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By Richard D. Alaniz

Hiring is an expensive, time-consuming process, so employers want to make sure they get it right the first time. For many employers, background checks represent a key tool in ensuring the people they hire are trustworthy and have the skills, experience, and education they claim to possess. Delving into a job applicant's background can also help insulate organizations from lawsuits and charges of negligent hiring in case something goes wrong.

But a growing number of federal, state, and local laws have complicated the types of background checks employers can perform and how companies can utilize the information that checks provide. Federal laws, such as the Fair Credit Reporting Act (FCRA), the Americans with Disabilities Act (ADA), and Title VII of the Civil Rights Act of 1964 (which prohibits discrimination), to name only a few, all come into play when an employer conducts background checks, and recent interpretation of these laws have made background checks more complicated.

In response, fewer employers conducted credit and criminal background checks for job candidates in 2012 than in 2010, according to surveys by the Society for Human Resource Management. "Human resources professionals are looking more closely at the job-relatedness of these practices," said Mark Schmit, the organization's vice president of research, in a statement. "As a result, fewer employers are using background checks, and checks are often done for specific jobs or to comply with the law."

So how can an organization comply with the law, maintain a safe work environment, and minimize legal liability? Employers need to understand the different types of background checks, determine which laws impact them, create proper policies, and train employees to abide by them.

Different Types of Background Checks

The Federal Trade Commission (FTC) considers employment background checks to be "consumer reports" that fall under the FCRA. Before getting any consumer report for current employees or job applicants, the FTC requires employers to take several steps. Those include specifically alerting applicants and employees that the information in consumer reports may be used for hiring and other employment-related decisions.

Many companies rely on third-party vendors to conduct background checks. When using other companies to conduct background checks, employers must certify that these companies are in compliance with federal law.

On January 1, 2013, the Consumer Financial Protection Bureau (CFPB) took over FCRA enforcement from the FTC, and employers need to update all of their forms to reflect the new contact information for employees and job applicants.

"Consumer reports" is a catch-all term that includes specific types of background checks, including:

Credit history check. Credit history checks can provide extremely helpful insights into a candidate's background. This can be particularly important if employees oversee goods or money. But these types of checks are highly regulated under the FCRA, and some states have their own versions of the law that can be even tougher.

Drug tests. Employees who use illegal drugs or drugs not prescribed for them can be enormously costly, and many employers require a drug test. According to some reports, drug use in the workplace costs employers around \$100 billion every year in worker compensation costs, lost time, health care, and accidents.

Social media. A quick glance at someone's Facebook page can reveal far more about their character, interests, and hobbies than hours of interviews. However, employers who scope out the social media presences of current and potential employees need to be careful about how they respond to the information they find online. It's illegal to discriminate against anyone based on age, sexual orientation, race, or creed, among other areas.

Employers should only view information that's available to the public. In some states, including Maryland and Illinois, it's illegal for employers to require that job applicants and employees hand over their passwords to social media sites.

Past employment and reference checks. A background check that simply involves verifying salary, employment dates, and titles doesn't usually qualify as a consumer report. A more in-depth questioning may constitute an "investigative consumer report" under the FCRA, which brings additional disclosure requirements.

Education and professional licenses. While many job applicants try to burnish their credentials as much as possible, some go too far. Résumé puffery may take the form of claiming professional licenses that have lapsed or degrees that weren't quite completed.

The ramifications for failing to verify degrees and professional licenses can be serious for employees and companies alike. In 2012, Yahoo Inc. CEO Scott Thompson resigned after the company learned he never earned a degree in computer science, as Yahoo's filings with the US Securities and Exchange Commission stated.

Criminal records. A criminal background check represents one of the trickiest areas for employers to navigate and is something currently receiving a great deal of legal focus. If an employee with a criminal history commits a crime while on the clock, a company could quickly find itself facing a lawsuit for negligent hiring. However, the US Employment Opportunity Commission, which enforces Title VII, recently issued new guidance for employers about the use of arrest and conviction records. The EEOC stressed that employers must be very careful to avoid any type of discriminatory hiring practices when considering criminal history.

Local and state laws may be even more stringent. Last year, Newark, New Jersey, passed a law limiting employers' use of criminal background checks. The new law "prevents employers with five or more employees who do business, employ persons, or take applications for employment in the City of Newark, from asking applicants about their criminal history."

Civil court records. Civil court records, which can include tax liens and bankruptcy proceedings, are public information that can reveal important aspect of a person's character. However, the Federal Bankruptcy Act prohibits employers from discriminating against applicants because they've filed for bankruptcy.

Medical history. Medical background checks represent another thorny area. Some states strictly govern the confidentiality of medical records and generally only allow them to be accessed with the written permission of the applicant or employee. The Americans with Disabilities Act limits medical background checks to questions about whether workers can carry out their job duties.

Best Practices

If employers haven't recently considered their background check policies, now is an excellent time to review them. Following are a few things to consider:

Stay current on laws, guidances, and court rulings. Federal, state, and local laws can impact the types of background checks employers can conduct. When companies have multiple locations in different jurisdictions, compliance becomes even more of a headache. It's important to stay on top of new developments and involve in-house counsel, outside law firms, HR departments, and senior-level executives in the process of reviewing current policies and updating them where necessary.

Create specific documents for background checks. Employers need to be sure they create clear, specific documents so that potential employees as well as current employees understand when a consumer report will be conducted and what exactly it will entail. If employers haven't updated their forms since the CFPB took over the enforcement of the FCRA, they need to do so immediately.

Update training manuals and educate supervisors and hiring managers. Supervisors and hiring managers need regular updates and refresher training to be sure they explain exactly what employees and potential employees are signing under the FCRA.

Consider the timing. Generally, it makes the most sense to conduct background checks after a conditional job offer has been extended. This cuts down on the number of checks that must be conducted. It also minimizes the chances that potential employees can claim discrimination based on the information in the background check.

Customize checks to the job. Companies should consider whether the information a check provides is necessary for the position the employee will hold. For example, if a position involves driving a company vehicle, then it makes sense to review an applicant's past driving record. However, that wouldn't be necessary for someone with a desk job. Jobs with more responsibility and visibility should carry greater scrutiny than entry-level positions.

Document everything. Hiring managers should keep written notes about every decision they make, including how background checks were used and how that information was used in hiring decisions. This information can help the company defend itself against any investigations and lawsuits that may arise.

According to an AARP study, it can cost 50 percent or more of an individual's salary to replace someone who has quit or been fired. Employers who conduct smart, appropriate background checks can minimize turnover, while staying in compliance with the law and decreasing the chances of hiring-related lawsuits.

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