

ESSENTIALS OF EMPLOYMENT LAW

Your A to Z Guide to HR Compliance



The Essential Building Blocks of a Human Resources Library



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This publication updates in
February/August

(44169)



Essentials of Employment Law

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Library of Congress Catalog Card Number: 2015935992

ISBN: 978-1-68008-054-4

Canadian Goods and Services Tax (GST) Number: R123-317687

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Printed in the U.S.A.

Essentials of Employment Law

Introduction

The material in this manual is presented alphabetically by topic. Each topic covers a specific area of compliance or best practices, and includes cross-references to other topics where applicable. The information is provided in a “how to comply” format to provide the most valuable information employers are likely to need.

This manual covers over 100 topics, and each tab provides a list of topics covered in that section. Many of the tabs list synonym topics to help you find the material you need. For example, if you look for information on “posters” in the tab for the letter P, you will find a reference to “Workplace posters” and will know to look under Tab W.

Each topic describes who is covered by the law (where an underlying law applies) and provides a summary of the requirements or best practices. Common issues that may arise have been addressed by analyzing a particular situation and presenting frequently asked questions.

Many topics also include resources or sample material, policy templates, sample job offer letters, and similar information.

Although some topics do not have an underlying law, the subject may still create liability or other problems for an organization. For example, there is no law on how to terminate an employee, and unless a mass layoff is covered by state or federal notification laws, employers are not required to give advanced notice. However, if a termination is handled improperly, the employee may attempt to file a wrongful termination lawsuit. These suits can be costly and time-consuming. Even if the employee's claim is not successful, the employer may expend unnecessary resources to defend itself.

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The Editors & Publisher
J. J. Keller & Associates, Inc.

Essentials of Employment Law

Published & Printed by

J. J. Keller & Associates, Inc.

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Background Checks

Often a job application, resume, or interview does not tell an employer all the necessary information relevant to employment eligibility. In fact, some candidates falsify or exaggerate items on their resume or job application. That's where background checks can be used as a revealing tool for more, and often more accurate, employment eligibility information.

Other terms used to refer to background checks include reference checking and employee screening. A background check may include such things as:

- Credit history
- Criminal records
- Driving records
- Past employment
- Education
- References
- Professional licenses
- Military service
- Social Security number
- Substance abuse records

Background checks are not always an option, and might be required for certain positions. Examples may include school bus and commercial motor vehicle drivers, law enforcement and security officers, child care workers, patient care workers, teachers, and financial institution workers.

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Where to Look

When performing a background check, there are a number of places to look for information, including, but not limited to:

- Resume, application, and interview;
- Personal references;
- Federal, state, and local government agencies;
- Educational institutions;
- Previous or current employers;
- Professional organizations;
- Online databases; and
- Consumer reporting agencies.

Defamation

One issue employers run into with background checks is potential liability for defamation . Many former employers decline to respond to questions about a prospective employee or they provide minimal information. That's because a former employee could sue the employer for defamation if he or she were denied employment at another company based on statements made by the former employer.

However, some states have passed job reference immunity laws to severely restrict employees' rights to sue over a "good faith" reference or statement. Remember, truth is always a defense against defamation; nevertheless, employers are reluctant to give out information because of potential lawsuits.

Employers that don't perform a thorough background check may be held liable for wrongful actions taken by an employee in the course of his or her employment. An employer can be sued for what is known as "negligent hiring."



Cross Reference

For more information on how employers can be held liable for employees' actions, see the **Negligent hiring** and **Negligent retention** topics.

Reference Checking

One of the most important, but often overlooked, types of background checks is the candidate's references, particularly work references. Always check work references (consistent with company policy). Beware, however, that many employers will not provide you with information beyond factual, job-related items (such as dates of employment, job titles, etc.). A good way to get information is to ask for the candidate's immediate supervisor (when calling a former employer). The supervisor may be more willing than the HR department to provide information.

When asking about a potential hire, employers should always be acting in good faith. Some state laws make obtaining and receiving the information easier, so you might want to check your particular state's statutes.

