

Potential Pitfalls of Conducting Applicant Background Checks

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[Wendy C. Hyland](#)

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Background checks have become a familiar arrow in the quiver for employers in the applicant selection process. They have taken on an important role in overall hiring schemes designed to help eager employers glean the cream of the crop in a competitive job market. Moreover, background checks are an effective tool for screening candidates to minimize risk of workplace violence and potential tort claims such as negligent hiring or negligent retention. However, as federal and state law continues to evolve, careful thought to the process of conducting background checks and the use of their results in employment decision making is more important than ever.

The Fair Credit Reporting Act (FCRA) applies to employers who obtain consumer reports for employment purposes from a third party service provider in the business of conducting background screening, known as a consumer reporting agency (CRA). This federal law requires a clear written disclosure that the report may be obtained and requires written authorization from the applicant for the disclosure of background information. If the information is used in any adverse employment action, employers must provide written notice before the adverse action is taken, including a copy of the report and a summary of rights under the FCRA to the candidate. In addition, employers must provide another written notice upon taking the adverse employment action which provides contact information for the consumer reporting agency, explains that the agency played no role in the employment decision, gives notice of the right to a free copy of the report within 60 days, as well as the applicant's right to dispute the report's accuracy.

State specific laws must also be considered before making an employment decision based on information learned from a consumer report, since many states prohibit consideration of an applicant's arrest record. In addition, some states prohibit consideration of criminal convictions unless there is a direct relationship between the conviction and the job.

To further complicate matters, the Equal Employment Opportunity Commission (EEOC) opines that the use of background checks and other selection procedures may run afoul of discrimination statutes if they are used to discriminate against candidates in a protected class, such as race, color, sex, national origin, religion, age or disability. As with any other employment decision, the use of information obtained from a background check must be consistently applied in decision making to reduce risk for discrimination claims based on failure to hire. The EEOC has also taken the position that the use of information obtained from consumer reports may have a disproportionate impact on applicants in protected classes. Furthermore, the EEOC recommends against using the information unless there is a justifying business necessity by showing:

1. the nature and gravity of the offense
2. the age of any conviction
3. the nature of the job

So where does this complicated web of compliance leave employers in effectively using background information as a way to recruit and retain a talented workforce? Consumer reports remain a critical tool to minimize legal liability and help gather the best pool of job applicants. As a guidepost, rather than bright line policies that any criminal conviction bars further consideration of an applicant's candidacy for a position, employers should consider the relationship between the competencies of the position and how the information obtained in the report is a concern for how the applicant's background fits with those competencies. For example, an applicant's criminal conviction for embezzlement may have some bearing on potential efficacy if applying for a position as a bank teller, or an applicant's conviction for abuse may have some bearing on the applicant's fit in a job at a nursing home. Careful tailoring of the information learned from a consumer report to a job-related analysis in applicant selection can help employers balance being in front of potential problem employees, and potential legal claims for hiring them, while minimizing legal risk of violating anti-discrimination statutes.