

April 2014

## Reporter

**Employment Law***by Karina Serman, Esq.***Pre-Hire Peril: Avoid Self-Sabotage Through Background Checks**

In a joint publication of the Equal Employment Opportunity Commission and the Federal Trade Commission, these federal agencies have issued a Guidance to Employers in which they discussed the common practice of using background checks to select employees. It should be noted that the Guidance does not make reference to state background check laws which may augment federal requirements.

**Before Obtaining the Background Check:**

Employers who use a professional company to obtain employee or applicant background information must observe the Fair Credit Reporting Act (FCRA) as part of the process by: (1) telling the applicant or employee in a “stand-alone” writing that the employer might use the information for decisions about his or her employment; (2) separately telling the applicant if the employer is also asking a company to provide an “investigative report” that is based on personal interviews concerning a person’s character, general reputation, personal characteristics, and lifestyle; (3) obtaining the applicant’s written permission to do the background check; and (4) certifying to the company from which the employer

is getting the report that the employer complied with all of the FCRA requirements and will not discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

In addition to complying with the technical requirements of the FCRA, employers must make sure that they are treating all applicants equally. It is illegal to check the background of applicants and employees when that decision is based on a person’s race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, asking only people of a certain race about their financial histories or criminal records is evidence of discrimination. Similarly, asking medical questions before a real conditional job offer has been made is also prohibited and likely to demonstrate evidence of discrimination. If the employee has already started the job, says the EEOC, employers may not ask medical questions unless there is objective evidence that the employee is unable to do the job or poses a safety risk because of a medical condition.

**Upcoming 2014 Seminars at ECJ****Thursday, April 24, 2014**Hiring Process by *Karina B. Serman, Esq.* - 8:30 a.m. - 9:30 a.m.Sexual Harassment Prevention Training by *Kelly O. Scott, Esq.* - 10:00 a.m. - 12:00 p.m.Please contact Brandi Franzman at [bfranzman@ecjlaw.com](mailto:bfranzman@ecjlaw.com) for registration information.

## **After Obtaining Information from the Background Check:**

Just as the act of obtaining background information cannot be used to discriminate, the act of invoking background information to deny an applicant a job also cannot be applied in a discriminatory way. This means, for example, that employers should 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). According to the EEOC, this also means that employers need to 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. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, the policy or practice has a “disparate impact” and is not “job related and consistent with business necessity.” In addition, the EEOC advises that employers must be prepared to make exceptions for problems revealed during a background check that were caused by a disability. For example, the agency says, if an employer is inclined not to hire a person because of a problem caused by a disability, the employer should allow the person to demonstrate his or her ability to do the job - despite the negative background information - unless doing so would cause significant financial or operational difficulty.

If an employer has a legitimate basis to take an adverse action against an employee or applicant based on information obtained

through a commercial background search service, the employer is required by the FCRA to first give the applicant or employee a notice that includes a copy of the consumer report relied on to make the employment decision and a copy of the official “A Summary of Your Rights Under the Fair Credit Reporting Act”. The employer must also provide the applicant or employee (orally, in writing, or electronically) the following information: (1) that he or she was rejected because of information in the report; (2) the name, address, and phone number of the company that sold the report; (3) that the company selling the report didn’t make the hiring decision, and can’t give specific reasons for it; and (4) that he or she 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:**

The EEOC requires that non-educational institutions must preserve any personnel or employment records (including all application forms, regardless of whether the applicant was hired, and other records related to hiring) for one year after the records were made, or after a personnel action was taken, whichever comes later. Once the employer has satisfied all applicable recordkeeping requirements, it may dispose of any background reports, but they must do so in a secure way. That, says the FTC, can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can’t be read or reconstructed. For more information, see “Disposing of Consumer Report Information? Rule Tells How” at <http://www.business.ftc.gov/documents/alt152-disposing-consumer-report-information-rule-tells-how>.

## **Did you know...**

That minimum wage in California goes up to \$9.00 per hour effective July 1, 2014? This means hourly wage workers will get an increase as well as salaried exempt employees who are receiving twice the minimum wage in order to maintain their Wage Order exemption.

