

## Pre-Employment Background Checks: The Cure Can Be As Bad As The Disease

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Studies show that an overwhelming number of employers conduct some form of pre-employment background check on prospective employees. There are many good reasons to do so: hiring qualified, safe and productive employees, preventing theft or workplace violence, and maintaining employee morale, just to name a few. While no one doubts the need to properly screen an applicant's background and qualifications, *how* you go about doing so and what criteria you use can potentially expose your organization to significant liability.

Employers who use a third party to gather background information and verify references must be sure to comply with the federal Fair Credit Reporting Act (FCRA). From its title, you may conclude that the FCRA only applies to traditional credit reports. It covers much more than that. The FCRA establishes detailed procedures that must be followed whenever a "consumer report" or an "investigative consumer report" is obtained for employment purposes. Consumer reports include such things as educational and employment histories, motor vehicle records, licenses and criminal background. Investigative consumer reports are consumer reports that are developed by interviewing people who may know the applicant or employee (such as checking references).

If you use a third-party vendor to do your background checks, the FCRA requires, in general, that you:

- Provide separate, advanced written notice to the applicant or employee
- Get the individual's authorization to obtain the information
- Certify to the third-party vendor conducting the background check that you have complied with the FCRA
- Provide a pre-adverse action notice and additional documentation to the individual before taking action based in whole or in part on the report
- Provide an adverse action notice containing specific information to the individual

Failure to comply with the FCRA can expose you to enforcement action by the Federal Trade Commission, legal action by your state attorney general's office for injunctive relief and damages, or a private cause of action by the applicant or employee. It was recently reported that an Ohio transportation company has agreed to pay \$2.6 million to settle a class-action lawsuit (*Hall v. Vitran Express, Inc.*) alleging FCRA violations.

Leaving aside the FCRA, there are several other legal land mines you should also be aware of. For example, some employers automatically screen out potential employees if they have an arrest or felony conviction in their record. Michigan law prohibits employers from requesting, making or maintaining a record regarding non-felony arrests where a

conviction does not result. Michigan employers may, however, request information relative to convictions or pending felony charges. Several other states have similar or more severe limitations on collecting such information.

In addition, the Equal Employment Opportunity Commission (EEOC) has taken the position that a policy or practice which automatically excludes individuals from employment solely because of a prior conviction will be presumed to violate Title VII of the 1964 Civil Rights Act because it may have a discriminatory adverse impact on individuals of certain races or national origins.

As such, an employer would be well advised not to adopt a blanket policy or practice that bars anyone with a criminal conviction from employment. The employer should also be prepared to show that, before rejecting an applicant because of a prior criminal conviction, it considered the nature and seriousness of the crime, the time that has passed since the conviction or completion of the sentence, and the nature of the job sought or held by the individual.

Employers who use traditional credit reports in the hiring process must not only comply with the FCRA, but recognize that such a practice is subject to the same adverse-impact concerns as conviction records. The EEOC, concerned that use of credit reports and credit scores has a discriminatory adverse impact against certain individuals, is suspicious of such practices and is contemplating publishing guidance on the subject.

Furthermore, several states have laws which prevent employers from using credit history in the hiring process unless there is some particular relevance to the job in question. Legislation prohibiting or limiting an employer's ability to use credit reports or scores in the hiring process is pending in several states, including Michigan. A bill that was recently introduced in the Michigan House would prohibit employers from inquiring into or refusing to hire or recruit an individual for employment based on his or her credit history unless good credit history is a "bona fide occupational requirement" for the position at issue (e.g., employees of banks, credit unions, securities firms, etc.).

Finally, federal bankruptcy laws prohibit public employers from denying employment to, or discriminating in employment against, a person "solely" because that person is or has been a bankruptcy debtor or is associated with a debtor. Private employers, on the other hand, are prohibited from discriminating in employment against a bankruptcy debtor "solely" because of that status, but almost every court has found that prohibition does not extend to a private employer's refusal to hire a bankruptcy debtor.

In summary, employers should investigate the background of every employee they hire. The extent of that investigation may depend upon the position at issue, but in doing so, ensure that you are complying with the applicable state and/or federal laws.

Employers should also limit the type of information sought to that which is relevant to the job in question. Those employers who establish blanket policies risk liability if their standards or qualifications have the effect of excluding persons of a particular race, national origin or other protected characteristic. As for information that is requested, ensure the candidate verifies that the information provided is accurate as falsification or omission of information can be a separate reason for rejection (or dismissal if it is discovered after the person is hired).

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If you need help navigating the FCRA maze or evaluating your other hiring policies and procedures, please contact anyone in our Labor and Employment Law Practice Group.

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