



Faulty Background Checks Can Be Very Costly

Unfortunately, many employers conduct background checks on applicants and employees without crossing the Ts and dotting the Is. Recent lawsuits and settlements totaling millions of dollars highlight the risk for employers who ignore the requirements of the Fair Credit Reporting Act ("FCRA"). It is mystifying how some employers seemingly are not aware of these 18-year-old requirements.

Most employers understand that they have to give written disclosure of the background check and obtain a written authorization before running the background check, but many employers do not understand what to do if and when they take adverse action based on the background check.

First of all, it is important to know if the information you are receiving constitutes a consumer report or an investigative consumer report under the FCRA. For example, a direct reference from an employer who had firsthand knowledge of the applicant would not constitute a consumer report under the FCRA. On the other hand, a report from an agency that had no direct contact with the applicant and is in the business of gathering information for the report would constitute a consumer report under the FCRA. And remember, the written disclosure regarding the background check cannot be part of the employment application. The disclosure needs to be in a separate document that is not attached to the application.

A large retailer and a nationwide business solutions provider are currently in litigation because the criminal background checks they received were not provided to unsuccessful applicants prior to their rejection. One applicant testified that she did not receive a copy of her report and other required information until days after she was rejected. Also, some of the criminal background checks were inaccurate, stale and/or involved mistaken identity.

A large discount retailer recently agreed to pay over \$4 million to resolve claims that it denied employment to applicants before they received the required notices, and a large transportation company recently agreed to pay \$4.4 million to resolve a class complaint arising over its failure to obtain authorizations from online applicants before running criminal background checks.

Many times employers do not acknowledge that the report played a part in the rejection of the applicant. The FCRA mandates notification if a background check is the basis, **in whole or in part**, for denying employment. This means that if there is anything in the background check that makes you look at other candidates, the rejected applicant must be informed that the adverse decision was based on the background check.

In sum, before taking adverse action based in whole or in part on a background check, you must send or give the applicant/employee: 1) a copy of the consumer report received from the consumer reporting agency; and 2) a copy of the Summary of Rights published by the Federal Trade Commission ("FTC").

If you then decide to deny employment based in whole or in part on information contained in an investigative report, then you must furnish in writing to the applicant/employee: 1) the name, address, and phone number of the investigative agency; 2) a statement that the agency did not make the decision to take the adverse action and is unable to provide the employee specific reasons why the adverse action was taken; 3) a statement setting forth the employee's right to gain a free disclosure of his/her file from the agency if the employee requests the report within 60 days; and 4) a statement setting forth the employee's right to dispute directly with the agency the accuracy or completeness of any information provided by the agency.

While there is no specified waiting period, experts suggest that you let the applicant know that you are contemplating rejection, and then give the employee approximately five (5) days to respond.

Every employer should audit its background check practices. While these amendments to the Fair Credit Reporting Act were passed in 1996, it appears that the litigation is just now heating up. With civil and criminal penalties, this is not a law to be taken lightly.

— [Sidney F. Lewis, V](#)

Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:

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