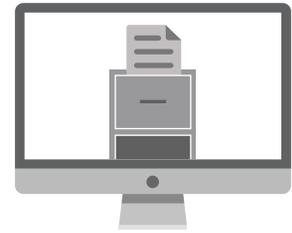
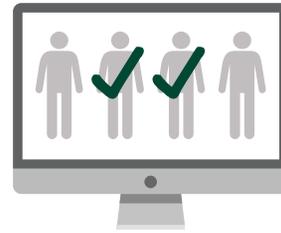
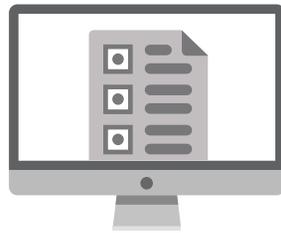


C O M P L I A N T
B A C K G R O U N D
S C R E E N I N G
P R A C T I C E S



T H E C O M P A N I O N G U I D E

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Introduction

Background screening compliance is an often overlooked aspect of the hiring process. In recent years, this complacent mind set has led to a heavy increase in litigation. Both small organizations and corporate giants with entire legal departments are falling prey to costly class action lawsuits because of non-compliant employment screening practices.



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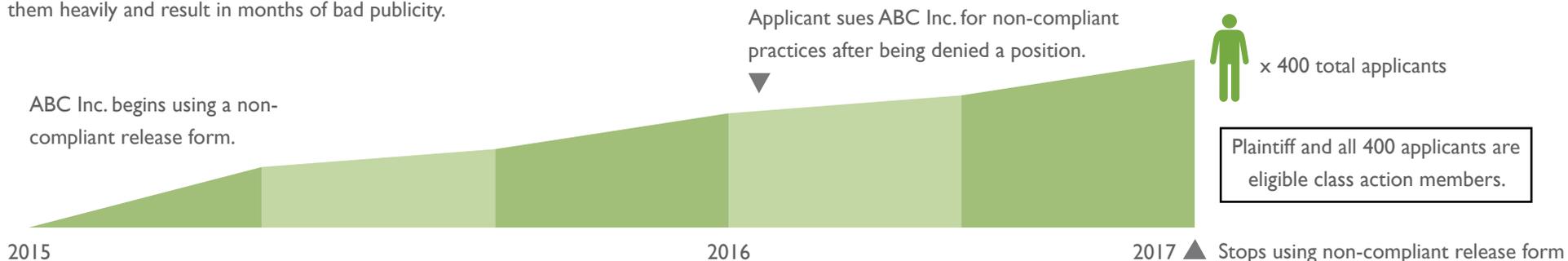
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WHY THE INCREASE IN LITIGATION?

Simply put, there is a lot of money to be made from Fair Credit Reporting Act class action lawsuits. Profit-driven attorneys have created an easily executed strategy of filing class action lawsuits against companies for seemingly trivial violations in their employment screening processes.

If an organization uses a non-compliant Disclosure/Authorization (release) form for several employees over the course of a few years, each of those employees can become members of that class action. The individual monetary entitlement tends to be very small (usually under \$100). When you multiply that by 400 class action members and add attorney's fees, that number gets a lot bigger. Employers will also have to pay the attorney's fees if they lose.

Because of the cost associated with lengthy trials, most employers who are sued for FCRA violations will choose to settle as opposed to taking it to court. Attorneys know this and count on it. That is why these cases have been so successful. They know that if you have a problem in your release form, they then have the legal standing to bring a case forward. If you aren't able to get the case dismissed immediately, the outcome isn't likely to be in your favor. Most employers would rather pay the settlement instead of dealing with a lengthy trial that could cost them heavily and result in months of bad publicity.



It is for this reason that we created this compliance guide. It is a checklist to ensure that your organization hasn't overlooked any aspect of your compliance obligations. If you are new to background screening, the guide will serve as a road map for creating your program. If you are a seasoned professional, the guide will help you identify any compliance gaps in your existing program.

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The Fair Credit Reporting Act

As the name implies, the Fair Credit Reporting Act (FCRA) was originally established to grant consumer protections to those entering into credit related transactions. The statute also created regulatory standards and general operating procedures for companies conducting business with these consumers. Shortly after the FCRA's adoption, the interpretation of the statute was expanded to include the background screening industry.



