

Background Checks in Employment

Editor's Note: This checklist provides a resource for counsel describing issues to consider in assisting employers to review, maintain, and implement legally compliant background check practices. It isn't a comprehensive review of all applicable laws pertaining to background checks.

This checklist was contributed by Christina A. Stoneburner and Brian J. McGinnis of Fox Rothschild LLP.

Benefits of Background Checks

There are many reasons employers decide to perform background checks on applicants for employment or current employees seeking promotion or other advancement:

- Confirmation of Qualifications.** Background checks provide an opportunity for employers to confirm that what applicants/employees present about their credentials (experience, work history, educational degrees, professional licensures, etc.) is truthful and accurate.
- Litigation Avoidance.** Properly performed and reviewed background checks can reduce the risk of litigation later on during an employee's employment (e.g., negligent hiring lawsuits).
- Reduction of Other Risks.** Background checks also can reduce other risks:
 - Workplace Violence/Harassment Prevention.* Has an applicant or employee engaged in violent behavior in the past? Has the applicant or employee been accused of discrimination or harassment in previous employment?
 - Workplace Honesty.* Has an applicant or employee exhibited past behavior that calls into question his or her honesty or integrity? (e.g., embezzlement, workplace theft, civil or criminal fraud, etc.).

Equal Employment Opportunity (EEO) Considerations

While many EEO laws (e.g., Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act, the Age Discrimination in Employment Act, etc.) don't expressly refer to background checks in their statutory text, improperly conducted background checks may implicate EEO issues.

- Disparate Treatment.** Background checks may reveal information about an applicant or employee that places him or her in a protected class under applicable law (e.g., race, national origin, age, religion, disability, sexual orientation, gender identity or expression, etc.). Employers shouldn't consider (or appear to consider) any protected class information revealed by a background check in making any hiring or employment decision.
- Disparate Impact.** Where background checks tend to reveal information that disproportionately results in members of a protected class not being hired or denied promotion, employers face the risk of a disparate impact claim under applicable EEO laws.

Fair Credit Reporting Act (FCRA) Obligations

Many employers use third-party providers known as consumer reporting agencies (CRAs) to perform background checks. Employers' use of CRAs is governed by the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*

FCRA Compliance Issues. The FCRA includes complicated and strict requirements for certain kinds of background checks for employment purposes. Please note: the FCRA covers both applicants for employment as well as current employees.

Consumer reports. Generally, the FCRA defines a consumer report as any written, oral, or other communication of information by a CRA relating to an individual's:

credit worthiness;

credit standing;

credit capacity;

character;

general reputation;

personal characteristics; or

mode of living

when the information is used or expected to be used in whole or in part for employment purposes. There are some exceptions to this definition.

Investigative consumer reports. The FCRA defines an investigative consumer report as a consumer report (or a portion of a consumer report) within which information on an individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with:

neighbors;

friends;

associates; or

acquaintances

of the individual, or others who may have knowledge about these items. Investigative consumer reports contain specific, additional requirements for disclosures and certifications.

Employment purposes. The FCRA defines employment purposes as a consumer report used to evaluate a person for employment, promotion, reassignment, or retention.

Disclosure. Prior to obtaining a consumer report from a CRA for employment purposes, the employer must disclose to the individual that a report may be sought. The disclosure must:

- include notification that the employer may obtain a consumer report for employment purposes;
- be clear and conspicuous;
- be in a document that contains the FCRA notice only (i.e., the notice must not address other topics).
- Written consent.** The individual must provide written authorization for the employer to obtain a consumer report.
- Certification.** When requesting a consumer report from a CRA for employment purposes, the employer must certify to the CRA that the employer will comply with the FCRA's disclosure and adverse action requirements and that the employer will not use the consumer report to violate EEO requirements.
- Adverse employment actions based on consumer reports.** If an employer takes adverse action against an individual on the basis of a consumer report or investigative consumer report, the employer must follow additional procedures.
- Adverse action is defined as a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.
- Before the adverse action, the employer must provide a pre-adverse action notice to the individual, which must include:
 - copy of the consumer report; and
 - written summary of the individual's rights under the FCRA (the CFPB maintains a model summary of rights on its website, see below).

