

## Know the law: Background checks continue to trip up employers

Background checks can be useful tools to uncover misconduct or dishonest behavior at previous jobs or outside of work, and to determine whether an applicant possesses the positive traits desired in an employee.

They can also be useful to avoid later claims of negligent hiring if things go wrong with a new hire.

However, the decision to use background checks should be carefully considered and implemented. If you don't follow the rules, background checks can cause more trouble than they prevent. Your background process can also become the basis for a class-action lawsuit.

### Federal & N.Y. laws apply

First, be sure to know and observe the requirements of both the federal Fair Credit Reporting Act (FCRA) and the New York Fair Credit Reporting Act. These statutes largely mirror each other, and both contain technical requirements regarding the collection and use of background check information.

The state law contains more restrictive requirements than the FCRA. For that reason, it is a mistake to assume a background check vendor has all the technical requirements covered, especially if it is an out-of-state vendor.

One common mistake is assuming the FCRA and the state equivalent only apply when an employer is seeking credit information. Even though the titles of both laws contain the term "Fair Credit Reporting," they cover a much broader set of reports.

Under the FCRA, for example, a background check performed by an outside agency instead of the employer, is a "consumer report" and is covered by both laws.

Another common mistake is relying solely on an employment application to inform applicants they will

be subject to a background check. The FCRA requires employers to provide applicants with a stand-alone authorization form.

There are many more potential state and federal FCRA pitfalls.

*The bottom line:* If you are running background checks, be sure you are fully versed on the details of the state and federal FCRA's.

### N.Y. law's notice requirements

Be aware of Article 23-A of the New York Correction Law. Most employers understand that it is unlawful to refuse to hire an applicant simply because of a prior conviction, except in certain circumstances. However, many employers may not yet recognize that, pursuant to an amendment to the New York Fair Credit Reporting Act, employers must provide applicants with a copy of Article 23-A whenever they obtain an investigative consumer report (a narrow subset of background investigations) or a criminal background check.

This same amendment includes a posting requirement: Labor Law Section 201-f now requires all employers—not just those conducting background checks—to post a copy of Article 23-A in the workplace. (Download a copy at [www.labor.ny.gov/formsdocs/wp/correction-law-article-23a.pdf](http://www.labor.ny.gov/formsdocs/wp/correction-law-article-23a.pdf).)

Finally, be sure to apply any background check policy consistently. Cherry picking certain applicants for a background check or skipping the process altogether for others can expose an employer to claims of discrimination or negligent hiring.

### Class-action lawsuits

The FCRA expressly requires employers to provide applicants with a stand-alone disclosure and authorization form prior to obtaining a background check. This form must be separate from the employment application, and cannot include

any type of language attempting to release the employer from liability associated with obtaining the background check.

Unfortunately, many employers still fail to comply with this law by relying solely on a disclosure located on an employment application to inform applicants that they will be subject to a background check, or by attempting to include additional language on the disclosure. That's a serious mistake.

### Important legal test coming

A recent proposed class-action lawsuit against Whole Foods Market in California provides a reminder to employers to review their disclosure and authorization forms for FCRA compliance.

The lawsuit accuses the grocery chain of using an invalid form to obtain consent to conduct background checks during the employment application process.

Specifically, it is alleged that Whole Foods relied on a background check consent that was included alongside several other consent paragraphs on an online employment application, and that the online consent form included a release of claims related to obtaining the background check.

If Whole Foods' form is found invalid, the consequences are significant, including invalidation of the consent, statutory damages in the amount of up to \$1,000 for each applicant, costs and attorneys' fees and potential punitive damages.

This lawsuit is a reminder that FCRA compliance makes good business sense, and that employers should periodically review their application and hiring forms and processes to ensure strict compliance.

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