Consumer – An individual who is the subject of a consumer report. This would be an applicant, employee, volunteer, or contractor that you would be running a background check on.



Consumer Report - It is the compiled report of information collected by a Consumer Reporting Agency that may include credit or other information used to evaluate an individual for employment purposes. Basically, this is the background check or background report.



Consumer Reporting Agency (CRA) – An organization that collects and compiles information on a consumer for the purpose of creating a consumer report.



End User – The individual or organization that will be using the consumer report to evaluate a consumer for employment purposes. In other words, this is you.

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Employers who screen employees, applicants, volunteers, or contractors using a CRA are required to follow the end user requirements of the FCRA. Basically, any time you run a background check on an individual for employment purposes, the FCRA applies. We'll get into the specifics of this a little further on.

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REGULATORY BODIES

There are a few regulatory agencies that have a hand in the interpretation and enforcement of the FCRA. The Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB) both have primary enforcement authority and may issue fines against organizations that violate the FCRA. The Equal Employment Opportunity Commission (EEOC) also provides guidance on employment screening processes in order to protect against discriminatory hiring practices.

FEDERAL TRADE COMMISSION

Up until 2010, the FTC served as the primary enforcement agency for the FCRA – responsible for interpreting the law. Now, the FTC primarily acts as a watch dog of consumer reporting agencies (CRA). CRAs that are found violating the FCRA can be fined heavily for their mistakes.



Spokeo Settled with the FTC for \$800,000 after allegedly marketing consumer information to employers and recruiters in violation of the FCRA¹



HireRight fined \$2.6 million for incorrectly listing criminal convictions on some consumer reports.²

CONSUMER FINANCIAL PROTECTION BUREAU

Since the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act of 2010, and the subsequent creation of the CFPB, the FTC has transferred the authority for interpreting the FCRA to the CFPB. Like the FTC, the CFPB also focuses more on enforcement with organizations that supply the information, rather than those who use it. While the FTC tends to enforce the FCRA with organizations that provide background checks, the CFPB focuses on financial agencies like creditors, debt collectors, etc.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Though the EEOC doesn't enforce the FCRA, they are an important agency to mention when bringing up employment screening compliance. The EEOC pursues discrimination cases based on several different federal laws.³

- Title VII of the Civil Rights Act (Title VII)
- The Pregnancy Discrimination Act (Title VII Amendment)
- Equal Pay Act (EPA)
- Age Discrimination in Employment Act (ADEA)
- Americans with Disabilities Act (ADA)
- Genetic Information Nondiscrimination Act (GINA)

An employer's employment screening practices can run afoul of the EEOC if their policy discriminates against someone who is protected by any of these federal laws.

¹ <https://www.ftc.gov/news-events/press-releases/2012/06/spokeo-pay-800000-settle-ftc-charges-company-allegedly-marketed>

² <https://www.ftc.gov/news-events/press-releases/2012/08/employment-background-screening-company-pay-26-million-penalty>

³ Laws Enforced by EEOC, US Equal Employment Opportunity Commission, <http://www.eeoc.gov/laws/statutes/>

Beginning the Background Screening Process

STEP I: CREATING YOUR POLICY

Before starting the background screening process, it is crucial that you create a policy that outlines the purpose and scope of your program. The following questions are meant to help shape the foundation of your policy, but are not enough by themselves to create a legally defensible policy.

PURPOSE

Why do you need to run background checks on applicants, employees, etc.?

SCOPE

Who will have a background check run on them and how often?

What types of background checks will you run? (County Criminal Records, Employment Verification, Credit History, etc.)

How will the information be used? How will it affect employment opportunities?

Will you use a third party agency for your background checks? If so, which agency?

How will you handle disputes and verify the accuracy of information in a report?

Always consult legal counsel before implementing a new employment screening policy. We advise that you consult with an attorney who is well versed in the Fair Credit Reporting Act and Labor/Employment Law.

PROCEDURES

You will also want to list out the compliance steps for following the Fair Credit Reporting Act. (Don't worry, we'll get to that)

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EEOC GUIDELINES

In April 2012 the EEOC released a consolidated guidance on the use of arrest and conviction records.⁴ This guidance outlined what the EEOC considers discriminatory practices in employment screening. When putting together your employment screening policy, there are a few important things to note from this guidance.

