

DON'T PULL THAT CREDIT REPORT SO FAST

The New Pitfalls of Employee Background Checks

Joann Needleman

(215) 640-8536

jneedleman@clarkhill.com

Stephanie Rawitt

(215) 640-8515

srawitt@clarkhill.com

Linda Watson

(248) 988-5881

lwatson@clarkhill.com

CLARK HILL

BACKGROUND CHECKS

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

BACKGROUND CHECKS – THE NEW NORMAL

- There was a time when employment background checks were reserved for only certain job applicants; government jobs with access to sensitive information, those working with children or finances and a handful of other public facing or high level corporate positions
- However, in the past two decades there has been a dramatic increase in the number of jobs for which employers conduct pre-employment screening
- Why?
 - Technology
 - Employment Litigation
 - Societal Pressure/Norm
 - Regulatory Requirements

WHY SHOULD EMPLOYERS CONDUCT BACKGROUND CHECKS?

- To comply with state statutes mandating background checks for public safety reasons
- To avoid theft, fraud, embezzlement, accidents, etc.
- To avoid negligent hiring claims
- To detect resume fraud
- To manage public relations



OVERVIEW OF LEGAL RISKS – PITFALLS

- The “Catch-22” – Employers may be sued for bad employees’ conduct, and by employees for not complying with background check laws
- Federal, State and Local discrimination laws
- “Ban the Box” laws
- Fair Credit Reporting Act



EEOC CRIMINAL BACKGROUND CHECK GUIDANCE

- Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.
- Part of EEOC's E-RACE (Eradicating Racism and Colorism from Employment)
- Guidance does not have force of law. However, it outlines conduct that the EEOC considers unlawful under title VII
- Guidance shows "best practices" for using background checks in employment decisions
- Guidance addresses disparate treatment and disparate impact

EEOC GUIDANCE – DISPARATE TREATMENT

- What is it?
 - Employer treats criminal history information differently for different applicants or employees, based on their protected class
- How to avoid this pitfall:
 - Employers should be consistent in conducting background checks and using the information from the background checks
 - Avoid rejecting an applicant in a protected class based on a background check but then hiring a similarly situated applicant outside of the protected class with a comparable criminal record
 - Avoid making biased statements
 - Avoid conducting background checks only on members of a protected class
 - Provide all applicants with the same opportunity to explain criminal history

EEOC GUIDANCE – DISPARATE IMPACT

- EEOC maintains that certain minority groups have higher statistical rates of arrest and conviction and thus the use of criminal history information can have a disparate impact on these groups
- Title VII liability as it pertains to background checks:
 - Does the neutral policy or practice disproportionately screen out a Title VII protected group?
 - Can the employer demonstrate that the policy or practice is job related for the position in question and consistent with business necessity?
- Best practices:
 - Use a “targeted” screen of criminal records
 - Provide opportunity for individualized assessment for those who are screened out

WHEN SHOULD EMPLOYERS RUN A BACKGROUND CHECK?

- Job applications
- Before the first interview
- After the first interview
- After conditional offer of employment
- During employment



BAN THE BOX LEGISLATION

- Bans employers from asking about an applicants criminal history at the beginning of the job application process
- Allows criminal background searches only after the applicant has passed an initial employment screening (i.e. first interview)
- Total of 24 states (including California, Colorado, Connecticut, Georgia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Rhode island, Tennessee, Vermont, Virginia and Wisconsin) and countless cities have ban the box legislation
- Nine states (Connecticut, Hawaii, Massachusetts, Minnesota, New Jersey, Oregon Rhode Island and Vermont) have removed the conviction history question on job applications for private employers completely (which advocates consider the next step in the process)

EMPLOYERS BEWARE – NEW LEGISLATION

- Even if you are not in a state or city that currently has ban the box, that could change. This is a trend that has taken root and there is pending legislation in many jurisdictions.
- New legal trend – pay equity laws (Massachusetts law signed August 1, 2016 and will be effective in 2018; Philadelphia law signed and will be effective during first half of 2017, other states and cities have pending legislation)
 - Goal of these new laws to close gender gap and make it unlawful for employers to pay men and women different rates for “comparable work”
 - Prohibit employers from screening job candidates based on previous salary, asking salary-related questions on applications or contacting prior employers to confirm wages



