

Background Checks:



Minimizing Risks

or How to Reject an Employment Application Without Being Sued

This article will address whether an employer should conduct a background check and, if it chooses to do so, how to avoid potential liability.

When to Run a Background Check

Background checks allow the potential employer the ability to determine whether a job applicant has committed a crime or mishandled their finances. This information is valuable to protect the employer and others (i.e.: third parties). It protects the employer from harm caused by the employee directly upon the employer, for example, a future theft. It protects others from harm by the employee, for instance, a future car accident. When an employee harms a third party, the employer becomes susceptible to a claim of property damage and negligent hiring.

Negligent hiring claims most often occur 1.) when the employee is in a position of trust, for example, handling other people's money, 2.) when firearms are involved, for example, a security guard, 3.) when dealing with the public; or 4.) when the employee was driving a vehicle at the time of an accident. For roofing companies who are considering hiring a particular employee who will be driving on the job, obtaining a report containing the applicant's driving history is of the utmost importance. Doing so keeps the company vehicle safe and avoids liability from third parties. The easiest way to obtain driving records is to have the applicant sign a Consent To Release Motor Vehicle Record—One Time, form #96-0463, at the time he/she applies for the job. That form allows the employer to obtain the employee's driving records from Arizona Department of Motor Vehicles.

When hiring an employee who will operate a commercial vehicle, pursuant to rules set forth through the U.S. Department of Transportation, an applicant must be provided a detailed application with specific questions that are set out within the rules.

A criminal background check should be conducted on any potential employee who will be handling money or driving a vehicle. Employers should disclose on its job application that it intends to run a background check on the potential employee.

Running a Credit Report on an Applicant

Employers can run a credit report on the potential

employee. The rules surrounding the disclosure of the use of credit reports are governed by the Fair Credit Reporting Act. Before obtaining a standard credit report, the employer must have the applicant sign a document, separate from the application form, authorizing the employer to run one. If an employer requests a more detailed investigative report, that is, one that includes interviews with persons who have personal knowledge of the applicant's lifestyle, reputation or personal characteristics, the employer must mail a written notice of the request to the applicant within three days of requesting the investigation. The notice must advise the applicant of the nature and scope of the investigation. If the applicant does request the information, the employer has five days to provide the applicant the name of the agency used for the investigation, questions asked of the witnesses, and types of witnesses. The employer is not required to identify the witnesses or the contents of their statements.

If the credit reporting agency provides information within the public record, for example, lawsuits, criminal records, and driving records, the credit reporting agency must report to the applicant that that information was provided to the employer. Otherwise, the credit reporting agency has no obligation to advise the applicant what information the credit reporting agency disclosed.

If the employer takes adverse action based upon what is in the credit report, the employer must provide oral, written or electronic notice of the adverse action. In addition, the employer must provide other information to the applicant. The notice requirements include contact information for the credit reporting agency, a notice that the credit reporting agency did not make any decision on hiring and that it cannot explain why the adverse action was taken, a notice of the applicant's right to obtain a free copy of the report from the credit reporting agency and another notice of the right to dispute the information in the report. An employer faces exposure to actual damages, in some cases, punitive damages, attorney's fees and costs, and even exposure to criminal liability for those who fail to comply with the Fair Credit Reporting Act. In spite of this exposure, credit reports should be run in the hiring situations described above. With a little care, including obtaining authority to run the reports when running a basic report, the employer can avoid potential liability.

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