ARREST VS CONVICTION RECORDS

The EEOC strongly discourages the use of arrest records in a screening program. An arrest record doesn't necessarily mean that the individual was convicted of a crime. If there isn't a conviction record associated with the same incident, an employer shouldn't imply that the person with the arrest record actually committed the crime.

⁴ "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (No 915.002) – Approved April 25, 2012

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	Executive Leadership	Directors	Managers	General Employees
CRIMES AGAINST PERSONS				
Sample Crime				
Assault Related Offenses				
Family Related Offenses Nonviolent				
Kidnapping/Abduction Related Offenses				
Sex Related Offenses Forcible				
All Other Person Related Offenses				
CRIMES AGAINST PROPERTY				
Arson Related Offenses				
Bad Checks Related Offenses				
Burglary/Breaking and Entering Related Offenses				
Motor Vehicle Theft Related Offenses				
Counterfeiting/Forgery Related Offenses				
Destruction/Damage/Vandalism Of Property Related Offenses				
All Other Property Related Offenses				
CRIMES AGAINST SOCIETY				
Purposely Obstructs Impairs Or Perverts The Law				
Disorderly Conduct Related Offenses				
Drug/Narcotics Related Offenses				
Traffic Violations While Operating A Motor Vehicle				
Trespass On Real Property Related Offenses				
Weapons Law Related Offenses				
Drug/Narcotic Related Offenses Involving Sale Or MFG				
All Other Society Related Offenses				

THE DECISION MATRIX

The EEOC guidance dictates the need for a consistent standard for screening applicants and employees that applies the same standards to everyone. They also emphasize that each criminal record needs to be examined and considered on a case by case basis. Their suggested tool for accomplishing this is the decision matrix.

KEY	
Pass/Acceptable	
Review	

Since each offense needs to be considered on a case by case basis, it's important to never have an automatic rejection or "Red" category in your decision matrix. There are some organizations that are exceptions to this rule. If your organization is regulated by a federal law that requires certain exclusions (e.g. FDIC), then those laws supersede the EEOC guidance. For state laws that conflict with the EEOC guidance, consult legal counsel.

JOB RELATEDNESS AND CONSISTENCY WITH BUSINESS NECESSITY (JRBN)

The EEOC states that any criminal information that is used to screen applicants, employees, etc. needs to be "job related and consistent with business necessity." There are three relevant factors to consider when trying to figure out if an offense is job related:

- Nature and gravity of the offense
- Time that's passed since the offense or completion of the sentence
- Nature of the job held or sought

JRBN will impact both the decision making process when considering criminal records and what types of background checks you should use for your applicants. For example, consider whether or not you need your background checks to go back 15 years. Is a 15-year-old DUI really relevant to the position? If yes, are you sure that a legal team would interpret JRBN the same way you have?

With criminal records that fall within the questionable area of JRBN, it never hurts to consult legal counsel.

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DISPARATE TREATMENT

According to the EEOC guidance of 2012, an employer violates Title VII if they treat the criminal history of one individual differently than another based on race or national origin. This again hits on the point that your organization's screening policy needs to be consistent and well outlined in a decision matrix. This makes it more difficult for disparate treatment incidents to arise.

Disparate treatment cases can also arise when a background check includes information that gives an employer information that identifies an individual as a member of a protected class, if it impacts their decision to hire an individual.



Employer looks up applicant on Facebook prior to an interview.



Employer sees a post where the applicant comments that she wants to have a baby within the next year.



Employer decides to go with a less qualified male candidate because of this information.

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DISPARATE IMPACT

If an organization's employment screening policy negatively impacts a protected group disproportionately and fails to prove that the practice is job related and consistent with business necessity, then it is considered disparate impact. The organization's policy can be neutral in nature, and still be discriminatory within the realm of disparate impact.

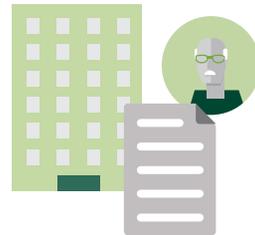
Example:



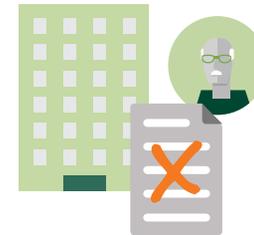
ABC Inc. implements a policy to screen applicants who don't have a high school diploma or equivalent.



