

Alternative Methods for Verifying Employment

Question:

Are there alternative ways to verify employment if an applicant's previous employer is unresponsive or out of business?

Analysis:

Yes, but many of these alternatives include legal risks and should therefore be used with an abundance of caution. Employers would be well-advised to request alternative documentation only after extending a conditional offer of employment that includes salary information and to request that the applicant mask or redact any protected or irrelevant information.

Some alternatives used by organizations to verify employment information if an applicant's previous employer is unresponsive or out of business include asking for W-2s, pay stubs and tax return documents.

However, when asking for these alternative documents, employers must be cautious of various laws that may prohibit such practices or that may open such practices up to potential legal challenges. For example, Rhode Island prohibits employers from asking for W-2s and other tax-related documents as a condition of employment. Thus, in this state, employers would have to ask for pay stubs or other non-tax-related documentation to complete the employment verification.

Further, asking for such documents may violate some recent laws that prohibit employers from inquiring into an applicant's salary history. Massachusetts, New York City and the City of Philadelphia¹ recently passed laws that prohibit employers from asking job applicants for salary history information. These laws

¹ The City of Philadelphia's law was scheduled to go into effect on May 23, 2017, but the Chamber of Commerce for Greater Philadelphia filed a federal lawsuit in early April that seeks to enjoin the law on the grounds that it is unconstitutional and violates Pennsylvania's Home Rule Act. On April 19, 2017, the United States District Court for the Eastern District of Pennsylvania entered a stipulated order that stays the effective date of the new law until after the court rules on the Chamber of Commerce's injunction request.

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likely extend to any documents that include salary history information, such as tax returns and W-2 forms, and thus would require employers to delay such requests until they are made lawful by the jurisdiction (which is typically after a conditional offer of employment is made, and then only to verify that the provided salary information is correct).

Even if a state does not explicitly prohibit an employer from requesting tax-related documents or pay stubs, there may be other laws that protect information included within those specific documents. For example, some states may prohibit employers from requesting a job applicant's Social Security number until after a conditional offer of employment is made. Employers may also learn certain "protected" information through tax documents, such as age or religious affiliations, which may open them up to potential discrimination claims. Employers may even open themselves up to discrimination claims by only requiring that some, but not all, applicants provide a W-2.

Thus, employers who use the above alternative methods to verify employment information would be well-advised to ensure that such practices are not prohibited in the jurisdictions in which they operate. Even if asking for tax documents or pay stubs is permissible, employers should ensure that they are following all other laws and regulations, including laws that may prohibit employers from learning certain information—such as salary history and SSN's—until after an offer of employment is made. If an employer is requesting additional documentation to verify employment information, it would be a best practice to conduct employment verifications only after extending a conditional offer of employment that includes compensation. Employers should also protect themselves against possible discrimination or other legal claims by requesting that the applicant mask or redact any protected or irrelevant information contained within the requested documents.

The aforementioned issues can arise whether your organization obtains the alternative employment verification documentation directly from an applicant or engages a third party to obtain this documentation from the applicant on your behalf. Thus, even if your organization engages a third party to complete employment verifications on your behalf, you would be well-advised to keep the above guidance in mind when developing your employment verification policies and procedures.

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