



Healthcare Compliance Symposium 2020

Navigating the Background Check and Fair Credit Reporting Act Compliance Minefield

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Today's Agenda

- Why use background checks?
- What laws apply?
 - Federal law
 - Federal agency regulations
 - State and local law
- Components of background checks
- Best practices for employers

We Interrupt This Program to Bring
You a Very **HOT** Topic...

COVID - 19...

and how it is impacting
hiring practices

Why Use Background Checks?

- May be required by law
- May be customary in certain industries
- May be a best practice for an employer who is seeking information to:
 - Improve the odds of hiring and retaining the best candidates for available positions
 - Improve workplace culture and stability by hiring and retaining candidates who reflect the values of the company and who will enhance the workforce

Why Use Background Checks?

- Compliance reasons
 - Exclusion Lists
 - Office of Inspector General (OIG) List of Excluded Individuals and Entities (LEIE)
 - General Services Administration (GSA) System for Award Management (SAM)
 - Licensing
 - Childcare workers
 - Adult and elder care workers
 - Specific types of healthcare workers

Why Use Background Checks?

- Reduce potential exposure to litigation
 - Vicarious liability, a/k/a *respondeat superior* (employee acted within scope of job duties for the employer's business purposes)
 - Negligent hiring, negligent supervision, negligent retention (employee acts outside scope of employment so vicarious liability does not attach, but employer knew or should have known that employee would pose risk of harm to others and took no preventive action)

Why Use Background Checks?

- Reduce risk of theft and other crimes
 - Embezzlement
 - Inventory theft
 - Theft from co-workers
 - Theft of intellectual property
 - Theft of trade secrets and proprietary information
 - Fraud
 - Other

Why Use Background Checks?

- Reduce potential risk for workplace violence
 - Workplace violence has an adverse impact on employee morale, productivity, attendance and retention
 - Health and safety violations (OSHA and state OSH laws require employers to provide a workplace free from recognized hazards that are likely to, or do, cause death or other serious harm, and workplace violence falls within the scope of such a hazard)

Why Use Background Checks?

- Confirm accuracy of candidate's credentials
 - Academic and professional credentials
 - Detect resume fraud and errors
- Reduce risk of noncompliance with immigration law
 - Avoid hiring individuals who are not authorized to work in the US
 - Avoid related fines and penalties

Fair Credit Reporting Act

- Fair Credit Reporting Act (FCRA)
 - Consumer protection law that applies to the use of third-party service providers to obtain background information on applicants and existing employees
 - Enacted to promote accuracy and regulate the collection and reporting of a consumer's personal information for credit, employment, insurance and other purposes

Fair Credit Reporting Act

- Applies to use of third-party **Consumer Reporting Agencies** (CRAs)
- CRAs are entities that regularly gather or evaluate information about individuals and provide reports to others, for example:
 - Credit bureaus (such as TransUnion, Equifax and Experian)
 - Private investigators and detective agencies
 - Collection agencies
 - Internet and social media background screening services

Fair Credit Reporting Act

- Focus on exchange of information about people, including information used in making employment decisions such as:
 - Hiring, retention, promotion, reassignment, termination
- Use of certain tools:
 - Consumer reports
 - Investigative consumer reports

Fair Credit Reporting Act

- ***Consumer reports*** typically include information about a person's:
 - Credit, character, reputation, lifestyle, personal attributes, family, criminal records, driver information and other information
 - Typically written materials but oral communication of information may also be a consumer report
- Contents of consumer reports are limited under certain circumstances

Fair Credit Reporting Act

- ***Investigative consumer reports*** are consumer reports that include personal interviews about the individual with neighbors, associates, acquaintances and others who may have knowledge about the individual
- Consumer reports and investigative consumer reports regarding both applicants for employment and current employees are regulated by the FCRA
- Reports regarding independent contractors may also be regulated by FCRA

Fair Credit Reporting Act

- Employers who use CRAs to obtain information for employment purposes are governed by specific notice, disclosure and consent requirements when:
 - Obtaining reports and
 - Taking adverse employment action because of information in the reports
- In the context of a consumer report, “employment purposes” means “employment, promotion, reassignment or retention as an employee”

Fair Credit Reporting Act

- On the other hand:
 - If a CRA or third party is not used, and the background check is conducted in-house, the FCRA is unlikely to apply
 - Simply checking an employee's references without the assistance of a CRA is unlikely to subject your company to FCRA requirements

Assuming the FCRA Applies...

- **Step 1:** Before a background check is requested, the employer must provide a clear and conspicuous disclosure that:
 - Is separate from any other documents, such as the employment application; and
 - Notifies the employee in writing that a consumer report may be used for employment purposes; and
 - That requires the applicant/employee to provide their written authorization to obtain the consumer report

Assuming the FCRA Applies...