## **Well, now you know!**

*If you have any questions regarding this bulletin, please contact Karina B. Sterman, Esq., at (310) 281-6395 or [ksterman@ecjlaw.com](mailto:ksterman@ecjlaw.com) or Kelly O. Scott, Esq., Editor of this publication and Head of ECJ's Employment Law Department, at (310) 281-6348 or [kscott@ecjlaw.com](mailto:kscott@ecjlaw.com). If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or [bfranzman@ecjlaw.com](mailto:bfranzman@ecjlaw.com).*

■ **Registration Time:**

8:15 a.m.

■ **Seminar Time:**8:30 a.m. to 9:30 a.m.  
(continental breakfast provided)■ **Cost:**

\$35 per person

*What attendees are saying ...*

*"Karina Sterman was articulate, confident in her subject matter and, at the same time, humorous when appropriate ... an unbeatable combo. Excellent seminar. Very educational. I would strongly recommend it to others."*

■ **Registration Time:**

9:45 a.m.

■ **Seminar Time:**10:00 a.m. to 12:00 p.m.  
(continental breakfast provided)■ **Cost:**

\$35 per person

*What attendees are saying ...*

*"Kelly Scott was fabulous. His good-natured presentation was both informative and entertaining. His presentation style enabled the attendees to participate and I believe retain the presentation materials."*

## ■ Hiring Mistakes You're Making and How to Stop Them

Presented by *Karina B. Sterman, Esq.*

Thursday, April 24, 2014 at Ervin Cohen &amp; Jessup LLP

Do you buy shoes without checking the fit and comfort level? Of course not. Yet, as an employer, you probably hire employees without even realizing the mistakes you are making in the process. No wonder, then, that so many new employees don't work out, are the wrong fit for the organization, and end up having so many HR problems. Join us in this interactive seminar to learn the best legal and practical practices in hiring that can be used to make your new hires fit in and be successful.

**Register by Monday, April 21st.** Contact Brandi Franzman at [bfranzman@ecjlaw.com](mailto:bfranzman@ecjlaw.com) or (310) 281-6328 for registration information. Space is limited. Parking validation will be provided.

*This seminar qualifies for 1.0 hours of Continuing Professional Education credit for Accountants.*



*Karina B. Sterman, Esq.* is a Partner in ECJ's Employment Law Department. Ms. Sterman has substantial expertise in advising employers on California and federal employment law, as well as representing employers in employment litigation and administrative matters. A published author and frequent guest speaker on employment law matters, Ms. Sterman maintains a Martindale-Hubbell peer review rating of AV Preeminent. Ms. Sterman has been recognized by her peers for many years as a Rising Star and most recently as a Super Lawyer in the field of Employment Law, as published by Los Angeles magazine.

## ■ Sexual Harassment Prevention Training

Presented by *Kelly O. Scott, Esq.*

Thursday, April 24, 2014 at Ervin Cohen &amp; Jessup LLP

You know the drill: all managers and supervisors who are employed in California are required by law to complete at least two hours of interactive sexual harassment training. The training must take place every two years and within six months of promotion or hire. This workshop will not only meet these educational requirements, but exceed them. You will learn situation-specific techniques regarding the prevention and correction of sexual harassment under both federal and state law. In addition, you will walk away with a practical understanding of the remedies available to victims of sexual harassment as well as the defenses employers have at their disposal. Presented in a lively, entertaining and engaging format, what you learn in this workshop will stay with you for the next two years... and beyond.

**Register by Monday, April 21st.** Contact Brandi Franzman at [bfranzman@ecjlaw.com](mailto:bfranzman@ecjlaw.com) or (310) 281-6328 for registration information. Space is limited. Parking validation will be provided.

*This seminar qualifies for 2.0 hours of Continuing Professional Education credit for Accountants.*



*Kelly O. Scott, Esq.* heads ECJ's Employment Law Department and has over 25 years of experience in wage and hour, wrongful termination, harassment, discrimination, retaliation, class action, disability, medical leave, investigation, compliance training and litigation matters. Mr. Scott was named Best Employment Lawyer in Southern California for 2010 by the 5W Report, and was selected for inclusion in Southern California Super Lawyers®, published in Los Angeles magazine, in 2014 for the tenth year. Mr. Scott is a published author and frequent speaker on employment law matters and maintains a Martindale-Hubbell peer review rating of AV Preeminent.