If they are unable to verify the diploma, the applicant will not be offered a job.



An international applicant who is authorized to work in US applies for the position.



The international applicant's diploma can't be verified so they are denied the position.



The organization inadvertently discriminated against the applicant based on national origin by having an exclusionary policy that disproportionately impacted that protected group.

SUPERVISOR TRAINING

Once you've created a polished background screening policy, you'll need to train those who will be involved in the hiring process on how to follow it. For managers and supervisors, it's especially important to train on how to appropriately interpret background information in a way that doesn't violate your policy.

Consistency is key. You don't want to have your managers independently determining the severity of different offenses.

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STEP 2: INITIAL NOTICE

Once you have a completed policy and are ready to begin conducting background checks on individuals for your organization, the first step is the initial notice. An initial notice of a background check can be a statement in job boards or recruiting tools stating that your organization conducts background checks. It can be a sign outside of the human resources door or a letter given to applicants and employees. Most commonly, the initial notice is given in writing with the disclosure form since they can be done at the same time.

Areas with “Ban the Box” laws may have specific requirements for the language within your initial notice - E.g. you may not be able to have a statement that says if a criminal conviction will preclude someone from being eligible for a position. Understanding your legal landscape is critical.

STEP 3: DISCLOSURE AND AUTHORIZATION

The Disclosure and Authorization documents must be given to an applicant or employee before a background check is initiated on them. It isn't enough to just tell the applicant that your organization runs background checks. They must receive the Disclosure in writing beforehand.

The Disclosure and Authorization is one of the most common areas of class action litigation. This is because the FCRA has very specific requirements on how the Disclosure and Authorization is supposed to be presented and what documents should be included. The purpose of the Disclosure and Authorization documents are to ensure that the applicant or employee understands that they will have

a background check run on them as a condition for employment, promotion, assignment, etc.

Here are a few checklist items to ensure that your Disclosure and Authorization is compliant:

- Disclosure and Authorization are stand-alone documents
- Disclosure and Authorization document doesn't include erroneous information
- Disclosure and Authorization doesn't include a release of liability statement, nor is there a release of liability statement that applies to the background screening process anywhere in a job application.

Also ensure that you include the following supplementary documents with the Disclosure and Authorization.



[Summary of Your Rights under the Fair Credit Reporting Act](#)



[Remedying the Effects of Identity Theft](#)

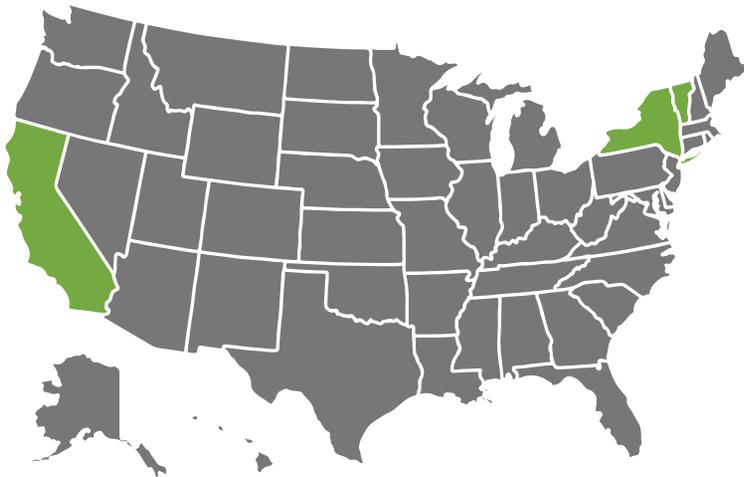
Though the “Remedying the Effects of Identity Theft” document isn't required as part of the Disclosure and Authorization process, it satisfies legal requirements under the FCRA if a consumer later believes they have been the victim of identity theft or fraud.

The disclosure and authorization should both be standalone documents.

Though it is legally compliant to have a combined Disclosure and Authorization document, we have recently seen the combined documents challenged in courts. As mentioned earlier, the focus of this guide is to help you craft a program that not only keeps you legally compliant, but also keeps you away from the defense table by removing murky areas where you can be hit by legal fees and settlements, regardless of whether or not your process is non-compliant.

STATE-SPECIFIC REQUIREMENTS

Certain states have specific disclosures that must be given to the applicant in addition to the standard Disclosure and Authorization documents. As an employer, you should provide these documents if your organization or applicant is located in one of the states.



