# Avoiding Missteps and Preventing Legal Liability in the Use of Background Checks

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Background checks are a critical screening tool for employers. However, it is imperative that companies conduct them, and take action in response to them, in a lawful manner. As illustrated through many recently filed lawsuits, this issue appears to have tripped up some of the largest companies in the country, who undoubtedly have sophisticated human resource personnel and otherwise competent in-house or outside counsel. The reality is that compliance is not always simple.

***Overview of the Laws***

Both state and federal laws govern an employer's ability to conduct background checks and take adverse action on information contained within an applicant or employee's criminal background. On January 1, 2015, the "Job Opportunities for Qualified Applicants Act" (the "Act") went into effect in Illinois. The Act, which is better known as the "Ban the Box" Law, prohibits employers, or any agent of an employer, from considering or inquiring into a job applicant's criminal background until the individual has been determined qualified for the position and notified of an impending interview, or, if the applicant will not be interviewed, until after a conditional offer of employment is made. The Act applies to any employers with at least 15 employees in the current or preceding calendar year, and any agent of such a person or entity, which includes third-party vendors. There are very few exclusions. The Act is enforced by the Illinois Department of Labor and violations can lead to penalties of up to $1,500 per occurrence. While this Illinois law is not overly difficult to comply with, the federal law has a few more twists and turns.

The federal Fair Credit Reporting Act ("FCRA") requires that before an employer obtains any form of consumer report, the employer disclose to the employee or applicant that the employer may use information contained within the consumer report as the basis for employment-related decisions.[1] The term "consumer report" is very broad and encompasses nearly every type of background report that could possibly be run on an individual. Specifically, it means "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (a) credit or insurance to be used primarily for personal, family, or household purposes; (b) employment purposes; or (c) any other purpose authorized under the FCRA."

[1] Illinois also has an Employee Credit Privacy Act, which prohibits employers from inquiring about an applicant's or employee's *credit* history unless a satisfactory credit history is a bona fide occupational qualification of the position. 820 ILCS 70/10.

The disclosure provided to the applicant or employee must be in writing and cannot be contained within an employment application. Rather, the disclosure must be a stand-alone document. By providing a separate document containing only the disclosure to the applicant or employee, the employer can ensure its compliance with this particular requirement of the FCRA.

Next, the FCRA requires that the employer obtain written authorization from the applicant or employee prior to conducting any screening. This authorization must be executed by the applicant or employee and can be obtained at the same time as the disclosure referenced above is given. In addition, if the employer wishes to retain the right to periodically check employee backgrounds during the period of employment, the document must clearly state that intent as well.

The next step in complying with the FCRA is to review the consumer report and to notify the applicant or employee before taking any adverse action. An employer must provide the applicant or employee with a copy of the consumer report and a copy of the Summary of Rights, which is available online.[2] This allows the applicant or employee the opportunity to refute any information in the report. For example, the report could contain information regarding someone with the same or a similar name, could include evidence of identity theft, or could include information that was properly expunged.

Finally, if the employer decides to take adverse action based upon information contained within a consumer report, under the FCRA, the applicant or employee must be provided with a notice advising the individual of the basis of the decision and the specific information relied upon. Moreover, the employer must provide the individual with: (i) the name, address, and phone number of the consumer reporting company that supplied the report; (ii) a statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it; (iii) a notice of the individual's right to dispute the accuracy or completeness of the information contained within the report; and (iv) information regarding how the individual can obtain an additional free report from the company within 60 days.

While these steps may seem a bit mundane and redundant, skipping any one of them can lead to potential liability. Violations of the FCRA can result in stiff penalties, including statutory, actual and punitive damages, in additional to attorneys' fees and costs. The penalties are greater if the violation is found to be willful. Also, these issues can be particularly problematic if the policy or procedure of the employer does not comply with the law and affects a group of people over time. This could lead to class action exposure.

[2] For a copy of the Notice, see: https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf (Please note that this document was updated in September 2018. Please make sure you are using the updated document.)

Using the appropriate disclosures and notices is only one piece in complying with federal law as it relates to employee background checks. Deciding whether or not to place an applicant in the "NO" pile due to information obtained through a background check can also be a source of liability. The Equal Employment Opportunity Commission ("EEOC") has issued Enforcement Guidance for employers regarding criminal background checks.[3] The Enforcement Guidance was issued as part of the EEOC's efforts to eliminate unlawful discrimination in employment screening, for hiring or retention, by entities covered by Title VII, including private employers as well as federal, state, and local governments.

The EEOC intended the document for use by (i) employers considering the use of criminal records in their selection and retention processes; (ii) individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and (iii) EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.

