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5 COMMON BACKGROUND SCREENING MISTAKES FOR RETAIL EMPLOYERS TO AVOID

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Retail employers often need to fill jobs fast, with seasonal demands, high turnover, and multiple store locations all pushing hiring managers to hire quickly. But properly vetting applicants is particularly important in retail given the risks around cash handling, inventory, customer-facing roles, and employee safety – not to mention the fact that background screening is one of the most heavily regulated aspects of the hiring process. When retailers rush the process or let each managers handle it their own way, they risk running afoul of federal, state, and local background check laws. How can you build a consistent process that satisfies the law while still obtaining reliable information that allows you to make informed hiring decisions? This Insight covers five of the most common mistakes retailers should avoid in the background screening process.

1. Allowing Individual Managers to Make Hiring Decisions Without Proper Guidance

Without a consistent process, managers may apply different standards across locations. For example, one local manager may permit an applicant to start work while the background screening is pending. Another may make quick decisions based solely on information contained in a background report without fully reviewing the circumstances. And yet another might not consider whether information from a background check is relevant to the position. When

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managers follow different practices, retailers risk inconsistent treatment of applicants and potential compliance issues.

- While federal law permits conditional employment, retailers should generally not allow applicants start working while a background screening is pending.
- Train your managers to recognize that a background report is there to provide information to support a hiring decision, not automatically determine the outcome.
- Your hiring staff should carefully review the results, consider the nature of the information, and follow applicable requirements before taking action.
- Provide your managers with clear guidance on how to handle background screening information and make hiring decisions.

2. Not Having Proper Stand-Alone Disclosure and Authorization Forms

Compliance with the Fair Credit Reporting Act (FCRA)'s disclosure requirements has been an ongoing area of litigation for employers.

- Make sure you provide applicants with a proper stand-alone disclosure before obtaining a background report for employment purposes.
- Avoid including disclosures within employment applications or other documents. Even information that is helpful or informative can create challenges if it distracts from the required disclosure. Read more here about FCRA disclosures.
- Typos, unclear language, or provisions that arguably change the meaning of a disclosure can create compliance concerns. Make sure to regularly review your forms to ensure they satisfy current legal requirements.

3. Not Considering State and Local Requirements

Multi-state retailers must consider that background screening requirements can vary by state and local jurisdiction. Some states, counties and cities impose additional restrictions on when and how employers may

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consider criminal history information during the hiring process.

- For example, the City of Philadelphia recently made changes to its ban on criminal history inquiries.

- Other jurisdictions require employers to conduct an individualized assessment to determine whether an applicant's or employee's criminal history has a direct, adverse, and negative bearing on the person's ability to perform the responsibilities of the position. This may require consideration of factors such as the nature of the offense, how much time has passed, and the relationship between the information and the position.

- Local managers may not realize that requirements differ from one location to another. Depending on the jurisdiction, you may need to provide additional notices, follow specific procedures, or conduct an individualized assessment before making certain employment decisions.

- Ensure your hiring managers and HR professionals understand that a process that works in one location may not meet the requirements of another.

4. Failing to Follow Required Pre-Adverse and Adverse Action Procedures

Retailers may also face challenges when hiring managers move too quickly after receiving background screening results. Taking adverse action based on information contained in a background report without following the required process can create significant compliance risk.

- Before taking adverse action, you generally must provide:

  - A copy of the background report;

  - A summary of rights under the FCRA; and

  - A reasonable period (five business days) for the applicant or employee to review the information and dispute potential errors.

- This waiting period allows applicants or employees to identify inaccurate information, explain the circumstances surrounding the information, or provide additional details for consideration before a final decision is made. For more on FCRA's Pre-Adverse and Action Notice Requirement, see our four-step compliance plan here.

5. Not Implementing a Clear and Documented Background Screening Process

For retailers, background screening requires more than just obtaining a written report. You need to develop a consistent process, trained decision-makers, and clear procedures that account for changing federal, state, and local requirements.

- Because of the complex legal landscape governing background screenings, technical mistakes regarding disclosures, authorizations, evaluations and adverse action procedures are quite common, especially for the multi-state retailer.

- Implement a comprehensive background screening procedure vetted by qualified employment counsel and tailored to your company's jurisdictional coverage requirements.

- Your process should identify who reviews background reports, who makes final hiring decisions, and how decisions should be documented. The process should also outline the steps for conducting background screening, obtaining required authorizations, evaluating the results, and completing any required adverse action procedures in compliance with applicable laws.

- Train all your hiring managers and HR professionals on the background screening procedures at onboarding and at least annually.

Conclusion

We will continue to monitor developments and provide updates as warranted. Make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information direct to your inbox. If you have questions, contact your Fisher Phillips attorney, the authors of this Insight, or any attorney on our Retail Industry Team or our FCRA and Background Screening Practice Group.