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The Employee Background Check(list)

Automatically disqualifying an applicant with a criminal history used to be standard practice for many employers. Dramatic changes in the law in recent years, however, have complicated what used to be a bright-line rule. How should companies detect applicants with a checkered past without breaking the background check laws themselves? The following checklist will help guide employers through these thorny issues.



❑ When should we request criminal history information?

Employers should consider whether their hiring needs allow for a practice of requesting criminal history information only from viable job candidates, as opposed to collecting such information from every applicant as part of a generic application form. Employers should also determine whether they operate in one of the many jurisdictions with "[ban the box](#)" laws, which often prohibit employers from asking about criminal history on an initial job application and set parameters regarding when and how such inquiries can be made. When developing policies and consent forms, employers should also consider that, even after hire, subsequent requests for criminal history information may be necessary. For example, an employer may need to obtain an updated report if the company learns of a current employee's criminal conduct or if the company's clients request an updated clearance for employees working on a specific project.

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❑ How strong are our background check consent forms?

Even companies relying on forms provided by background check companies should closely review their consent forms to confirm that they meet their specific business needs. The consents should not only be broad enough to cover the scope of the intended inquiry consistent with law, but also should (a) require applicants to certify the accuracy and completeness of the information provided by the applicant; and (b) provide that the consent will continue in effect and remain valid even after hire, unless revoked in writing by the employee.

❑ Are our background checks too narrow?

Background checks soliciting records from multiple states may be necessary, particularly when the applicant recently relocated from another state, the company operates in multiple states or the company operates in a location with closely bordering states. Aliases or prior names should be requested from the applicant in order to return more comprehensive results.

❑ Do we comply with the Federal Fair Credit Reporting Act and any applicable state laws?

Prior to making an adverse employment decision based on a background check, most employers are required to provide the applicant with advance notice of the contents of the background check report, an opportunity to challenge any inaccuracies in the report and a notice of rights under the Federal Fair Credit Reporting Act. Additional notice requirements may also be in effect. For purposes of consistency and legal compliance, employers should develop a procedure and a set of forms for use for such communications.

❑ Does our industry impose additional restrictions?

Certain regulated industries (e.g., financial services, health care, child/elder care) are subject to additional or differing restrictions regarding applicants with a history of certain convictions, including in some instances automatic disqualification requirements. For example, in addition to conducting a standard criminal background check, health care entities often consult databases identifying applicants with a

history of health care fraud or licensure issues to determine whether applicable regulations bar the applicant from hire. Employers should review these industry-specific considerations and determine how they should impact background check procedures and disqualifications in a manner consistent with applicable law.

❑ How do we maintain the confidentiality of background check results?

Background check results should be retained in a secure location and in accordance with the company's record retention and destruction policies. Not only does federal law require an employer to take "reasonable measures" to secure such reports, but the reports may be useful to the employer both in future incidents involving hired employees and in defense of claims of refusal to hire from rejected applicants. Certain clients may also request to see the background report or request that an updated report be performed before assignment to certain client projects. Employers should consider this possibility when drafting consent forms and, if such a disclosure request is made by a client, determine whether the consents obtained and applicable law allow the employer to make such a disclosure or otherwise dictate the form of disclosure.

❑ How do we determine whether to disqualify an applicant based on criminal history?

Employers should review the background check report in the context of the position for which the applicant has applied. Would a disqualification be job-related and consistent with business necessity? Does the report reflect a conviction or just an arrest (many states prohibit decisions based solely on arrests)? How long ago did the activity occur? Do regulations in our industry or specific aspects of our operations impact the analysis? Is disqualification consistent with decisions we have made about other applicants in the past? In published [guidance](#) for employers, the United States Equal Employment Opportunity Commission (EEOC) takes the position that certain criminal background check procedures result in unlawful discrimination and that employers should engage in a fact-specific

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analysis to combat discriminatory hiring practices. Although there has been [debate](#) to the contrary, the EEOC has [responded](#) to dissenters by reaffirming its position that employer background check policies and procedures, as well as disqualification decisions, must be scrutinized for indicators of unlawful discrimination.

Lawmakers have been on a spree of restricting employer use of background checks, and they show no signs of stopping. Employers should consult with their own human resources mastermind to develop appropriate forms and procedures that will protect the company from both criminal activity from within and legal action from rejected applicants or the EEOC. ■

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