

A PRIMER ON EMPLOYEE BACKGROUND CHECKS

By: *Shane P. Swilley, Employment Law Group*

Employers sometimes want to consider the backgrounds of employees and applicants when making personnel decisions. It is not illegal for employers to ask questions about an applicant's or employee's background, or to require a background check except for certain restrictions related to medical, genetic, and credit history information. However, any time you use background information to make an employment decision, regardless of how you got the information, you must comply with federal and state laws that protect applicants and employees from discrimination. In addition, when you run background checks through a company in the business of compiling background information, you must comply with the Fair Credit Reporting Act (FCRA). The following advice comes from us and EEOC to help you comply with federal and state nondiscrimination laws and the FCRA.

● **Before you request background information**

In all cases, make sure that you are treating everyone equally. It is illegal to check the background of applicants and employees because of that person's race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age, or other classification protected by state or federal law.

Do not ask any medical questions before a conditional job offer has been made. If the person has already started the job, do not ask medical questions unless you have objective evidence that he or she is unable to do the job or poses a safety risk because of a medical condition.

You cannot request credit history except in limited circumstances set by Oregon law.

If you get background information (for example, a credit or criminal background report) from a company in the business of compiling background information, there are additional procedures the FCRA requires beforehand:

1. You must notify the applicant or employee in a separate writing that you may use the information for decisions about his or her employment. The notice can't be in an employment application. You can include minor additional information in the notice, if it doesn't confuse or detract from the notice.
2. If you are asking a company to provide an "investigative report" - a report based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle - you must also inform the applicant or employee of his or her right to a description of the nature and scope of the investigation.
3. You must get the applicant's or employee's written permission to do the background check. This can be part of the document you use to notify the person that you will get the report. If you want the authorization to allow you to get background reports throughout the person's employment, make sure you say so clearly and conspicuously.



4. You must certify to the company from which you are getting the report that you notified the applicant and got their permission to get a background report; you complied with all of the FCRA requirements; and you won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or any state laws or regulations.

● ***Using Background Information***

Any background information you receive from any source must not be used to discriminate in violation of state or federal law. You should:

1. Apply the same standards to everyone when considering background information, regardless of their race, national origin, color, sex, religion, disability, genetic information, age, or other classification protected by state or federal law.
2. Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, age, or religion; among people who have a disability; or among people of any other classification protected by law. For example, you should not use a blanket policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee.
3. Be prepared to make exceptions for problems revealed during a background check that were caused by a disability, unless doing so would cause significant financial or operational difficulty to your business.

When taking an adverse employment action (for example, not hiring an applicant or firing an employee) based on background information obtained through a company in the business of compiling background information, the FCRA has additional requirements.

Before you take an adverse employment action, you must give the applicant or employee a written notice that includes a copy of the report you relied on to make your decision, and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which you should have received from the company that sold you the report. By giving the person the notice in advance, the person has an opportunity to review the report and explain any negative information.

After you take an adverse employment action, you must tell the applicant or employee that he or she was rejected because of information in the report; the name, address, and phone number of the company that sold the report; that the company selling the report didn't make the hiring decision, and can't give specific reasons for it; and that he or she has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.

● ***Storing and Disposing of Background Information***

Any personnel or employment records you make or keep (including all application forms, regardless of whether the applicant was hired, and other records related to hiring) must be preserved for at least one year after the records were made, or after a personnel action was taken, whichever comes later. (The EEOC extends this requirement to two years for educational institutions and for state and local governments. The Department of Labor also extends this requirement to two years for federal contractors that have at least 150 employees and a government contract of at least \$150,000). If the applicant or employee files a charge of discrimination, you must maintain the records until the case is concluded. If you suspect an applicant or employee may file a charge, the best practice is to preserve the records until the deadline to file a charge has passed.

Once you've satisfied all applicable recordkeeping requirements, you may dispose of any background reports you received. However, you must dispose of the reports - and any information gathered

from them - securely. This can include burning, pulverizing, or shredding paper documents and disposing of electronic information in a manner such that it can't be read or reconstructed.

Time for a Business Health Check-Up?

By: Jill D. Laney, Business Practice Group



Like people, businesses can benefit from a periodic health check-up. As businesses evolve, changes may be necessary to maintain health and vitality. Owners and key principals should keep their pulse on a number of different areas:

● *Continuity of the business:*

Is there a plan in place for successor owners and managers to continue the business after the retirement of the current owners and managers? It can take some time to put a plan in place, so owners and key principals should consider this issue early and often.

● *Tax structure:*

Is the current tax structure the best option for the business? In the current business climate a limited liability company may, for instance, benefit from electing S-corporation (as opposed to partnership) tax status. Or, there may be a benefit to converting a C-corporation to an S-corporation. When business owners are considering these issues, the company's accountant or attorney can be a good resource.

● *Insurance:*

Does the business have adequate insurance in place? It is not unusual to renew coverage at the same level, year after year, without thinking of how the business has changed over the years. Are copies of all of insurance policies archived in the event they are needed in the future? This can be very important if environmental issues arise or an employee makes a claim arising from exposure to hazardous materials at the worksite.

● *Employment practices:*

Are employment applications, contracts and handbooks up-to-date? Are managers properly trained in interview techniques? Are all required employment signs posted?

● *Corporate governance:*

Is the company's minute book up-to-date? Have annual meeting minutes been created? Have minutes been drafted to approve all significant company events? Is the stock register complete and up-to-date? Are the articles of formation, by laws and operating agreement up-to-date? These things become very important if the company is audited by the IRS, if the company is under scrutiny by any other governmental agency, or if a dispute ever arises amongst the owners of the business.

Taking a few minutes from time-to-time to examine these issues and make necessary changes can ensure a healthy and prosperous business.

Contact Jill Laney at 503.219.3849 or jlaney@cosgravelaw.com to set up an appointment for your business health check-up.



EMPLOYMENT LAW UPDATES

- ***Reminder: It's Time to Update Your Employees On Accrued Portland Sick Leave***

The City of Portland's sick leave ordinance requires covered employers to "provide written notification each quarter to each Employee of the amount of accrued and unused Sick Time available for use by that Employee." This information can be provided to employees as a separate written or electronic notice, in their itemized paystub, or using accessible online resources. If you have questions about this or any other requirement of Portland's Sick Leave Ordinance, feel free to contact us.

- ***Upcoming Employment Seminar***

In June, Tim and Shane will be attending the ALFA International Labor & Employment, Insurance and Professional Liability Practice Groups seminar in New York. This two day seminar features first-class presentations on a variety of issues by experienced and well-qualified senior claims personnel, risk managers, brokers, in-house counsel and others. Some of the topics included are cutting edge issues such as cyber-liability, accounting malpractice and emerging trends in employment litigation.

- ***Employees Can Choose To Decline FMLA Leave and Its Protections***

The Ninth Circuit Court of Appeals (the federal appeals court covering Oregon) held that an employee is not entitled to federal Family Medical Leave Act (FMLA) job protections when the employee expressly rejects FMLA leave. Even though the need for leave may qualify as FMLA leave, the employer is not obligated to automatically designate the leave as FMLA leave and provide necessary notices. It is not certain whether the same would hold true under the Oregon Family Leave Act (OFLA). However, OFLA is often interpreted in line with FMLA. Employers should modify their medical leave procedures to specifically ask and record whether an employee intends to take or decline FMLA or OFLA leave.

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If you have any questions about the content of this newsletter, please contact Shane P. Swilley at (503) 276-6074 or swilley@cosgravelaw.com.

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.

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 tc Coleman@cosgravelaw.com for a consultation.