



Check 1 Check 2 – What an Employer Needs to Know About Employee Background Checks

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Overview

- Introduction to criminal background and credit checks and the benefits and concerns they present for employers
- Complying with the Fair Credit Reporting Act (FCRA)
- Considering state laws that apply to the use of credit reports by employers
- Assessing the EEOC's stance on criminal background checks
- Conclusion and Q+A

Introduction:

Types of Background Checks

- The FCRA covers all “consumer reports”
 - “Consumer reports” covers information provided by a consumer reporting agency bearing on:
 - Credit worthiness
 - Credit capacity
 - Character
 - General reputation
 - Personal characteristics, or
 - Mode of living

- Criminal background and credit checks are the most common types of background checks performed by employers

Introduction: The pros and cons of using background checks

- Potential benefits of background checks:
 - Screening potential employees whose actions could result in vicarious liability
 - Avoiding negligent hiring claims
 - Protecting the safety of other employees
 - Protecting proprietary interests

- Use care and caution
 - Perform background checks selectively and consistently
 - Always be mindful of applicable federal AND state laws

The Three Stages of FCRA Compliance

- Stage 1: Before Requesting a Consumer Report
- Stage 2: Before Taking Adverse Action Based on a Consumer Report
- Stage 3: Concurrent with or After Taking Adverse Action Based on a Consumer Report

Stage 1: Before Requesting a Report

- Notify the individual in writing
 - Give the notice in a stand-alone format
 - Notice should not be part of the employment application
- Get written authorization
 - To be authorized to request reports throughout the individual's employment, this intent must be clear and conspicuous in the authorization
- Always check state laws

Stage 2: Before Adverse Action

- Adverse action includes:
 - Rejecting a job applicant
 - Reassigning or terminating an employee
 - Denying promotion

- Give the individual a pre-adverse action disclosure which must include:
 - Copies of the reports you used AND
 - A copy of "Summary of Your Rights Under the Fair Credit Reporting Act"

Stage 3: Concurrent With Or After Adverse Action

- Give notice of adverse action based on consumer report
 - Notice may be oral, written or electronic
 - Notice must include:
 - The name, address and phone number of the company supplying the report
 - A statement that the company did not make the decision and can't give reason for it
 - A notice of the person's right to dispute the accuracy of the information and get an additional free report if requested within 60 days

Consequences of Violating the FCRA

- Civil liability for willful noncompliance
- Civil liability for negligent noncompliance
- Criminal fines or imprisonment for willfully obtaining a consumer report under false pretenses
- Administrative penalties

Local Law on the Use of Consumer Reports

- Maryland has statutes covering employers' use of consumer reports
- Virginia and D.C. do not
 - D.C. allows consumers to freeze their credit reports such that employers can only obtain the report if the consumer authorizes the consumer reporting agency to release it to them

Local State Law on the Use of Credit Reports: Maryland

- Employers may not use credit history to:
 - Deny employment
 - Discharge an employee
 - Determine compensation, terms, conditions and privileges of employment

- Exceptions to the above apply when:
 - An offer has been given and report won't be used for one of the above purposes OR
 - The employer has a bona fide purpose that is substantially job related and disclosed in writing

- Employer must give notice of any adverse employment decision and the name and address of the agency making the report

Maryland, continued

- Under Maryland law, a report may be “substantially job related” for positions that involve:
 - managerial or decision making powers
 - access to personal information
 - fiduciary responsibilities
 - access to expense accounts or corporate credit cards
 - access to privileged or confidential business information

State Laws on the Use of Consumer Reports

- At least 23 states have relevant consumer reporting statutes
 - Examples:
 - Hawaii – Conditional offer of employment must be made before an applicant's credit history can be considered
 - Illinois – Inquiries into credit history can only be made if at least one of seven statutory factors is met
 - New Mexico – Anyone requesting a consumer report must execute a service contract certifying that they will only use the report for appropriate purposes

EEOC Involvement in Criminal Background Checks

- For decades the EEOC has taken a stance on employers' use of criminal background checks
 - Recently the EEOC has become particularly concerned with and active on this issue
- The EEOC is increasingly concerned that the use of criminal background checks will have a disparate impact on protected classes

EEOC Guidance on the Use of Criminal Background Checks

- The EEOC has published a number of decisions and policy documents touching upon this issue
- The latest guidance from the EEOC was released April 25, 2012
- The EEOC has strongly advised against the use of a blanket practice of asking about convictions in employment applications

EEOC Guidance: Continued

- The guidance distinguishes between arrest records and convictions records and states that arrest records alone may NOT be used to deny employment
- Under the EEOC guidance, employers can still make employment decisions based on the conduct underlying the arrest, however, a number of state laws ban inquiry into arrest records

EEOC Guidance: Continued

- The EEOC continues to favor the three-factor test for evaluating criminal history known as the Green Factors:
 - The nature or gravity of the offense or conduct
 - The time elapsed since the conviction and/or the completion of the sentence AND
 - The nature of the job sought or held

Targeted Screening + Individualized Assessment

- Employers can avoid Title VII liability by:
 - **Applying the Green Factors to adopting a practice of targeted screening AND**
 - **Conducting individualized assessments:**
 - Informing the employer/applicant that they might be excluded because of past criminal conduct
 - Providing an opportunity for the individual to demonstrate that they should not be excluded
 - Considering whether the individual's response and additional information shows that the policy as applied to this individual is not job related or consistent with business necessity

The EEOC Guidance in Relation to Federal and State Laws

- Conducting criminal background checks to comply with federal law or regulations will not violate Title VII
- Compliance with state or local laws requiring criminal background checks will not automatically protect against liability
- Many states have their own laws governing the use of criminal background checks

Local State Laws on the Use of Criminal Background Checks

- District of Columbia:
 - Employers must bear the cost of obtaining an “arrest record”
 - An “arrest record” will only contain list of convictions and forfeitures that have occurred within 10 years
- Maryland:
 - Employers can not require the disclosure of criminal charges that have been expunged
- Virginia:
 - Employers can not require employees or applicants to disclose criminal charges that did not result in a conviction or arrests that have been expunged

Best Practices

- Document your practices and ensure that they are applied consistently
- Do not run background checks on an entire pool of applicants – wait until the field is narrowed
- Do not rely merely on the mere fact of arrest to make an employment decision
- Confirm that all inquires are relevant to the position and consider the information obtained in relation to the position
- Do not apply blanket exclusions
- Provide employees/applicants the opportunity to discuss or refute the information
- Revise your policies, applications and authorizations to reflect the most recent laws and guidance
- Consider what laws apply in your state

Conclusions & Q+A

We hope this has been helpful to your approach to background checks

If there are any questions we would be happy to address them now

Thank you

Please join us next time



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