

Using background checks in hiring employees

BY JOANNA R. BRODY | LANE POWELL

BACKGROUND CHECKS are a vital tool in avoiding hiring problems and in limiting a company's liability. With more than 65 million people in the United States having been arrested or convicted, and in the age of negligent hiring lawsuits where employers have been successfully sued for criminal and civil acts performed by employees, it is not surprising that more than 90 percent of employers conduct criminal background checks, with almost 70 percent requesting broader "consumer reports" on all job applicants. However, an employer must be careful as it can run into serious trouble for not following the rules regarding background checks.

In recent years, state and federal laws and regulations have dramatically altered the landscape of conducting background checks for employment purposes. In 2010, the Oregon legislature made it unlawful for most Oregon employers to use credit reports in making employment decisions. In 2012, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing federal discrimination laws under Title VII, issued Guidance stating that sweeping company wide decisions to not hire or promote based on criminal history violated Title VII. Also in 2012, Congress amended the Fair Credit Reporting Act (FCRA), detailing procedures to be followed when a "consumer report" (which includes criminal and civil records, driving records, social media research and other information obtained about an applicant/employee by a consumer reporting agency) is used for employment purposes.

These laws and regulations concerning background checks are being actively enforced by the EEOC and the Federal Trade Commission (FTC), which is responsible for the enforcement of FCRA. The EEOC currently has hundreds of charges pending across the country against employers' use of criminal background checks, and the FTC is actively investigating employers

who fail to follow FCRA when using consumer reports.

Perhaps the biggest threat to employers, however, is from private lawsuits brought by applicants and employees who allege that the employer improperly obtained and used background reports. Compensatory damages are available under Title VII, and FCRA provides for statutory damages. In addition, both statutes provide for punitive damages and attorneys' fees. In fact, recent class actions involving employee background checks have resulted in multi-million-dollar settlements.

Given these developments, it is imperative that employers structure their employment background screening policies to comply with recent changes. Broadly speaking, here are five steps you should immediately take to ensure compliance:

1. Review employment applications

- Do not inquire about an applicant's arrest record. If you are going to inquire about convictions, the inquiry should be tailored for the position. Also, eliminate the requirement that the applicant mark the "box" if the applicant has ever been convicted of a crime.
- Insert language stating that if any listed information is found to be false, or if requested information is not disclosed, the application will not be considered, or if the applicant is already employed, the employee may be subject to immediate termination.
- Make sure the application contains a release of liability for anyone using or providing background information.

2. Make the required disclosures and obtain the necessary authorization before conducting any background check

- If your company uses a consumer reporting agency to conduct background checks, make

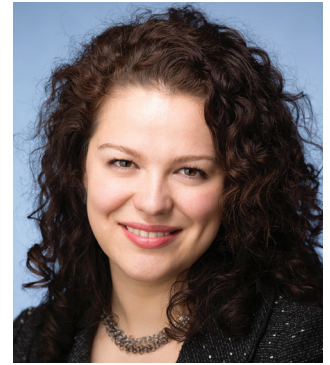
sure your disclosure complies with FCRA and discloses to the applicant that you will be obtaining a consumer report for "employment purposes." The disclosure form must be separate from all other employment-related documents and should consist only of the disclosure, or at most, the disclosure and a signature line authorizing the background check. Make sure written permission is obtained from the applicant *before* any background check is performed.

3. Evaluate hiring policies and requirements

- Eliminate blanket policies that disqualify candidates because of prior arrests or convictions. Take the time to narrowly tailor policies for the available positions.
- If an applicant has a criminal conviction, make an individualized assessment of the facts surrounding the conviction. Review relevant facts such as: (1) What is the nature and gravity of the crime(s)?; (2) How long ago did the crime(s) occur?; and (3) Has the applicant been performing a similar job successfully since serving the sentence? Make a detailed written record of this review. If an applicant is not hired based on a prior conviction, make sure the link between the conviction and the nature of the position is well-documented.

4. Train your staff

- Make sure that all employees involved in background checks and employment decisions are trained to comply with the EEOC Guidance, FCRA, and federal and state anti-discrimination laws. Also, keep all background checks confidential and make sure the reports, and all information gathered from them, are securely disposed of once they are no longer needed.



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5. Give the required notice before rejecting an applicant

- Prior to taking adverse action against an applicant/employee based on a consumer report, provide the applicant/employee with a pre adverse action letter enclosing a copy of the consumer report and the FCRA Summary of Rights. This communication allows the applicant/employee the opportunity to resolve any errors in the report. After the letter is sent, you must provide the individual with a reasonable amount of time (at least five business days) to dispute the contents of the report. Before moving forward with the adverse action against the applicant/employee, you must provide an "adverse action" notice to the individual informing them of the company's decision.

Background checks are a key element in maintaining a safe and productive workforce. Following these guidelines should help you minimize the risks when using this valuable tool.

