



THE WORKPLACE WORD

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Applicant Background Searches

Many employers use third-parties to conduct background checks to evaluate their applicants. The information obtained in these background checks can prove invaluable in making a hiring decision. If an employer is obtaining consumer reports on applicants for use in the hiring process, employers must comply with the federal Fair Credit Reporting Act ("FCRA"). The FCRA broadly defines a "consumer report" as "any communication of information by a consumer reporting agency bearing on a consumer's character, general reputation, personal characteristic, or mode of living." The FCRA requires that employers take specific steps when obtaining the consumer report of an applicant. Employers must:

- Make a clear and conspicuous written disclosure to the applicant before obtaining the consumer report;
- Obtain prior written authorization from the applicant;
- Certify to the credit reporting agency that the employer made the proper disclosures, obtained the applicant's authorization, will not use the report for any unlawful purpose, and will provide a copy of the report and summary of FCRA rights to any applicant against whom adverse action is taken because of the report;
- Provide a pre-adverse action disclosure to an applicant prior to taking any adverse action; and
- Notify the applicant if adverse action is taken based at least in part on the information provided in the report.

Some states also impose additional steps and requirements on employers using consumer records to make hiring decisions. Employers must carefully follow each step, because failure to comply can result in the assessment of statutory fines, actual damages, attorneys' fees and costs, and punitive damages.



Another Background Search Tool

One background search tool, which currently does not have the same restrictions as consumer reports, is also one of the most powerful and free – the internet. All an employer needs to do is enter the name of its applicant in Google.com, Yahoo.com or any number of other internet search engines, and a list of related websites will likely surface. Each search engine can provide links to family websites, sports leagues, club memberships, business and school organizations, and a number of other sites. Other websites, however, may be much more extensive and may include information that could affect an employer's hiring decision.

To learn more, employers can search one of the many internet social networking websites like MySpace.com, Facebook.com, and Xanga.com. These websites contain pages designed by millions of individuals, most of whom are in the college-aged demographic. To search these sites, an employer simply needs to create a profile and begin perusing the vast number of profiles contained within. On these profiles, many users post descriptions and pictures of things that they likely would not show their family, let alone their future employer. Drunken nights, drug-induced misadventures and sexual exploits have all been noted as common content for these profiles. Some users also discuss their feelings about their current employers, most of which are less than flattering. Some of the information on the applicant's site comes

from "friends" – individuals who are allowed to post information and pictures on another's profile. These comments and photos can be the most telling about an applicant's character and background.

Although some college counselors and employment services are warning individuals to remove embarrassing websites and profiles from the internet, it does not seem to be stopping the growing number of profiles that are added daily. Estimates of MySpace.com users top 120 million profiles and Facebook.com has over 9 million college students' profiles online. Odds are your potential applicant is already listed.

Currently, there are no laws in place prohibiting or restricting employers from using the internet as a background search tool. Employers should however review the terms and conditions of the website they are using prior to beginning any search. Also, there are federal and state laws that may restrict employers' use of the information obtained in these searches. Employers must always be careful to base hiring decisions on lawful reasons.

Snell & Wilmer will continue to monitor how the law develops in the growing field of employer background searches. If you have questions about state and/or federal compliance in your current or proposed background search process, or you are interested in learning more about the using the internet as a background search tool, please feel free to contact us.

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