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E-ALERT | Employment and Privacy

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EEOC AND FTC ISSUE JOINT GUIDANCE ON BACKGROUND CHECKS PERFORMED BY EMPLOYERS

On March 10, 2014, the Equal Employment Opportunity Commission ("EEOC") and the Federal Trade Commission ("FTC") issued joint guidance on how the anti-discrimination laws enforced by the EEOC and the Fair Credit Reporting Act ("FCRA") enforced by the FTC apply to background checks performed by employers for employment application purposes. The guidance is unique in that it represents the first time the two agencies have worked together to address how each interprets the sources of law that address background checks. This guidance is published in two technical assistance documents, one directed at employers and the other directed at employees and applicants. The guidance aims to provide high-level practical assistance and answers to commonly asked questions that arise during the application process.

The pamphlet directed to employers builds off of the EEOC's April 25, 2012 guidance regarding employer use of criminal history information, which we summarized here, and is broken into three distinct categories: (1) ensuring procedures to consider before an employer seeks or obtains background information, (2) using background information appropriately, and (3) disposing of background information. In addition to this information, the employer guide cautions employers to review the laws of their state and municipality regarding background reports or information. This warning is critical since the guidance does not address, for example, the recent wave of state and municipal "ban-the-box" legislation that forces employers to remove the check box from employment applications that asks if applicants have a criminal record.

BEFORE AN EMPLOYER GETS BACKGROUND INFORMATION

As initial matter, the guidance reminds employers of their obligation to treat all applicants and employees equally. The guidance instructs employers to refrain from performing background checks on applicants or employees in a selective manner, where that decision is or could be perceived to be based on protected characteristics such as a person's race, national origin, color, sex, religion, disability, genetic information, or age. Except in rare circumstances, the EEOC warns employers against seeking, or making employment decisions based on, an applicant's or an employee's genetic information (including family medical history), lest such questions lead to challenges under the Genetic Information Nondiscrimination Act. Similarly, the employer guide notes that employers should not ask any medical questions before a conditional job offer has been made, and only ask medical questions of a current employee if there is objective evidence that he or she is unable to do the job or poses a safety risk because of a medical condition.

The FTC reminds employers that any time an employer obtains a background report from an outside company, the employer must comply with the FCRA. To comply with the FCRA, the employer must notify the applicant or employee that the information might be used in making employment decisions and that the employees have a right to a description of the nature of the investigation to be performed. Employers must obtain written permission from employees or applicants to do a background check and also provide certain certifications to the company conducting the check.

Although not directly addressed in the joint guidance, the FCRA is not limited to checks of an applicant's credit standing, but also covers any checks that include "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for employment purposes." This can include reports by third parties based on their review of applicants' or employees' social media profiles or other information on their internet use (e.g. blog posts and even craigslist activity). Any company that provides reports that include information derived from social media profiles or other internet use can qualify as a "consumer reporting agency" under the FCRA. Accordingly, both consumer reporting agencies and employers considering ordering or using a wide range of reports from third parties, including those that review an employee's or an applicant's social media or internet use, must comply with the requirements of the FCRA, including the relevant notices and disclosures.

USING BACKGROUND INFORMATION

When using background information to make employment decisions, the guidance cautions employers to apply the same standards to all individuals and to take special care when basing employment decisions on background problems that may be more common among certain categories of people. If a background check policy disproportionately impacts members of a protected group (such as criminal history inquiries, which have been found to disproportionately disqualify African Americans), the check must be job-related and consistent with business necessity in order to withstand EEOC scrutiny. The guidance does not explain, however, how employers are to discern whether certain background problems are more common among specific groups or disproportionately impact members of protected groups, nor does the guidance mandate that employers conduct any research to investigate these possibilities.

Before taking an adverse action based on background information found in a credit report or other report that falls under the FCRA, an employer must give the applicant or employee a notice that includes a copy of the report the employer relied on to make the decision and a copy of a summary of the applicant's or the employee's rights under the FCRA. After taking an adverse action, the employer must tell the applicant or employee that he or she was rejected because of information in the report; the identity of the company that provided the report; that the company providing the report did not make the hiring decision; and that he or she has the right to dispute the findings in the report and receive an additional free report within 60 days.

DISPOSING OF BACKGROUND INFORMATION

According to the EEOC, employers must retain any personnel or employment records for one year after the records were made, or after a personnel action was taken, whichever comes later. This requirement is extended to two years for educational institutions, state and local governments, and federal contractors above a certain size and revenue threshold. After that period, employers may dispose of the reports and any information gathered from them, but must do so securely.

In light of the new guidance, employers are advised to review their procedures for conducting background checks on employees and job applicants to ensure compliance.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our employment practice group:

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