



Pre-Employment Documents and Background Investigations

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I. PRE-EMPLOYMENT DOCUMENTS

A. Designing a Lawful and Effective Employment Application

The use of employment applications is certainly considered standard operating procedure, even for the smallest and most unsophisticated employer. Yet, employment applications can and have been used against employers by thwarted applicants and disgruntled employees. The key is having a lawful and effective application for employment that elicits the information necessary to evaluate the candidate but that disavows that the application is a guarantee of any term or condition of employment.

1. EEO statement: affirmative action employer status, if applicable; protected characteristics under federal, state and local law (e.g., race, sex, sexual orientation, age, religion, national origin, marital status, disability, etc.)
2. Personal information: name; mailing address; contact information
3. Work authorization
4. Employment desired
5. Job-related skills: clerical, mechanical, professional
6. History: education (highest grade completed, not dates of matriculation); vocational or trade schools; courses of study
7. Military service --- be careful of wording
8. Criminal convictions: Be careful! Are you in a ban the box jurisdiction? Individualized assessments – a conviction still may not bar to employment but understand applicable laws and limitations.
9. Licenses & certificates
10. References: name, address, phone number; former job titles, supervisors, salary history, reasons for leaving
11. Limitation or restrictions upon employment: restrictive covenants, confidentiality agreements

12. Certification statement: no promise of contract; employment-at-will; authorization to obtain reference information; acknowledgement of company rules; affirmation of complete and truthful responses
13. Salary history – Understand the scope of any applicable salary history ban.

B. Other Forms

Be careful introducing other forms at the pre-employment stage. If your Company does, make sure proper disclaimers are on the forms and explain the purpose of introducing the form.

II. I-9 FORM EMPLOYMENT ELIGIBILITY VERIFICATION SIMPLIFIED

The document inspection process for employers to verify an individual's eligibility for employment in the United States has been made simpler. When hiring an employee, the employer is required to complete Form I-9. To prove work authorization, the employee has the choice of showing a document establishing both identity and work authorization (List A) or one document establishing identity (List B) and a second document demonstrating work authorization (List C).

III. FEDERAL FAIR CREDIT REPORTING ACT REQUIREMENTS FOR BACKGROUND INVESTIGATIONS

The Federal Fair Credit Reporting Act will directly affect a company's ability to obtain background information on applicants and current employees through contracts with consumer reporting agencies. The law specifically addresses and regulates the circumstances under which employers can use such reporting agencies to obtain background information and to rely on that information in making hiring, promotion, transfer, and other employment decisions. In addition to the federal FCRA, many states have their own fair credit reporting laws and may have requirements different from the federal law. Here we touch on the requirements under the federal

law only. It also should be noted that investigative consumer reports, which include information obtained from personal interviews, require additional employer reporting and disclosure under these amendments which are not discussed here.

A. What Employers Must Do

Prior to obtaining a consumer report on an applicant or employee, the employer must certify to the consumer reporting agency that it has provided to the applicant or employee a “clear and conspicuous” written disclosure that a report may be obtained for employment purposes. Additionally, the applicant or employee must give the employer written authorization to procure the report. Previously, the disclosure could be included as part of the employment application. That is no longer the case, and it must now appear in a “stand alone” document.

The employer must also certify to the reporting agency that before the employer takes any adverse action based in whole or part on the report, it will provide the applicant or employee with a copy of the report and provide a description of his or her FCRA rights (formerly published by the Federal Trade Commission, and now published by the Consumer Financial Protection Bureau (CFPB)). The certification must include a statement that the information being obtained will not be used in violation of any federal or state equal employment opportunity law or regulation.

After receiving the report but before any adverse action is taken, the employer must provide the applicant or employee with the following: (a) a copy of the report; and (b) a description in writing of his or her rights under the law. In New York, if the report reveals a conviction, irrespective of whether the employer is considering not hiring the individual, the Employer must distribute a 23A Correction Law Notice. Employers must also review any applicable ban the box

obligations, and understand the processes that run concurrent with FCRA or even beyond FCRA compliance.

After taking adverse action based on the report, the employer must provide the applicant or employee with the following: (1) an oral, written or electronic notice of the adverse action; (2) the name, address and telephone number, either orally, in writing or electronically, of the consumer reporting agency that furnished the report; (3) a statement that the consumer reporting agency did not make the decision to take adverse action and is unable to provide the applicant or employee with the specific reasons why the adverse action was taken; and (4) an oral, written or electronic notice of the applicant or employee's right to obtain a free copy of the complete consumer report from the reporting agency, if requested within sixty days, as well as information regarding the consumer's right to dispute the information with the reporting agency.

B. Practical Implications

According to a designated attorney with the FTC for handling inquiries on the Amendments, the Commission had taken the position that the law implies the employer should not take any adverse action until the consumer has an opportunity to review the report and address any discrepancies. The statute does not state this, however, the FTC's interpretation is not unreasonable since the law requires the employer to give the applicant or employee a copy of the report before the adverse action is taken.

The provisions of the statute concerning the use of the report for employment purposes were clearly written to protect the consumer reporting agency, not the employer using the report, from lawsuits. Several aspects of the law invite this conclusion: (1) the employer must notify the applicant or employee that adverse action was taken based on the report; (2) the consumer

reporting agency did not make the decision and does not know why it was made; and (3) the statute does not require the employer to disclose the nature of the information relied on to reach the adverse decision.

To minimize the increased risk of litigation over the use of consumer reports, we suggest the following steps: (1) in the notice to the applicant/employee before adverse action is taken, reveal the nature of the information received from the consumer reporting agency; (2) include with this notice a copy of the report and notice of rights as required by the statute; (3) give the applicant/employee a short but reasonable period of time to provide information that would explain the discrepancy, omission, or misrepresentation; (4) if the applicant or employee is unable to do so, take appropriate action; and (5) if that action is adverse to the applicant or employee's interest, provide the notice described above. Also, remember and concurrently comply with any applicable ban the box requirements.

With respect to current employees, the employer should consider whether to require all employees to sign a Disclosure and Consent form even though no background investigation is planned with respect to any specific employee. Before making this decision, the employer should be prepared to deal with the situation where employees may refuse to sign the form. Is the employer prepared to terminate these employees for refusing to sign? What are the practical and legal implications of doing so?

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