New York - [Article 23-A of NY Correction Law](#)



California - [Notice Regarding Credit Checks Per California Law](#)



Vermont - [Notice Regarding Credit Checks Per Vermont Law](#)

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STEP 4: SUBJECT NOTIFICATION

If a considerable amount of time has passed between when the Disclosure and Authorization documents were signed, and when you begin the actual background check, you may want to notify the individual that a background check has been initiated. This can help keep an applicant from thinking that a background check is being run on them without their consent.

Example:

An applicant applies for a position electronically. You do not currently have a need for this position to be filled but keep them in an applicant pool for later consideration. Six months later you decide to hire the individual on the condition that they pass a background check. Since a considerable amount of time has passed since they signed the disclosure and authorization documents, the subject notification serves as a reminder of their rights and that they signed the documents.

While this is an optional step, it helps to create a transparent process where the subject is aware of what is going on and is less likely to claim that you didn't properly disclose your intent to run a background check.

Making the Hiring Decision

Once you've completed all of the necessary steps to run a background check on an individual, you are then able to submit their information for a background check. The results of the background check will be returned in the form of a consumer report.

STEP 5: REVIEWING YOUR POLICY

Before making any decisions based on the information in a consumer report you should first take a minute to review your organization's employment screening policy. This will help to ensure that you make consistent decisions based on the information presented in the consumer report.

SO, WHAT HAPPENS WHEN THE CONSUMER REPORT RETURNS WITH A CRIMINAL RECORD?

The most important thing to remember if a consumer report comes back with a criminal record is to not react impulsively to the information. If there is a criminal record in the applicant or employee's report, you will need to review your policy and decision matrix to determine whether or not the offense in the report would preclude the person from being hired, promoted, etc.

If the offense isn't in your "green column" for acceptable convictions, then you will need to proceed to the next step, considering the individual offense based on the individual circumstances surrounding them. Remember these are things like "job relatedness and consistency with business necessity." You will want to consider:

- Nature and gravity of the offense
- Time that's passed since the offense or completion of the sentence
- Nature of the job held or sought

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Once you've reviewed your policy, considered the specific case, and perhaps even sought legal counsel, you may determine whether or not the offense would preclude the individual from the position. You are not deciding if they will be denied the position at this point – just if the information on their consumer report could have that result.

STEP 6: PRE-ADVERSE ACTION

Before you commit to any Adverse Action because of any information on a person's report, you must first notify them of the information in their consumer report and the potential adverse impact that it could have.

Adverse action is defined as any action that would negatively impact the consumer. It can be a termination, refusal to hire, change of job assignment, loss of contract, or any other decision that could feasibly have a negative impact.

WHY IT'S IMPORTANT

There are circumstances in which the information on a background check could be incorrect. Most consumer reporting agencies have 99.9% accuracy based on the information given by the courts. The problem is that the physical records in the court can be wrong, themselves.



Applicant has a criminal conviction on his record expunged months before applying for a job at ABC Inc.



When ABC Inc. runs a background check on Joe, the report comes back showing the expunged criminal record.

There are two reasons why this could happen

1. The information hasn't been updated in the record yet because it's relatively recent.

2. Someone in the process forgot to sign or file a document to expunge the record.

Either way, the information is actually expunged and should not be used against the individual in a hiring decision.

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As you can see through the example, there are instances in which false positives can occur. This is why it's important to first give the individual a chance to review and dispute the information in their consumer report before making any sort of adverse employment decision.

HOW IT WORKS

The Pre-Adverse action step should be done in writing in the form of a letter or email. In this communication, you will want to let the applicant know that their background check was reviewed and evaluated on a case-by-case basis in accordance with the law and EEOC guidance – outlining that there is information on the consumer report that could preclude them from employment.

