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### Avoid A Few Common Mistakes When Conducting Background Checks

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The percentage of employers conducting background checks as part of the hiring process has steadily increased. Background checks can be useful tools to uncover any misconduct or dishonest behavior at previous jobs or outside of work, and to determine whether the 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. More than one employment law applies to use of this tool in the hiring process.

First, be sure to know and observe the requirements of both the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681, and the New York Fair Credit Reporting Act, General Business Law Article 25. These state and federal statutes largely mirror each other, and both contain technical requirements regarding the collection and use of background check information. However, in certain areas, state law contains more restrictive requirements. 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. Another 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. For example, if a criminal background check is performed by an outside agency instead of by the employer, it is a "consumer report" and is covered by both laws. A third 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. 15 U.S.C. § 1681(b)(2)(A). These are just a few examples of the mistakes employers make when conducting background checks. 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.

Second, 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 (General Business Law Sections 380-c and 380-g) which took effect in February, 2009, 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 new 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.)

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

Be Careful Out There!

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