

Blog Post

# Looking for Skeletons in the Closet? Avoid These Background Check Mistakes

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A scary surprise is fun to encounter when you are in a haunted house at a Halloween event, but not so much fun when you are performing a background check on a potential employee. Even worse is finding out after the fact that you failed to comply with one of the many legal requirements, and that your company is now suddenly facing a fine or lawsuit. This Halloween, make background checks and hiring much less spooky by avoiding these common mistakes.

## Failing to Provide Required Disclosures or Obtain Proper Consent

Traditionally, vampires could not enter a home without permission from the owner. Similarly, in many instances, an employer needs permission from a potential employee in order to obtain background information. Although it is typically okay for an employer to perform their own internet search of a potential employee or to use in-house staff to call former employers and verify references, most employers use outside companies to prepare in-depth background reports. In these instances, employers will almost always need to comply with the requirements of the Fair Credit Reporting Act (FCRA).

Before obtaining background information from these outside companies, the FCRA requires that notice be given to the job applicant, and for the applicant to

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give permission. The notice itself must meet additional requirements. For instance, it must be in a stand-alone document that does not address any other topics, and must be clear and conspicuous. The failure to provide an appropriate authorization and consent has led to class action lawsuits and cost companies millions of dollars. For more information about the FCRA, [see our previous blog post](#).

## Not Being Consistent

Ghosts and ghouls and goblins and witches are all different, but if you want to do a pre-employment background check, you better treat them all the same. The regular employment discrimination laws still apply when you are conducting background checks. While it is not illegal or discriminatory to conduct background checks, if you only require background checks for job applicants that are members of a particular protected group, but not others, that could potentially violate anti-discrimination laws such as Title VII of the Civil Rights Act of 1964. Employers that perform background checks of job candidates in particular positions should perform background checks for all of the job candidates in those positions, regardless of race, color, religion, sex, national origin, disability, or any other category protected by federal, state, or local law.

## Ignoring Additional State-Specific Requirements

A Hydra has many heads, and every time you deal with one, more replace it. In addition to the federal requirements from the FCRA, some states have their own authorization and disclosure requirements, or may otherwise limit the timing, scope, or use of background information that can be sought or considered in making a hiring decision. For example, California requires that, in addition to the FCRA authorization and disclosure forms, employers who do background checks must provide additional authorization and disclosure forms to comply with California law, and further limits the type of

information that can be considered and when. Employers are cautioned not to combine these state and federal forms. So, although it may seem repetitive, do not forget to comply with these additional requirements. Several states place restrictions on what background information employers are allowed to ask for, so before employers stir the cauldron, they must check all the ingredients to avoid getting burned.

### Failing to Warn of Potentially Adverse Act

It is courtesy to knock before entering, and so, before making a potentially adverse decision based on information in a background check, an employer cannot not just ding and dash. If an employer has a concern about the results of a background check, it must provide the potential employee with a copy of the report, a notice of their FCRA rights, and a chance to clarify or correct information in the report before slamming the door on an employment opportunity. This is not the time for tricks, and an employer's failure to comply with this technicality may blow up in smoke.

### Failing to Provide Final Adverse Action Notice

In classical tales, faeries can never lie, and employers must say their final goodbyes. So, if an employer decides not to hire a potential employee based upon information in a background check, it must bid its final adieu. The final adverse action notice informs the individual that employment is being denied based upon information in the background report. This notice also advises the individual how to contact the outside company directly that provided the report, to dispute (and attempt to correct) any inaccurate information. One misstep in this highly technical process and the employer might have to pull out a wand and recite hocus pocus.

### Failing to Consider Rehabilitation or Relevance

Not every ghost from the past should continue to haunt your present. When basing an employment or hiring decision on a potential employee's past actions, employers should consider the relevance of the past conduct on the requirements of the position at issue to make an appropriate determination. For example, if an individual has an excessive amount of recent traffic citations, that may present no issue whatsoever if they were applying for an office position that did not require them to drive a motor vehicle. Conversely, if the position involved driving a delivery truck, it may be cause for concern. Employers should also consider the length of time that has passed since any prior infractions occurred. A conviction for petit theft occurring decades ago, when the individual was a teenager, is much different from a conviction for petit theft occurring five days, five weeks, or even five months ago. Of course, the relevance of the information may depend upon the circumstances of the position and duties for which the individual is being considered.

Using arrest and convictions records as a blanket disqualifying factor may also implicate federal anti-discrimination laws. The EEOC has taken the position that, because African Americans and Hispanics are arrested and incarcerated in numbers, and at rates, disproportionate to their representation in the general population, criminal record exclusions may have a disparate impact based on race and national origin. For employers operating in multiple jurisdictions, it is imperative that they consider any state or local "ban-the-box" or "fair chance" laws that may impact the timing and scope of any criminal history inquiries, or notice and adverse action upon such information.

### Additional Considerations

- *Accurate Information.* Employers should not forget to consider the possibility that the information from the background check was inaccurate. Identity theft is a real threat that impacts many individuals. Additionally, with how many people share similar names, be sure to

verify that all of the identifying information matches.

- *Keeping Records.* Employers should maintain records of background checks and the decision-making process in order to demonstrate compliance with any legal requirements and to defend against potential claims.

Background checks are an important way to limit exposure to litigation for negligent hiring claims, and of ensuring that employees you hire will be a good fit at your company. Make things less scary for yourself and your company by avoiding these mistakes. For more information or guidance regarding background checks, contact your Akerman labor and employment attorney.

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