



Virginia Workplace Law

Background Checks – Minefield For The Unwary

By: Annemarie Cleary. *Wednesday, January 18th, 2012*

Pepsi's \$3.13 million settlement with the EEOC over an overly broad background check policy should cause all employers who use such checks to re-evaluate their policies. While background checks can provide invaluable information to employers in the hiring process, if used improperly, they may be deemed tools of discrimination.

As we discuss in our **Talking Points Legal Tip video**, businesses need to be aware that the **Equal Employment Opportunity Commission** continues to focus on **employment screening** policies, including criminal background checks, credit checks and **social media** checks, in an effort to eradicate discrimination in the workplace. In the Pepsi case, the EEOC determined that Pepsi's broad policy excluded more than 300 black applicants because it excluded individuals convicted of minor offenses.

The concern is that the use of criminal background checks could have a disproportionate impact on minorities and contribute to discrimination. Any employer's blanket prohibition against hiring someone with a criminal conviction will bring extra scrutiny. Instead, employers should evaluate prospective employees on a case by case basis, weighing the nature and gravity of the criminal offense and the amount of time since the conviction against the job's specific duties and responsibilities.

The EEOC considers arrest records to be particularly unreliable indicators of guilt and discourages their use in the hiring process. According to the EEOC, because individuals are presumed innocent until proven guilty and because state criminal record repositories do not always report the final disposition of arrests, an arrest record is not a useful tool. If an employer decides it needs to ask about arrests and charges, the EEOC recommends limiting the inquiry to arrests and charges for offenses that are related to the position at issue and that the applicant be given an opportunity to dispute the validity of any record. Employers also need to remember that if a third party conducts the background check, the process is governed by the **Fair Credit Reporting Act**, and the employer must have specific disclosure forms signed by employees. Critically, these disclosure forms must be in a document separate from any other information or notice.

The EEOC also scrutinizes the use of traditional **credit reports** that evaluate an individual's financial situation. In light of the tough economy the last few years, the EEOC also has expressed concern that using credit reports as a screening tool could adversely affect protected classes. Credit checks provide useful information when employers are hiring for positions that involve access to or control over financial accounts, cash or

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property. But, there are limitations on how an employer may use this information. For example, an employer cannot refuse to hire an applicant because he or she filed bankruptcy. Nor can an employer discriminate on the basis of medical or health information revealed in a credit report.

Before an employer takes any adverse employment action based on a credit report (either the traditional financial report or a background check performed by a third party), the employer must notify the applicant in writing and supply a copy of the report and a summary of consumer rights under the Fair Credit Reporting Act to contest inaccurate information. Several states have enacted laws prohibiting the use of credit reports in the hiring process.

If you are using social media searches in the hiring process, be aware that you increase the risk of a discrimination claim. Information such as a person's race, sex and age may be readily apparent on social media sites such as **Facebook** and **LinkedIn**. But that information cannot be considered in the hiring process. So, what is an employer to do? To protect yourself from a discrimination claim, consider establishing a policy limiting who conducts social media searches for job applicants, and separate them from the interview process. Employers also should save or record all social media searches for the time period provided under applicable recordkeeping statutes or regulations.

If you need assistance making your way through this minefield, the **Virginia employment lawyers** at Sands Anderson PC would be pleased to assist.

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