Navigating the **Background Check Minefield**

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Background checks require compliance with a **host of legal requirements**—here are just a few that are essential for **maintaining your firm's reputation** and bottom line.

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In an economy where it is difficult to fill client orders, staffing companies may be tempted to skip or relax criminal background check requirements. But client contracts often require them and discontinuing background checks creates the risk of a negligent hiring or retention lawsuit. Additionally, the staffing company's reputation, and ultimately bottom line, may be affected if it assigns an employee with a criminal record to a client and theft or workplace violence ensues.

Staffing companies must comply with a host of legal requirements if they conduct background checks, which presents its own legal risks. This article focuses on three of these laws: Title VII of the Civil Rights Act of 1964 ("Title VII"), the Fair Credit Reporting Act, and Ban-the-Box/Fair Chance laws.

Title VII prohibits discrimination in employment on the basis of several protected characteristics, including race. One form of prohibited discrimination is when a policy or practice, although neutral on its face, has a disparate impact against a protected class. This form of discrimination is known as "disparate impact."

Since minorities, particularly African-American men, are arrested and convicted at higher rates than nonminorities, background checks pose the potential for disparate impact race discrimination. As a result, employers are prohibited from

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making employment decisions based on an arrest. Likewise, employers cannot automatically disqualify a candidate due to a criminal conviction. Instead, according to the U.S. Supreme Court and Equal Employment Opportunity Commission, employers must conduct an individualized analysis. Three factors are considered: the severity of the crime, the nature of the job, and how long ago it occurred. If the employee provides a plausible explanation, employers should consider additional factors, including the age of the candidate when convicted, whether the candidate has obtained gainful employment postconviction, and whether the candidate has any references. For example, a drunk driving conviction may not disqualify a candidate interested in a warehouse position, but it may be relevant if the position is to drive a van from the airport to a hotel.

It is particularly challenging for staffing companies to comply with Title VII when they are contractually obligated to follow a client's demands, often reflected in a matrix, or cede the hiring decision to the client without regard to these factors. Matrices, by their nature, are formulaic and seemingly contradict the requirement to conduct an individualized analysis. Moreover, matrices usually focus solely on the severity of the crime, without regard to the other factors. Thus, staffing companies should push back on one-size-fits-all matrices and try to retain sole control over the hiring decision, or at least broaden the matrix to include other factors and an individualized assessment component. Staffing companies should also seek to negotiate favorable indemnification provisions into their staffing services agreements to provide a contractual protection should their company face litigation due to their client's unlawful requirements or actions.

Second, employers must comply with the FCRA if they are using a third-party consumer reporting agency (CRA). Under the FCRA, prior to conducting a background check, the employer must provide the candidate a standalone disclosure form that contains no extraneous information and obtain a signed authorization form. If, after running the background check, the consumer report informs the staffing company of an issue that may result in an adverse action (e.g., not hiring the candidate), the employer must first provide a pre-adverse action letter to the candidate notifying them that an adverse action may be taken. A copy of the consumer report and a notice published by the Federal Trade Commission must accompany that communication, and the employer must wait a reasonable period of time (i.e., at least five business days) before taking adverse action. Once the five days have passed, the employer should provide an adverse action letter to the candidate notifying them of the decision if they have been disqualified.

The FCRA process raises unique concerns for the staffing industry. First, has a candidate experienced an adverse employment action if they are not eligible for placement with one client, but are eligible for another? Does it matter if the candidate applied for a particular position, or just inclusion on the staffing company's general database? There is scant case law directly addressing these issues.

Finally, staffing companies should be mindful of state and local Ban-the-Box and/or Fair Chance laws. These laws vary by jurisdiction, but generally prohibit asking about criminal history on an employment application or in an interview. Often, they prevent running a background check until an offer of employment has been extended. Some jurisdictions require additional factors to review or additional forms or notices, or prohibit an employer from even mentioning on a job advertisement that a background check will be required. It is important for staffing companies that conduct business on a multistate basis to stay apprised of the growing body of law focusing on this topic.

Although the laws pertaining to background checks form a complex web of obligations on the employer, the good news is that compliance is relatively easy if your staffing company has a system in place alerting you of new federal, state, or local laws; your staff is well-trained; and you have transparent communications with your client. ■

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KEY TAKEAWAY

Staffing companies must comply with a host of legal requirements if they conduct background checks, but keeping apprised of new laws, training your staff, and having transparent communications with your client make compliance easier.