

Important Facts about Background Checks: Improper Administration May Actually Increase Your Company's Liability

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Companies conduct background checks of applicants, and at times existing employees, for a variety of reasons including, the desire to:

- Avoid exposure to negligent hiring/retention lawsuits;
- Increase the security of the company's assets and employees;
- Reduce liability from inconsistent hiring or screening practices;
- Proactively reduce the risk of employee-related loss; and
- Mitigate the likelihood of an adverse incident occurring on company property that could jeopardize customer or employee confidence.

However, many employers do not realize their background check policies and processes may actually subject them to increased liability. Background checks are subject to close scrutiny by both the Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC). If your company uses a third party private company to perform background checks on prospective or existing employees, this is considered a consumer report governed by the Fair Credit Reporting Act (FCRA).

The FCRA provides for the recovery of statutory damages of \$100 to \$1,000 per violation from employers who fail to comply with the processes discussed below in conducting a background check. The FCRA also allows prevailing parties to seek punitive damages and recover their attorneys' fees. Attorneys are increasingly bringing class action suits against employers for violations of the FCRA.

Likewise, the EEOC has filed actions in federal court seeking damages for violation of Title VII of the Civil Rights Act of 1964 against employers, alleging the employer's background check policies have a discriminatory effect on minorities and/or male applicants.

RECENT EEOC AND FTC GUIDANCE

The EEOC and the FTC recently published guidance about how the laws administered by these agencies apply to employment background checks.

The EEOC believes an employer's unfettered use of criminal background checks causes a disparate impact to minorities applying for employment. In accordance with this guidance, the EEOC urges employers not to make an inquiry about applicants' criminal backgrounds until after the decision has been made to offer employment. Once that decision has been made, the employer may, in certain circumstances, condition an applicant's employment on successfully passing a background check.

If your company's employment application still requires applicants to disclose whether or not they have been convicted of a criminal offense, include disclaimer language that makes it clear that a past criminal conviction will not automatically disqualify an applicant's employment. If your company routinely performs criminal background checks of job applicants, it is wise to have a written policy governing those checks. The policy should include a list of factors the company may consider in determining the applicant's suitability for employment, such as:

- Relevance of the crime to the position sought or held;
- The nature of the work to be performed or being performed;
- Time since the conviction;
- Age of the candidate/employee at the time of the offense;
- Seriousness and specific circumstances of the offense;
- The number of offenses;
- Whether the applicant/employee has pending charges;
- Any relevant evidence of rehabilitation or lack thereof; and
- Any other relevant information, including information submitted by the candidate/employee or reasonably requested by the company.

Employers must also make sure they are treating everyone equally. The EEOC considers background checks based on a protected class, such as race or national origin, to be illegal.

The EEOC also does not want employers to have a blanket policy of performing criminal background checks on all applicants. Instead, the employer must be able to show there is a business necessity for the check. For example, it may be difficult for an employer to prove a business necessity to perform a background check on an applicant for a position as the company's receptionist or for someone who will only perform general labor for the company. Conversely, it is much easier to show a business necessity in the event the employee will work in a customer's residence or will handle money for the company.

FCRA PROCESSES

As mentioned above, the FCRA has strict processes that must be followed when employers use third party credit reporting agencies to perform background checks on applicants or existing employees. Applicants or employees must be given separate written notices concerning their rights under the FCRA and that the employer may use information in the report that could affect their employment. The employer must also obtain written consent from applicants or employees to perform the background checks.

In the event the resulting background report reveals information that may affect the employability of an applicant or existing employee, the employer must provide the applicant/employee with what is commonly referred to as the "Pre-Adverse Action" notice. This notice informs applicants and employees that their background reports contain derogatory information that may affect their employment. A copy of the background check report and also a form entitled "A Summary of Your Rights under the Fair Credit Reporting Act" must be included with the Pre-Adverse Action notice. The purpose of the Pre-Adverse Action notice is to provide an applicant or employee with the opportunity to contact the company that performed the

background check to request its correction in the event the report contains information the applicant/employee believes is false. If the employer ultimately decides to take an adverse action (not hire the applicant or terminate or take some other adverse employment action against an existing employee), the employer must provide the applicant/employee with a second notice, commonly referred to as the "Adverse Action" notice. This second notice:

- Informs the employee/applicant about the adverse employment action that has been taken based on the information found in their background check;
- Must provide the applicant/employee with the name, address, and phone number of the consumer reporting company that supplied the report;
- Must also include a statement that the credit reporting agency providing the report did not make the decision to take the adverse employment action; and
- Inform the employee/applicant that they have a right to dispute the accuracy of the report.

In summary, don't allow a tool your company uses to reduce liability to actually increase your exposure to government or private actions for violations of the FCRA or Title VII of the Civil Rights Act of 1964.

Make sure you have a properly drafted background policy in place. Also, ensure that you are familiar with the consents and notices you must provide applicants and existing employees in the event you decide to take an adverse action based on the results found in a background check.

If you'd like more information about SWBC PEO Services, call **877-704-0454**.
