

Background Screening: Navigating the Legal Issues

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Background Screening: Navigating the Legal Issues

- The Application
- The Interview
- Disclosure Requirements: Background checks, credit checks, reference checks
- Implications of the Fair Credit Reporting Act
- Exemplars

The Employment Application

- Under Title VII, Employer may not discriminate in the application process (e.g., race, color, creed, religion, citizenship...)
- Plaintiff can establish a prima facie case of discrimination in the hiring process by demonstrating:
 - Plaintiff is a member of a protected class;
 - Plaintiff applied and was qualified for a job for which the employer was seeking applicants
 - Plaintiff was rejected despite his/her qualifications
 - After being rejected, the position remained open and the employer continued to seek applicants from person of plaintiff's qualifications or the position was filled by someone outside plaintiff's protected class. (*McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802)

The Employment Application

- Under California law, an employer may not refuse to hire any person based upon race, color, creed, religion, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation
 - Cal. Gov. Code § 12940(a)
 - Exceptions
- Know your state laws in this regard!

The Employment Application – Do's

- **Proper** inquiries on application:
 - Name, address, telephone number
 - Position applying for
 - Prior applications with company
 - Whether applicant is at least 18 years of age and can provide proof of age if hired
 - Availability to work
 - Prior work experience
 - Ability to perform essential job functions with or without reasonable accommodations
 - References – ask for references who can attest to applicant's work habits, ability

The Employment Application – Do's

- Provisions that Should Be in Application
 - Unambiguous statement that any and all future employment is at-will
 - Statements made by the applicant are true and correct and that any incorrect, misleading or false information contained in the application are subject to rejection of the application or termination
 - Release for employer to check references
 - Each provision should be initialed by applicant
 - Signature of acknowledgement by applicant

The Employment Application – Don'ts

- **Improper** Inquiries

- Birthplace
- Marital status/personal relationships
- Age
- Race or religion
- Sexual orientation
- Gender
- Education: Years attended high school, college

The Employment Application – Don'ts

- Improper inquiries (continued)
 - Whether ever been fired
 - See, e.g., *Soliman v. City of Tampa*, 2008 WL 10931320 (M.D.Fla. May 2, 2008) – plaintiff claimed that potential employer violated Title VII in refusing to hire him based in part upon statement in his application that he was terminated from previous job for filing EEOC complaint of discrimination
 - Rather, ask reasons for leaving prior employment
 - Gender-specific questions
 - Whether a woman is pregnant
 - Intend on having children

The Interview Process – Do's

- Want to find out whether the applicant is qualified for job
- Tailor questions around the job qualifications
- Inquire about any gaps in employment
- Behavior-based questions
 - Pinpointed towards situations that may arise in job

The Interview Process – Don'ts

- Do not ask questions implicating or suggesting protected activity
 - Marital status
 - Age
 - Religion
 - Ancestry
 - National Origin
 - Gender-based (i.e. pregnancy, whether have children)

The Interview Process

- If you take notes during an interview, make sure they are clear and unambiguous.
 - Interviewer looking to hire an associate for jewelry department noted on application “no jew” intending to mean that the applicant did not have any jewelry experience resulted in discrimination claim being filed
 - *Stedman v. State*, 1997 WL 118115 (Minn.App. Mar. 18, 1997) – notes attached to application indicating decision to hire based upon gender, race and national origin

Disclosure Requirements: Background, Credit, Reference Checks

- Background checks
 - Disclose in writing to the potential applicant **in a stand alone document** that any offer of employment is subject to a background check
 - Identify the purpose of the background check
 - Do not need to use an investigative consumer reporting agency
 - Advise applicant in writing that he/she has a right to receive a copy of the background report unless waives right
 - In California, the person/entity conducting investigation has 7 days to provide any public information obtained to applicant
 - If adverse action taken as a result of background check, applicant entitled to copy

Background, Credit and Reference Checks – Disclosures

- Credit checks for employment purposes
- Investigative v. credit reports
 - Investigative reports are more expansive than credit reports and include information on applicant's character, general reputation, personal characteristics
 - Cal.Civ.Code § 1786.2(c)

Background, Credit and Reference Checks – Disclosures

- Fair Credit Reporting Act (FCRA) Requirements
 - Clear and conspicuous written disclosure to applicant before report obtained that a report may be obtained for purposes of employment – stand alone document
 - Written authorization from applicant to obtain report giving the applicant the opportunity to obtain a copy of the report

Background, Credit and Reference Checks – Disclosures

- Fair Credit Reporting Act (FCRA) Requirements (cont.)
 - Certification to the consumer credit reporting agency that:
 - disclosure has been made to the applicant;
 - applicant has provided written authorization to obtain report;
 - that the report will not be used in violation of any state or federal equal opportunity law or regulation; and
 - a copy of the report and FCRA Rights will be provided to applicant in the event of any adverse action based upon the credit report

