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Navigating the minefield of criminal background checks

By Michelle A. Morgan

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Investigating the criminal backgrounds of prospective and current employees can help employers determine the suitability of candidates for employment, promotion, and retention. In conducting their criminal background checks, however, employers should ensure that their inquiries, use of, and disclosures regarding criminal background check reports are compliant with federal and state nondiscrimination and consumer reporting laws.

Conducting the inquiry

Be careful what you ask for (and when and how you ask for it). Investigation into an applicant's or employee's criminal background must be job-related, appropriately limited in scope, and disclosed to and authorized in writing by the applicant or employee in accordance with applicable federal and state law. For prospective employees, criminal background checks should be performed on a pre-employment basis, after extending a conditional offer of employment contingent upon the employer's evaluation of the background check report.

Employers should use caution in determining the scope of the criminal background

information requested to ensure that such information complies with any restrictions imposed by federal and state law, relates to the employment position at issue, is not an absolute bar to employment, and does not have a disparate impact on any protected group. Numerous states prohibit or otherwise restrict inquiries into arrest records, juvenile records, vacated or expunged records, and criminal records antedating the request by a certain time period. Further, the Equal Employment Opportunity Commission (EEOC) has found that, because inquiries into arrest records have a disparate impact on some racial and ethnic minorities, arrest records alone are not reliable evidence that a person actually has committed a crime. To justify use of arrest records, employers must not only determine whether the conduct alleged in the arrest record is job-related to the position at issue, but must also evaluate whether the arrest record reflects the applicant or employee's conduct.¹ Accordingly, employers should carefully consider whether to include arrest records in their criminal background checks.

Further, employers must comply with the disclosure, authorization, certification, and reporting requirements of the Fair Credit Reporting Act (FCRA) and any applicable state law consumer reporting requirements whenever they obtain criminal background information from a consumer reporting agency. Consumer reporting agency means

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.²

The information must be for employment purposes for use in evaluating a prospective or current employee. When used in connection with a consumer report, "employment purposes" means "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."³

Under FCRA, before initiating a criminal background investigation through a consumer reporting agency, employers must:

- provide the applicant or employee with a "clear and conspicuous" written, stand-alone disclosure which informs the applicant or employee that the employer may obtain a consumer report (including criminal background information) and use it to make employment decisions; and
- secure written authorization from the applicant or employee to obtain such a report.⁴ The authorization should be prospective and sufficiently broad to encompass not only the application process, but also the entire duration of employment.

In conjunction with making the disclosure to and obtaining the authorization from the applicant or employee, employers should also secure a written release of claims associated with the investigation, verification, or use of any information relevant to the background check process, such as invasion of privacy claims.

Under FCRA, before requesting a criminal background check from a consumer reporting agency, employers must certify to the agency that they

- have provided the required "clear and conspicuous disclosure" to the applicant or employee;
- have received written permission from the applicant or employee to obtain the report;
- will adhere to the disclosure requirements if any adverse employment action is intended or taken in whole or in part based on the report; and

- will not use the information in violation of any applicable federal or state nondiscrimination law or regulation.⁵

Evaluating the results

What you know can hurt you. Employers should develop procedures and guidelines for evaluating criminal background check results to ensure confidentiality, consistency, and compliance with consumer reporting and nondiscrimination laws. Access to criminal background check information should be limited to authorized human resources personnel, legal counsel, and those management individuals with a “need to know” for legitimate employment purposes and/or business reasons. Written guidelines should be implemented to assist Human Resources and hiring managers in assessing criminal background check results. These guidelines should make clear that no applicant or employee will be automatically disqualified from employment because of a prior criminal record.

Criminal background information must not be an absolute bar to employment. Indeed, adverse employment actions taken on the basis of criminal conviction records must be justified by business necessity, which requires the employer to show that it considered the following three factors:

- the nature and gravity of the offense or offenses;
- the time that has passed since the conviction and/or completion of the sentence; and
- the nature of the job held or sought.⁶

These guidelines also should identify:

- what criminal history information will and will not be sought and/or considered (e.g., misdemeanor and felony convictions, but not arrests);
- what factors will be considered in evaluating criminal background check results (including the nature and gravity of the

offense, the time that has elapsed since the conviction or completion of the sentence, and the nature of the job sought or held); and

- what weight should be given to such factors (e.g., felonies are more serious than misdemeanors; crimes involving moral turpitude are more serious than other types of crimes; a pattern of misdemeanors, whatever their nature, is more serious than an isolated offense).

Providing the adverse action notices

Look (and let know) before (and after) you leap. Under FCRA, an “adverse action” means “a denial of employment or any other decision for employment purposes that adversely affects any prospective or current employee” such as a decision not to hire, a denial of a promotion, or termination.⁷ Adverse employment actions considered and/or taken based in whole or in part on the results of criminal background checks conducted by a consumer reporting agency must be handled in accordance with FCRA and applicable state law.

