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Background Checks: Recent Developments and Practical Considerations

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With the recent surge in social media and internet usage, conducting background checks has become a complex process for employers. Furthermore, new publications from the United States Equal Employment Opportunity Commission ("EEOC") and the United States Federal Trade Commission ("FTC") create additional hurdles for employers to jump as they screen job applicants. This article provides an overview of the legal regulations guiding the background check process, along with practical considerations for employers when screening applicants.

Why Conduct Background Checks?

Conducting background checks of potential employees provides many benefits to employers. Companies could avoid potential employees who might cause liability to the business, who might harm the business's reputation, or who might engage in theft, fraud, or workplace violence. Background checks could also ensure the potential employee does not have an interference with an essential job function, such as an applicant for a firefighter position who was convicted for arson. Employers might also be able to find applicants who are trustworthy and reliable. This type of information is valuable when making hiring decisions.

There are many types of background checks that employers can utilise, all of which could provide a wide array of information about the applicant. Employers can search for a person's criminal background, credit history, driving records, educational records, employment history, and military service, among other information. Employers also can look for an applicant's social media profiles, blogs, and webpages. When searching for these facts about an applicant's background, however, employers must be cautious to comply with the legal guidelines regulating this activity.

EEOC and FTC Guidelines

In 2014, the EEOC and the FTC released publications offering technical assistance and guidelines to employers on how the agencies' laws apply to employment-related background checks. The overarching emphasis of the publications is to ensure that employers avoid discrimination and breaches of privacy when screening applicants.

Employers are prohibited from checking the background of an individual when the decision to conduct the background check is based on the person's protected characteristic, such as race, national origin, colour, sex, religion, disability, genetic information, or age (40 or older). If the employer hires a third party that is in the business of compiling background information, the employer must comply with the Fair Credit Reporting Act ("FCRA"). FCRA mandates the employer provide stand-alone, written notice to the applicant that the employer might use background information when making employment decisions, and the employer must receive the written permission of the applicant to conduct the background check before doing so.

Further, employers cannot use any information to discriminate against an applicant based on his/her protected characteristics. The employer must apply the same standards to every applicant regardless of their protected characteristics and to ensure their employment decisions do not result in a disparate impact on individuals of a certain characteristic.

All decisions based on background information must be job-related and consistent with business necessity. This also applies to an applicant's arrest and conviction records. When determining how past criminal conduct can be linked to job positions, employers must conduct an "individualised assessment" before excluding an applicant based on his/her criminal background and, therefore, consider the nature and gravity of the offense, the time that has passed since the offense, and the nature of the job. Open communication between the employer and applicant regarding these factors, and the impact of the past criminal conduct,

is an important aspect of the individualised assessment.

If an employer decides to take an adverse employment action against an applicant based on the findings of the background check, the FCRA mandates the employer first provide written notice by way of a "pre-adverse employment action letter," a copy of the consumer report, and a copy of the notice entitled "A Summary of Your Rights Under the Fair Credit Reporting Act" to the applicant. The applicant would also be provided a set amount of time to contact the third party company that prepared the consumer report, to respond to the consumer report, and to provide the employer with information should he/she choose to dispute the report. If after receiving the applicant's response to the consumer report the employer decides to take an adverse action, the employer must provide the applicant with an "adverse employment action letter," which informs the individual in writing that he/she was rejected because of information in the report and that he/she has the right to dispute the accuracy of the report.

Employers are required to preserve employment records for one year after the records were made or after a personnel action was taken, whichever comes later. The FTC permits employers to dispose of background reports once they have satisfied all applicable recordkeeping requirements, but employers must do so in a secure manner.

Practical Tips for Employers

Employers who follow the EEOC and FTC guidelines and implement a few basic strategies will be in a better position to avoid engaging in prohibited acts when conducting background checks. All employers should beware of state and local laws that may contain additional parameters governing the screening process, and they should take note of pending legislation, like Ban the Box laws (which would effectively "ban the box" on job applications that asks job seekers if they have a criminal history), that also could impact employer background checks.

When employers search applicant names on the internet, they might come across information that lawfully can become the basis for making a hiring decision, such as illegal drug use, poor work ethic, poor communication skills, and negative feelings about previous employers. At the same time, however, employers must be careful because they may face a lawsuit for unlawful use of information obtained about the applicant's protected class status, and evidence of a background search may be revealed during the discovery phase of a lawsuit.

Thus, the individual(s) responsible for interviewing and hiring an applicant should not search for any background information on an applicant. Every employer should designate a person who is not involved in the interviewing and hiring process to check applicants' backgrounds, as such a practice gives further protection against allegations of discriminatory hiring decisions.
Employers using social media to screen applicants should obtain the applicant's written consent to an Internet search, establish one set of websites to be searched for all applicants, create a list of lawful information to be included in the search, consistently screen all applicants based only on the lawful information, document the reasons for the employment decision, and try to independently verify information from other sources. Employers must not connect with applicants on social media sites, or ask for their social media passwords, to gain access to their non-public social networking profiles.

Every employment decision based on background check information must be supported by legitimate, non-discriminatory reasons. Employers are well-advised to create and maintain documentation on every aspect of the screening and hiring processes. Those files should be separate and apart from any personnel file that the employer maintains, and confidentiality as to their contents should be preserved.

In addition to taking the above steps, the employer is well-advised to consult with employment counsel

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before any employment decision is reached based on information discovered in a background check as an "ounce of prevention is worth a pound of cure."

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