

CRIMINAL BACKGROUND CHECKS: A GUIDE FOR PENNSYLVANIA EMPLOYERS

(Part Two)

In Part One of our discussion of criminal background checks, we asked and answered *why* employers conduct criminal background checks of applicants and employees, and identified *legal risks* associated with requiring applicants and employees to submit to criminal background checks.

In Part Two of our discussion of criminal background checks, we address *how* employers may conduct criminal background checks that comply with federal, Pennsylvania and municipal law. Please keep in mind that the content of this article is not legal advice; it is intended only to provide a general guide to its subject matter. You should seek specialist advice about compliance in your specific circumstances.

Step One: ascertain which laws – federal, state, local – may apply to your undertaking to conduct a criminal background check. For example, is employer planning to hire a candidate to work in Philadelphia? If so, then you must be familiar with Philadelphia’s “ban the box” limitations placed on an employer’s lawful ability to conduct such a check. Is a candidate a New Jersey resident? If so, then you want to pay close attention to bills pending in New Jersey’s Assembly; by year’s end, New Jersey will likely enact legislation that will severely curtail use of criminal background checks on residents of the Garden State.

Step Two: in all cases, make sure that you’re treating everyone equally. It’s illegal to check the background of applicants and employees when that decision is based on a person’s race, national origin, color, sex, religion, disability, genetic

information (including family medical history), or age (40 or older). For example, asking only people of a certain race about their criminal records is evidence of discrimination.

If you plan to purchase criminal background reports from a company in the business of compiling background information, there are procedures the Fair Credit Reporting Act (FCRA) requires beforehand:

- Tell the applicant or employee you might use the information for decisions about his or her employment. This notice must be in writing and in a stand-alone format. The notice can't be in an employment application. You 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.
- Get the applicant's or employee's written permission to do a criminal background check. This authorization can be part of the document you use to notify the person that you will get the report. If you want the authorization to allow you to get background reports throughout the person's employment, make sure you say so clearly and conspicuously.
- Certify to the company from which you are getting the report that you:
 - Notified the applicant and got his permission to get a background report;
 - Complied with all of the FCRA requirements; and

- Won't discriminate against applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

Step Three: Using Background Information

Any background information you receive from any source must not be used to discriminate in violation of federal law. This means that you should:

- Apply the same standards to everyone, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, if you don't reject applicants of one ethnicity with certain criminal records, you can't reject applicants of other ethnicities because they have the same or similar criminal records.
- Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex or religion; among people who have a disability; or among people age 40 or older. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, such a policy or practice may have a "disparate impact" and is not "job related and consistent with business necessity."

- Be prepared to make exceptions for problems revealed during a background check that were caused by a disability. For example, if you are inclined not to hire a person because of a problem caused by a disability, you should allow the person to demonstrate his or her ability to do the job - despite the negative background information – unless doing so would cause significant financial or operational difficulty.

When taking an adverse action (for example, not hiring an applicant or firing an employee) based on criminal background information obtained through a company in the business of compiling background information, the FCRA has additional requirements:

- Before you take an adverse employment action, you must give the applicant or employee:
 - A notice that includes a copy of the consumer report you relied on to make your decision; and
 - A copy of “A Summary of Your Rights Under the Fair Credit Reporting Act,” which you should have received from the company that sold you the report.

By giving the person the notice in advance, the person has an opportunity to review the report and explain any negative information.

- After you take an adverse employment action, you must tell the applicant or employee (orally, in writing, or electronically):
 - That he or she was rejected because of information in the report;

- The name, address, and phone number of the company that sold the report;
- That the company selling the report didn't make the hiring decision, and can't give specific reasons for it; and
- That he or she has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.

Conclusion

Criminal background checks are an excellent hiring tool, but only if they are used properly. Legal landmines associated with using such background checks abound. Please seek advice from legal counsel before beginning to use them.