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"He Was The Perfect Applicant... Until We Received The Background Check"

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It’s not uncommon to make a job offer conditional on the results of a pre-employment background check. But, how often do you deny an otherwise good job applicant a job because something unexpected came back in the background check? How do you go about informing this applicant—who you told had the job (subject to the results of the background check)—that he or she is now not going to be considered for employment?

First off, it’s perfectly legal to base a hiring decision on the results of a background check. However, doing so opens up the possibility of either a disparate treatment claim (if the individual can prove that others outside of a protected category were hired, despite similar violations showing up in their background checks) or a disparate impact claim (if a member of a protected category can prove that the use of background checks adversely affects members of the protected category more than others). So, as with many employment practices, it’s best to have a written policy in place that sets forth what sorts of flags raised in a background investigation will be disqualifying and under what conditions. For example, will your company only consider felony convictions to be disqualifying, or are there some misdemeanor convictions that will act as a bar to employment? How far back in the applicant’s past will you look—is a felony conviction from twenty years ago, with no intervening trouble, enough to prevent you from hiring an applicant?

The Equal Employment Opportunity Commission (“EEOC”) has taken the position that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of such protected characteristics as race, sex, religion, and national origin, requires that a hiring policy that excludes applicants with criminal convictions be job-related and consistent with business necessity. A background check hiring policy should accurately distinguish between applicants that pose an unacceptable level of risk to an employer and those who do not. So, for a job that requires driving a company vehicle, it might be reasonable to exclude applicants who have drunk driving convictions; but, if no driving is required for a job, that policy might not be found reasonable by the EEOC if it were challenged. Similarly, for safety sensitive positions, you may wish to exclude applicants who have convictions for illegal drug use, but you might not need to do so for all employees. (Of course, this is a separate issue from a drug-free workplace. Here, we are talking about past convictions for drug use, not current drug use.)

Also, there are obligations under the Fair Credit Reporting Act that must be

undertaken *before* informing the applicant of the adverse decision and *afterwards* if the background check was done by a company that is in the business of conducting background checks:

Before taking an adverse action, such as not hiring an otherwise qualified applicant, you must give the applicant a copy of the report you relied upon to make the decision and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which you can find on the Federal Trade Commission's website.

After taking the adverse action, you must inform the applicant orally, electronically, or in writing (and it is always best to memorialize such decisions in writing), that he or she was rejected because of information contained in the report; the name, address, and telephone number of the company that provided the report; that the company providing the report did not make the hiring decision and cannot give specific reasons for the decision; and that the applicant has the right to dispute the accuracy or completeness of the report and to get an additional free report from the reporting company within 60 days. Your legal counsel can assist you in drafting both the pre- and post-adverse action notifications.

Finally, what do you do with the report after you've notified the applicant that you will not be hiring him or her? Do you have to keep the results of these background checks? Are we allowed to? The EEOC requires that private employers keep all personnel or employment records, including records related to hiring decisions, regardless of whether the applicant was hired, for one year after the records were made or a personnel action was taken—whichever is later. For educational institutions and state and local governments, the requirement is for two years. Additionally, the Department of Labor requires federal contractors that have at least 150 employees and a government contract of at least $150,000 to keep these records for two years. If an applicant or employee files a discrimination charge, you are required to maintain the records until the case is concluded.

As you can see, if you decide not to hire an otherwise qualified applicant based upon the results of a background check, there is more involved than simply informing the applicant, "Thanks, but we're not interested."

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