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To: Clients and Friends

From: David F. Dulock

Subject: “Danger, Will Robinson!”¹ FTC and EEOC Issue Guidance on Employer Background Checks To Comply with Federal Nondiscrimination Laws and the FCRA

The Federal Trade Commission (FTC) and Equal Employment Opportunity Commission (EEOC) recently issued a joint publication titled “Background Checks – What Employers Need to Know” ([click here](#)) that explains to employers how to comply with the federal nondiscrimination laws and the Fair Credit Reporting Act (FCRA) when obtaining and using background information in making personnel decisions, such as hiring, retention, promoting, and reassignment.

Although it is not illegal for an employer to inquire about a person’s background or to require a background check (except for certain restrictions related to medical and genetic information) when making personnel decisions, the employer must comply with federal laws that protect against discrimination and comply with the FCRA when running background checks through a company that compiles background information.

The publication is divided into four sections:

Before You Get Background Information. This section gives warnings and information necessary before an employer obtains background information:

- It is illegal to check the background of applicants and employees based on a person’s race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older).
- Do not attempt to obtain an applicant’s or employee’s genetic information, which includes family medical history. If you have that information, do not use it to make an employment decision. Do not ask any medical questions before a conditional job offer has been made. If the person has already started the job, do not ask medical questions unless you have objective evidence that the person is unable to do the job or poses a safety risk because of a medical condition.
- Before obtaining background information from a company in the business of compiling background information, the employer must notify the applicant or employee in writing and in a stand-alone format that is not in an employment application that the employer might use the information for decisions about the applicant’s or employee’s employment. If the background information to be provided by the company is an “investigative report” – a report based on personal interviews concerning a person’s character, general reputation, personal characteristics, and lifestyle – the employer must also notify the applicant or employee of his or her right to a description of the nature and scope of the investigation.

¹ From 1960s’ TV series *Lost in Space*. In everyday use, the phrase warns someone that they are about to make a mistake or that they are overlooking something (Wikipedia).

- Get the applicant's or employee's written permission to do the background check.

Using Background Information. This section gives warnings and information necessary in the use of background information and gives examples:

- Apply the same standards to everyone, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older).
- Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older.
- Be prepared to make exceptions for problems revealed during a background check that were caused by a disability.
- Before taking an adverse employment action based on background information from a company in the business of compiling background information, the employer must give the applicant or employee: (i) a notice that includes a copy of the consumer report relied on in making the decision; and (ii) a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act."
- After taking an adverse employment action based on background information from a company in the business of compiling background information, the employer must tell the applicant or employee (orally, in writing, or electronically): (i) that the applicant or employee was rejected because of information in the report; (ii) the name, address, and phone number of the company that sold the report; (iii) that the company selling the report did not make the decision, and cannot give specific reasons for it; and (iv) that the applicant or employee has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.

Disposing of Background Information. This section discusses recordkeeping and disposal requirements for employment records and background reports:

- Any personnel or employment records the employer makes or keeps (including all application forms, regardless of whether the applicant was hired, and other records related to hiring) must be preserved for one year after the records were made, or after a personnel action was taken, whichever comes later. If the applicant or employee files a charge of discrimination, the employer must keep the records until the case is concluded.
- Once the employer has satisfied all applicable recordkeeping requirements, the employer may dispose of any background reports received. The law requires that the reports – and any information gathered from them – be securely disposed (*e.g.*, burning, pulverizing, or shredding paper documents and disposing of electronic information so that it cannot be read or reconstructed).

Further Information. This section provides EEOC and FTC toll-free telephone numbers and Web site addresses for more detailed information on compliance with federal nondiscrimination laws and the FCRA in making personnel decisions.

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