

Chapter 4

Background checks

Screening candidates for employment by conducting background and reference checks is a valuable way for employers to discover relevant information about potential employees. The information discovered may indicate whether an applicant will be a good fit for a position. On the other hand, the information discovered may suggest that an applicant is not qualified. An important benefit associated with thoroughly checking into the applicant's background is that an employer may protect itself from potential liability associated with negligent hiring and negligent retention claims.

Often, as a part of the application process, an employer will want to gather information from a prospective employee's current or former employers.

There are many different steps an employer may take to check into an applicant's background. Depending on the nature of the position in question, employers may choose to use a few or all of the steps that follow for conducting appropriate background investigations.

Reference checks

In most cases, it is advisable that employers check the personal and prior employment references listed by an applicant and document the information received, or, if not successful, the efforts made. While the law does not require a written authorization from the applicant, employers normally should obtain such a broad authorization before conducting these reference checks. Additionally, employers might consider requesting a waiver from an applicant that releases former employers and the requesting employer from any claims relating to the reference check. With this type of waiver in place, a former employer may be more willing to give more relevant information about their former employees. An employer also should make sure it has a fully completed application to use as a resource in the reference check, including past employment history, references, names of immediate supervisors, and educational background.

When contacting references, prospective employers should request basic information such as dates of employment, job duties, performance assessments, wage history, discipline record, tendency for violence, circumstances surrounding discharge, and eligibility for rehire. Although a former employer may not be willing to respond on all of these topics, a prospective employer may shield itself from negligent hiring and subsequent negligent retention claims simply by asking appropriate questions and making notes of the responses given. In addition to asking relevant questions and listening closely to the answers, a prospective employer should take careful notes of information given by a reference, as well as all unsuccessful attempts made to contact references.

When an employer is asked to provide information regarding a former employee, the employer should consider adopting a policy of providing only “name, rank, and serial number” information about former employees. Under such a policy, employers should decline to volunteer any subjective, speculative, and/or undocumented information and provide only the dates of employment and the positions held by the employee. Most employers provide only this limited information in connection with reference checks for fear of a later lawsuit by the former employee alleging claims of defamation, slander, breach of privacy and/or retaliation. As discussed above, Nebraska law gives some protection to employers from liability. However, the protection afforded is not absolute and, therefore, the safest course of action is to cautiously disclose to third parties only limited information regarding current and former employers.

Criminal record checks

An employer in Nebraska may consider an applicant’s actual criminal record in its hiring decision. Federal law, however, including leading decisions of the federal court of appeals with jurisdiction over employment cases arising in Nebraska, distinguishes between inquiries regarding an individual applicant’s prior arrests, as opposed to criminal convictions, and precludes consideration of prior arrests which do not result in convictions, in making hiring decisions. It is important to emphasize, however, that there is a critical difference between an inquiry into the mere fact of an arrest, and the underlying facts surrounding the arrest, which may indicate guilt, even though no conviction results. Therefore, it is permissible for a Nebraska employer reviewing a criminal records or background check to inquire further into the facts leading to a mere arrest, such that it would possibly be lawful for an employer to reject an applicant when other probative job-related evidence is available to confirm that the individual actually engaged in the conduct for which they were arrested, the conduct is job related, and the conduct occurred fairly recently.

In Nebraska, it is well settled that employer inquiries into prior criminal convictions are considered relevant and lawful, and do not carry the restrictions applicable to arrest records outlined above. Nebraska employers may utilize information regarding prior criminal convictions in making hiring decisions, so long as the prior conviction does not constitute an absolute bar to employment, and the employer considers the nature and gravity of the offense or offenses, the time that has passed since the conviction and/or completion of sentence, and the nature of the job for which the applicant has applied.

Please note that Nebraska employers in certain industries and professions are required to perform criminal background checks, including: public law enforcement; employment in assisted living facilities; adult day services; child care facilities; security and/or private detective agencies; social services provided to families, children and youth; and real estate brokers and agents.

Driving record checks

Employers should review the driving record of applicants for positions that would require the use of a company vehicle. Driving record checks should be conducted before an applicant is hired and then periodically throughout employment. When checking the driving record of an applicant, employers should confirm that an applicant has a valid driver’s license and review any driving violations, particularly past violations involving reckless driving and driving under the influence of alcohol. However, keep in mind that under the ADA alcohol related convictions

cannot be used to discriminate against an applicant perceived to be an alcoholic or with a record of alcoholism. As discussed below, if the employer uses a third-party company to obtain this information, the Fair Credit Reporting Act (FCRA) may be implicated.

Credit checks

Credit checks may be performed for positions that involve financial responsibilities. However, the EEOC takes the position that credit checks may have an adverse impact on minorities. Thus, it is a good employment practice to limit the use of credit checks to positions for which there is a legitimate business necessity. For example, a credit check for a restaurant cook with no financial responsibilities would be inappropriate, while a credit check for a controller or accounts payable clerk might be more legitimate. Credit checks should be performed for all applicants for a particular position. Typically, credit reports can only be obtained through third-party entities that prepare such reports for a fee. As a result, the provisions of the FCRA usually bind employers that obtain credit reports and the necessary disclosures and provisions apply.

