



Employment Background Checks: In a State of Flux, but Still Worth Doing

Insights

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Background checks have been a tool for employers to use to screen applicants for quite some time. However, recently there have been many changes and an increase in litigation in the background check arena.

First, many jurisdictions—including municipalities, counties, and/or states—have implemented ordinances or legislation commonly referred to as “ban the box” which requires employers to remove the question and check box, “Have you been convicted by a court?” from applications for employment. The intent in doing this is so that applicants with a criminal history can have a fair chance at getting a job by requiring employers to consider a candidate’s qualifications first, and then waiting until after a job offer has been extended to conduct a background check.

In 2004, when the ban the box movement first started picking up momentum, Hawaii was the only state with such a law. In contrast, according to the National Employment Law Project, today there are over 150 cities and counties as well as 25 states with some form of ban the box law or ordinance. These figures are expected to grow.

Second, employers have seen an increase in litigation involving alleged violations of the Fair Credit Reporting Act (“FCRA”) and corresponding state laws. These cases usually involve allegations that an employer using defective background check authorization / disclosure forms. FCRA cases filed in the U.S. have increased by 20% at a rate of approximately 300 new cases each month. Although FCRA suits against employers have become very common, they oftentimes can be easily avoided. More often than not, employers are sued for violating simple rules and procedures.

Notwithstanding all the litigation surrounding background checks, and limitations put in place with ban the box ordinances/laws, background checks are still important and beneficial to employers. For example, conducting background checks can improve the quality of hires, mitigates negligent hiring risk, improve workplace safety and security (i.e. reduced employee theft, workplace accidents, and workplace violence), and reduce employee turnover.

Instead of shying away from doing background checks, employers should have their applications reviewed by counsel for compliance with applicable ban the box laws/ordinance, and have their

background check authorization/disclosure reviewed by counsel for compliance with FCRA and state law.

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