Background, Credit and Reference Checks – Disclosures

- Fair Credit Reporting Act (FCRA) Requirements (cont.)
 - Before taking any adverse action based upon the credit report:
 - Provide a copy of the pre-adverse action disclosure
 - A copy of the credit report
 - Summary of FCRA Rights
 - <http://www.ftc.gov/bcp/menus/consumer/credit/rights.shtm>
 - Click on link for Fair Credit Reporting Act under “Summaries of Rights”

Background, Credit and Reference Checks – Disclosures

- Reference Checks
 - Include in application or stand alone document that references may be checked
 - Have applicant sign a consent and waiver form that can be presented to the reference to assuage any liability concerns of the third party providing information
 - Absent any intentional or malicious conduct, information provided by third party privileged
 - See, e.g., Cal.Civ.Code § 47(c)

Fair Credit Reporting Act Implications for Background Checks

- Intent of the FCRA is to protect the consumer from inaccurate information contained in reports prepared by consumer reporting agencies. (See, e.g., *Ewbank v. Choicepoint, Inc.* 2008 WL 681470 (N.D.Tex. Mar. 11, 2008))

Fair Credit Reporting Act Implications For Background Checks

- Who is Subject to the FCRA?
 - Consumer Reporting Agencies and users of consumer and investigative reports
 - 15 U.S.C. § 1681
 - *Wiggins v. Phillip Morris, Inc.*, 853 F.Supp. 458 (D.D.C. 1994)
 - Employers who utilize consumer and/or investigative reports in hiring decision are subject to the FCRA.
 - 15 U.S.C. § 1681a(d)(1)(B); 15 U.S.C. § 1681a(e)
 - *Wiggins v. District Cablevision, Inc.*, 853 F.Supp. 484 (D.D.C. 1994)

Fair Credit Reporting Act

Implications for Background Checks

- Are background checks a consumer report or investigative consumer report for purposes of the FCRA?
 - Consumer report is defined as any written, oral or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is or is expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for...employment purposes
 - 15 U.S.C. § 1681a(d)(1)(B)

Fair Credit Reporting Act Implications for Background Checks

- Investigative Consumer Report is defined as a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer
- 15 U.S.C. § 1681a(e)

Fair Credit Reporting Act Implication for Background Checks

- Information can only be used for a permissible purpose subject to certain requirements
 - Employment purpose is a permissible purpose
 - 15 U.S.C. § 1681b(a)(3)(B)

Fair Credit Reporting Act Implications for Background Checks

- FCRA Requirements for Permissible Use by Employer
 - 15 U.S.C. § 1681b(b)(1)-(3)
 - Employer certification
 - Clear disclosure to applicant that employer may obtain consumer report for employment purposes
 - Blanket authorizations are permissible (*Kelchner v. Sycamore Manor Health Center*, 305 F.Supp.3d 429 (M.D.Pa. 2004))
 - Before taking any adverse action based in whole or in part on consumer report, the employer will provide a copy of the report and a copy of the Summary of FCRA Rights to the applicant
 - Must provide name, address and telephone number of agency that provided the information
 - The information in the report will not be used in violation of any state or federal equal employment opportunity law or regulation

Fair Credit Reporting Act Implications for Background Checks

- What if applicant disputes information in report?
 - Applicant can request that the consumer credit reporting agency reinvestigate
 - Provide information to the consumer credit reporting agency information indicating the information on the report is inaccurate
 - No duty to employer to reinvestigate
 - Consumer credit reporting agency has 30 day to reinvestigate and report results
 - Inaccurate information must be reported as disputed during reinvestigation

Remedies for Violation of the Fair Credit Reporting Act

- Negligent noncompliance – 15 U.S.C. § 1681o
 - Actual damages sustained by the consumer;
 - Attorney's fees and costs
- Willful noncompliance – 15 U.S.C. § 1681n
 - Actual damages sustained by consumer or damages of not less than \$100 and not more than \$1,000
 - Actual damages or \$1,000, whichever is greater in claims against natural persons
 - Punitive damages
 - Attorney's fees and costs

Fair Credit Reporting Act

Other Issues

- State law claims for defamation, negligence or invasion of privacy are preempted unless false information furnished with malice or intent to injure the consumer
- 15 U.S.C. § 1681h(e)
- *Young v. Equifax Credit Information Services, Inc.*, 294 F.3d 631, 638 (5th Cir. 2002)

Exemplars

- Appendix A - Disclosure to Obtain Consumer Reports
- Appendix B – Authorization To Obtain Consumer Reports
- Appendix C – Certification to Consumer Credit Reporting Agency
- Appendix D – Notice of Adverse Action
- Appendix E – Summary of Rights Under the Fair Credit Reporting Act