

Key Things You Should Know About Background Checks

By Karen Sutherland

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Legal Background

Employers are legally liable for negligent hiring and negligent retention. In other words, if you as an employer either knew or should have known that an employee was likely to cause harm to someone else, then you can be liable for putting them in a position where they could cause the harm. Background checks are a way to avoid having this situation arise.

If your employees interact with children under 16, developmentally disabled persons or vulnerable adults, then there is a special set of rules that apply regarding what type of information you can obtain if you do a background check.

Background checks are also useful to help protect you from direct losses and to keep your workplace running smoothly. They can reveal something about the applicant's skill level, experience and personality, and can alert you to issues that may be a red flag for the position you are trying to fill, such as an accountant with a past conviction for embezzlement or a delivery driver with a history of reckless driving convictions.

The downside of background checks is that they can be time-consuming and expensive, and there is some information that you do not really want to know because it could result in claims that you refused to hire applicants for illegal reasons – such as because you found out their sexual orientation, or their religion, or that they have a disabled child that would make your insurance premiums go up. Overall, though, most employers believe that the benefits of conducting background checks outweigh the hassles.

Practical Guidelines

Talk to the applicant's former employers. If the applicant tells you that you cannot do so (for confidentiality reasons, for example), then get the names of customers or vendors or industry peers or others who would be familiar with the applicant's work.

If the applicant's prior employers are reluctant to talk or tell you that their policy is to release only dates of employment and title of position, read between the lines. Ask them if they follow this policy with all former employees. You can also obtain a release from the applicant that will allow former employers to provide you with the applicant's personnel file and to talk to you about the applicant. If you need a release of this type, you can contact me at Ogden Murphy Wallace, P.L.L.C.

At the very least, call the applicant's references. Be careful in your probing, though, not to get into areas that could lead to a claim of illegal discrimination (such as marital status, disabilities, religion, race, etc.).

If you have a third party conduct the background check, you will need to comply with the Fair Credit Reporting Act ("FCRA"). Most companies that specialize in conducting background checks are familiar with the FCRA and can help you with its requirements.

Decide whether a criminal background check is warranted for the position. There are some limitations on how you can use criminal history, which may vary from state to state. For example, in Washington State, a municipal corporation can only use conviction data if the applicant has a felony conviction that relates to the position sought and the conviction is less than 10 years old, and it cannot be the sole reason for turning down the applicant. For the private sector, the Human Rights Commission has taken the position that criminal convictions must be job-related. The courts will not necessarily support the Human Rights Commission's position, however. If this situation arises with one of your applicants, you should contact an employment law attorney for further guidance.

Decide whether you want to know credit information, such as for a position that involves handling money. If so, you will need a release to obtain the information.

If you use personality testing as part of your background check, make sure that it does not seek information about disabilities or about the applicant's race, religion, marital status, or other status protected by the anti-discrimination laws.

You can obtain civil lawsuit information from each county where the person may have been involved in a lawsuit, such as the county where they live or work or where they have done business or own property. This information would include torts such as auto accidents and business-related claims such as trade secret theft, trademark infringement, tortious interference with a contract or business expectancy, breach of contract, etc. It will also reveal judicial foreclosures, disputes with neighbors, collection suits, libel or slander suits, dissolutions, etc.

You can interview neighbors if they may have some information that would be relevant.

You may wish to obtain educational transcripts directly from the educational institutions, as these records are not too difficult to forge or alter.

You can interview former teachers or teaching assistants for input on personality, study habits, professionalism and aptitude.

Be sure to use background information appropriately. I am aware of many situations where the background check turned up negative things about the applicant, but the employer hired the applicant anyway based on a good first impression or because there were no other candidates. Often, the employer ended up regretting the decision.

The above suggestions are broad, general comments only. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such as the employment and labor law practice group of Ogden Murphy Wallace, P.L.L.C. The author, Karen Sutherland, can be reached at (206) 447-7000 or ksutherland@omwlaw.com