

9 Concepts To Consider When Conducting Background Checks

Law360, New York (March 21, 2014, 12:36 AM ET) -- On March 10, the Equal Employment Opportunity Commission and the Federal Trade Commission copublished new guidance that for the first time synthesizes the two agencies' rules on employee background checks.

The new guidance is contained in two documents, "Background Checks: What Employers Need to Know" and "Background Checks: What Job Applicants and Employees Need to Know," and it reflects not only the EEOC's concern about preventing unlawful discrimination, but also the FTC's concern about enforcing the Fair Credit Reporting Act.

A central theme is that employers still have wide latitude to conduct background checks. But, as the guidance also explains, there are significant protections for job applicants and employees, as well as important restrictions on employers' efforts to obtain and use individual background information. The guidance also underscores the opportunities available to job applicants and employees to correct their records in advance of adverse employment action even being considered.

Below are nine key concepts that employers should understand based on the new EEOC and FTC guidance.

1. Employers are still allowed to ask job applicants and employees for a wide range of individual background information and it, generally speaking, is not illegal to require an applicant or employee to submit to a background check.
2. But, regardless how background information is obtained, an employer that uses the information to make an employment decision must comply with three sets of laws: federal laws protecting individuals from employment discrimination, the FTC's rules relating to enforcement of the FCRA and any other applicable state or local laws.
3. Before obtaining job applicant or employee background information from a company that is in the business of compiling with such information an employer must do all of the following to comply with the FCRA:
 - The employer must tell the applicant or employee that it might use the information for decisions about his or her employment. This notice must be: (1) in writing, (2) in a stand-alone format, and (3) cannot be in an employment application. The employer "can include some minor additional information in the notice, like a brief description of the nature of consumer reports, but only if it doesn't confuse or detract from the notice."

- If the employer is asking a company to provide an "investigative report" (i.e., a report based on personal interviews concerning a person's character, general reputation, personal characteristics and lifestyle), then the employer also must tell the applicant or employee of his or her right to a description of the nature and scope of the investigation.
- The employer must get the applicant's or employee's written permission to do the background check. This can be part of the document used by the employer to notify the person that the employer will get the report. If the employer wants the authorization to allow background reports throughout the person's employment, then the notice must say so "clearly and conspicuously."
- The employer must certify to the company which it is getting the report from that the employer: (1) notified the applicant and got his or her permission to get a background report, (2) complied with all FCRA requirements and (3) will not discriminate against the applicant or employee or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

4. When taking an adverse action against a job applicant or employee, such as not hiring an applicant or firing an employee, based on background information obtained through a company in the business of compiling background information, the employer is required by the FCRA to give the applicant or employee all of the following: (1) a notice that includes a copy of the consumer report relied on to make the adverse decision, (2) a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which the employer should have received from the company that provided the report and (3) "notice in advance ... [that the applicant or employee] has an opportunity to review the report and explain any negative information."

5. After taking an adverse action against an job applicant or employee, the employer is required by the FCRA to tell the applicant or employee — orally, in writing or electronically — all of the following: (1) that he or she was rejected because of information in the report; (2) the name, address and phone number of the company that sold the report; (3) that the company selling the report did not make the hiring decision and cannot give specific reasons for it; and (4) that he or she has a right to dispute the report's accuracy or completeness and to get an additional free report from the reporting company within 60 days.

6. There also are limitations on the subject matter of an employer's lawful inquiry. Employers are not allowed to ask for medical information until a job is offered. And only in rare circumstances can employers ask a job applicant or employee for genetic information, including family medical history. Indeed, even in those rare circumstances when an employer can ask for genetic information, the employer should not use it to make an employment decision.

7. All the usual nondiscrimination laws apply in this area. Whenever an employer asks a job applicant or employee about his or her background, or uses the information obtained from such an inquiry, the employer must do so without discriminating on the basis of race, national origin, color, sex, religion, disability, genetic information (including family medical history), older age (40 or older) or other protected status.

8. Improperly obtaining or using a background check can constitute unlawful discrimination either as “disparate treatment” or “disparate impact.” For example, it would be unlawful disparate treatment to reject job applicants of one ethnicity with criminal records, but not reject other applicants with the same criminal records. Likewise, according to the EEOC, it would be unlawful “disparate impact” if the employer’s policy or practice (1) excludes people with certain criminal records to the disadvantage of individuals of a particular race, national origin or other protected characteristic, but (2) does not accurately predict who will be a responsible, reliable or safe employee. Or, to state the latter point more simply, any employer policy or practice with a disparate impact has to be job-related and consistent with business necessity.

9. This final point may be the most important: Any job applicant or employee can ensure that mistakes in his or her own report are corrected before they cause problems. He or she can not only ask the background reporting company to fix the mistake and send a copy of the corrected report to the employer, he or she can also tell the employer about any mistake or report directly. It does not cost an individual anything to fix mistakes in advance, before they are seen by an employer. A diligent job applicant or employee can get a free copy of his or her credit report either by visiting www.annualcreditreport.com or calling 1-877-322-8228.

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