Include the following documents:



Copy of the applicant's consumer report



[Summary of Your Rights under the Fair Credit Reporting Act](#)



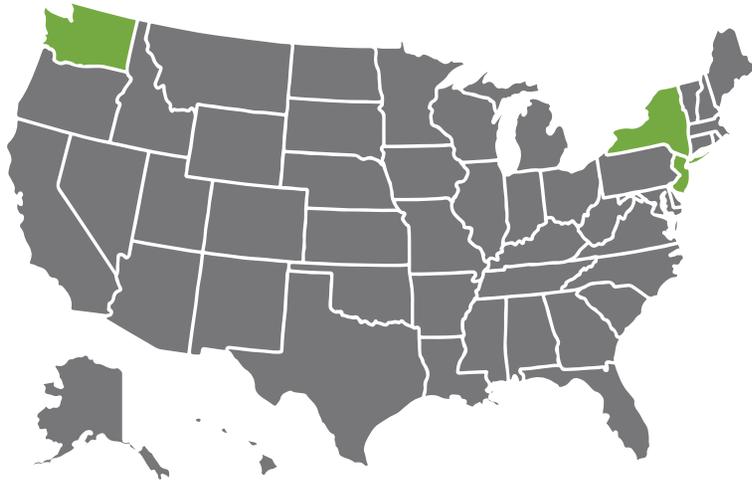
[Remedying the Effects of Identity Theft](#)

Always ensure that the applicant is aware that they are entitled to a free copy of their background check. If requested, the end-user and CRA must provide a copy of the report to the consumer.

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STATE-SPECIFIC REQUIREMENTS

New York, New Jersey, and Washington each have their own documents that are required to be given to applicants along with the Pre-Adverse action letter. You will need to give these document to an individual if your organization or the individual resides in that state.



DOC

New York - [Article 23-A of the NY Correction Law](#)

DOC

New Jersey - [Summary of Your Rights Under the New Jersey Fair Credit Reporting Act](#)

DOC

Washington - [Summary of Your Rights Under the Washington Fair Credit Reporting Act](#)

Since the person is entitled to dispute the information of the report, you must include the source of the consumer report in the Pre-Adverse action letter. Include the name of the consumer reporting agency and their contact information. If your applicant chooses to dispute, the consumer reporting agency will re-investigate the record in question to ensure it is accurate.

STEP 7: WAITING PERIOD

The Fair Credit Reporting Act only dictates that an employer should wait a “reasonable amount of time”⁵ between Pre-Adverse and Adverse Action. We recommend a minimum five-business day waiting period (accounting for mailing time), however, be aware that some regions may require as long as 10-days.

To clarify, this is giving the applicant five days to communicate their dispute to the background screening provider. If they decide to dispute the information, you should wait for the information to be re-investigated and a new report sent to you, before proceeding.

San Francisco, CA; Montgomery County, MD; and Prince George’s County, MD require a seven-day waiting period between pre-adverse and adverse action steps.

⁵ Procedure in case of disputed accuracy, 15 U.S.C. § 1681i

STEP 8: ADVERSE ACTION

The final step in the Adverse Action process is the adverse action notice; communicated by letter or email. Employers are required by law to provide an adverse action notification to an applicant when adverse action has been taken, based in whole or in part, on information contained in a consumer report.

HOW IT WORKS

Much like the Pre-Adverse action notice, the Adverse Action notice will outline that there was certain information on the applicant's consumer report that will keep them from being employed. With the Adverse Action notice, you are now telling the applicant that you have given them the chance to dispute the information, and will now act upon the information within the report.

In the Adverse Action notice you will need to include text that details what the Adverse Action will be (e.g. denied a position, promotion, or contract). You will need to explain that the decision was made in part or in whole because of information contained within their consumer report - including the name and contact information for the agency that provided the report.

It's important to indicate to the applicant that your organization made the employment decision, not the consumer reporting agency you used to supply the information.

Once an Adverse Action letter has been sent, an applicant still has the right request a copy of their report from you or the consumer reporting agency that provided it. They may also dispute the accuracy of the information, though it may not impact the hiring decision.

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Include the following additional documents with the adverse action notice when sending it to the applicant:

-  Copy of the applicant's consumer report
-  Your Rights Under the Fair Credit Reporting Act
-  Remedying the Effects of Identity Theft*
-  Any state-specific documents

*While the "Remedying the Effects of Identity Theft" document isn't a required piece of the adverse action step, we recommend providing it as supplemental information for the applicant.

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STATE-SPECIFIC REQUIREMENTS

California and Massachusetts both have additional disclosures to include if the organization or applicant is located in that state, and the consumer report included credit information.



