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Hiring

Employee Background Checks Have Companies Caught in the Middle

Employers are caught in a bind with background checks, facing threats of lawsuits for not doing them diligently and for doing them unfairly or illegally.

Negligent hiring lawsuits are increasing, Attorney Lester Rosen, founder and CEO of Employment Screening Resources, said June 19. These target employers that hire employees who go on to do harm. At the same time, if background checks don't follow the law, they can trigger lawsuits by rejected applicants. Thus, when it comes to background checks, "you have to do them, and you have to do them right," Rosen told HR professionals at an event in New Orleans.

To stay legally compliant, the "first thing" employers should do is check with their counsel, Clare Hart, CEO of background check firm Sterling Talent Solutions, told Bloomberg BNA June 19.

The three major challenges with applicant screening are "access to quality and accurate checks," compliance, and turnaround time, Hart said. And the first two should never be sacrificed to the third.

These conflicts can be seen in the results of an online survey Sterling did Feb. 1 to March 3, garnering 507 employer responses. While 45 percent said cutting the time it takes to hire applicants is their biggest challenge, 38 percent said they have problems getting all the information they need to make hiring decisions.

Delays in the screening process can happen if a county that needs to be contacted for court records handles them manually and only keeps certain hours, although two-thirds of counties do have these records automated, Hart said. International checks also take longer.

Potential Liability Under Fair Credit Reporting Act A major potential source of liability with employer background checks is the Fair Credit Reporting Act, Bret Jardine, general counsel of Atlanta-based background screening firm First Advantage, told Bloomberg BNA June 19. He said employers can "find themselves in litigation" under this law over whether they have provided job applicants, employees up for a promotion, or employees being re-screened for some other reason with proper notice that they are to be screened.

The applicant or employee, as a "consumer," also has to be asked for authorization and consent for the screening, Jardine said. Further, the applicant or employee has to be informed by letter five days before any adverse action is taken based on a credit report, such as being turned down for a job or promotion, or being fired, he said. California also mandates that the employer provide the applicant with a copy of his or her credit report.

Fines for violating the FCRA are \$100 for each violation, or \$1,000 if the violation is "willful," plus attorneys' fees. For large employers that have been following incorrect practices for a while, the liability can really add up, Jardine said.

Beyond 'Ban the Box' Rosen, speaking June 19 at the annual conference of the Society for Human Resource Management in New Orleans, said many states and localities have adopted "ban the box" laws to stop employers from screening out job applicants with any criminal convictions on their records at the beginning of the process.

The Equal Employment Opportunity Commission recommends but does not require the same thing, he said. The federal agency also recommends but does not require an "individualized assessment" (i.e., a chance to explain) for applicants whose criminal records are revealed later in the process, he said.

Some "ban the box" laws go further than the standard bar on asking for an applicant's criminal history before the employer extends a conditional offer of employment, Jardine said. These laws also require the employer to send out a detailed letter about the individualized assessment the employer has done of the job applicant, before turning him or her down for a position, he said.

Another new wrinkle in background screening is the spread of local and state marijuana legalization, Hart said. Employers handle these changes in different ways, she said; for example, some ignore the marijuana results included with applicants' drug tests.

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