



The Need for “Hire” Education Rules to Follow Regarding Background Checks

By Joanna R. Brody, Attorney, Lane Powell PC

Background checks are a vital tool used to avoid hiring problem employees and can help limit a company's potential liability. With more than 65 million people in the United States having been arrested or convicted of crimes, and with employers successfully being sued for the criminal and civil acts of their 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, care must be taken, because an employer can also run into serious trouble for not following the rules regarding background checks.

An employer's ability to conduct background checks is limited by both federal and state laws and regulations. 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 employees based on criminal backgrounds violated Title VII. Also in 2012, Congress amended the Fair Credit Reporting Act (FCRA), setting forth detailed procedures to be followed when a “consumer report” (which includes criminal, civil, and driving records; reference checks; social media research; and other information obtained about an applicant/employee by a consumer reporting agency) is used for employment purposes. Additionally, federal law makes it unlawful for an employer to make employment decisions based on an individual's filing of bankruptcy.

These federal laws and EEOC Guidance have no special carve-outs for financial institutions, and they are being actively enforced by the EEOC and Federal Trade Commission, the agency responsible for enforcing the FCRA. However, the biggest threat to employers is from private lawsuits brought by applicants and employees who allege the employer improperly obtained and used background checks. Compensatory damages are available to applicants and employees under Title VII, and the FCRA provides for statutory damages of \$100 to \$1,000 *per violation* of the statute. In addition, both statutes provide for punitive damages and attorneys' fees. Recent class action law suits involving employee background checks have resulted in multi-million-dollar settlements.

Oregon law also places limitations on the use of background checks in making employment decisions. In 2010, the Oregon Legislature passed the Job Applicant Fairness Act, making it unlawful for most Oregon employers to use credit history — information relating to a consumer's creditworthiness, credit standing or credit capacity — in making employment decisions regarding an applicant or employee. As with the federal laws addressed above, the Oregon statute also provides for compensatory and punitive damages, as well as attorneys' fees.

There are two narrow exceptions to the Oregon law. The first applies to certain financial institutions; federally insured banks, credit unions, and businesses required by law to consider em-

ployee credit history, as well as police and other public employers hiring for law enforcement and airport security are excluded. The second exception permits a credit report if the information is “substantially job-related” and the employer discloses to the applicant/employee the reasons for the use of such information. Credit history information is “substantially job-related” only if: (1) an essential function of the job requires access to financial information not customarily required in a retail transaction other than a loan or extension of credit (i.e., the employee has access to more than check information, cash handling, or credit and debit card numbers); or (2) the employer is required to obtain credit history information as a condition of bonding or insuring the employee.

Employers should use the substantially job-related exception with care. For most positions a credit history is not going to be substantially job-related. However, if an essential job function requires that the employee obtain such information as financial institution account numbers, social security numbers, and amounts and sources of income, obtaining that employee's credit history information may be “substantially job-related” and therefore permissible.

Given these federal and state developments, it is imperative that all employers, including financial institutions, structure their pre- and post-employment background screening policies to comply with recent changes. Broadly speaking, employers should:

- Review their employment application to confirm it complies with recent EEOC Guidance;
- Make the required disclosures and obtain the necessary authorization *before* conducting any background checks;
- Make individualized assessments of the position to be filled. If the position allows for the use of credit reports under Oregon's narrow exceptions, make sure the applicant receives written disclosure of the employer's reasons for requiring such information;
- Make individualized assessments of each applicant. If the applicant has a criminal conviction, make an individualized assessment of the facts surrounding the conviction;
- Give the required notice *before* rejecting an applicant; and
- Keep all background checks confidential.

Background checks are a key element of maintaining a safe and productive workforce. Following these guidelines should help minimize the risks of conducting background checks and limit potential liability for the employer. ■

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