Background Checks and Hiring Practices: Dos and Don’ts for Municipal Employers

August 27, 2020
Connecticut Conference of Municipalities
Presenters

Paula N. Anthony, Esq.
Senior Counsel, Berchem Moses PC
panthony@berchemmoses.com

Lt. William Meier
Vernon Police Department
wmeier@vernon-ct.gov
Objectives

- Common legal issues regarding background investigations
- Important questions that should be asked of any candidate
- Components of a comprehensive background screening program
- Open source methods available for background investigations
OVERVIEW
Navigating the Hiring Process

• Pay Equity
• “Ban the Box”
• Credit Checks
• Non-Discrimination
• Usernames and passwords
• Drug Testing
Hiring Process

- Job Posting
- Application
- Initial Screening
- Testing
- Interviews
- Conditional Offer
- Background Check
APPLICATION
CT Pay Equity Law

• Effective January 1, 2019
• Prohibits employers from asking applicants about salary history
• Prospective employees cannot be asked about past salary/wages or compensation history at any time in the hiring process
• Applies to state and political subdivisions
“Ban the Box”

• Effective January 1, 2017

• Prohibits employers from inquiring about a prospective employee’s prior arrests, criminal charges or convictions on an initial employment application, unless:
  • Required by federal or state law; or
  • Security, fidelity, or surety bond is required for position

• Supplements law prohibiting employers from requiring an employee or prospective employee from disclosing any arrest, criminal charge or conviction which records have been erased
“Ban the Box”

Required notice:
(1) The applicant is not required to disclose the existence of any arrest, criminal charge or conviction, the records of which have been erased pursuant to section 46b-146, 54-76o or 54-142a; (2) criminal records subject to erasure pursuant to section 46b-146, 54-76o or 54-142a are records pertaining to a finding of delinquency or that a child was a member of a family with service needs, an adjudication as a youthful offender, a criminal charge that has been dismissed or nolled, a criminal charge for which the person has been found not guilty or a conviction for which the person received an absolute pardon; and (3) Any person whose criminal records have been erased pursuant to 46b-146, 54-76o or 54-142a shall be deemed to have never been arrested within the meaning of the general statutes with respect to the proceedings so erased and may so swear under oath.
Application shall include:
  • List of and contact information for prior employers where applicant had direct contact with children
  • Written authorization for release of employment information
  • Written statement whether applicant:
    • subject of abuse or neglect or sexual misconduct investigation (unless unsubstantiated)
    • disciplined, terminated, or resigned from employment while allegation of abuse, neglect, or sexual misconduct pending or under investigation by DCF or due to a substantiated finding under the mandated reporter statute (Conn. Gen. Stat. §17a-101)
    • ever had professional license or certification revoked or surrendered under any of the above circumstances
  • Written statement whether such applicant has ever been convicted of a crime or whether criminal charges are pending against such applicant at the time of such application and, if charges are pending, to state the charges and the court in which such charges are pending
Board of Education Positions

• Request information from listed employers (SDE Educational Employer Verification form)

• Request to State Department of Education concerning (1) eligibility status of any applicant, (2) knowledge of substantiated finding of abuse, neglect or sexual misconduct pursuant to Conn. Gen. Stat. 17a-101g

• DCF check (DCF-3031 form)
  • Request additional national registry check under Adam Walsh Act (not required)
Credit Checks

Federal Fair Credit Reporting Act

• Disclosure and limits on use of employment applicant’s credit histories and reports
• Applicants must be provided with notice of their rights, and if a negative employment decision is made based on credit history, employer must inform applicant of credits rights relative to that decision
Credit Checks

Federal Fair Credit Reporting Act

• Employers using consumer reports, including credit histories must follow specific procedures, including
  • Written authorization to perform the credit check
  • Advise how will use credit report
  • Not misuse applicant’s credit information
  • Give applicant copy of credit report if negative decision; and
  • Give applicant opportunity to dispute information in credit report before final decision
Use of credit history in CT

• Prohibits employers from inquiring into applicant’s (or employee’s) credit history unless the position applied for is financial or fiduciary

• Other exceptions
  • Employer is a financial institution
  • Report is required by law
  • Reasonable belief employee engaged in specific activity in violation of law
  • Report is *substantially related to the employee’s current or potential job or the employer has a bona fide purpose for requesting or using information in the credit report that is substantially job-related* and is disclosed in writing
Use of credit history in CT