Pre-adverse action notice

Under FCRA, employers who intend to take an adverse action based in whole or in part on information contained in a criminal background check report must first provide a pre-adverse action notice to the applicant or employee that includes:

- a summary of the applicant or employee’s rights under FCRA (which can be satisfied by providing a copy of the Federal Trade Commission’s publication “A Summary of Your Rights Under the Fair Credit Reporting Act”); and
- a complete, unredacted copy of the applicant’s or employee’s background check report.⁸

Interim period

Under FCRA, after making the pre-adverse

action disclosure and before taking any adverse action based in whole or in part on information contained in the criminal background check report, employers must provide the applicant or employee a reasonable opportunity to respond to any information contained in the report that is incomplete or inaccurate. The statutory text of FCRA is silent as to an employer’s obligation to provide an applicant or employee with an opportunity to respond to the pre-adverse action notice and does not specify the interval of time required between the pre-adverse and post-adverse action notices. Legislative history, case law, and staff opinion letters from the Federal Trade Commission (FTC, the agency empowered to enforce FCRA), however, indicate that employers must provide prospective or current employees with a reasonable opportunity to respond to disputed information in the consumer report before taking an adverse employment action based on the report.⁹ FTC Informal Staff Letters consistently state that the intervening time period will vary on a case-by-case basis depending on the circumstances of the particular employment situation, and remind employers to keep in mind that “the purpose of the [pre-adverse action notice provisions are] to allow consumers to discuss the report with employers before adverse action is taken.”¹⁰

Accordingly, employers must wait a reasonable period of time, the length of which should be determined on an individualized, case-by-case basis, between providing the pre-adverse action notice to the applicant or employee and taking an adverse action. The waiting period between the adverse action notices is intended to allow the applicant or employee the opportunity to rectify any inaccuracies in the report. Employers should respond as appropriate under the particular circumstances to communications and/or inquiries from applicants or employees in connection with the pre-adverse action notice, including by directing the applicant or employee to contact

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the consumer reporting agency if he or she disputes the completeness or accuracy of any information contained in the report.

Post-adverse action notice

Under FCRA, upon or after taking an adverse action based in whole or in part on information contained in the criminal background check report, employers must provide a post-adverse action notice to the applicant or employee that includes:

- notice of the adverse action;
- the name, address and toll-free telephone number of the consumer reporting agency that provided the report;
- notice of the applicant or employee's right to receive, within 60 days, a free copy of the report upon which the adverse action is based;
- notice of the applicant's or employee's right to dispute with the consumer reporting agency the accuracy or completeness of any information in the report; and
- notice that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the specific reasons for the adverse action.¹¹

Steering clear

Employers should tread carefully in conducting, evaluating, and making employment decisions based on criminal background checks. Knowing what to ask for, what to do with the results, and what to disclose in the event of an adverse employment action is critical to minimizing legal exposure. ■

1 EEOC Policy Guidance on the Consideration of Arrest Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. (Sept. 7, 1990).
 2 15 U.S.C. § 1681a(f).
 3 15 U.S.C. § 1681a(h).
 4 15 U.S.C. § 1681b(2)(A)(i)-(ii).
 5 15 U.S.C. § 1681b(1)(A)(i)-(ii), (b)(2), (b)(3).
 6 Green v. Missouri Pacific Railroad Company, 523 F.2d 1290 (8th Cir. 1975), appeal after remand, 549 F.2d 1158, 1160 (8th Cir. 1977); EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (Feb. 4, 1987).
 7 15 U.S.C. § 1681a(k)(1)(B)(ii).
 8 15 U.S.C. § 1681b(3)(A)(i)-(ii).
 9 See, e.g., Kelchner v. Sycamore Manor Health Center, 305 F.Supp.2d 429, 435 (M.D.Pa. 2004), aff'd, 135 Fed. Appx. 499 (3d Cir. 2005) (citing H.R. Rep. 103-486, at 30 (1994) (discussing 15 U.S.C. § 1681b(3))) (recognizing that employers must "provide the consumer with a reasonable period to respond to any information in the [consumer report] that the customer disputes and with written notice and the opportunity and time period to respond."); Beverly v. Wal-Mart Stores, Inc., No. Civ. A. 3:07-CV-469, 2008 WL 149032, at *3 (E.D.Va. Jan. 11, 2008) ("The statutory purpose of [the FCRA's pre-adverse action notice requirement] is to enable an employee applicant to receive his draft report and correct any of [sic] inaccurate information in the report before any decision or action is commenced.");
 10 See, e.g., Letter from William Haynes to Sidney F. Lewis (June 11, 1998); Letter from Clarke W. Brinckerhoff to Eric J. Weisberg (June 27, 1997).
 11 15 U.S.C. § 1681m(a)(1), (2)(A)-(B), 3(A)-(B).