

Pressure on the Policy: Trends in the External Environment Driving Employers to Review Employment Background Screening Practices

Employers need employment screening more than ever to help create a safe workplace, and at the same time, retain the flexibility and fair-mindedness to ensure equitable hiring.

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While [employment background screening](#) is virtually ubiquitous among large companies and rapidly growing with small businesses, it also is a practice that's subject to increasing regulation and attention from litigators, government agencies, and advocacy groups. Newly enacted and proposed state and federal legislation and increased Equal Employment Opportunity Commission scrutiny are forcing employers to take another, closer look at their employment screening programs to ensure they're addressing the risks of a bad hiring decision, while mitigating the risks of litigation as a result of non-compliance with applicable state and federal laws and the risks that come with inconsistent application of a screening policy in hiring. The threat of negligent hiring lawsuits and other risks associated with a bad hire drive policy decisions at one end, while at the other end there's the increased focus of lawmakers and administrative agencies on reducing challenges faced by ex-offenders in securing a job and increasing scrutiny on the application of screening policies. Employers must walk a careful line between the proverbial rock and a hard place.

Some of the areas of particular sensitivity today are the use of criminal and credit checks by employers. Since a majority of employers perform criminal checks today, this affects many companies. The EEOC, under Title VII, has taken a keen interest in background checks as they relate to the potential to have a disparate impact on applicants who fall into one of the areas with protected class status (e.g., race, national origin). For criminal checks, this translates into: a deeper look at academic and government studies focused on time-based recidivism rates of ex-offenders; ensuring a crime's relationship to the duties of a specific job or job classification; and

the application of fair and consistent screening policies in hiring practices across all protected groups. Because of, among other things, racially correlated disparities in credit ratings, the EEOC has also scrutinized the use of credit checks due to their potential for discriminatory disparate impact.

Two other developments are also noteworthy. Some states and even some cities are actively passing new laws that have an impact on background check programs. As one example, on April 12, 2011, the state of Maryland approved a law limiting the use of credit history information for purposes of employment (goes into affect later this year), and as another, the City of Philadelphia recently passed an ordinance that prohibits employers from including on job applications questions about the applicant's criminal background. This highlights another layer of complexity to an employer's compliance efforts, namely the need to account for jurisdictional variation.

While employers face increasing scrutiny from the EEOC and a changing landscape of state and local legislation, they must simultaneously deal with the potential implications of a high number of negligent hiring and retention lawsuits and their affect on company hiring policies. In these cases, a completely different standard of review is applied by juries being asked to decide if the employer exercised reasonable care to detect potential discoverable issues (such as a prior conviction) that might have disqualified the candidate for employment as unfit for the particular position. For employers, the costs of not taking reasonable care in the hiring process are real. In fact, according to *USA Today*, the average settlement in a workplace violence lawsuit exceeds \$1.6 million per case. In addition to addressing negligent hiring concerns, background checks can also help employers protect their work-

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place from the risks of fraud, theft, and workplace violence, and improve the quality of hiring decisions, helping to reduce turnover and improve business performance. Furthermore, many industry regulating bodies today acknowledge the importance of screening and require that employers conduct background checks in order to meet industry compliance requirements.

What, then, can companies do to walk this line between mitigating discrimination risks on the one hand, and negligent hiring and other business risks on the other, especially since the controlling legal standards are not static and will continue to evolve through court decisions and agency guidance? Here are some steps:

- *Designate a subject matter expert*—The importance of this position cannot be overstated. This is not an afterthought that gets assigned to someone's overworked assistant. The person must be thoroughly familiar with the various intersecting and inter-related federal and state laws, including the federal Fair Credit Reporting Act, which covers all aspects of background screening, not just the use of credit history information. This person works with management, legal, HR, and the background check provider, taking ownership of all employment screening processes.
- *Evaluate screening program infrastructure*—Ensure all unique requirements for background checks are met, for all applicable jurisdictions, including required authorization and disclosure forms enabling applicants to provide their consent to submit to background screening.
- *Coordinate hiring and screening programs*—Ensure all hiring professionals are familiar with the background screening process and its basic legal requirements, including Title VII and the FCRA.
- *Identify all state and local legal requirements*—In addition to the FCRA, some states and cities have their own versions of federal laws, plus industry-specific regulations that may apply. Companies must also understand the laws and reg-

ulations that constrain background check providers, while also ensuring they are not misusing information that can be reported by the background check provider. For example, it's possible that even if a given piece of information can be reported by a background check provider, laws and regulations may prohibit a company from using that information.

- *Identify positional variations*—A position-specific risk assessment is appropriate for many companies with a broad diversified workforce. Link the job responsibilities of the position with the searches being performed. For example, running a credit check on an individual with no fiduciary responsibility or access to company assets or intellectual property is usually not a best practice. Having unique requirements for employees who, for example, handle money or sensitive information (e.g., SSNs, credit card numbers), drive, handle machinery, or work with sensitive populations (e.g., children, the elderly) helps employers strike a balance between various, and sometimes competing, risk considerations.

When developing an employment screening policy, the details are critical. The company's policy documents may end up filed with a court as exhibits, and even admitted at trial if the company has to defend civil or administrative litigation. It is important to be certain that: the process, policies, and documents comply with all applicable laws; all documents are clear, contain the necessary disclosures, and are securely and privately handled and stored: the policies are clear, fair and regularly updated; and that the entire company is familiar with the policies and their importance. Employers need employment screening more than ever to help create a safe workplace, and at the same time, retain the flexibility and fair-mindedness to ensure equitable hiring.

Note: This article is intended for informational purposes. It does not constitute, and should not substitute for, specific legal advice. You should consult experienced legal counsel for answers to specific legal questions.

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