- **Step 2:** Prior to taking any adverse employment action based in whole or in part on a consumer report, the employer must:
 - Provide the applicant or employee with a copy of his or her consumer report;
 - Provide the applicant or employee with a summary of the consumer's rights under FCRA; and
 - Allow the individual time to dispute the consumer report
- “Adverse employment action” includes a denial of employment, rescinding a job offer, denying a promotion, or any other decision which adversely affects any current or prospective employee

Assuming the FCRA Applies...

- **Step 3:** After the adverse employment action is taken, the employer must provide written notice containing the following information:
 - That an adverse employment action has been taken;
 - The name, address, and phone number of the CRA or entity that provided the consumer report;
 - A statement that the employer made the adverse decision, not the CRA or entity that supplied the consumer report;
 - A statement of the individual's right to dispute the accuracy of the information as well as his/her right to obtain a free consumer report from the agency

Investigative Consumer Reports

- Investigative consumer reports are more invasive than consumer reports
- If used for employment purposes, employers must take additional steps, including:
 - Written disclosure, within three days after report is requested, that an ICR may be obtained, plus:
 - Type of information that may be sought
 - Synopsis of individual's rights
 - Notice that the individual can request additional disclosures about the ICR's nature and scope

Investigative Consumer Reports

- If investigative consumer reports are used for employment purposes, employer must also
 - Certify to CRA that employer has made required disclosures and that employer will continue to comply with disclosure requirements
 - If individual requests additional disclosures, provide written disclosure of the nature and scope of the investigation within five days of the request

Workplace Investigations

- Investigations into employee misconduct and other workplace investigations also implicate the FCRA
 - If employer uses a CRA report as the basis for taking an adverse employment action, it must supply employee with a summary of the report findings; however, employer:
 - Does not have to reveal source of report
 - Can disclose report after taking adverse action
 - Can NOT use information for investigating creditworthiness or share information with unauthorized parties

FCRA Penalties

- Penalties of violation of the FCRA can include:
 - Statutory damages in an amount between \$100.00 to \$1,000.00 for each consumer who has been subject to a willful violation of the Act
 - Punitive damages
 - Actual damages for negligent violations
 - Attorney's fees
- Enforced by Consumer Financial Protection Bureau, which took over enforcement responsibility from the FTC effective 1/1/2013

FCRA Damages

- Class actions for non-compliance with FCRA background check requirements on the rise
- Potential for statutory damages per violation and attorneys' fees available under FCRA has resulted in increased focus by FCRA class action attorneys
- Recent class action lawsuits against large companies have netted millions in damages
- How do employers avoid similar problems?
 - Know the law
 - Implement and follow requisite procedures
 - Apply rules consistently

Background Checks and Discrimination

- Numerous federal and state anti-discrimination laws prohibit discrimination against a multitude of protected classes, including, but not limited to:
 - Title VII - race, color, religion, sex, national origin
 - Age Discrimination in Employment Act (ADEA) – age 40 and above
 - Americans With Disabilities Act (ADA) – qualified individuals with a disability
 - Equal Pay Act – sex
 - Genetic Information Nondiscrimination Act (GINA)
 - Various federal contractor obligations

Discrimination and Disparity

- Discrimination falls into two categories:
 - Disparate treatment discrimination
 - Disparate impact discrimination
- An employer can be found liable for ***disparate treatment*** discrimination when a practice or policy is applied differently to individuals based on their protected class

Discrimination and Disparity

- An employer can be found liable for ***disparate impact*** discrimination when:
 - A neutral policy or practice has the effect of disproportionately screening out individuals due to their protected class and
 - The employer fails to demonstrate that the policy or practice is “job-related and consistent with business necessity

EEOC Guidance on Use of Criminal Records

- April 25, 2012: EEOC issued its “*Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*”
- Focuses on race and national origin discrimination under Title VII of the Civil Rights Act of 1964
- EEOC takes the position that African-Americans and Hispanics are arrested and convicted in disproportionate numbers
- Guidance provides “best practices” on how to use criminal background checks without violating Title VII

Key Points of Guidance

- Only consider criminal convictions that are “job-related and consistent with business necessity”
- Employers must consider:
 - Nature of conviction
 - Nature of job
 - Whether nature of conviction would adversely affect performance of job
- Focus on the conduct underlying the conviction, not the title of the criminal offense
- Conduct individual assessments of candidates
- Training of managers/supervisors involved in hiring process

