Potential Traps for Employers in Conducting Background Screening

By: Brendan Collins, Esquire

Most employers, including associations and their members, conduct some type of criminal background check on potential employees before hiring them. It is a sound practice to do so. A recent decision by the Equal Employment Opportunity Commission (EEOC), however, highlights risks associated with conducting overzealous background screening procedures. In addition, employers relying upon credit histories of job applicants or current employees must be careful to comply with the federal statute governing the use of such information.

Criminal Background Checks

In January of 2012, the EEOC reached a settlement with Pepsi which required it to pay $3.13 million based upon Pepsi's practice of denying employment to individuals who had been arrested but not convicted of crimes. The EEOC found reasonable cause to believe that the criminal background check policy discriminated against African Americans in violation of Title VII of the Civil Rights Act of 1964. The EEOC also asserted that the use of conviction records to deny employment can be illegal under the Civil Rights Act when it is not relevant for the job because it can limit the employment of opportunities of applicants or workers based on their race or ethnicity. The EEOC recommends that in instituting a background check policy employers take into consideration the nature and gravity of the offense, the time that has passed since the conviction and/or completion of the sentence, and the nature of the job sought in order to be sure that the exclusion is important for the particular position.

The scope of the EEOC's ruling and the size of the penalty imposed is surprising. Whatever one thinks of the merits of the EEOC's position, however, it should serve as a cautionary tale for associations and other employers who inquire as to an individual's arrest record, as opposed to history of convictions, and use such information in making hiring or other employment decisions. Further, even in the case of hiring or promotions based upon criminal convictions, an employer would be well served to create a record showing the relevance of the criminal conviction to the employment decision being made.

Credit Histories

In addition to checking potential employees criminal backgrounds from public sources, many associations and other employers check out the credit histories of potential and current employees. Often, if the applicant or employee has a credit history which shows significant problems, the employer may decide not to hire the applicant or not to promote an employee.

One easy way to obtain detailed information on prospective applicants or employees is to use the services of companies such as Equifax, TransUnion or Experian. These companies provide a broad range of information including both criminal records and credit information. Companies such as those listed above are known as third party Credit or Consumer Reporting Agencies or CRA's.

Employers who use the services of CRA's must comply with the provisions of the Fair Credit Reporting Act (FCRA). This Federal statute has strict requirements governing the practices of employers who use CRA's for information when evaluating applicants or employees. Employers who violate this statute are subject to damages, payment of defendant's attorney fees and in some cases, punitive damages.

As a general rule, an employer who uses a report from a CRA in evaluating an applicant or an employee must:

a. Disclose to the employee or applicant its intent to procure the report in advance of obtaining the report.

b. Obtain written authorization from the employee or applicant to procure the report.

c. Give the employee or applicant written notice, prior to taking action , if the employer intends to take adverse action based in whole or in part on the content of the report.

d. Give the employee or applicant written notice explaining the adverse action after the adverse action is taken.

The four basic requirements outlined above each have sub parts that require that employer's train HR staff who participate in the hiring process on the details of FCRA compliance. During the past several years there has been an increase in class action lawsuits alleging that large employers have intentionally violate FCRA in their hiring practices. In 2007, the U.S. Supreme Court in *Safeco Insurance Company of America v. Burr,* 551 U.S. 47 (2007), broadly defined "willfulness" under FCRA, making it easier for class action attorneys to obtain large FCRA damages.

If your association uses CRA's to obtain information on applicants or employees, contact us to make sure that you have adopted the proper policies to ensure FCRA compliance.

For additional information or if you have questions or comments about the proceeding article, please contact:

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