Fair Credit Reporting Act

The FCRA was amended, effective October 1, 1997, to add significant new compliance requirements for employers who use consumer reports in making employment-related hiring, promotion, and termination decisions. The term “consumer report” is defined very broadly by the FCRA as any written, oral, or other communication from a consumer reporting agency bearing upon the consumer’s credit worthiness, standing, credit capacity, character, reputation, personal characteristics, or mode of living. It includes, among other things, motor vehicle, criminal background, bankruptcy, and medical and credit history records that are used “in whole or in part” to assess an individual’s qualifications for employment. These consumer reports must be generated by a consumer reporting agency for the FCRA to apply. Generally, the FCRA does not apply to an employer’s ability to conduct its own reference checks by contacting former employers or otherwise checking public records or documents.

The following guidelines summarize some of the principal requirements imposed by the FCRA when an employer uses a consumer report in making employment decisions. Failure to follow the requirements of the FCRA could result in liability for civil fines or damages and even criminal prosecution.

Before obtaining a consumer report for the purpose of screening potential employees or in making promotion, demotion, or discharge decisions regarding existing employees based upon the contents of the consumer report, an employer must first:

- have an employment purpose for obtaining the consumer report (that is, the report is used for evaluating a consumer for employment, promotion, reassignment, or retention)
- give the affected individual **written notice** of the employer’s intention to obtain a consumer report in a document that consists solely of this notice
- obtain from the affected individual **written permission** to obtain a consumer report on that individual. Federal Trade Commission opinion letters indicate that an employer may combine the written notice and permission described in the above paragraphs on a single form, but nothing else may be included on this form

- certify to the consumer reporting agency from which the employer obtained the consumer report that it has complied with all applicable provisions of the FCRA.

The following form is a sample authorization to obtain information under the FCRA from a consumer reporting agency.

NOTICE	
<i>The company intends to obtain a consumer report within the meaning of the Fair Credit Reporting Act (FCRA) regarding you during the application process and/or during the course of your employment with the company.</i>	
AUTHORIZATION TO PROCURE CONSUMER REPORTS AND/OR OTHER BACKGROUND INFORMATION	
<p>I understand that the company or a third-party, consumer reporting agency acting on its behalf may conduct an investigation to obtain information about my background including, but not limited to: information about my personal character, previous employment, general reputation, educational background, credit history, driving record, and/or criminal history. I authorize all persons, corporation; credit agencies; educational institutions; law enforcement agencies; city, state, county, and federal courts; and military services to release any such information about my background. Moreover, I authorize any person or entity conducting the investigation or compiling and/or processing such information to furnish the company, and/or any third party acting on the company's behalf, with such information. I release anyone providing such background information and the company from any and all liability and damages whatsoever in connection with collecting, furnishing, obtaining, or using such information. I further understand that the company will provide me with written notice if any adverse employment action is to be taken based in whole or in part on information contained in a consumer report within the meaning of the FCRA.</p>	
<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> WITNESS	<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> APPLICANT'S SIGNATURE
	<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> APPLICANT'S PRINTED NAME
	<hr style="border: 0; border-top: 1px solid black; margin-bottom: 5px;"/> DATE

Before taking any adverse action (that is, declining to hire, promote, or retain an employee), where that decision is based in whole or in party on information from a consumer report, the employer must first:

- provide a copy of the consumer report relied on to the affected individual

- provide a copy of the “Summary Of Your Rights Under The Fair Credit Reporting Act” to the affected individual. The summary of rights form may be obtained from the Federal Trade Commission’s website at www.ftc.gov.

After taking any adverse action (based in whole or in part on information from a consumer report), the employer must provide oral, written, or electronic notice to the affected individual of the following (although written notice is the better practice because documentation is created):

- the fact that the adverse action has been taken (that is, declined to hire, retain, or promote the individual)
- the name, address, and phone number – the toll-free number, if there is one – of the consumer reporting agency that provided the consumer report
- the fact that the consumer reporting agency that provided the consumer report did not take the adverse action and cannot provide the individual with the specific reasons why the adverse action was taken.
- the fact that the individual has the right to a free copy of the consumer report in question from the consumer reporting agency that provided the report if the request is made within 60 days from the date the action is taken
- the fact that the individual has the right to dispute with the consumer reporting agency the accuracy or completeness of the report furnished.

The following form is a sample letter that should be provided to applicants and/or employees who experience an adverse employment action based at least in part on a consumer report under the FCRA.

[ON THE COMPANY'S LETTERHEAD]

{Date}

{Employee Name}

{Employee's Address}

Re: Notice of Adverse Employment Action

Dear {Employee Name}:

Based in whole or in part on information contained in the consumer report that the company obtained from {Name of Consumer Reporting Agency}, a copy of which the company previously provided you, the company has decided _____ at this time. *[Please note that the last sentence of this paragraph may change depending on the type of adverse employment action at issue (i.e., failure to promote, decision to terminate, etc.)]*

The name, address, and phone number of the consumer reporting agency that provided the consumer report is as follows:

{Name, Address, and Toll-free Number of the Consumer Reporting Agency}

Please note that the consumer reporting agency that provided the consumer report was not involved in the decision to take an adverse employment action against you. As a result, the consumer reporting agency cannot provide you with the specific reasons for the adverse employment action at issue. However, you have the right to obtain from the consumer reporting agency identified previously a free copy of the consumer report in question if you request a copy of the report within 60 days following your receipt of this notice. Moreover, you have the right to dispute with the consumer reporting agency the accuracy or completeness of the information contained in the consumer report it provided to the company.

If you have any questions regarding your rights under the Fair Credit Reporting Act (FCRA), please do not hesitate to contact the Federal Trade Commission (FTC), the agency responsible for enforcing the FCRA at (202) 326-3761.

Sincerely,

{Company Representative}