The pre-adverse action notice must be provided in writing, and the employer should keep a record.

- Adverse action – timing. The FCRA doesn't state how long an employer must wait between issuing the pre-adverse action notice and taking the adverse action. As a best practice, employers should wait a reasonable amount of time (e.g., 5-10 business days).
- After the adverse action, the employer must provide a post-adverse action notice to the individual, which must include:
 - notice regarding the adverse action;
 - the name, address, and phone number of the CRA that provided the report, along with a statement that the CRA itself didn't make the adverse decision and can't provide information about the reasons for the adverse action;
 - notice of the individual's right to contest the consumer report's contents with the CRA;
 - notice of the individual's right to request an additional, free copy of the consumer report from the CRA within 60 days, subject to the individual providing the CRA with proper identification; and

There are additional requirements if the individual's credit score was used as a basis of the adverse action.

These items may be provided in writing, orally, or electronically. As a best practice, employers should provide these items in writing and keep a record.

Compliance with the FCRA requirements and procedures listed above, however, isn't the end of the inquiry:

FCRA Updates. The federal agencies listed below administer the FCRA and occasionally issue updated rules and guidance relating to employers' FCRA obligations.

For example, in September 2018, the Consumer Financial Protection Bureau required the FCRA Summary of Rights to include information regarding individuals' ability to place a security freeze on their credit reports.

Employers should regularly monitor the agencies' postings for updates:

Federal Trade Commission (FTC)

Consumer Financial Protection Bureau (CFPB)

State & Local Requirements

State and local governments may have their own requirements applicable to background checks. Employers should review the applicable laws in their jurisdictions. These laws may mirror the FCRA or require different notices when adverse action is taken, require specific authorizations before obtaining a credit report, or limit the information that may be obtained or used during a background check.

See, e.g., Arizona's state-level FCRA, Ariz. Rev. Stat. §§ 44-1691 through 44-1698.02, essentially mirroring the FCRA employment-related provisions

See, e.g., California's Labor Code §1024.5 and California's Civil Code §1785.13, respectively: (1) prohibiting an employer from obtaining credit history unless the individual works in or is applying for one of eight enumerated positions and (2) prohibiting credit reporting agencies from including in a credit report records of arrest, indictment information, misdemeanor complaint, or conviction of a crime that predates the report by more than seven years.

See, e.g. New Jersey's state-level FCRA, N.J.S.A. §§ 56:11-29 through 11-41, establishing a summary of rights under the NJFCRA that must be given to employees and applicants when an adverse action is contemplated.

See, e.g., the Philadelphia Fair Practices Ordinance, Unlawful Credit Screening Practices in Employment at Philadelphia Ordinances § 9-1130.

Criminal Background Checks

Employers may wish to receive and review Criminal History Information (CHI), such as records of arrests and convictions, when undertaking a background check on an applicant or employee.

EEO Considerations. (See above).

The U.S. Equal Employment Opportunity Commission (EEOC) has issued guidance regarding employers' consideration of arrest or conviction records to make employment decisions.

The EEOC takes the view that in many instances, such considerations in employment decisions may violate Title VII of the Civil Rights Act of 1964 and create liability for a disparate treatment or disparate impact claim.

Generally, employers may not have blanket rules that a conviction is automatically disqualifying. Notices to applicants that a background check will be required should also note that a conviction isn't automatically disqualifying. In general, arrests that didn't result in conviction, shouldn't be considered.

To be disqualifying, a conviction must be "job-related." The EEOC Guidance lists several factors to consider when determining if the conviction should be disqualifying.