Background Check Basics

An effective background check may include a number of elements:

- **Criminal:** This check must be made with each state and in some states may go back only so many years. Other states limit the use of criminal records in hiring decisions, and may also restrict when and how records may be obtained.
- **Employment:** This check verifies elements on an applicant's resume.
- **Personal reference:** This check provides information about an applicant's values, sense of responsibility, and strengths and weaknesses. Personal references are often designated by the applicant, but prospective employers could contact other individuals with whom the employee has had working relationships.
- **Court records:** This check will reveal an applicant's involvement in any legal proceedings, but employers must be careful since most states limit the use of public court records in employment decisions. Employers should remember that arrests that did not lead to convictions are not proof of any wrongdoing.
- **Workers' compensation:** This check, only allowed after offering employment, gives your company reason to take back a job offer if a claim is missing from a post-offer form. Employers should remember that it can be difficult to determine whether workers' compensation has been used fraudulently. Employers may not refuse to hire an individual simply because he or she has filed a workers' compensation claim.
- **Driving record:** This check can verify a Social Security number and address, and should reveal any driving violations.
- **Credit history:** This check shows financial history, but the Equal Employment Opportunity Commission (EEOC) recommends that credit checks be conducted only for jobs that handle money or which require the incumbent to make financial decisions. Some states ban credit checks unless they are specifically job-related. According to the Fair Credit Reporting Act, you must first obtain a written release before requesting a copy of a credit report.
- **Social Security number:** This verifies not only the number, but addresses which can be used for other background checks.
- **Education:** This check verifies an applicant's educational background including any degrees claimed.



Avoid Background Check Backfire

Before performing a background check, you will want to understand all the state and federal laws and regulations related to background checks. There are laws protecting the privacy of people. Plus, if used improperly, background checks can be ammunition in a discriminatory lawsuit against your company. Therefore, these checks must be done carefully.

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To avoid background check problems:

- Have applicants sign an agreement to allow former employers to give your company or its representative information relating to the applicant, no matter how positive or negative the information is. Such an agreement must be separate from the authorization and disclosure forms required for FCRA.
- Only search for information relating to the prospective employee's job. For example, a credit check for an editor position might not be relevant.
- Consider using an outside source for performing background checks, consistent with FCRA requirements. This may ensure that the checks are done consistently for all employees.
- Get legal advice before implementing your own internal background checking process.

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) protects prospective employees, existing employees, and other individuals by requiring employers to follow certain steps, including obtaining the individual's written consent when obtaining a consumer report from a consumer reporting agency (CRA). There are some exemptions when investigating employee misconduct.

The FCRA deals with handling and disposal of paper, electronic, or other forms of consumer reports and records, consumer consent forms, and consumer complaints.

Employers may use consumer reports when they hire new employees and when they evaluate employees for promotion, reassignment, and retention — as long as they comply with the FCRA. The FCRA spells out employer responsibilities when using consumer reports for employment purposes.

Under the FCRA, employers must obtain authorization from applicants or employees to run background checks if using a third-party CRA to conduct the checks.

In addition to the authorization, an employer must disclose the permissible purpose for obtaining a background check (e.g. evaluating an applicant or employee for employment, reassignment, or retention), what kind of information will be evaluated (criminal history, credit report, etc.) as well as information about the CRA (name, address) and any additional third parties who may also have a legal right to view the report.

Employers are prohibited from sharing reports with other parties if they are not listed on the disclosure form (for example, an employer could not share the information with its insurance provider).

The FCRA requires that a disclosure consist *solely* of the disclosure that a consumer report may be obtained for employment purposes. Although the required disclosure and authorization forms may be combined in a single document, the Federal Trade Commission has warned that “the form should not include any extraneous information.” Thus, the form cannot be attached to a job application, or combined with any other authorization forms (e.g. liability waivers for reference checks).

Some state laws have additional requirements. Employers should consult with their CRAs on the need and use of notices and disclosures.



If we decide not to hire an individual after receiving negative feedback from the references we contacted, do we have to provide the applicant with a pre-adverse action disclosure under the FCRA before we finalize the decision?

No, the FCRA applies when employers use consumer reporting agencies (CRAs) to look into the backgrounds of employees and applicants. It does not apply to employers who conduct their own reference checks by calling the employee's references. Just as employers are not required to notify the employee in writing (as they would be required to do under the FCRA had you used a CRA), they are not required to issue the employee a pre-adverse action notice because of adverse action that will be taken on the reference check. The same is true if the employer were to decide not to hire the employee after calling to verify her educational credentials.



Cross Reference

For more information, see the **Investigations (FACT and FCRA)** topic.

