

What U.S. Multinational Employers Need to Know about Background Checks

Article By:

Daniel L. Saperstein

David Reid

Employers often run background checks on their applicants and employees in order to protect the workplace and to assemble a good and trustworthy workforce. For U.S.-based employers with operations overseas, the legal requirements governing the background check process in the United States can vary from the requirements of the process abroad. This post examines some cross-border differences and offers practical guidance for U.S. multinational employers.

Background Checks in the United States

Whether on their own accord or through a third-party vendor, it is common practice for employers in the United States to run background checks on their prospective and current employees. For years, as part of the due diligence process, employers have inquired into a range of records regarding an applicant's or employee's credit, criminal, driving, educational, and employment history. In recent years, however, a growing number of federal, state, and local laws have imposed a series of requirements and restrictions on U.S. employers both before running a background check and before taking adverse action based on the results.

Background Inquiries

In the United States, employers typically rely on a third-party vendor known as a *consumer reporting agency* ("CRA") to perform a background check. For decades, federal law (specifically, the ***Fair Credit Reporting Act ("FCRA")***) has regulated this process, requiring employers to disclose to applicants and employees when they intend to have a CRA run a background check, and to obtain the applicant's or employee's consent before doing so. Several states have levied similar obligations on employers.

U.S. employers face other restrictions under various state and local laws regardless of whether they run a background check through a CRA or on their own initiative. For instance, jurisdictions across the country have limited when an employer can ask about an applicant's criminal history—a movement better known as "ban the box." To date, in seven states and about a dozen localities, private employers cannot ask an applicant to divulge his or her criminal history on the initial

employment application and, in some cases, until after a conditional offer of employment.

Even when permitted to make criminal history inquiries, employers may not ask about certain types of criminal records in certain jurisdictions. For example, D.C. prohibits questions about arrests that are no longer pending, San Francisco outlaws queries about convictions more than seven years old, and New York nixes inquiries concerning youthful offender adjudications. Employers also face limitations when asking about credit history, as ten states and at least four localities forbid credit checks for employment purposes, with limited exceptions.

Taking Adverse Action

Employers in the United States also are subject to increasing regulation whenever they intend to take adverse action (e.g., rescind a job offer, terminate employment) based on the results of a background check. For instance, before taking adverse action against an applicant or employee based on the results of a background check report prepared by a CRA, federal law requires the employer to first send a notice of intent to take adverse action and allow the applicant or employee at least five business days to contest the results or provide additional information. If, after considering any corrective or mitigating information, the employer still intends to take adverse action, it must send the applicant or employee a final notice of adverse action. Certain states require employers to follow a similar process.

In addition to these notice obligations, some employers may not take adverse action on the basis of certain criminal offenses or credit history, regardless of whether they use a CRA. For instance, several states prohibit employers from considering arrests or sealed or expunged convictions in hiring and other employment decisions. A growing number of states and localities also only permit employers to take adverse action based on criminal offenses that reasonably relate to the job. And, some jurisdictions limit employer use of certain types of convictions (e.g., drug offenses) for purposes of employment.

International Background Checks

Background Inquiries

Prior to conducting background checks in foreign jurisdictions, U.S.-based employers should first consider the nature of their business presence. Indeed, whether an employer “does business” in a given jurisdiction can impact the extent of its obligations to comply with the employment laws of that jurisdiction. Oftentimes, U.S.-based parent companies will conduct background checks on individuals seeking work at an international subsidiary of the parent company. In such cases, international privacy laws may restrict the free transfer of personal information. Where, in fact, the parent company is not technically the individual’s employer, the company still should consult with local counsel on the extent of its legal obligations before proceeding with the background check.

Unlike the process in the United States, employers may not be able to utilize third-party vendors to conduct background checks in certain jurisdictions. Indeed, sometimes, local rules may block access of third-party vendors to certain information – including credit history and criminal records – and require that the individual employee or applicant obtain the records directly from the source (e.g., the credit bureau or law enforcement agency headquarters). The employer may be able to request that the individual obtain the records and turn them over to the employer, but in certain circumstances, it may not be able to condition prospective or continued employment on the individual’s compliance with such directives.

As noted earlier, certain U.S. states restrict the ability of employers to ask questions about an applicant's criminal history. The same can be said in countries abroad. As an initial matter, certain countries do not keep centralized criminal records and, therefore, it may prove difficult – if not impractical – for the individual to even obtain his or her criminal history. Moreover, in some countries, conditioning employment on the successful completion of a criminal background check, particularly where not job-related, may run afoul of applicable anti-discrimination laws, as well as an employee's right to privacy and/or right to work.

In jurisdictions that allow employers to conduct background checks, at the very least, the consent of the applicant or employee often is necessary. Certain countries may restrict the ability of employers to obtain consent through an electronic signature, and employers should consult with local counsel to determine if a hard copy signature is necessary. In addition, as a practical matter, employers often need to provide the background check consent forms in the jurisdiction's national language.

Taking Adverse Action

Employers that operate internationally also often face significant restrictions when taking adverse action based on the results of a background check. Generally speaking, the employer must demonstrate “just cause” before taking an adverse action against an employee, and terminating employment based on the results of a background check may not rise to that level. And while the hurdle may be lower in cases where an employer decides not to hire a prospective employee based on the results of a background check, in cases where the employer is considering terminating a current employee, it should consult the applicable anti-discrimination and employment laws in that jurisdiction and/or seek the advice of local counsel.

Practice Pointers

Given the growing patchwork of laws, when running background checks in the United States, employers should remember to:

- ensure that hiring guidelines regarding employment of individuals with criminal records are consistent with federal, state, and local law;
- conduct individualized assessments of candidates and employees when possible;
- train managers on the appropriate use of criminal and credit history in hiring, promotion, and separation; and
- adhere to FCRA and other state and local requirements before conducting background checks and when considering or taking adverse actions against applicants or employees based on the results.

And, when running background checks internationally, employers should remember to:

- “know your business presence” in a given country;
- obtain consent to retrieve any given number of background check records;
- ensure compliance with applicable privacy and anti-discrimination laws; and

- consult with local counsel both before running a background check or before taking adverse action based on the results.

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