RULES ON THE USE OF EMPLOYMENT BACKGROUND CHECKS

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Many businesses make it a practice of having background checks performed on job applicants or on current employees who are up for a promotion. This is becoming more common in the transportation industry where employees are often entrusted with the valuable property of the carrier’s customers. While the term “background check” is often associated with a criminal history, it may also include a credit history and in the transportation world, employers may also use the FMCSA pre-employment screening service which provides information on a commercial driver’s driving record. If this sort of due diligence is used when making employment decisions, your company needs to understand its obligations under the law before using background information to make decisions on hiring, retention, promotion or reassignment of employees.

EVERYONE OR NO ONE

As a general practice, if your company does background checks on applicants or employees for a certain position, it should do them for all applicants and employees for that position. In other words, if your company wants to have background checks performed when filling a driver position, all applicants for that position should be subject to a background check. Deciding to do a background check of an applicant or employee based upon that person’s race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older) is illegal. This may seem like common sense, but cases are popping up across the country with claims of discriminatory practices by employers who selectively use background checks when making a hiring decision.

BEFORE YOU START

The Fair Credit Reporting Act (FCRA) requires that an applicant or employee must be given clear written notice of the fact that the employer may use information received from their background check when making an employment decision. Under the FCRA, this notice must be a stand-alone writing and may not be contained or hidden within the employment application. Additionally, employers must request that the applicant or employee provide written
authorization to do the background check. Technically, when hiring a commercial driver, the trucking industry is exempt from the requirement that this disclosure and a driver-applicant’s authorization be in writing. This exemption does not apply to office or other non-driving employees and appears to be based on the assumption that drivers are often on the road with no access to mail. Nevertheless, whenever it is possible, the best practice would be to comply with the written notice/authorization requirements as it would avoid any claim at a later date that the notice was never provided.

Also, if the background check will involve a third-party investigator providing your company with a written report based on personal interviews concerning the applicant’s/employee’s character, general reputation, personal characteristics or lifestyle, the applicant/employee must be told that they have a right to a description of the nature and scope of the anticipated investigation.

**BE PREPARED FOR SOMETHING TO COME UP**

Your company should have a policy in place on how it will respond to an adverse finding from a background check before the first background check is conducted. That policy should articulate which types of information are a concern for the position the applicant or employee is being considered for and the rationale for why the information is a concern for that position. Also, the policy should establish that any possible adverse action must be as a result of a genuine job-related concern and be consistent with a business necessity. Blanket policies or practices such as “we don’t hire people with prior criminal convictions” must be avoided as they violate the law. The circumstances of prior convictions must be considered and evaluated with the applicant or employee before any adverse employment action is taken.

**ACTING ON BACKGROUND INFORMATION**

If a decision is made to not hire an applicant or to fire/not promote an employee based on background information obtained, your company has further obligations under the law. First, before actually taking any action, an employer must give the applicant or employee a “pre-action notice” that includes a copy of the report relied on to reach the decision and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.” This publication of the Fair Trade Commission should be provided by any third-party that performed the background check for you, however a link to it is here: [http://www.ftc.gov/sites/default/files/documents/one-stops/credit-reporting/pdf-0096-fair-credit-reporting-act.pdf](http://www.ftc.gov/sites/default/files/documents/one-stops/credit-reporting/pdf-0096-fair-credit-reporting-act.pdf) The applicant or employee should then be given the opportunity to review the information and explain any negative information.
After an adverse employment action is taken, the applicant/employee must be informed that they were rejected because of information in the report. They must also be provided with the contact information for the agency that provided the report, informed that the agency had no involvement in the decision and notified that he or she has a right to dispute the accuracy or completeness of the report as well as get an additional free report from the reporting company within 60 days.

As you can see, there are many requirements and potential pitfalls when using background checks. Be sure to seek out the proper guidance to make sure that your company’s practices and procedures comply with federal and state law in order to avoid unintended legal consequences from a simple hiring decision.

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