Adverse action procedures

If an employer relies on a consumer report for an “adverse action” (denying a job application, reassigning or terminating an employee, or denying a promotion) then:

Before taking adverse action, the employer must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act,” a document prescribed by the Federal Trade Commission. The consumer reporting agency (CRA) that furnishes the individual's report will give the employer the summary of consumer rights.

The individual must then be given a “reasonable” time to challenge the information in the report. While the FCRA does not define this term, other guidance indicates that five days should be reasonable in most cases. Employers are not obligated to withdraw the adverse action decision or otherwise change that decision based on the nature of the individual's dispute, but employers may do so at their discretion.

After the employer has taken an adverse action, the employer must give the individual another notice — orally, in writing, or electronically — that the action has been taken in an adverse action notice. This is sometimes called the “final” adverse action notice (since it follows the pre-adverse action notice). The final notice must include:

- The name, address, and phone number of the CRA that supplied the report;

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- A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

Some employers choose to conduct background checks on the final candidate after making a conditional offer of employment (conditioned upon a satisfactory background check). The withdrawal of the job offer would be an adverse action that would trigger the above notice requirements.

Other employers choose to conduct background checks on the top few candidates, before an offer of employment has been extended. These employers should be aware that the FCRA defines an adverse action to include any decision that adversely affects a prospective employee. For example, if a candidate is removed from further consideration based on the background check results, this action would likely trigger the above notice requirements, even though no job offer had been extended or withdrawn.

Disposal of Background Check Information

The Federal Trade Commission (FTC) requires that any person that possesses or maintains covered consumer information take “reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal.” The term “disposal” means discarding or abandonment of consumer information, or the sale, donation, or transfer of any medium, including computer equipment, upon which consumer information is stored.

The FTC allows covered entities flexibility in determining what measures are reasonable based on the sensitivity of the information, the costs and benefits of different disposal methods, and relevant changes in technology over time. The regulation's flexibility should also facilitate compliance for smaller entities. However, the regulation includes specific examples of appropriate measures that would satisfy its disposal standard. Here's the list in brief:

1. Implementing and monitoring the burning, pulverizing, or shredding of papers.
2. Implementing and monitoring the destruction or erasure of electronic media.
3. After due diligence, entering into and monitoring compliance with a contract with another party engaged in the business of record destruction to dispose of material.
4. Implementing and monitoring protections against unauthorized or unintentional disposal of consumer information, and disposing of such information in accordance with examples 1 and 2.
5. For persons subject to the Gramm-Leach-Bliley Act and the Federal Trade Commission's Standards for Safeguarding Customer Information (“Safeguards Rule”), incorporating the proper disposal of consumer information as required here into the information security program required by the Safeguards Rule.

EEOC Guidance on Criminal Records

On April 25, 2012, the EEOC issued a guidance on the use of arrest and conviction records in employment decisions. The EEOC has long held that using an individual's criminal history may violate Title VII of the Civil Rights Act of 1964. However, if an employer's criminal records screening policy or practice disproportionately screens out a Title VII-protected group (e.g., members of a particular race or nationality), the employer may defend against a discrimination claim by showing that the policy or practice is job related and consistent with business necessity, and that a less discriminatory alternative screening method was unavailable.

Though the EEOC's guidance does not change the agency's fundamental position, it does provide more clarification in analyzing whether applicants' arrests and convictions should exclude them from certain positions. When considering applicants' criminal histories, the EEOC recommends that employers:

Do not use an arrest record to exclude an applicant. Arrests are not proof of criminal conduct, and excluding a job candidate based only on the fact that he or she was arrested is not job related and consistent with business necessity. However, in some circumstances, an arrest may trigger further examination. If the conduct underlying the arrest makes the individual unfit for the position in question, the EEOC states that the conduct may be grounds for exclusion. The conduct, not the arrest, is what is relevant. However, employers should still be mindful of state laws restricting arrest record inquiries.

Do not ask about convictions on job applications. As a best practice, and consistent with applicable laws, the EEOC recommends that employers not ask about convictions on job applications.

Some states already require employers to wait until later in the selection process to ask about convictions. In theory, an employer is more likely to objectively assess the relevance of an applicant's conviction when the employer is already aware of the applicant's qualifications and experience.

Do not exclude all individuals with criminal records. A policy or practice requiring an automatic, across-the-board exclusion because of any criminal conduct may violate Title VII. In order to show that a criminal record screening procedure is job related and consistent with business necessity, an employer needs to show that the policy effectively links specific criminal conduct and its dangers with the risks inherent in a particular position.

