

Employee Background Checks: Increased Use and Risks

The number of employers who conduct background checks on job applicants has grown dramatically in recent years. Employers more than ever recognize the dangers and costs associated with bad hiring decisions, and the Internet has made obtaining background information on applicants considerably easier and less expensive. However, there are significant legal risks in this area and it is important for employers to know the rules. This edition of the *Employment Law Advisor* focuses on the increased use of background checks and the evolving rules governing employer conduct.

Why Are Background Checks Increasing?

Bad hiring decisions hurt businesses in many ways. There is increased turnover and higher recruitment costs, as a bad hiring decision often turns into a disciplinary matter that results in resignation or discharge. There is lost productivity and decreased employee morale when a bad hire absorbs management time and/or causes hostilities and distractions in the workplace. There can be workplace safety concerns when employers belatedly learn that an employee has a history of criminal and/or violent behavior. Indeed, in our post-9/11 world, employers in many industries have real concerns about potential terrorist activity in the workplace, which can take apprehension about who is being hired to a much higher level.

As employment lawyers, we see the absence of background screening being raised in employee lawsuits to support punitive damage awards or as an element of a “negligent hire” claim. Harassment claimants increasingly assert separate claims alleging that their employers negligently failed to perform adequate background screening in the hiring process that would have uncovered the alleged harasser’s prior history of similar conduct.

As employers recognize the need to conduct employee screening, the ability to

What should employers know about employee background checks?

- ✓ Employee screening is on the rise
- ✓ Employers who fail to conduct screening face increased risks
- ✓ Specific federal and state rules apply in this area

Read on for guidance...

obtain personal background information on applicants quickly and inexpensively is expanding rapidly. In today’s “information age” computer databases containing millions of records of personal data are readily accessible.

What Types of Background Checks Are Being Conducted?

Most employers perform some level of employee screening. In a recent survey of 196 Boston-area businesses conducted by The Survey Group, about 80% of the companies reported having a formal policy for conducting background checks (up from 71% two years earlier). Approximately 64% of the companies reported that they conducted checks for new hires only, while about 15% reported doing background checks on both new and current employees.

The survey reflects that for those companies conducting background screening the majority check personal references, prior employment and criminal history, and verify education and training. A significant minority of the companies reported that they also checked driving records and credit/financial history. Thanks to the Internet, national and statewide criminal background checks, sex offender checks, driving records, credit reports, and name/address histories traced by social security numbers can be conducted instantly.

What Are the Legal Obligations for Employers?

An evolving maze of federal and state laws apply to this area, as legislatures, regulatory agencies, and courts attempt to address sometimes competing concerns over employer rights, individual privacy, discrimination, workplace safety, and basic fairness. The most important federal law affecting background checks is the Fair Credit Reporting Act (“FCRA”). Massachusetts has its own Consumer Credit Reporting law containing very similar requirements, M.G.L. c. 93, §§ 50-68.

Fair Credit Reporting Act Requirements

FCRA is designed to protect the privacy of “consumer report” information and to ensure that the information supplied by consumer reporting agencies is as accurate as possible. A consumer report is any written, oral or other communication containing information about an individual’s personal and credit characteristics, character, reputation and/or lifestyle. To be covered by FCRA, a report must be prepared by a consumer reporting agency – a business that assembles such reports for other businesses.



Generally, any third party that performs background checks for employers is a consumer reporting agency for FCRA purposes.

FCRA requires an employer to take several steps, including:

Disclosure and consent: An employer must provide applicants or employees a clear and conspicuous disclosure that a report may be obtained for employment purposes. The employer also must obtain applicants' or employees' signed authorization to obtain a report. Additional disclosure requirements apply when an employer seeks a report that contains information on an individual's character and reputation obtained through personal interviews (an "investigative consumer report").

Providing documents prior to any adverse action: If an employer decides to take "adverse action" against an applicant or employee based on the information in a consumer report then, prior to making any final employment decision, the employer must provide the individual with (i) a copy of the report and (ii) a summary of rights under FCRA (as prescribed by the Federal Trade Commission (the "FTC")). Adverse action is defined broadly to include all employment actions having a negative impact on an applicant or employee, including denying employment or promotion.

Notice after adverse action: After an employer has waited any "reasonable" time period it has decided to establish, the employer may take adverse action with respect to the applicant or employee. The employer must then provide the applicant or employee with (i) the notice of adverse action, (ii) the name, address and telephone number of the consumer reporting agency, (iii) a statement that the agency did not make the decision and does not know the reasons for it, (iv) notice that the individual may obtain a free copy of the consumer report, and (v) notice that the individual has the right to dispute the accuracy or completeness of any information in the report.

Disposal of consumer report information: Recent amendments to FCRA establish a new "disposal" rule for businesses and persons using consumer reports. The rule

requires the proper disposal of information in consumer reports and records to protect against the "unauthorized access to or use of the information."

Practice Pointer: FCRA applies to consumer reports obtained from third parties. Thus, an employer may avoid FCRA's requirements by conducting background checks "in-house," that is, without the assistance of an outside company. Be aware, however, that when an employer uses an internet search service in conducting background checks (to perform, for example, public records searches) the FTC has taken the position that such internet search firms are "consumer reporting agencies" subject to FCRA.

Criminal Offender Record Information

In Massachusetts, the Criminal History Systems Board (the "Board") controls access to and dissemination of Criminal Offender Record Information ("CORI"). CORI includes records and data compiled by any Massachusetts criminal justice agency concerning an individual and regarding the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release.

To receive CORI, organizations and individuals must first be certified by the Board. The Board has certified an expanding variety of businesses, including those employing persons with access to children or homes, persons serving security functions, and persons with access to patients or sensitive materials (e.g., pharmaceutical companies). In addition, any member of the general public may request conviction data on individuals convicted of a crime punishable by a sentence of at least five years, as well as other categories of individuals who have been incarcerated.

Last year the Board issued new regulations imposing new "FCRA-like" obligations on certified employers requesting CORI on applicants and employees. Among other things, these employers must:

- ✓ adopt a written CORI policy;
- ✓ notify the applicant or employee of the possibility that an adverse decision may be based on the CORI report;
- ✓ provide a copy of the CORI report to the applicant or employee;
- ✓ provide a copy of the employer's

CORI policy to the applicant or employee;

- ✓ provide a copy of the Board's "Information Concerning the Process in Correcting a Criminal Record;" and
- ✓ provide an opportunity to challenge the accuracy and relevancy of the CORI report.

The new regulations also require employers to use a new CORI request form containing more detailed information on the subject applicant or employee and to verify the individual's identity with a least one government issued photo identification.

Other Restrictions

Massachusetts law prohibits discrimination in hiring based upon an applicant's race, color, religious creed, national origin, sex, sexual orientation, age, ancestry, or disability. According to the Massachusetts Commission Against Discrimination, employers may not make any inquiry, directly or indirectly, regarding any such "protected class status," including pre-employment inquiries "the response to which would likely disclose the applicant's protected class status." Other restrictions apply to inquiries regarding workers' compensation histories and certain types of criminal records. These restrictions are addressed in more detail in an earlier *Employment Law Advisor*, which can be found at http://www.mbbp.com/practices/employment/ela/ela_0604_-_employment_applications.pdf.

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