



How Much Do You Really Want to Know About Your Employees? The Growing Popularity of Continuous Background Checks

Insights

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Most companies perform background checks on employees at the outset as part of the application / new hire process. A number of background check companies are now offering “continuous screening” or re-screening services as a risk management tool where background checks are performed on all employees annually or semi-annually. Continuous background checks are gaining popularity among employers. In theory, this will catch items that were missed during the new hire process as well as criminal events that have transpired since the employee was hired. This is viewed as a risk management tool to protect against employee theft, embezzlement, fraud, violence, etc.

With that said, employers should consider the following with respect to continuous screening of employees:

- You get what you pay for. Less expensive background checks oftentimes use an online database, which are notoriously not as reliable as information gathered directly from the source/courthouse (more expensive).
- Perform a cost/benefit analysis. Currently, there is no empirical evidence that shows continuous screening is advantageous to employers. Whether it is a cost-effective tool, and whether the advantages outweigh the disadvantages, is something very specific to the company which each employer should analyze.
- Look at consent / legal compliance issues. Background check authorization forms should make it very clear that an employee may be re-screened on a regular basis throughout their employment—commonly referred to as “continuous authorization.” Although signing an authorization one time at the outset of employment is generally accepted under federal law, it is not necessarily permissible under state or local law. There has been litigation in some jurisdictions—particularly California—as to whether continuous authorizations are permissible, versus authorization must be obtained each time a background check is performed.
- Do you have the right policies and practices in place? Employers need to have clear policies and practices in place for when they get background check reports with criminal history information. Employers should comply with the EEOC guidelines on background checks, state and local fair chance laws requiring individualized assessments of criminal history and the

position the employee holds, pre-adverse and –adverse action letters when an employer wants to terminate an employee based on the background check report, etc.

In addition, employers need to be prepared as to how they will handle an employee’s refusal to authorize a background check. Is the employee going to be terminated? The employee may claim it is an invasion of privacy. This is an uncharted territory of litigation, which comes with some risk, particularly if the employee is a member of a protected class, which may trigger a discrimination claim.

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