Mistaken Identity. When conducting a background check that includes CHI, employers should verify the CHI matches the applicant or employee (e.g., does this arrest record for John Smith match our applicant, John Smith?).

State/Local Law Considerations. Many jurisdictions have particular rules and regulations about how CHI may be received, used, and considered in employment decisions. A growing number of states and localities have moved to pass "Ban the Box" laws, which have tightened restrictions on employers' ability to consider CHI for employment purposes. These laws also often govern the timing of when an employer may obtain a criminal background check, with some requiring an employer to wait until after a conditional offer of employment is made and some allowing the check once some initial part of the application process like the first interview is completed.

See, e.g., the Pennsylvania Criminal History Information Act, 18 Pa. C.S.A. § 9125.

See, e.g., the New Jersey Opportunity to Compete Act, N.J.S.A. §§ 34:6B-11 through 34:6B-19.

See, e.g., the Philadelphia Fair Criminal Record Screening Standards Ordinance, Philadelphia Ordinances §§ 9-3501 through 9-3510.

See, e.g., the New York City Fair Chance Act, prohibiting any criminal background check or inquiry until after a conditional offer of employment is made.

Best Practices. Where CHI may be considered for employment purposes under applicable law, employers should consider some best practices:

Job relatedness. Employers should consider whether the CHI revealed is job-related. For example, when considering applicants for a youth swimming instructor position, a prior conviction for child endangerment will be much more job-relevant than a disorderly persons offense. If the CHI isn't particularly job-related, the employer should evaluate whether it makes sense to consider that particular CHI for employment purposes.

Underlying conduct distinction. Sometimes, state and local laws restrict employers from considering only the fact of an arrest or conviction for employment purposes. In these circumstances, employers

may be permitted to conduct their own investigations or review of the underlying facts of the incident for employment purposes.

Remoteness. Employers should consider giving less weight, if any at all, to CHI relating to incidents occurring many years prior to the background check.

Other legal requirements. In certain circumstances, laws may prohibit employers in particular industries from hiring employees with certain categories of convictions. Employers should review applicable law in this area to maintain compliance.

Social Media Background Checks

Employers may wish to conduct a background check for applicants or employees that includes a review of the individual's public social media presence.

Mistaken Identity. As above, when conducting a background check that includes review of an applicant or employee's public social media presence, make sure to confirm the social media account actually belongs to the applicant/employee.

EEO Considerations. Review of an applicant's or employee's public social media presence as part of a background check may reveal protected class information (e.g., race, national origin, age, religion, disability, sexual orientation, gender identity or expression, etc.) about that individual under applicable law.

Employers shouldn't consider (or appear to consider) any information revealed by a social media background check that pertains to protected class status as part of any hiring or employment decision.

Employers also should screen all applicants'/employees' social media presence in the same manner to minimize the risk of a discrimination claim.

National Labor Relations Act (NLRA) Considerations. Section 7 of the NLRA protects employees' rights to engage in protected concerted activity. Please note: this protection applies to employees even where the employee isn't a member of a unionized workforce.

Please note: this protection applies to employees even where the employee isn't a member of a unionized workforce.

Review of an applicant's or employee's public social media presence as part of a background check may reveal information about the individual that represents protected concerted activity under Section 7 of the NLRA.

Generally, employers should refrain from considering (or appearing to consider) information that reveals an individual's participation in any of the following in making employment decisions, in order to minimize the risk of an unfair labor practice (ULP) charge:

Affiliation with or support of a labor union;

Discussions about labor unions or unionizing;

Discussions about wages or hours;

- Discussions about management decisions regarding workplace conditions;
- Discussions about other terms and conditions of employment.
- State & Local Laws.** There are a number of other state/local law considerations to evaluate as well, including:
 - Lawful off-duty conduct laws.** Social media background checks of applicants or employees may reveal information about the individual's activities that isn't illegal but that the employer nevertheless views with disapproval.

A number of states have laws prohibiting employers from making adverse decisions on the basis of applicants' or employees' lawful off-duty conduct. Employers should review the state and local laws in their jurisdictions on this point.