Preliminary Steps

- Eliminate policies or practices that exclude people from employment based on any criminal record
- Train managers, hiring officials, and decision-makers about Title VII, disparate treatment and disparate impact theories
- Develop a narrowly tailored written policy and procedures for screening for criminal records
- Identify essential job requirements and the actual circumstances under which the jobs are performed
- Review any applicable federal, state, local law requirements for job

Preliminary Steps

- Review any contractual requirements for job
- Determine the specific offenses that may demonstrate unfitness for performing a particular job
- Determine the duration of exclusions for criminal conduct based on all available evidence
- Record the justification for the policy and procedures
- Note and keep a record of consultations and research considered in crafting the policy and procedures

Preliminary Steps

- Train managers, hiring officials, and decision-makers on how to implement the policy and procedures
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity
- Review/revise employment documents, such as applications, job descriptions, advertisements, etc.

Develop a Targeted Screen

- Questions to ask:
 - Is conviction job related?
 - Is screening out the candidate consistent with business necessity?
- Purpose of Targeted Screen
 - Screen individuals who were convicted of certain types of offenses, within an identifiable time period, that would result in initial determination that individual is unqualified for the position, while taking into consideration the nature of the position
 - Identify specific offenses and time from such offenses that may demonstrate unfitness for performing certain jobs

Develop a Targeted Screen

- **Step 1:** Consider the nature of the crime
- **Step 2:** Consider the time elapsed since the crime or conviction
- **Step 3:** Consider the nature of the job

Perform an Individualized Assessment

- If a candidate is identified by the targeted screen as someone who may be screened out of qualifying for the job, the next step is an individualized assessment to determine if additional information warrants an exception to exclusion from employment

Individualized Assessment

- **Step 1:** Notice to Candidate that s/he may be screened out because of criminal conviction
- **Step 2:** Give individual the opportunity to demonstrate that exclusion should not apply to his/her particular circumstances
- **Step 3:** Does additional information provided by applicant warrant exception to the exclusion?

Targeted Screen Procedures

- ***Do not*** apply where:
 - Employers are subject to federal statutory or regulatory requirements that prohibit individuals with certain criminal records from holding positions
 - Federal statutes or regulations prohibit individuals with specific convictions from holding occupational licenses
 - Criminal record results in denial of federal security clearance required for job

Targeted Screen Procedures

- **Do** apply where:
 - Employers are subject to state statutory or regulatory requirements that prohibit individuals with certain criminal records from holding particular positions
 - State statutes or regulations prohibit an individual with a certain conviction from holding certain occupational licenses
- EEOC's reasoning– federal law preempts state law

Recordkeeping and Other Considerations

- Each time an individualized assessment is performed, create and maintain a record of the justification for the decision including:
 - The decision that was made
 - Documents and notes reflecting the decision-making process
- Confidentiality
- Compliance with federal, state and local laws and regulations

State and Local Laws

- Most states and many municipalities have their own statutes limiting or prohibiting use of applicants' and employees' information:
 - “Ban the Box” laws
 - Criminal history
 - Expunged records
 - Salary history
 - Credit information

State and Local Laws

- Employers with facilities in multiple locations must develop employment practices in accordance with each jurisdiction or cull current practices down to the lowest common denominator among the relevant jurisdictions
- Goals include leveling the playing field for all employment seekers, breaking cycle of discrimination and poverty, and providing equal employment opportunity

Other Useful Background Check Components

- Drug testing
- Social media screening
- References
- Post-employment screens
- I-9s
- E-Verify

10 Employer Best Practices

- Understand whether background checks are required by law, by industry standard or by employer for business reasons
- Determine appropriate nature and scope of background check
- Follow EEOC Guidance when using criminal records

10 Employer Best Practices

- If applicable, comply with FCRA requirements for
 - Consumer report and/or investigative consumer report disclosures and acknowledgments
 - Adverse employment action notices, including pre-adverse action and post-adverse action requirements
- Identify and comply with state and local laws: ban the box, salary history, credit history, etc.

10 Employer Best Practices

- Implement written background check procedures that provide clear guidance on specific elements for each type of position and at specific points in the process
- Create checklists and use them consistently
- Develop procedures regarding use of social media in the hiring process

10 Employer Best Practices

- Train managers and other personnel involved in the hiring process on all laws applicable to background checks, including federal, state and local laws
- Implement reasonable steps to prevent unauthorized access to and use of background check information

More on Best Practices

- Some mantras:
 - Do NOT request information if you are not going to use it!
 - Stay abreast of the law
 - Train relevant personnel on a regular basis
 - Create forms, use them consistently and keep them up to date
 - Create checklists to decrease the opportunity for failure
 - Document, DOCUMENT, **DOCUMENT!**

Questions?



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