

THE LAW ADVISOR

# CRIMINAL BACKGROUND CHECKS...



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## TO DO... OR NOT TO DO?

by Michael B. Berger, Esq.



**E**ditor's Note: This month begins a new legal column, which will be published in Cleaner Times | IWA on a semi-regular basis. The initial columns will focus on legal issues pertaining to the hiring and firing of employees. This month will address the use of criminal background checks.

The hiring and firing of employees is a legal minefield, and employers must be extremely careful in how they handle these decisions in order to minimize the risk of having to defend against lawsuits for discrimination, wrongful termination, etc. Even a frivolous lawsuit, which is ultimately dismissed, can be financially devastating for a small business as attorney's fees can easily cost tens of thousands of dollars.

#### **The Purpose of Criminal Background Checks**

Employers use criminal background checks primarily to screen out potentially undesirable employees who have a history of committing violent acts, sexual assaults, or thefts. Hiring an employee with such a background without conducting a criminal background check could result in a number of negative consequences to the employer, such as: 1) the employee steals from a customer or the employee embezzles company funds; 2) the employee commits acts of workplace violence on a fellow employee or commits violent acts against a customer. The hiring of such an employee could expose the employer to devastating financial losses or to lawsuits for negligent hiring or negligent retention.

While a company should maintain sufficient liability insurance to cover its litigation costs and potential exposure to damages, insurance may not cover all potential losses (such as for punitive damages) or may not be sufficient to cover a potential multi-million dollar verdict. Liability insurance policies also have deductibles that must be absorbed by the employer. Lawsuits also have direct and indirect costs that are not covered

by insurance such as personnel time spent working with the company's attorneys, gathering evidence, and attending depositions and hearings. Finally, such lawsuits can turn into a public relations nightmare for a business.

#### **How to Conduct a Criminal Background Check**

In order to properly and legally conduct a criminal background check, most businesses (especially small

companies without their own human resources and legal departments) should outsource the function to a third-party service provider, which specializes in this area. The Fair Credit Reporting Act (the FCRA) is the federal statute that most directly regulates background checks.

Under the FCRA, third-party service providers are "consumer reporting agencies" (CRA's), and the background reports they generate

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are “consumer reports.” Employers are considered “end users” under the FCRA and must comply with certain requirements, including giving notice to the applicant that background screening will take place and obtaining the applicant’s authorization for the screening. The disclosure notice must be “clear and conspicuous” and on a separate document (not on the application). The disclosure and the authorization can be in a single, combined document.

Before the CRA can provide the report, the employer must certify to the CRA that: 1) the employer will provide the written disclosure and obtain the required authorization from the applicant; 2) the employer will not use the report for any illegal reasons (for example, to discriminate); and 3) the employer will comply with the “adverse action” requirements of the FCRA. Under the FCRA, before an employer takes an adverse action (for example, not hiring the applicant) due to information found in the background check, it must first provide a copy of the report to the applicant and provide the applicant with a notice of his or her rights under the FCRA.

#### **The EEOC Is Watching**

In addition to complying with all of the requirements of FCRA, an employer must also be careful to avoid running afoul of new guidelines promulgated by the Equal Employment Opportunity Commission (EEOC) in 2012 concerning the use of criminal backgrounds checks during the hiring process. In its guidelines, the EEOC states that criminal background checks might discriminate against minorities and recommends that businesses do not use them. The guidelines can be reviewed online at [www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).

Recently, the EEOC filed lawsuits against retailer Dollar General and a BMW facility in South Carolina alleging civil rights violations based on the companies’ alleged unlawful use of criminal background checks

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in their hiring practices. Attorney generals in nine states sent a joint letter to the EEOC in July in response to the lawsuits, which stated in part, "We believe that these lawsuits and your application of the law, as articulated through your enforcement guidance, are misguided and a quintessential example of gross federal overreach." The interplay between the states and the federal government on this hot-button issue should be interesting to watch.

#### What Is an Employer to Do?

An employer is therefore stuck between the proverbial rock and a hard place. If an employer does not use criminal background checks, it risks making bad hiring decisions and exposing the company to potential civil liability for negligent hiring and/or negligent retention. If an employer does use criminal background checks, it could face liability if the FCRA is not strictly followed. Even if an employer complies with the FCRA, an employer could find itself being sued for civil rights violations if an applicant (or the EEOC) feels that the employer has discriminated in its hiring practices based on the use of background checks.

My advice is to consult with your company's attorney and weigh the pros and cons of using background checks for your specific business. If you are going to use criminal background checks, make sure you obtain and retain the proper documentation (disclosure and authorization) and that you use a competent third-party service provider to obtain the reports. As the Sergeant on the hit television show *Hill Street Blues* used to say, "Let's be careful out there."

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