Employers Guide to Best Practices



For Use of Background Checks in Employment Decisions



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A 2010 poll of the Society of Human Resource Management shows that approximately 60 percent of employers use credit checks and approximately 92 percent use criminal histories in screening job applicants. While employers are permitted, under certain circumstances, to rely on the information obtained about an applicant or employee from a criminal history and/or consumer report in making employment decisions, employers must take certain precautions to ensure they do not violate federal laws.

Employers should first determine if they have a business need to conduct a background check for the particular position. If the employer does have a legitimate need to conduct a background check, that check must be carried out in accordance with the law. Employers must be aware of their responsibilities, restrictions and potential liabilities under both state and federal law.

This brochure serves to advise employers of their legal responsibilities when obtaining criminal and consumer histories for job applicants and employees, potential legal consequences under federal law for failing to comply with these legal responsibilities, and best practices in implementing the lawful usage of background checks when making employment decisions.

What Employers Should Know About Running a Background Check

Employers that rely on "consumer reporting agencies" to conduct background checks by obtaining what the law refers to as "consumer reports" must comply with the Fair Credit Reporting Act (FCRA). A consumer report is actually much broader than credit histories- it is any written, oral or other communication on a consumer's credit worthiness, credit standing or capacity, character, general reputation, personal characteristics or mode of living. This complete consumer report is then used to determine eligibility for employment. The definition of "consumer reporting agency" is equally as broad and includes any person, paid or unpaid, who engages in evaluating consumer credit information or other related information for the purpose of providing consumer reports to third parties (such as employers.) Most background checks conducted by separate reporting agencies and provided to employers such as criminal background checks, driving record histories, educational, personal or employment investigations, as well as credit histories are within the FCRA regulatory scope.

Employers obtaining information on an employee's/applicant's history other ways, such as getting information from a government agency directly, finding it themselves through online sites (Google/Facebook), or from the applicant/employee directly do not have to follow these FCRA requirements. However, they may still be liable under other laws for how they use the information.

Complying With the FCRA

Generally speaking, the Fair Credit Reporting Act (FCRA) requires employers to ensure that applicants/employees are:

- (1) aware that consumer reports are being obtained for employment purposes;
- (2) in agreement to disclose these reports and
- (3) receiving notifications when an employer takes action based on information gathered from the consumer reports.

These requirements are broken down into the following four different steps that the employer must take for every consumer report it obtains:

Notice: The employer must provide written notice to the applicant/employee of the intent to obtain a consumer report. The notice must be a separate document and not part of an application.

Consent: The employer must obtain written consent from applicant/employee acknowledging he/she has been provided with a notice of the employer's intent to obtain a report, and that the applicant/employee read/understands all terms and consents to any and all background checks and reports on employee/applicant. Employer may include notice and consent on one form.

Certification to Reporting Agency: Before the employer obtains a consumer report, he or she shall also send written notice to the consumer reporting agency certifying its compliance with FCRA in connection with the background checks of applicants/employees.

Certification to consumer reporting agency shall include the following:

- Employer notified applicant/ employee of intent to obtain consumer report.
- Applicant/employee consented to release of a consumer report.
- If employer makes employment decisions based on information in consumer report, it shall notify applicant/employee of its intent to take action and action taken.
- Employer's use of the consumer report will not violate state or federal equal opportunity law or regulation.

Adverse Employment Action

If the employer discovers information in the employee/applicant's consumer report that it intends to rely on in making an adverse employment decision, under the FCRA, it must first notify the employee of both its intent to take such "adverse action," and it must also send a follow-up notification when such an action is actualized. This must be done as two separate notices with enough time in between to let the employee respond and possibly dispute and correct any errors.

An "adverse action" is not limited to denial of employment. It also includes "any other decision for employment purposes that adversely affects a current or prospective employee." Examples of adverse actions include: termination of employment, demotion, job transfer or salary cut. Employers who are unsure if their employment decision constitutes an "adverse action" should consult with legal counsel before taking any action.

Before Taking Adverse Employment Action

If the employer intends to take any adverse action against an applicant/employee, the employer must provide a copy of the consumer report to the applicant along with a written notice of the intent to take action and a summary of the employee's rights under the FCRA. The summary can be obtained from the FTC website at: <u>http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf</u>

When Taking Any Adverse Action

Once the employer takes the adverse action, the employer must issue a **second** written or oral notice to the applicant/employee advising of its decision to take the adverse action.

Under the FCRA, the notice must include the following:

- The name, address and telephone number of the consumer reporting agency that prepared the consumer report provoking the adverse action, including a toll free number if the agency works on a national basis.
- A statement advising the applicant/employee that the consumer reporting agency did not make the decision to take the adverse action and therefore cannot explain why a decision was made.
- An explanation of the applicant's/employee's rights to obtain a free copy of the consumer report from the consumer reporting agency, as well as a right to dispute (with the consumer reporting agency) the accuracy or completeness of the report.