“Substantially related to the employee’s current or potential job”

- Managerial position involving setting the direction or control of business, division, unit or agency of a business
- Involves access to customers’, employees’ or employer’s personal or financial information other than customarily provided in a retail transaction
- Involves a fiduciary responsibility to the employer
- Provides an expense account or corporate debit/credit card
- Provides access to certain confidential or proprietary business information, or
- Involves access to employer’s nonfinancial assets of $2,500 or more
Non-discrimination laws

- Arrest and conviction records
  - Employers who use in hiring decisions must do so without discrimination
  - Decision specifically relate to position consistent with business necessity

- Inquiries into Protected Matters
  - Prohibits inquiries into protected status, including age, martial status, sexual orientation, religion

- Disability Inquiries
  - ADA prohibits employers from making specific inquires into applicant’s disability at time of application
Usernames and Passwords

- Conn. Gen. Stat. 31-40x
- Prohibits employers (public and private) from requesting or requiring applicants (or employees) to
  - Provide username/password to personal online account
  - Access to online account in employer’s presence; or
  - Invite, or accept invitation from, the employer to join a group affiliated with applicant/employee’s personal online account
The Basics

• Review candidate’s information before interview
• Have prepared questions
• Be consistent in interviewing candidates
• Use an evaluation rubric
• Take notes
• Be straightforward and accurate about position
What can you ask?

• Information requested should be limited to those essential for determining if applicant is qualified for position
  • Experience
  • Education
  • Licensure or certification, if required
  • Whether applicant can perform essential job requirements
And what can’t you ask?

• Don’t ask about salary history or specific fringe benefits
• Don’t ask about immigration status or nationality
• Don’t ask about physical or mental disabilities
• Don’t ask about whether applicant will need reasonable accommodation unless
  • Applicant voluntarily discloses, or
  • Applicant has obvious disability
Other Potential Pitfalls

• When did you graduate high school?
• What is your maiden name?
• Do you have children?
• Where are you from?
• What is your accent?
OFFER LETTERS
What’s Required?

• Every new hire must be advised
  • Rate of pay (hourly or weekly)
  • Wage payment schedule
  • Hours of employment
• Make available in writing or through posted notice
  • Vacation
  • Sick leave
  • Health and Welfare Benefits
Other terms and conditions

Should also include

• Start date
• Job title
• Whether full or part time
• Direct supervisor
• Employer has discretion to change information during course of employment
• Letter supersedes any prior oral or written agreements and cannot be modified unless in writing
Other terms and conditions

• Statement that offer is contingent on:
  • Within 3 days of hire, legally-required proof of identity and authorization to work in U.S.
  • Reference checks, if applicable
  • Background checks, if applicable
  • Drug test, if applicable

• At will disclaimer for non-union positions

• Signature line for employee to sign acknowledgment of terms and conditions
POST-CONDITIONAL OFFER
Criminal History

• What checks permitted?
  • Connecticut
  • FBI

• What information provided
  • Convictions only
  • Goes back 7 years
Drug Tests

- May require applicants to take a drug test as a condition of employment
  - Must inform applicants, in writing, if drug testing will be required
  - If applicant fails the test, must provide a copy of the test results
  - An employer may refuse to hire an employee who will not submit to a drug test
- Have applicant sign Drug Testing Consent Form if position requires drug test
• Check all references carefully before hiring employee

• Have applicant sign a release/waiver form that releases persons from liability for providing honest reference

• Have release/waiver for use of information received during application process, including information about criminal misconduct, theft and other violations of law
Public Sources

- Freedom of Information Act
- Judicial Website
- Internet
  - Google
  - Social Media
Questions?
Due to the constantly changing nature of government regulations, it is impossible to guarantee the total and absolute accuracy of the material contained in this presentation. The presenters cannot and do not assume any responsibility for omissions, errors, misprinting or ambiguity contained in this presentation and shall not be held liable in any degree for any loss, damage or injury caused by any omission, error misprinting or ambiguity present. This presentation is made available by the lawyer or law firm for educational purposes only as well as to give general information and a general understanding of the law, not to provide specific legal advice.