

Reduce your hiring risks

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By **Sharolyn Whiting-Ralston**

The news is full of stories about people committing crimes either while they are working or at their place of employment. So, what are employers' risks and how do they protect their businesses? One way is to conduct background checks on potential employees. However, employers must be aware of the restrictions on obtaining the information and using it.

First, why might an employer want to conduct background checks of job applicants? Simply, if an employee hurts someone while on the job, the employer may be liable for "negligent hiring." Such a claim may come from another employee or it could come from a customer or client. In either case, a "negligent hiring" claim asserts that the employer knew or should have known the employee was likely to be dangerous. However, an employer can greatly reduce any potential liability by taking reasonable steps to discover if an applicant has the propensity to harm someone.



Background checks are generally a reasonable way to determine someone's propensity to harm. However, the ability to legally conduct and use background checks is limited. What is "reasonable" depends upon the business and the position. To start, the employer needs to determine the responsibilities of the potential candidate for employment and what harm may arise if someone potentially dangerous fills that position, focusing on the "business necessity" of obtaining the information. In other words, is the information being sought and used relevant to the job the applicant will be performing?

Before conducting any background check, employers should obtain the consent of the applicant. Some laws, like the Fair Credit Reporting Act, require employers to specifically advise the applicant, in a separate document, that it will be investigating his or her background, and get the applicant's signature consenting to the check. This is always a good idea, even if a specific law does not apply to the check being conducted.

Many states distinguish between the inquiry into, and use of, information regarding arrests and convictions. Oklahoma law only forbids an employer from asking about arrests that have been sealed or expunged; however, many other states restrict employers from asking about arrests except in very limited situations where public safety is at issue. One of the main reasons for this restriction is the fact that minority groups continue to be subject to illegitimate arrests on a greater scale than non-minorities, which creates a disparate impact on those groups in employment.

Information concerning convictions may generally be requested and used with more freedom, although some limitations still exist. Like with arrests, employers must be aware that using conviction records, without limits, may result in a disparate impact on certain groups of the population, giving rise to a discrimination claim. Accordingly, any application requesting information about convictions, or informing the applicant a background check will be done, should include language stating that a criminal conviction does not automatically disqualify the candidate from employment. According to the Equal Employment Opportunity Commission, to avoid the possibility of disparate impact, employers need to consider the timing, nature, and number of convictions along with the applicant's immediate past employment records. For instance, an employer should not use a drunk-driving conviction as a basis for not hiring someone as an in-store sales clerk. But such a conviction should be considered before hiring that person to drive a delivery van.

The bottom line is that employers can reduce their risk of liability from the actions of an employee by conducting, and using, reasonable background checks. Employers should develop a policy that ensures the applicant properly consents to the background check, and that the information is obtained and used in compliance with both federal and state law.

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