Highway to the danger zone: employee background checks

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You can never have too much information when it comes to making hiring decisions; the more information you have, the more of an informed decision you can make. The quality of personnel will improve, the company reputation will be better protected, and employees will be safer in the workplace.

Although an interview is still the first step in an attempt to draw out information and screen applicants (note, however, that this has its own hazards), employers are increasingly utilizing some form of background check to gather information on prospective employees. According to a 2017 study, 96 percent of U.S. employers stated they conducted one or more kinds of employment background screening. Although some employers may be able to conduct an internal screening, many will need to seek the assistance of a third party to gather relevant information.

Employers must be careful when entering the arena of applicant and employee background checks – the process is subject to multiple layers of shifting regulatory regimes. Such checks can be a valuable source of information, but many employers and background check companies are still following outdated procedures. Without precaution, an employer can easily run afoul of the law when conducting or requesting a background check on an applicant.

The practice of conducting background checks often implicates federal, state and even local laws, and different kinds of information sought (and different methods of seeking it) trigger different protections. Recent case law has further complicated the matter, and different levels of regulation control how information can be obtained, as well as what and when that information may be considered.

At a federal level, the Fair Credit Reporting Act (FCRA) regulates the third-party performance of background checks. The FCRA allows for solicitation of a background check only for a "permissible purpose," and lays out the permissible reasons (including "employment purposes") for seeking such information. The FCRA requires that before an employer may have a background check run on an employee or prospective employee by a third party (a "consumer reporting agency"), the employer must make a "clear and conspicuous" written disclosure to the employee or prospective employee that a report will be obtained. Furthermore, the disclosure must be in a document that consists "solely" of that disclosure. The prospective employee must then authorize in writing the procurement of that report.

Two recent decisions by the U.S. Court of Appeals for the Ninth Circuit have highlighted that compliance with these requirements is not as easy as many people thought. In 2017, the Ninth Circuit decided in *Syed v. M-I LLC* that an employer willfully violated the FCRA when any additional terms were included in the disclosure and authorization. In that case, a broad liability release was included in addition to all the necessary terms. Many observers believed that this decision merely required that the disclosure be its own stand-alone document.

Then, earlier this year, the Ninth Circuit decided another disclosure case that was less obvious to the observer. In *Gilberg v. Cal. Check Cashing Stores LLC*, the court held that an employer included the necessary disclosure, but that the disclosure disclosed too much; the employer had included the necessary federal disclosures, but had also included disclosures required by state credit reporting laws. The disclosure did not consist solely of the federal disclosure, and was thus invalid.

The takeaway? Employers must give multiple, carefully crafted disclosures to an individual on which they will procure a background check, and the federal disclosure must be issued entirely on its own.

But beware: compliance with state law requirements can be just as difficult, if not more so. While not all states have additional requirements, many have passed their own laws to add requirements or restrictions they feel are important or necessary. For example, in Oregon, an employer may only obtain or use information that "bears on a consumer's creditworthiness, credit standing, or credit capacity" if that information is "sufficiently job-related," and the employer provides the reasons for using the information in writing to the employee. The information is sufficiently job-related if "an essential function of the position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit ... or the position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond."

Additionally, Oregon's "ban-the-box" statute makes it an unlawful practice for an employer to exclude an applicant from an initial interview solely because of a past criminal conviction. In practice, this means an employer may not require an applicant to disclose a criminal conviction prior to an initial interview. But if you are in Portland, you may be subject to a stricter requirement under city ordinance; an employer subject to that ordinance may consider an applicant's criminal history only after making a conditional offer of employment.

To further cement the fact that no part of this process is simple, even the question of which state or local laws may apply is not always easily answered. If the applicant, the employer and the job are all located in the same place, the answer seems simple, but this isn't always the case. Courts are undecided on how to apply these laws. The prudent choice might be to provide the necessary disclosures and follow both the requirements of the employer's state and the applicant's state.

With such a wide range of laws potentially implicated, employers should proactively reach out to counsel when implementing or reviewing background check policies. Then gain clarification regarding any remaining questions as to best practices in evaluating potential employees.

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