime-and-policing/>; ACLU. Racial Profiling In Texas: Report Shows Significant Disparities In Stops And Searches. February 3, 2004. Found at: <https://www.aclu.org/press-releases/racial-profiling-texas-report-shows-significant-disparities-stops-and-searches>.

⁷ The Texas Center for Justice and Equity (TCJE).” Misunderstood and Mistreated.” Found at: <https://www.texascjc.org/misunderstood-and-mistreated>.

⁸ U.S. Equal Employment Opportunity Commission (EEOC). *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act*. April 4, 2012. Found at: <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#VIII>

⁹ Ibid.

Recommendations

The Committee remains concerned that there are trends indicating possible discrimination when arrest information is used in background checks and is greatly troubled about the lack of transparency about what is included in background checks. The Committee believes that arrest information should be limited in background checks. Given that arrests are not equivalent to conviction, this information should be shared in very limited circumstances. The Committee recommends to the U.S. Commission on Civil Rights to conduct more research into how background records are being generated, what information is included, and how people use the information in their hiring and housing decisions.

The U.S. Commission on Civil Rights is an independent, bipartisan agency of the federal government charged with studying discrimination or denial of equal protection of the laws because of race, color, religion, sex, age, disability, national origin, or in the administration of justice.