

Does Your Policy on Background Checks Break the Law?

Using criminal background checks to make decision about new or current employees poses two distinct and significant legal risks.

First, the Fair Credit Reporting Act (FCRA) imposes disclosure obligations on employers who use a third party to conduct criminal and/or employment background checks. Before obtaining the background check, employers must notify the applicant or employee in writing that a background check will be performed and get their written consent. If the employer then makes a negative employment decision about the applicant or employee (such as choosing not to hire or promote) based on the background check, then the employer must give the applicant or employee a copy of the report, the name of the agency that prepared the report, and notice of their rights under the FCRA (including the right to dispute the report).

In addition, starting January 1, 2013, there are new forms that must be used as part of the process. In particular, an updated “A Summary of Your Rights Under the Fair Credit Reporting Act,” must be given to applicants and employees as part of pre-adverse action notice (with regard to criminal or other records). In the case of investigative consumer reports, which include personal interviews as opposed to relying solely on documents, the revised notice must be given at the onset when the employer notifies the applicant or employee that a background check will be performed. A copy of the updated form can be found [here](#) in the Code of Federal Regulations.

The second risk with using criminal background checks is that your policy may inadvertently be discriminatory. The Equal Employment Opportunity Commission (EEOC) is scrutinizing the use of criminal records as an automatic bar to employment because, in the EEOC’s opinion, such a practice discriminates against minority groups with higher rates of criminal convictions. To prevent this inadvertent discrimination, the EEOC requires that employers conduct individualized assessments of criminal records before making an employment decision. This means that, in screening for criminal conduct, the employer must: (1) consider the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the job in question; (2) give the applicant or employee the opportunity to explain why he or she should not be excluded; and (3) consider whether the explanation shows that the policy as applied is not job related and consistent with business necessity. Although the individualized assessment inquiry adds another layer to the process, this burden is outweighed by making the employment decision more defensible before the EEOC should a charge of discrimination be made.

It should be noted that the EEOC recognizes “targeted exclusions” negating the need for an individualized assessment when there is a tight nexus between the nature of the crime, the time elapsed since the criminal conduct occurred, and the nature of the job in question. For example, a sex offender could be automatically excluded from working with children. More detail on targeted exclusions can be found [here](#) on the EEOC’s website.



EMPLOYMENT LAW UPDATE

- **REMINDER:
MINIMUM WAGE INCREASED FOR 2013**

Effective January 1, 2013, the minimum wage for Oregon employees increased to \$8.95 per hour. The minimum wage for Washington employees increased to \$9.19 per hour.

Both Oregon and Washington have issued new minimum wage posters that employers are required to post as of January 1, 2013, in a conspicuous place that is accessible to employees. The Oregon poster can be downloaded and ordered from the Oregon Bureau of Labor and Industries website. Washington's "Know Your Rights as a Worker" poster is available for download and order from the Washington Department of Labor and Industries website.

These posters are in addition to the mandatory federal minimum wage poster. If you have a diverse workforce where languages other than English are spoken, then you should make sure to display posters in English and in the other languages spoken.

This is a good time to review your payroll practices to ensure compliance with not just minimum wage, but also overtime practices, correct designation of salary-exempt employees, and other wage and hour laws. If you have any questions about wage and hour issues, feel free to contact Shane Swilley of our employment law group at (503) 276-6074.

Cosgrave Vergeer Kester LLP *Employment Law Group*

Shane P. Swilley,
Timothy J. Coleman



Announcements

The new year is a perfect opportunity to review and update your employment policies and practices. Take advantage of our free consultation to review the current state of their employment policies and procedures. This service is invaluable to ensure compliance with current employment laws. For more information or to schedule an appointment,

contact Shane Swilley at (503) 276-6074 or swilley@cosgravelaw.com.

If you or your company has been threatened with litigation, or a lawsuit or complaint has been filed, then contact the head of Cosgrave's Employment Law Group, Tim Coleman, at (503) 219-3810 or tcoleman@cosgravelaw.com for a consultation.