Handling Federal, NY State And NYC Background Check Laws

By Brian Murphy

Law360, February 20, 2018, 11:33 AM EST

Employers often seek background information about applicants and employees as part of standard due diligence during the hiring process or in connection with other employment decisions. The Fair Credit Reporting Act serves as the primary legal framework guiding these efforts. However, state and local laws that overlap and intersect with the FCRA's requirements have proliferated in recent years. New York State and New York City employers face perhaps the greatest burden in navigating these competing paradigms, because compliance with one does not ensure compliance with another.

The FCRA is a federal law, the most broadly applicable and, therefore, the most useful starting point. The FCRA sets forth specific requirements that govern an employer's procurement and use of background reports containing a variety of information, such as criminal records, credit reports and education history, when making employment decisions. The FCRA is designed to protect the due process rights of the subject of a report and sets forth a notice and opportunity to dispute framework. The FCRA establishes three critical time periods, each of which carry hypertechnical requirements, the most notable of which are addressed here for context.

Before procuring a background report, an employer must provide written notice to the applicant/employee of its intent to obtain the report and secure written consent from the applicant/employee to do so. That notice must be in a standalone document without extraneous information. It should not, for example, be part of an employment application and it should not contain a waiver of liability.

Before taking adverse employment action on the basis of information contained in a background report, an employer must provide the applicant/employee with written notice of its intent to do so, together with a copy of the background report, a document entitled "A Summary of Your Rights Under the Fair Credit Reporting Act," and contact information for the background check company. The employer must then give the applicant/employee a "reasonable time" to dispute or correct any inaccurate information or otherwise explain the information in the report.

After taking an adverse employment action, an employer must provide the applicant/employee with a second notice setting forth the contact information for the background check company, a statement explaining that the background check company did not make the employment decision, a notice of the applicant's/employee's right to dispute the accuracy of any information in the report, and a notice of their right

to get an additional free report from the provider upon request within 60 days.

A New York state employer can unwittingly run afoul of state law despite compliance with this FCRA process if the background report reveals prior conviction history in two respects. First, the New York State Human Rights Law (NYHRL) prohibits discrimination on the basis of a prior conviction unless: (1) there is a direct relationship between the offense and employment sought; or (2) employment would involve an unreasonable risk to property or safety. In assessing whether these criteria are met, New York employers must consider eight factors set forth in Article 23-A of the New York Corrections Law. Second, the New York state analogue to the federal FCRA requires New York employers to provide a copy of Article 23-A to the subject of any report that contains criminal conviction information. Therefore, an employer in New York cannot merely comply with the FCRA notification process, but must also assess all eight Article 23-A factors if it intends to take adverse action on the basis of prior convictions, and add a copy of Article 23-A to the packet of information to be provided to the applicant/employee under the FCRA.

A New York City employer is on shakier ground even where it otherwise complies with the first step of the FCRA process. The New York City Fair Chance Act prohibits inquiries concerning the criminal history of an applicant before a conditional offer of employment is extended. The New York City Stop Credit Discrimination in Employment Act prohibits employers from requesting or using the consumer credit history of an applicant/employee for the purpose of making any employment decision at any time. And the recent New York City salary history law prohibits employers from inquiring or otherwise learning about an applicant's compensation history. Thus, a New York City employer violates New York City law — even if it otherwise complies with the FCRA and its New York state analogue — if it seeks a background report containing information concerning criminal histories (before a conditional offer is extended), credit histories, or salary information. Further, while a New York City employer may permissibly refuse to hire an applicant who refuses to consent to a background check under the FCRA, it cannot do so if the background report was intended to seek any of this prohibited information.

A New York City employer must also be wary of a potential violation of city law even where it otherwise complies with the second step of the FCRA process and complies with the New York State Article 23-A analysis discussed above. Assuming a conditional offer of employment has been extended, a New York City employer may permissibly seek criminal history (but not credit or salary) information. However, whereas the FCRA requires only that the employer provide notice of potential adverse action and the NYHRL requires only that the employer conduct the Article 23-A analysis, New York City law requires an employer to provide an applicant with, among other items, a copy of the inquiry, a copy of Article 23-A and a copy of the employer's written Article 23-A analysis. A New York City employer must provide this information at least three business days before taking any action.

While a desire for compliance should alone be enough for employers to conform their

policies and practices, there are significant financial benefits as well. Each law carries a host of penalties from as low as $100 for a technical violation of the FCRA to as high as $250,000 for a “willful” violation of the New York City salary history law, as well as the possibility of actual damages, punitive damages, and attorneys’ fees and costs. These penalties are powerful incentives for employers to not simply assume that compliance with the FCRA will provide cover from all liability, but to ensure that they meet the requirements of each state and local law as well.