WHO RUNS BACKGROUND CHECKS IS IMPORTANT

Legal pitfalls of concern depending upon who runs the background check:

- Employer – Human Resources/Hiring Authority
 - Disparate treatment claims
 - Careful of false information!
 - Same name, but different person (i.e. Joe Smith)
 - Impersonators/Fake Blogs and Postings
 - Be consistent with search methodology
- Third Party
 - Fair Credit Reporting Act (FCRA)

SERVICE PROVIDER LIABILITY

CLARK HILL

ARIZONA | DELAWARE | ILLINOIS | MICHIGAN | NEW JERSEY | PENNSYLVANIA | WASHINGTON, DC | WEST VIRGINIA

REGULATORY BACKGROUND

- Dodd-Frank Wall Street Reform and Consumer Protection Act (12 USC § 5481 et seq.)
- Authorized formation of the Consumer Financial Protection Bureau (CFPB)
- 12 USC § 5481(15) – Entities Covered, who is under the direct jurisdiction of the CFPB, anyone who provides a consumer financial product or service
- CFPB has authority to supervise, examine and enforce covered persons – banks and non-banks
- Issue regulations under the enumerated consumer protection laws including but not limited to FCRA
- 12 USC § 5481(26) – Service Provider Rule
- 12 USC § 5531 – UDAAP authority (unfair, deceptive and abusive act or practices)

COMPANIES THAT PROVIDE AND GATHER INFORMATION FOR EMPLOYEE BACKGROUND CHECKS ARE CREDIT REPORTING AGENCIES

- Subject to FCRA
- Employers that provide information to these companies are considered data furnishers
- Employers are subject to dispute process under the FCRA

FINANCIAL SERVICE EMPLOYERS

- Already covered persons
- Those entities must comply with all Federal consumer financial laws including the FCRA
- To the extent these same entities hire Third Parties to provide these background checks, employer is still responsible for these service providers
- CFPB Service Provider Compliance Bulletin & Policy Guidance: 2016-02
 - Banks and non banks (employers) responsible to ensure that service providers comply with all Federal consumer financial laws, including the FCRA
 - Entities must have a processes in place to manage service provider risk and harm to consumer
 - Must have a formalized vendor management program

WHAT ABOUT NON-FINANCIAL SERVICE EMPLOYERS?

- You still have legal obligations under the FCRA when you use background checks under the FCRA
- Must certify that you are FCRA compliant
- Must have oversight over companies who pull credit reports and gather information on your behalf.
- Do you know their processes and procedures?

BEWARE OF UDAAP

- Compliance does not stop with FCRA, employers must have measurable procedures and policies in place to ensure Third Party service provider is not otherwise violating UDAAP
- 12 USC 5536(a)(3) – UDAAP authority extends to non-covered entities, so even if you are not considered a credit reporting agency, you may have exposure if you have reason to know Third Party is engaging in UDAAP
- Unfortunately, what is considered a UDAAP violation may not be entirely known, and will required an on-going assessment of not only your policies and procedures but your service providers as well

WHAT SHOULD YOUR VENDOR MANAGEMENT OF THIRD PARTY SERVICE PROVIDERS LOOK LIKE?

- Business relationship must be established in writing with clear details on the expectation of compliance and consequences of non-compliance including termination
- Annual to bi-annual review/audit of service providers policies & procedures, especially upon on-boarding
 - Procedures for ensuring authorization of data
 - Procedures to ensure accuracy and control of data
 - Proper procedures for adverse action notices
 - A review of sample reports
- Possible on-site visit to ensure data security

NEW YEAR – NEW PRESIDENT

How will the change in administration affect the world of background checks, the FCRA and service provider liability?

CLARK HILL

QUESTIONS?



Joann Needleman

(215) 640-8536

jneedleman@clarkhill.com



Stephanie Rawitt

(215) 640-8515

srawitt@clarkhill.com



Linda Watson

(248) 988-5881

lwatson@clarkhill.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL