

Privacy Expectations Of Job Applicants: Tips For Employers In Conducting Background Checks

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The practice of conducting pre-employment background checks has become increasingly popular in recent years. There are a number of reasons for employers to perform background checks on job applicants. First, federal and state laws often require that background checks be conducted for certain jobs, such as positions working with children or the elderly. Second, employers may want to minimize liability for negligent hiring in the event that an employee's actions harm a third party. Third, employers themselves may want to verify the accuracy of the information supplied by the applicants, since significant numbers of job applications contain false or misleading information. Employers are permitted to conduct background checks when hiring new employees, so long as they comply with the requirements of federal and state laws. Careful preparation will both lower the costs of compliance and reduce the likelihood of errors.

Consumer Reports And CRAs

One key federal statute is the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.* FCRA requires employers to obtain a job applicant's consent to gain access to "consumer reports" – a term that is broadly defined – whenever background checks or investigations involving such reports are performed by a third party. Consumer reports include information prepared by a "consumer reporting agency" (CRA) related to the applicant's credit characteristics, character, general reputation, or lifestyle, when such information is used – or is expected to be used – for employment purposes among other uses. Examples include Department of Motor Vehicles records checks, criminal background checks, and credit history checks. Investigative consumer reports are a subset of consumer reports in which the information is collected through personal interviews with the applicant's friends, neighbors, or business associates. Examples include employment verifications and interviews with former employers and coworkers.

However, the FCRA does not apply if the employer conducts background checks internally – such as where interviews are conducted directly by

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employees of the human resources department. For example, a reference verified by the employer – rather than by an outside company retained for this purpose – is not subject to the statute. Congress expanded employer responsibilities under the FCRA primarily out of concern that inaccurate or incomplete reports prepared by CRAs could cause applicants to be denied jobs unfairly. Thus, only employers using CRAs to provide reports must abide by the FCRA.

Employer Duties

To comply with the FCRA's requirements, employers should implement the following procedures:

Before requesting the consumer report: (1) give the applicant a special notice in writing – a separate document that does not reference other subjects – stating that the employer will request a report; (2) if an investigative consumer report is sought, make additional disclosures regarding the nature of such a report; (3) provide the applicant with a summary of his or her rights under federal law; (4) obtain a signed consent form from the applicant; and (5) certify to the CRA, usually by signing a form provided by the CRA, that the employer will comply with federal and state laws.

Once the report has been obtained: (1) provide the applicant with a copy of the report; (2) give the applicant a letter summarizing his or her rights as prescribed by the Federal Trade Commission (FTC) and, if any adverse action is anticipated, describing the action to be taken; and (3) allow time for the applicant to correct any mistakes in the report. Even if the information supplied in a report is only a minor factor in the employer's decision not to hire, and even if the information is not negative or disparaging, the employer still must follow the FCRA's procedures in any instance where such a report is considered when making a decision that results in an adverse action.

After any adverse action is taken, provide written notice to the applicant containing: (1) the CRA's contact information; (2) a statement that the CRA did not make the decision to take adverse

action; (3) a statement of the applicant's right to receive an additional free copy of the report; and (4) a statement of the applicant's right to dispute the accuracy or completeness of the report.

Other Federal Requirements

Additional procedures may apply beyond the basic obligations of the FCRA. Employers cannot access certain kinds of information without explicit permission from the applicant. If medical information is being sought, the employer must obtain the applicant's specific consent to the release of such information, in order to comply with the FCRA. Under the Family Educational Rights and Privacy Act, educational information, including school records and transcripts, cannot be released without the student's permission. 20 U.S.C. § 1232g. The Privacy Act, 5 U.S.C. § 552a, imposes certain restrictions on the release of military service records.

Besides following procedures relating to the *collection* of information, employers must abide by restrictions on the *use* of such information. For example, under the Bankruptcy Act, an applicant may not be discriminated against in employment solely because the individual has filed for bankruptcy. 11 U.S.C. § 525. Additionally, rejection of an applicant based solely on an arrest record may violate Title VII of the 1964 Civil Rights Act, 42 U.S.C. § 2000e *et seq.*, and/or state law. However, employers generally are permitted to consider an applicant's criminal *convictions* when making hiring decisions. Furthermore, any information related to an applicant's medical condition or history must be collected and maintained separately and treated as confidential, as required by the Americans with Disabilities Act. 42 U.S.C. § 12112(c)(3)(B).

State Laws

In addition to the foregoing back-

ground report requirements under the FCRA and other federal laws, employers must comply with procedures required under applicable state laws. For example, California law provides strong protection for applicants and employees. See Investigative Consumer Reporting Agencies Act, CAL. CIV. CODE § 1786; California Consumer Credit Reporting Agency Act, CAL. CIV. CODE § 1785. Employers should be familiar with the laws of the state (or states) where the background report is ordered, the applicant resides, the reporting agency is incorporated or has its primary place of business, the employer is incorporated or has its principal place of business, or the report is received and used.

Conclusion

There are legal consequences for employers who do not comply with these laws. Even if the employer can show that it would have made the same adverse decision without a report, an applicant still can recover damages if the employer retained a third party to perform a background check and failed to provide notices and/or obtain consents as required by the FCRA. The statute also allows applicants to seek punitive damages for deliberate violations. Furthermore, the FTC, other federal agencies, and states can sue employers for noncompliance, and civil penalties are a possibility.

In sum, background checks are a valuable tool for employers to screen job applicants. However, when drawing on these investigations, employers should be mindful of the requirements imposed by the FCRA and other laws. If you have any questions regarding the implementation of background checks in your workplace or would like sample language for use in your employment application, please contact the author.

FCC Wireline Competition Bureau Chief Thomas J. Navin Joins Wiley Rein

Wiley Rein is pleased to announce that Thomas J. Navin, former Chief of the Federal Communications Commission's Wireline Competition Bureau, has joined the firm as a partner in its preeminent *Communications Practice*. With more than a decade of public and private sector experience handling regulatory matters and litigation, Mr. Navin will play a leading role in the firm's *telecommunications group*, covering a wide range of issues.

Managing Partner Richard E. Wiley commented, "We are delighted to welcome Tom to the firm and our team. He possesses extensive knowledge of the telecom industry that will enhance our existing capabilities and greatly benefit our clients."

Mr. Navin's career includes a diverse tenure at the FCC. In addition to his most recent role with the Commission, he served as Chief and Deputy Chief of the Competition Policy Division of the Wireline Competition Bureau, Deputy Chief of the Policy Division of the Wireless Telecommunications Bureau and Attorney-Advisor in the Common Carrier Bureau's Policy and Program Planning Division and in the Competitive Pricing Division. As a private practitioner, Mr. Navin assisted telecommunications clients on a range of wireless regulatory issues.

Mr. Navin received his J.D. from the University of Virginia, where he was an Executive Editor of the *Virginia Journal of International Law*. He can be reached at 202.719.7487 or tnavin@wileyrein.com.

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