

Developments in Employee Screening for Real Estate Industry

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The real estate industry, and the people employed in it, build and maintain communities driving domestic growth. Naturally, employers in the real estate world want to know their employees are reliable and trustworthy. Therefore, employers are taking steps, including conducting background checks, to ensure a single hire does not inadvertently cause liability.

Background checks have been the traditional means to ensure quality hires. Background checks are regulated by the Fair Credit Reporting Act, which imposes certain requirements on employers and background check companies, such as requiring authorization, providing a stand-alone disclosure form to employees and job applicants prior to requesting a background check report, and exposure to potential liability for noncompliance.

In light of continuing workforce shortages and ever-changing legal requirements, employers across all areas of the real estate industry are responding with changes to their hiring standards and criteria. In some cases, employers may also have relaxed their previous standards as being outdated or in response to the urgings of state and local agencies to be more lenient when screening out candidates. On the other end of the spectrum, at least one state has enacted a law requiring enhanced employee background screening for certain segments of the real estate industry. Regardless of how any employer decides to go about performing background checks, they should keep the following recent legal developments in mind.

“Ban the Box” Laws Enacted in States and Cities

“Ban the box” laws (or “Fair Chance Acts”) limit employers’ access to a job applicant’s criminal history pre-offer. Typically, these laws require employers to consider qualifications first when examining an applicant’s eligibility for employment. Different states, and even some municipalities, have enacted their own requirements. Multi-state employers, therefore, should take care to confirm the requirements of any state or local laws, if any, before conducting background screening. If recruiting nationally, which many employers now are in response to labor shortages, employers should be mindful of the laws in the states where they recruit.

Further, the federal Fair Chance Act, effective December 20, 2021, requires only post-offer background checks; federal contractors must comply with its requirements.

Employers making hiring decisions based upon a criminal history record are urged to conduct an individualized assessment, where appropriate (and certain jurisdictions have mandated this step). The Equal Employment Opportunity Commission (EEOC) has issued guidance to assist employers on this point.

While balancing all of these considerations, employers must still protect against

potential liability in the form of negligent hiring and retention claims. Negligent hiring and retention claims scrutinize an employer's hiring and employment practices and seek to hold the employer responsible for the harmful acts of its employee, where the employer did not take all reasonable steps, when hiring and retaining that employee, to ensure that employee was not dangerous or otherwise likely to harm others.

In the real estate industry, it is almost always the case that employers are juggling the interests of their employees, their business, and third parties. "Ban the box" laws and the potential for negligent hiring and retention claims add another layer of complexity to this balancing act.

Drug Screening Guidelines Change for Marijuana

It has been nearly 10 years since Colorado and Washington became the first states to legalize recreational cannabis use. Since then, many other states have followed suit. In addition, the U.S. House of Representatives passed the Marijuana Opportunity Reinvestment and Expungement Act (MORE Act) on April 1, 2022. The MORE Act is intended to decriminalize cannabis use nationwide and remove cannabis from the federal schedules of controlled substances. In July 2022, the U.S. Senate unveiled their own draft legislation to decriminalize marijuana, titled the Cannabis Administration and Opportunity Act.

Regardless of whether these proposed federal laws are enacted, the legal landscape governing cannabis use has changed significantly in the last decade and will likely continue to shift. For instance, some states that have loosened cannabis restrictions also have enacted laws prohibiting discrimination against employees and job applicants based on their lawful use of cannabis, both medicinal and recreational. As states continue to legalize or loosen restrictions on cannabis use, employers in the real estate industry should exercise caution and ensure they understand state and local laws governing cannabis use as related to drug and background screening and the treatment of job applicants. Failure to do so can expose employers to discrimination, failure to accommodate, and retaliation claims. In contrast, employers still have to balance the risks created by employees (*e.g.*, those in safety sensitive positions) using cannabis who may expose their employers to other claims of liability.

Equal Employment Opportunity

Employers should continue to take proactive steps to ensure their hiring practices comply with federal, state, and municipal equal employment opportunity laws, especially as they relate to criminal history. In the past, the EEOC has been concerned that, even if an employer has a lawful, job-related reason for a background check, such a practice may tend to have a disparate impact on protected classes of job applicants. Employers should review existing policies, even if they are neutral on their face, to ensure they do not have a disproportionate negative impact on any particular class of persons and to minimize the risk of discrimination claims. For instance, some automated screening processes using artificial intelligence may inadvertently generate disproportionate results in hiring, requiring careful design and review. Such results, though unintended, may be perceived as discriminatory. In addition, the inconsistent application of these policies and practices, such as making exceptions for some applicants and employees but not others, may create additional issues of liability.

Employers should closely monitor the effects their policies may have on applicants to

avoid unintentionally disparate outcomes when examining and making hiring determinations based on applicants' backgrounds.

If you have any questions on screening requirements or limitations for applicants and employees, please contact a Jackson Lewis attorney to discuss.

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