Even though the FCRA allows employers to give verbal notice of the adverse action, it is recommended that employers use written notice to inform employees of the decision to take adverse action so that the employer can document that it complied with all FCRA requirements.

All of the information that must be included in the notices and certifications required by the FCRA can be found at the Federal Trade Commission website at:

http://www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm.

Potential Legal Liabilities For Using Information From Background Checks

Possible legal pitfalls exist under federal law if an employer misuses or improperly relies on the results of a background check. Again, employers may face additional liabilities under state laws and should consult the laws of their states as well.

FCRA

Employers that fail to comply with the FCRA requirements described above may be legally responsible for any harm caused to an employee, applicant or consumer reporting agency. Employers may be required to pay actual damages, punitive damages, costs and attorneys' fees as a result of such non-compliance. In addition, employers may be subject to certain financial penalties imposed by the Federal Trade Commission. State laws may impose additional penalties.

Title VII of the Civil Rights Act of 1964

Employers that take adverse employment action based on the results of a consumer report could also be found liable for violations under Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII prohibits employers from discriminating against employees or applicants on the basis of race, gender, religion or national origin.

The Equal Employment Opportunity Commission (EEOC), which is the federal agency responsible for enforcement of civil rights statutes like Title VII, believes that employers that have sweeping policies prohibiting the hiring of individuals based on their criminal or credit history may negatively impact minority populations. This means that policies that appear to be equally applicable to all applicants/employees may unlawfully exclude minority populations from employment.

The EEOC has issued guidelines that employers should follow when taking an adverse action based on the criminal history of an applicant/employee. According to these guidelines, the employer must consider:

- The nature and gravity of the offense or offenses of which the applicant/employee was convicted;
- The time that has passed since the conviction or completion of the criminal sentence; and
- The nature of the job held or sought.

The employer should be able to demonstrate the connection between the nature of the crime and the employee's/applicant's position. The EEOC has also issued guidance that *arrest* records alone cannot be used to routinely exclude individuals from employment.

Some examples of employer policies that the EEOC has found discriminatory include:

- A policy barring from employment anyone who has been arrested on "a number of occasions" because some minority populations have a larger and longer history of arrest than non-minority populations.
- A policy that automatically discharged any employee whose wages were garnished more than once within a 12-month period because some minority populations face wage garnishment more frequently than other non-minority populations.
- A policy that refused employment to any person convicted of a crime other than a minor traffic offense because some minority populations have higher conviction rates than non-minority populations.

The EEOC' position is based on statistics demonstrating that certain minority groups are arrested and denied credit advantages at a disproportionately higher rate than non-minorities. Therefore, broad policies that deny all persons employment because of a negative credit history or criminal background may lead to "disparate impact" lawsuits under Title VII. "Disparate impact" means that a facially neutral policy or practice adversely affects minority applicants/employees. Employers may avoid liability only when the contested policy or practice is both job related and consistent with business necessity and that no less discriminatory alternative is available to achieve the same intended objective.

Although the EEOC has focused on the racial impact of background checks, employers face the same liability if their policies have a disparate impact on employees/applicants because of gender or other protected classes. Employers may also face liability under state antidiscrimination statutes as well.

Violations of Title VII, as well as state statutes, may subject the employer to compensatory damages, including lost past and future wages, punitive damages, emotional distress damages and attorneys' fees and costs. Employers may also be required to hire/reinstate the complaining applicant/employee.

Minimizing Liability Risks

To minimize their liability risks, employers should follow these guidelines for a background check program:

- Be consistent by obtaining the same type of information from background checks for all applicants/employees;
- Comply with all of the procedural disclosure, notice and consent requirements in the FCRA and any applicable state credit reporting statute;
- Ensure that there is a job-related reason why any adverse action taken as a result of information obtained through a background check is necessary for the employer's business.

Any employer that is unsure if he or she can lawfully take an adverse action based on information obtained through a background check should consult legal counsel before making a final decision.

Other Laws

Employers can also face liability under state laws restricting the use of criminal records or credit histories. If employers spread damaging information about applicants/employees that turns out to be inaccurate, they can face liability for defamation as well. Before acting on any background information, employers should make sure the information is reliable and that no state law prohibits its use.

Additional Information

Visit the EEOC's Web site at: <u>http://www.eeoc.gov/laws/practices/</u> <u>inquiries_arrest_conviction.cfm</u>

Visit the FTC's Web site at: <u>http://www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm</u>

Visit the Lawyers' Committee Web site: <u>http://www.lawyerscommittee.org</u>

or contact the Lawyers' Committee's Access Campaign hotline: 888/324-7578



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