



Background Screening: What Every Employer Needs to Know

Until recently, many companies conducted criminal background checks only on job applicants for higher-level positions or positions that involved direct access to the companies' finances. Most employers have abandoned this approach in the wake of a sharp increase in negligent-hiring lawsuits, most of which involve lower-level employees. The best practice now is to subject all, or at least most, job applicants to a criminal background check, and to subject them to a new background check when considering them for promotion or reassignment into positions that would materially increase the nature or extent of their interactions with the public or their access to company financial accounts. In addition, background checks are now required by law in many industries, including those that involve healthcare practices and interactions with children and the elderly.

The increased use of criminal background checks has been accompanied by increased regulation and increased litigation against employers who fail to comply with the strict, and often hyper-technical, requirements of background screening laws. The lawsuits often take the form of class actions, and seven-figure settlements are becoming the norm.

The primary federal law governing the background screening process is the Fair Credit Reporting Act, 15 U.S.C. § 1681a *et seq.* (the "FCRA"). Specific industries are governed by additional federal statutes and regulations, and a number of states have separate laws that expand upon these requirements. Failing to comply fully can subject an employer to private litigation and regulatory enforcement actions. And there's a whole cottage industry of plaintiffs' attorneys just waiting to pounce on the slightest slip-up.

To help mitigate your risk of litigation, here are a few key issues (by no means exhaustive) to consider before engaging in any background screening activities:

- Be sure you have insurance that covers the types of litigation and government enforcement actions to which background screening can give rise, and make sure your policies do not contain exclusions for federal statutory or regulatory claims.
- Be sure your contract with your background screening company (known as a "consumer reporting agency" or a "CRA") addresses all of the issues necessary to ensure compliance and decrease the chances of liability.
- You are permitted to order a background report on an individual only for certain statutorily-approved purposes, and you must certify to the CRA that your order complies with this and other requirements.
- Some states require employers to perform an individualized assessment of an applicant's qualifications and ability to do the job at issue, so if you perform background searches in those states, be cautious in treating certain criminal background events as automatic disqualifiers for employment.

- Before you may order a background report on an individual, you must provide the individual with certain disclosures, and you must secure the individual's authorization.
- Before you may take any adverse employment action based on a background report, you must provide the individual with notice, a copy of the background report, and a summary of the individual's rights under the FCRA; then you must wait for a period of time before actually taking the adverse action.
- When you take the adverse employment action, you must provide a new notice to the individual.

The law in this field is rapidly developing, as are the specific steps one must take to comply with each of the last five bullet points. Employers are well-advised to engage counsel to assist them in auditing their background screening processes and documentation on a regular basis.

If you have any questions regarding these or other background screening topics and how they may affect your business, please contact:

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About Henry R. Chalmers

Henry is the Co-Chair of Arnall Golden Gregory's Litigation Group, a member of its Background Screening Industry Team, and a member of the National Association of Professional Background Screeners. He has nearly two decades of experience representing clients in litigation and arbitration and counseling clients in best practices, including advising employers on a wide array of background screening matters. Henry is also a certified Arbitrator with the American Arbitration Association (AAA), through which he presides as an arbitrator over disputes throughout the United States.

About Arnall Golden Gregory

Selected to The National Law Journal's prestigious 2013 "Midsize Hot List" for helping clients adapt to increasing globalization and regulatory complexity, Arnall Golden Gregory has more than 160 attorneys in Atlanta and Washington, DC who offer big-firm services to growing companies without big-firm costs and bureaucracy. AGG celebrates its 65th anniversary this year of providing exceptional client value.