

Member's Quarterly

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Feature

Does Everything the Candidate Says Check Out?

A refresher on background checks

It is no secret that candidates put their best foot forward when putting together their resume and attending interviews. It is therefore no surprise that, as employers, we often want to dig a little deeper before extending that offer of employment. Background checks are one way to do just that, but they must be used cautiously.

What is a background check?

Background checks offer employers the opportunity to screen a job candidate beyond their resume and responses in an interview. There are a number of different kinds of background checks available:

- Reference checks;
- Verifying educational or licensing credentials;
- Credit check;
- Social media check;
- Driver's record; or
- Criminal record check.

Are they really necessary?

It might sound ideal for an employer to be able to screen a potential hire so thoroughly. However, employers should take the time to consider which types of background checks are actually necessary before diving in.

Generally, only background checks that are reasonable should be conducted. This means that employers should only conduct background checks that are relevant to the candidate's ability to perform the duties and responsibilities of the position in question.

Employers should also consider background checks in the context of privacy. For some, like federally-regulated employers, background checks are also guided by privacy legislation. In light of this, it is best practice only to collect the information that is required and relevant to the position, and to adhere to legislation and best practice with respect to the collection, use and storage of such information.

Finally, employers should be consistent in their application of background checks. For example, if background checks have been determined to be required for a certain position, they should always be required. In other words, all hires made in that position should be subject to the same background checks.

When to implement background checks?

Once the type of background check that is reasonably required is determined, the next step is sorting out when they should be conducted.

Believe it or not, the timing of a background check is important.

Background checks should only be conducted once a conditional offer of employment is made to a candidate. The conditional offer of employment should also clearly indicate that the offer is pending the result of the background check.



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Contrary to popular belief, background checks should not be conducted prior to making a conditional offer of employment. One of the primary reasons for this is to avoid claims of discrimination, ensuring that each candidate gets a fair chance with respect to the information gathered in the recruiting process. During the recruitment stage, employers cannot ask questions that may pertain to human rights-related grounds. This can include information about a candidate's place of origin, age or sex. Because background checks often provide for this type of information, they should not be conducted prior to an offer of employment being made to a candidate from the hiring pool.

Informed consent

Many types of background checks will require the individual's informed consent. This is best practice for concerns already discussed relating to privacy. Furthermore and practically however, many types of background checks, like the criminal record check for example, involve forms that the individual must complete and submit.

If they refuse to do so, the employer can take the position that they are not fulfilling a condition of employment and thus, rescind the offer.

The results are in. Now what?

A conditional offer has been made. The required background checks have been completed. What if something shows up in the results?

The options available to an employer will depend on (1) the type of background check that was conducted, and (2) the result in question. Legal advice is always generally recommended in these circumstances as not all results provide a reasonable basis for an employer to rescind an offer of employment.

Can we conduct background checks on existing employees?

This is not a recommended practice.

There is a recognized distinction between prospective employees versus current employees being asked to provide a background check, the latter being in a much more precarious position. In short, the courts have viewed it as a "no win" where current employees can only keep their job (which is fundamental to one's sense of identity and self-worth) if they disclose private information for the purposes of a background check.

In order to balance the interests of employers asking for background checks and the involved privacy interests of employees, a number of factors should be considered when looking at asking existing employees to submit to background checks. This will include reasonableness, whether the business interest (primarily physical safety) trumps privacy, and whether there are less intrusive means to address the employer's concerns.

As with background checks upon a conditional offer of employment, the employer would also require informed consent from the employee. The employer may be able to enforce a background check on an employee subject to discipline. However, the circumstances in which that would be acceptable would be very narrow. Primarily, there would need to be a change in the employer's business from the time of hire such that checks become required (i.e., a new requirement of a primary client, etc.).

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Takeaways for Employers

Employers wishing to implement background checks should be sure to limit them to only what is reasonably required in light of the position in question, and generally, should only conduct them once a conditional offer of employment has been made.

Outside of the above, background checks can raise precarious issues and can expose employers to litigation, notably in the area of human rights. As such, legal advice is always recommended.

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