Evolution of "Ban the Box" Laws and Why Your Standard Background Check Forms May No Longer Be Sufficient

Insights
9.20.21

More and more organizations are conducting background checks on applicants and employees. Whether it's to minimize safety and security risks, increase protection against fraud and theft, or required by law for your industry, background checks have become a vital tool in employers' risk management toolkit. But a very common practice – using standardized disclosure forms from third-party vendors or which have been used by the company for as long as you can remember – can be a source of dangerous legal exposure. What do you need to know about modern legal standards and what should you do to avoid a common legal pitfall?

FCRA Requirements Have Led to (Potentially Problematic) Standardized Practices

To obtain background reports, many employers go through third-party vendors. These vendors can be an invaluable asset to employers. Many offer technology platforms to help expedite and streamline hiring processes. Often, they can also prepare more comprehensive reports (including educational history, credit history, criminal history, reference checks, etc.) and can conduct more expansive searches than those you would be able to obtain on your own.

The Federal Fair Credit Reporting Act (FCRA) has traditionally governed procedures for obtaining these reports. Over the years, many provisions of the FCRA have remained relatively unchanged. (However, see our article regarding highly technical aspects of the FCRA and case law demonstrating that federal requirements are all but straightforward.) Accordingly, most of the forms used by employers to obtain background checks, such as employee authorization forms, have become fairly standardized. Vendors often provide sample forms as part of their background check screening packages.

Many organizations simply take these forms and implement them into their new hire processes "as is," assuming they are sufficient to meet their legal obligations. However, the recent expansion and evolution in state and local "Ban the Box" and similar criminal history laws has disrupted the practice of using standardized background forms and processes – and should force you to take a second look at your own practices.

What's Changed?

Historically, "Ban the Box" and similar criminal history laws were intended to prohibit employers from asking about criminal history on job applications. However, criminal history laws have expanded and evolved in recent years to not only prohibit inquiries into criminal history on employment applications but to also dictate the procedures that must be followed before an employer can assess a candidate ineligible for employment. As a consequence, these laws are often referred to now as "Fair Chance" laws.

Before illustrating examples of these state and local laws, it's worth briefly reviewing general requirements under the FCRA that employers must follow once they've obtained a report (note, there are additional requirements that must be followed prior to obtaining a report). Under the FCRA, employers intending to take an adverse employment action against individuals based on a background check report must, prior to performing the adverse action, notify the candidate of their intent to do so, along with a copy of the individual's report and a summary of their rights under the FCRA. This is commonly referred to as a "pre-adverse action notice."

Employers must then provide employees with a reasonable period of time to review the report and identify inaccuracies or submit additional information for consideration, before the employer takes action. Upon expiration of a reasonable period of time, and assuming that no inaccuracies have been identified, the employer can generally move forward with the adverse action by issuing a subsequent adverse action notice, notifying the individual of the action being taken.

Under expanding state and local laws, however, cities like Los Angeles and New York now require employers to conduct written individualized criminal history assessments and to provide those written assessments to candidates along with their pre-adverse action notice. Jurisdictions like Portland (Oregon) and Montgomery County (Maryland) require employers to notify individuals of the specific relevant conviction(s) disqualifying them from employment, as opposed to simply attaching a copy of the report to the pre-adverse action notice. Further, jurisdictions like San Francisco and Philadelphia have legislated specific lengths of time that must be provided between issuance of a pre-adverse action and an adverse action notice. As a consequence, one-size fits all FCRA forms and procedures are often no longer sufficient to satisfy an increasing patchwork of state and local requirements.

It's also worth noting that some jurisdictions have implemented their own fair credit reporting act laws requiring their own language and additional forms, and many jurisdictions have implemented general criminal history limitations. These include limitations on the types of criminal convictions that can be the basis for an adverse action; identifying factors that must be considered in conducting individualized assessments; and specifying other limitations on background check reports (such as prohibitions and limitations on credit history reports).

What Should You Do?

You should take a good hard look at your background check forms and processes prior to implementing to ensure they are compliant not only with federal requirements, but also state and

implementing to ensure they are compliant not only with federal requirements, but also state and local considerations. Given the web of criminal history laws at play, you are further encouraged to seek legal counsel for advice and assistance in reviewing these forms and procedures, to avoid complex lawsuits that can arise as a result of using outdated and/or generic forms.

We will monitor these developments and provide updates as events warrant. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our FCRA & Background Screening Practice Group.

Service Focus

Counseling and Advice

FCRA and Background Screening