

**EEOC obtains Consent Decree requiring employer to create and maintain records of race and gender of applicants and hires when using criminal background checks to make hiring decisions.**

Like many employers, Crothall Services Group, Inc., a janitorial and facilities management services company, relies on criminal background checks to make hiring decisions. However, Crothall did not make and keep records of the gender, race, and ethnicity of applicants rejected because of their criminal history or selected for hire.

In July 2015, the EEOC sued Crothall contending that its reliance on criminal background checks to screen applicants constitutes an “employee selection procedure” within the meaning of the EEOC’s long-standing Uniform Guidelines on Employee Selection Procedures, and that the company failed to create and maintain required records that would enable the EEOC (or the company for that matter) to determine whether this “employee selection procedure” has a disparate impact on females or minorities. EEOC v. Crothall Services Group, Inc., Case No. 2:15-cv-03812.

On June 28, 2016, the U.S. District Court for the Eastern District of Pennsylvania issued a Memorandum Opinion agreeing with the EEOC’s position, but finding a disputed factual issue (i.e., the sufficiency or insufficiency of the records the employer did maintain) requiring further discovery and a trial.

However, on December 16, 2016, the Court entered a Consent Decree ending the litigation on terms favorable to the EEOC. This Consent Decree continues in effect for a period of four years, and among other things, requires the company to do each of the following:

- Make and keep records identifying applicants’

gender, race and ethnicity “using, at a minimum, self-identification forms, self-identification inquiries, and visual observation,” and “keep all records reflecting communications regarding such information.”

- Keep records of all criminal background checks or other records of criminal histories obtained, regardless of the source, and “keep all records reflecting communications regarding such information.”
- Enter and save all required records in electronic databases “in such a manner that permits EEOC to determine whether such information was entered into the databases accurately.”
- Make and keep all records indicating whether any person passed or failed any criminal background check, and “keep all records reflecting communications regarding such assessments.”
- Make and keep “records indicating what employment decision was made, what aspect of the person’s criminal history was deemed relevant to the employment decision, and why [the company] deemed the person’s criminal history to be relevant to the employment decision.” This obligation extends to all those who are, and to all those who are not, offered employment or otherwise selected for an employment opportunity.
- Make and keep “an investigation file containing detailed information concerning each charge, complaint, report or inquiry submitted to [the company] about any person’s criminal history reviewed or assessed by [the company], including all affidavits or witness statements obtained, a detailed

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description of all actions taken by [the company] to investigate the matter, and a detailed description of any corrective action taken in response.”

When making employment decisions, employers who use criminal background checks should consider whether they are creating and maintaining records expected and required by the EEOC.

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