According to the EEOC, an employer can do this by:

- Validating the criminal records screen for the position in question per the Uniform Guidelines on Employee Selection Procedures standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible); or
- Developing a targeted screen considering at least the nature and gravity of the offense or conduct; the time that has passed since the offense, conduct, and/or completion of the sentence; and the nature of the job held or sought. Then, provide an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

A targeted screen would need to be narrowly tailored to identify criminal conduct with a demonstrably close connection to the position in question. It should focus on the dangers of particular crimes and the risks in particular positions. Exclusions based on targeted screening takes into consideration fact-based evidence, legal requirements, and/or relevant and available studies.

Make an individualized assessment. Title VII does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

Individualized assessment generally means that an employer informs the individual that he or she may be excluded because of past criminal conduct, provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him or her, and considers whether the individual's additional information shows that the policy as applied is not job related and consistent with business necessity.

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Employers are not obligated to accept the individual's explanation of the circumstances, and could still exclude the individual based on an evaluation of credibility or other issues. However, there may be situations where the individual offers mitigating information that the employer accepts, and agrees that the applicant should not be excluded.

Do not use information differently based on an applicant's protected class. An employer may be liable for violating Title VII when it treats an applicant differently because of his or her race, national origin, or another protected basis. This is known as disparate treatment. For example, an employer may violate Title VII if it rejects an African American applicant based on his or her criminal record but hires a similarly situated white applicant with a comparable criminal record.

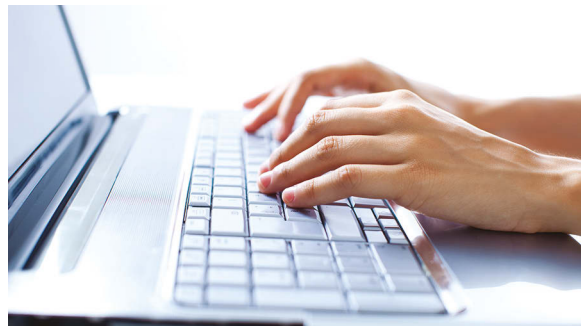
The following examples offer additional clarification.

Example: Arrest Record Is Not Grounds for Exclusion. Mervin and Karen, a middle-aged African American couple, are driving to church in a predominantly white town. An officer stops them and interrogates them about their destination. When Mervin becomes annoyed and says that his offense is simply “driving while black,” the officer arrests him for disorderly conduct. The prosecutor decides not to file charges, but the arrest is reported in a background check when Mervin applies for a promotion to an executive position. The employer's practice is to deny such promotions to individuals with arrest records, even without a conviction, because it views an arrest record as an indicator of untrustworthiness and irresponsibility. If Mervin filed a charge, and disparate impact based on race was established, the EEOC would find reasonable cause to believe that his employer violated Title VII.

Example: Employer's Inquiry into Conduct Underlying Arrest. Andrew, a Latino man, worked as an assistant principal for several years. After several girls attending the school accused him of touching them inappropriately, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. School policy requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students.

After learning of the accusations, the school places Andrew on unpaid leave pending an investigation. The school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn't remember the incidents. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew's explanation credible. Based on Andrew's conduct, the school terminates his employment.

Andrew challenges the policy. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest.



Example: Exclusion Is Not Job Related and Consistent with Business Necessity.

Leo, an African American man, has worked successfully at PR Agency as an account executive for three years. After a change of ownership, the new owners adopt a policy under which it will not employ anyone with a conviction. The policy does not allow for any individualized assessment before exclusion.

Twenty years earlier, as a teenager, Leo pled guilty to a misdemeanor assault charge. Since then, Leo graduated from college and had no further contact with the criminal justice system. At PR Agency, all of Leo's supervisors assessed him as a talented, reliable, and trustworthy employee, and he has never posed a risk to people or property at work. However, the new owners learn about Leo's conviction record and terminate his employment. They refuse to reconsider despite Leo's positive employment history.

Leo files a Title VII charge alleging that the policy has a disparate impact based on race. After confirming disparate impact, the EEOC finds that PR Agency does not show that all convictions are indicative of risk or danger in all its jobs for all time. Nor does PR Agency provide any factual support for its assertion that having a conviction is necessarily indicative of poor work or a lack of professionalism. The EEOC concludes that there is reasonable cause to believe that the policy is not job related for the position in question and consistent with business necessity.

