

Employment Law Corner

Monthly Report



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Employment Law Corner: Checking in on Criminal Background Checks

Criminal background checks can be an essential part of the hiring process. These checks could be mandatory where workers interact with vulnerable populations like children and the elderly. Even when they are not mandatory, a criminal background check is a valuable tool for minimizing risk, keeping your employees and customers safe, and protecting your company's reputation. Like so many parts of running a business, background checks can be a liability minefield for unwary employers. Federal, state, and local laws can all impact how, when, and whether an employer can or must run a criminal background check on a current or future employee.

Federal Law – FCRA

Background checks are principally regulated at the federal level through two laws: the Fair Credit Reporting Act (FCRA) and Title VII of the Civil Rights Act. A criminal background check is treated as a form of a consumer report that is regulated because of the significant impact an incorrect report can have on an individual's employment opportunities. With that in mind, the FCRA sets out several procedures an employer must follow when running a criminal background check on a prospective employee.

First, the FCRA requires an employer to give applicants notice in a standalone document that the employer will be conducting a background check and that information uncovered by the report may be used for employment-related decisions. If your background check is going beyond public records and will go to topics such as the applicant's character, reputation, or lifestyle, the employer must give the applicant a description of the nature and scope of the investigation. The applicant should give written permission for the background report.

The FCRA's requirements don't stop at notice and written permission – if the report comes back with troubling information that makes the employer rethink hiring, the employer must first give the applicant a notice that includes a copy of the consumer report relied upon to make the decision and a copy of "A Summary of Your Rights Under the Fair Credit Reporting

Act," which should be provided by the vendor with the report. Once adverse employment action has been made, the employer must tell the applicant:

- that they were rejected because of information in the report;
- the name, address, and phone number of the company that sold the report;
- that the company selling the report did not make the hiring decision, and cannot give specific reasons for it; and
- They have a right to dispute the report's accuracy or completeness and to get an additional free report from the reporting company within 60 days.

This process is intended to give the applicant an opportunity to dispute or explain the contents of the report, which may change the employer's decision. Of course, an applicant or employee's background check should be kept confidential and used only to make the employment decision at hand.

Federal Law – Title VII

As always with employment decisions, it is critical to treat everyone, whether a customer, applicant, or employee, equally and without discriminating based on race, national origin, color, sex, religion, disability, genetic information, or age. For example, all applicants for a particular position should be subject to the same background check. The Equal Employment Opportunity Commission (EEOC) goes even further, recognizing that a neutral policy may have a disparate impact on applicants of a particular background. (Translation: your policy make look fine but causes discriminatory decisions to be made.) To address this, the EEOC has endorsed three factors, the Green Factors (named after a 1975 court case), to give employers guidance on how to assess information that comes up in a criminal background check in the context of a hiring decision:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought.

To properly apply the Green factors, employers should not have a blanket policy against hiring individuals with a criminal record of any kind and should instead develop written policies that identify essential job requirements and determine the specific offenses or classes of offenses that may make an applicant unfit for the job. This assessment should be individualized, and any decision made about an applicant should be put in writing. The key considerations should be whether excluding the applicant based on their criminal record is job-related and consistent with business necessity. Examples of relevant individualized evidence can include the circumstances of the offense, the number of offenses the applicant has been convicted of, the age at which the applicant was convicted and the gap between the conviction and the application, the employee's employment and criminal history before or after the offense in question, and character references or rehabilitation training. Of course, if the applicant does not cooperate with giving the employer additional information, the employer has no choice but to use only the information in the background report.

State and Local Law – Ban the Box and Beyond

State and local law provides a wide range of regulations and restrictions on criminal background checks, though public employers tend to have more restrictions than private employers. However, employers should be aware of a recent trend to restrict when and how they can ask about an applicant's criminal record. Starting with Massachusetts in 2010, dozens of states and municipalities have adopted a so-called "Ban the Box" law, which prohibits employers from asking about an applicant's criminal record during the application phase. Some laws apply to the application phase, while others ban certain types of criminal history inquiries altogether. Some laws apply only to contractors with public entities, others apply to employers of a particular size, and still others apply across the board. Because laws can vary by jurisdiction, it is important to ensure that your job applications and background check procedures comply with the law of each location where your business operates.

The good news is, we can help!

Who We Are

We want to introduce ourselves to those we have not met:

- We represent employers exclusively from coast to coast in all facets of employment law and litigation. Our mission is solving problems and anticipating issues so you can concentrate on your business.
- We are constantly searching for the trends and upcoming issues in the law that will impact our clients. We want our clients to be informed and ready. Our familiarity with the workplace and our approach sets us apart from other law firms, making us well equipped to handle your unique needs.
- We are not like other firms: Anyone can tell you what the law states and its limits. That is easy. We find creative solutions within those restrictions that move your business forward. We seek to minimize your risk so you can get back to business. Learn how we can help your business: **[Foley & Foley PC attorneys specialize in Employment and Labor Law in the Public and Private Sectors \(foleylawpractice.com\).](http://foleylawpractice.com)**

Meet Gregory Paal

We are happy that Attorney Gregory Paal has joined our team! Greg has experience advising employers on regulatory compliance, contract matters and employment-related litigation. Greg has worked with employers both large and small to meet various challenges, including implementing overtime and leave policies, drafting employment agreements and privacy policies, and resolving discrimination complaints!

For more info, check out his full bio [here](#)!



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