Criminal background checks fit within the definition of "consumer reports" and are, thus, governed by both the FCRA and the EEOC's Enforcement Guidance. Accordingly, when conducting a criminal background check of an applicant or employee, employers must comply with the FCRA, and before making a negative decision with respect to a candidate or employee, employers must abide by the EEOC's Enforcement Guidance.

The EEOC's guidance is somewhat similar to the FCRA, however, it provides that across-the-board prohibitions on hiring or promoting based upon the existence of some criminal history leads to the potential for discrimination and does not comply with the law. Essentially, the EEOC strives to prevent applicants and employees from being placed in the "NO" pile for hiring or promotion decisions simply because he or she has some sort of criminal background. Rather, the EEOC urges employers to make decisions regarding criminal background information that are job-related and consistent with business necessity. The mandate requires that companies consider the type of conviction, the timing of the conviction, and whether it is reasonably related to the position being applied for.

For example, if an applicant was convicted of check fraud and he or she is applying for a bookkeeping position, that would likely be considered a lawful basis for a denial decision because the conviction is reasonably related to the position applied for. The same is true for an applicant with a violent criminal history who is applying to work in a position with a vulnerable population; e.g. a school or assisted living facility. The safety of the vulnerable population would be considered a business necessity and, thus, a denial decision would likely be appropriate. However, the EEOC would probably frown upon denying a position to an otherwise qualified candidate who was convicted of check fraud or participating in a bar fight twenty years ago, when he or she is not applying to work with financial accounts or with the children or elderly. Basically, the EEOC expects employers to do some reasonable analysis regarding the specific

[3] https://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf

criminal history, rather than to automatically place the applicant or employee in the proverbial "NO" pile.

***Practical Considerations***

Based upon the recent lawsuits filed by disgruntled applicants and employees, and based upon the rulings from the various courts, there are certain steps that employers can take to ensure compliance with the law and avoid the potential for liability. One of the simplest ways to avoid liability for a screening decision is to use a third-party vendor to collect information and conduct the background checks on behalf of the employer. Vendors who specialize in this area are in the best possible position to understand the nuances in the law and to conduct the screening in a fashion that complies with the law. However, employers should understand and be knowledgeable about the vendor's process to be certain that it complies with the law. It would be a mistake to assume that all vendors are equally informed and competent. Obtaining a referral from a trusted resource may be the best way for an employer to narrow down the field of possible vendors. In addition, employers should seek strong indemnification language in the agreement with the outside vendor in order to shield themselves from liability for vendor missteps.

Not all employers are in the position to hire a vendor to handle this process. In that case, employers should have skilled human resource personnel who are well versed in the FCRA and the EEOC's Enforcement Guidance and should have counsel to rely upon when sticky situations arise. Indeed, counsel can provide direction not only in meeting the requirements of the FCRA and EEOC's Enforcement Guidance, but also when the employer must balance important considerations that arise with an applicant or an employee, who does have a criminal record, including any safety risk that person may bring to other persons he or she engages with in the work environment.

Reviewing your background check process is a worthwhile risk management strategy. As gleaned from recent litigation, disclosures to applicants and employees should be unambiguous, and easy to comprehend. Employers must not couple the disclosure with a waiver, release or any other miscellaneous information. Rather, it must be a stand-alone document. Employers need to pay attention to timing requirements and ensure that a copy of the report and summary of rights is provided to the prospective or current employee *before* taking any adverse action, and employers should be counseled to ensure that the prospective or current employee has an opportunity to dispute the report. Employers must also give careful consideration as to how any criminal conviction correlates with the position sought or currently held by the employee.

Simply put, performing background checks on applicants and employees remains a key component in an employer's hiring tool kit. Indeed, background checks can be the best way to uncover red flags that would otherwise be unknown regarding the applicant or employee. However, employers, their human resource personnel, and their counsel, must ensure compliance with the law and utilize a reasonable and thoughtful approach when deciding to exclude an applicant or employee from a job opportunity. In

many cases, employers are right to consider criminal convictions in hiring and, in fact, must do so given the potential liability they face in the event of any negligent hiring and retention claim resulting from harms caused by their employees. Giving careful consideration to EEOC guidance, particularly in making individualized assessments and allowing explanation or argument from the candidate regarding the circumstances of the offense, does not have to create a risk, but instead reflects an effort on behalf of the employer to ensure employee honesty, reliability, and even safety. As noted above, there are plenty of lawful reasons to place an applicant in the "No" pile, so long as it is not a matter of course, and so long as the individual executed an authorization and received the proper disclosures throughout the process. The bottom line is that employers must ensure that those who are in charge of hiring are effectively dotting their 'i's and crossing their 't's when executing the process in order to avoid the potential for liability.