- See, e.g., Colorado's off-duty conduct law, Colo. Rev. Stat. § 24-34-402.5, which generally prohibits employers from terminating employees on the basis of an employee's "engaging in any lawful activity off the premises of the employer during nonworking hours," subject to certain, limited exceptions.
- Social media passwords.** A growing number of states prohibit employers from requiring or requesting applicants or employees provide their personal (i.e., unrelated to business) social media account passwords. Employers should review the state and local laws in their jurisdictions on this point. As a best practice, employers should generally avoid requiring or requesting this information, unless required to do so by other law.
- See, e.g., New Jersey Personal Accounts Law, N.J.S.A. §§ 34:6B-5 through 34:6B-10.

Other Considerations

- Maintenance/Disposal of Background Check Files.** Background check materials should be kept and maintained confidentially, on a need-to-know basis, and should be securely stored/disposed of.
 - Are background check materials kept as hard copy files? If so, ensure they are kept securely (e.g., in a locked filed cabinet, in a locked office, restricted to HR's filekeeping system, etc.).
 - Are background check materials kept electronically in the employer's computer systems? If so, ensure they are kept securely (e.g., on a password-protected device, a password-protected folder or shared drive, implementing system resources to create user restrictions on who can access the file(s), etc.).
 - Advise HR team members, supervisors/managers, and any other employees who may review background check materials in connection with employment decisions that information in background check materials is to be kept confidential and on a need-to-know basis.
 - Ensure that background check materials that are no longer needed are disposed of securely (e.g., shredding instead of simply being put into trash cans).
 - Failure to maintain or dispose of background check materials in a confidential and secure way may expose the employer to liability (e.g., defamation claims, claims of invasion of privacy, violations of

applicable privacy statutes, etc.).

- Document Retention Requirements.** EEOC regulations require that all documents related to an applicant must be retained for one year. If a charge of discrimination is filed, documents must be maintained until the completion of the charge.
 - Employers should also consult applicable federal and state statutes of limitations for failure to hire claims or violations of FCRA or Ban the Box laws to determine the length of time that background check material should be retained.
 - Title VII has a two-year statute of limitations.
 - FCRA claims must be brought no later than two years after the date of discovery of a violation, but no later than five years after the cause of action arose.
 - State local anti-discrimination and Ban the Box laws may have different statutes of limitations.
- Regular Review.** Ensure that background check procedures (including forms, processes, information that is/isn't considered in employment decisions after background checks are received, etc.) are regularly reviewed for legal compliance and best practices. A review at least once a year is recommended, as well as in connection with updates to applicable laws.
- Regular Training.** Ensure that all employees in charge of administering background checks, reviewing background check materials, or maintaining/disposing of background check materials (e.g., HR team members, supervisors/managers who have input into the hiring process, etc.) receive regular training on legal requirements and best practices. Such training at least once a year is recommended, as well as in connection with updates to applicable laws.

©2019 The Bureau of National Affairs, Inc. All rights reserved. Bloomberg Law Reports® is a registered trademark and service mark of The Bureau of National Affairs, Inc.

Disclaimer: This document and any discussions set forth herein are for informational purposes only, and should not be construed as legal advice, which has to be addressed to particular facts and circumstances involved in any given situation. Review or use of the document and any discussions does not create an attorney-client relationship with the author or publisher. To the extent that this document may contain suggested provisions, they will require modification to suit a particular transaction, jurisdiction or situation. Please consult with an attorney with the appropriate level of experience if you have any questions. Any tax information contained in the document or discussions is not intended to be used, and cannot be used, for purposes of avoiding penalties imposed under the United States Internal Revenue Code. Any opinions expressed are those of the author. The Bureau of National Affairs, Inc. and its affiliated entities do not take responsibility for the content in this document or discussions and do not make any representation or warranty as to their completeness or accuracy.