

Pre-Offer Background Checks: Employer Beware

Article By:

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We were recently asked if it was safe to conduct background checks on a particular applicant before making an offer of employment. The employer typically conducts background checks only after making a conditional offer of employment.

While the practice of doing spot pre-offer background checks may be legal, it is not a best practice. First, if the employer's typical practice is to conduct background checks only after making a contingent employment offer, I question why there is a need to deviate from that practice. As we consistently advise employers and HR professionals, you should always follow your policies. Any time you deviate from a policy, you open the door to litigation. For example, why would you only conduct pre-offer background checks on some applicants, but not others? Although the manager here may have a valid reason for doing so, applicants who were not hired may point to the policy and allege that they were not hired for discriminatory reasons and that the company required them, but not others, to submit to background checks in order to disqualify them from a job offer. If you feel that you need to conduct pre-offer background checks for certain positions, then you should make this your policy, and then follow it. Be sure you can clearly state a valid reason why some positions require pre-offer checks while other positions do not.

Second, pre-offer background checks are problematic for another reason. The background checks reveal so much more information about a person than a mere job application. While nothing in the job application may indicate the person's race, religion, political affiliation, national origin, or other protected characteristic, this information is frequently gleaned from background checks. If you conduct the background check before denying someone a job offer, that person may allege that you failed to offer him a job, not because he wasn't qualified, but because of a discriminatory reason. On the other hand, if you make a contingent offer of employment without any knowledge of the person's protected characteristic, but later withdraw the offer based on the results of the background check, it's hard to argue that your reason for not hiring someone was discrimination and not the unfavorable background check.

Third, consider the costs of the background checks. It's not very cost effective to run a background investigation on every applicant, only to then not hire the person. It's much cheaper to cull through applications and conduct interviews to separate those who may be qualified for a job from those who obviously are not, and then conduct the checks on only the few to whom you are making offers.

Although there's nothing illegal about conducting pre-offer background checks, you should weigh the

pros and cons and decide whether it is really necessary. If you have any questions about the practicality of conducting pre-offer background checks, you should consult your legal counsel.

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