Example: Targeted Screen with Individualized Assessment. County Community Center rents meeting rooms to civic organizations and small businesses. The County has a targeted rule prohibiting anyone with a conviction for theft crimes (e.g., burglary, robbery, larceny, identity theft) from working in a position with access to personal financial information for at least four years after the conviction or release from incarceration. This rule was adopted based on data from the County Corrections Department, national criminal data, and recent recidivism research for theft crimes. The Community Center also allows individuals to provide information showing that the exclusion should not be applied to them.

Isaac, who is Hispanic, applies for a position as an administrative assistant, which involves accepting credit card payments for room rentals. After conducting a background check, the County learns that Isaac pled guilty 18 months earlier to credit card fraud. Isaac confirms these facts, provides a reference from the restaurant where he now works on Saturday nights, and asks the County for a “second chance” to show that he is trustworthy. The County tells Isaac that it is still rejecting his employment application because his criminal conduct occurred 18 months ago and is directly pertinent to the job in question. The information he provided did nothing to dispel the County's concerns.

Isaac challenges this rejection, alleging that the policy has a disparate impact on Hispanics. After confirming disparate impact, the EEOC finds that this screen was carefully tailored to assess unacceptable risk in relevant positions, for a limited time period, consistent with the evidence, and that the policy avoided overbroad exclusions by allowing individuals an opportunity to explain special circumstances regarding their criminal conduct. Even though the policy has a disparate impact on Hispanics, the EEOC does not find reasonable cause to believe that discrimination occurred because the policy is job related and consistent with business necessity.

Checking Social Media Sites

Some employers conduct online searches as part of a background check. Checking for information that has been made public (including open-access blogs or social media pages with a less private setting) is certainly acceptable. However, asking an applicant to “friend” the employer on a social media site isn't recommended, and many states have adopted laws which specifically prohibit this.

Some studies have indicated that many applicants feel a prospective employer who checks their social media sites is invading their privacy. However, there is no right to privacy regarding information that the individual voluntarily posted on the internet and otherwise made available to the public. In other words, searching for and reading information that an applicant posted on the internet is not an invasion of privacy.

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Cross Reference

For more information, see the **Privacy** topic.

While online searches are acceptable, employers must be cautious in using the information found. A search may reveal information that shouldn't be used in the hiring decision such as age, race, national origin, or other protected characteristics. Individuals who use social media may even post information about medical conditions (which could create a problem under the Americans with Disabilities Act) or might post medical information about family members (family medical history is considered genetic information under the Genetic Information Nondiscrimination Act).

Merely having knowledge of such information is not a violation. Obviously, upon meeting and interviewing a candidate, the employer will learn much of the same information (approximate age, gender, race, etc.) and won't use that information in the hiring decision.

However, the potential for learning medical information is more challenging to address. If an applicant is denied employment and knows the company checked social media pages (perhaps the interviewer mentioned seeing photos or other posts on the site), the applicant might attempt to claim that employment was denied because of the information posted. The employer may then have the burden of proving that the information was NOT used in denying employment.

Some employers have adopted the practice of having someone else check online (someone removed from the hiring decision) and simply reporting whether any issues were discovered — without reporting any confidential or protected information. If the employer can show that the person who made the decision to deny employment was not aware of the protected information, it may be easier to refute a claim of discrimination.

If the person is hired, remember that medical information (even obtained inadvertently) must remain confidential and cannot be shared. For example, it would not be appropriate to mention the new hire's personal or family medical history when introducing the new employee.

State Ban the Box Laws

A number of states have passed “ban the box” legislation or taken similar action. The name refers to prohibitions against requiring applicants to check a box on a job application indicating whether they have been convicted of a crime and/or felony. Below is a brief description of state restrictions.

While the information below covers state law, note that numerous cities and counties have adopted similar restrictions. Many local laws apply only to government (public) employers, but some may apply to private employers as well. The following covers only state (not local) laws.

Alabama

While not a “ban the box” law, Alabama allows applicants whose minor charges (but not convictions) have been expunged to refrain from listing that charge on a job application. The law lists possible charges that may be eligible for expungement to include certain misdemeanors, traffic offenses, and nonviolent felonies. The individual would have to meet certain criteria to have the charge expunged.

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