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6 STEPS FOR EMPLOYERS TO SET UP AN EFFECTIVE BACKGROUND SCREENING PROGRAM

Insights
Oct 4, 2021

More than 90% of employers use some form of a background screening on applicants or employees when making employment decisions. There can be several reasons for using them: ensuring safety in the workplace; reducing exposure to liability and legal costs; verifying information provided by applicants and employees; and ensuring position fit. However, while these value-adds may make a strong case for conducting employment background screenings, the legal landscape of this area is constantly evolving, which means that unsuspecting employers can easily find themselves in a minefield of trouble. In order to successfully navigate that legal minefield, you need to ensure that your employment-screening processes result in decisions that are ultimately based upon qualifications and job match. Here are six key steps that can assist you in laying the groundwork for a fair, consistent, and effective background-screening program.

STEP 1: Create Your Written Background Screening Policy

Your written background screening policy should contain certain key details about your organization's background screening process. Reducing your policy to writing will help to ensure that it will be applied

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consistently across your organization. It will also create a process for applicants and employees that is fair and transparent, and help to avoid potential private litigation and governmental enforcement actions. At the very least, your policy should cover:

- what kinds of background screens you will conduct and for whom they will be conducted;
- how you will use the results in making employment decisions; and
- when you will conduct background screens.

You should not adopt any blanket policies refusing to hire applicants with any type of criminal or disciplinary record.

STEP 2: Check that Your Policy is Legal

Once you have created your written background screening policy, you will need to confirm that it is legally compliant. Background screening for employment purposes is regulated by a patchwork of federal, state, and local laws. The failure to comply with any one or all of them, as may be applicable, can result in a nightmare of costly penalties or fines, private or governmental lawsuits, and expensive settlements. Without getting too deep into the weeds, there are four common compliance pitfalls that you should keep in mind:

- **Failure to Provide Written Notice and Obtain Written Authorization:** Under the Fair Credit Reporting Act (FCRA), employers are required to provide written notification of a background screen for employment purposes. It must be clear and conspicuous, and perhaps most importantly, contained in a stand-alone document. The written authorization form is the applicant's or employee's acknowledgment that the employer will conduct a background screen and is authorized to do so. It must be signed by the employee. Neither the notice nor authorization should contain any extraneous information, such as

liability waivers relating to the hiring process, the background screening results, or any employment decisions. Though seemingly simple, the statutory requirements for a compliant disclosure and authorization have resulted in a multitude of class action lawsuits and federal court decisions.

- **Failure to Follow the Multi-Step Pre-Adverse and Adverse Action Process:** In addition to above, the FCRA also requires an employer to follow a multi-step process of providing additional notices to applicants or employees when the employer intends to make an adverse employment decision based upon the results of a background screen.
- **Failure to Consider Ban-the-Box and Fair Chance Laws:** Ban-the-Box and Fair Chance laws are popping up all over and there are a variety of them. However, most tend to require that employers wait to run a background screen or ask about criminal history until after a conditional offer of employment is made, and often require specific considerations before making employment decisions on a background screen.
- **Failure to Consider Anti-Discrimination Laws:** In all instances, employers must ensure that they are applying the background screen process consistently and equally. It is illegal to conduct a background screen on an applicant or employee simply because of something like their race, age, national origin, sex, religion, or disability.

STEP 3: Consider Partnering with an Accredited Background Screening Company

A background screening company may be able to guide you through the logistics of the background screen process as well as aspects of compliance. For example, many of them will offer additional service offerings such as built-in pre-adverse and adverse action process workflows, among others. These can help take a lot of legwork off of your staff so that they can focus on other things. The key, however, is choosing the right

one. An accredited background screening company can, most importantly, offer you more confidence that the results of a background screen are legally compliant and accurate. Employers, of course, remain responsible for employment related compliance documents and platforms that may be provided by your selected background screening company.

STEP 4: Perform Individualized Assessments and Allow for Clarification of Any Mistakes

Under guidelines established by the U.S. Equal Employment Opportunity Commission (EEOC), you have an obligation to consider whether the results of a background screen are directly pertinent to the job in questions – in other words, whether they will actually impact the applicant or employee’s performance on the job. This usually comes up in the case of a criminal or disciplinary history. In making a decision regarding whether such history will exclude someone from employment, the EEOC’s guidelines provide that you should consider individualized evidence, such as: the facts and circumstances surrounding the offense or conduct; the age at the time of the offense or conduct; performance of similar work, post offense or conduct, with no known instances of criminal or disciplinary conduct; rehabilitation efforts; and employment or character references. Thus, the point is to consider whether there is a clear link between the results of the background screen and the job duties in question.

In addition to the EEOC’s guidance, under the FCRA’s multi-step process described above, you must offer applicants or employees an opportunity to refute or explain any unsatisfactory information before making a final employment decision.

STEP 5: Make a Fully Informed Decision

You are now ready to make a fully informed and legally compliant decision. This should enable you to ensure the quality of your employment decisions and mitigate the risks associated with them.

STEP 6: Conduct Annual Self-Assessments of Process

Finally, you should conduct an annual audit of your background screening program. Many employers fail or forget to do so, which in turn means they miss out on a key opportunity to learn whether the program is effectively satisfying their employment decision and risk mitigation needs. An annual audit can also help you to stay current on the ever-evolving federal, state, and local laws in this area.

What Should You Do Now?

You should review your background screening process to ensure that it has all of the key attributes described above. Given the complexity and changing nature of the laws at play, you should also consider seeking legal counsel for assistance in reviewing your process to ensure that it is legally-compliant and meets your hiring needs.

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](#).