[California Notice Regarding Credit Checks](#)



[Massachusetts Notice Regarding Credit Checks](#)

The following jurisdictions have laws that require the adverse action letter to detail the specific items contained within the report that contributed to the adverse action decision:



WHY IT'S IMPORTANT

The Adverse Action process is crucial for FCRA compliance. Many organizations are hit with class action lawsuits based on this issue. Legal proceedings are often triggered by a misstep in the Adverse Action process, a laundry list of charges based on different areas of non-compliance being discovered.

This is because most applicants don't understand their rights under the FCRA and don't have any complaints about a non-compliant disclosure form so long as they get the job. It's only after an applicant is told that they were removed from consideration because of a criminal record, that the disclosure form becomes a problem. Now there is a FCRA lawyer involved who can go through your processes with a magnifying glass to build a case based on every tiny speck of non-compliance in your process. The more areas of non-compliance they can identify, the more potential class action members there might be.

Transparency is a good practice regardless of your jurisdiction. Explain which specific offenses would preclude a candidate from a position so that they don't think you are holding erroneous information against them.

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RECENT CLASS ACTION EXAMPLES



A class action lawsuit was initiated after an applicant applied for a job and was given a conditional offer of employment – provided that they pass a background check. The lawsuit alleges that the plaintiff was notified that he wouldn't get the job because of the results on their background check. According to the plaintiff, UPS didn't provide a copy of the background check used in the decision.

The class action claims that UPS routinely makes adverse employment decisions based on the information provided in background reports. As a result, the class is open to all UPS applicants and employees nationwide that may have similar circumstances.



An applicant was given a conditional job offer, pending the results of a background check. When the results came back she was denied the position based on a 28-year old infraction for consuming a malt beverage in the passenger seat of a car that resulted in a \$40 fine. The applicant was allegedly never given a chance to dispute the information or given notice through pre-adverse or adverse action steps.

EEO consideration - In this particular case it is important to also note that the EEOC's guidance on "job relatedness and consistency with business necessity" also comes into play. It's very rare that a report would include such old information. If it does, both the age and gravity of the offense need to be considered before making an adverse decision.



An applicant was denied employment because of an arrest record associated with a pending case for felony possession of a controlled substance for sale in connection with a gang. When the organization saw this arrest record, the applicant was allegedly denied the position without providing Pre-Adverse or Adverse Action steps. The applicant's legal defense was also able to use the organization's non-compliant Disclosure and Authorization documents in their case.

EEO consideration – The EEOC guidance on the use of arrest and conviction records clearly states that employers shouldn't use arrest records as part of their hiring decision if there isn't a conviction also associated with the charge. In this particular case, the arrest was very recent and the charges for felony possession were still pending. Since the applicant had not been convicted, the employer shouldn't use the information against them until after a verdict had been given. This is a very rare situation, and as a such, it would be very beneficial to consult an employment lawyer if it were to ever arise.

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ADMINISTRATIVE REQUIREMENTS

Once you've completed the background screening process, there are a couple additional things to also be aware of in your record keeping processes.

STEP 9: DATA RETENTION

You will need to retain a copy of the applicant's consumer report and their signed Disclosure and Authorization documents. We suggest that you maintain a filing system for your background-related documents that is separate from other personnel files. This helps ensure limited access to the information - keeping it private.

The statute of limitations for the Fair Credit Reporting Act is five years after the date of the consumer report, or 2 years from when a consumer becomes aware of the issue, whichever is less, though there are some other common law and background screening related statutes that can have up to a six-year statute of limitation. Records must be retained for a minimum of five years. We recommend retaining background screening related documents for six years, to meet these additional circumstances.

Retain background screening related documents for 6 years after the date of the consumer report.

STEP 10: DATA DISPOSAL

The Fair and Accurate Credit Transaction Act of 2003 (FACTA) was enacted to help consumers in the fight against identity theft. A few of the byproducts of FACTA are the "Remedying the Effects of Identity Theft Document" and redacted social security numbers in consumer reports. FACTA also had specific guidance for the proper

disposal of consumer report information.

The information contained within a consumer report is sensitive in nature. It is important to ensure that when you dispose of records after the six-year retention period, they are disposed of in a way so that they cannot be read or reconstructed.



SHRED



PULVERIZE



INCINERATE

Additional Compliance Considerations

While it would be impractical for us to try and cover everything that could impact employment screening practices in your organization, there are a few additional considerations that employers should at least be aware of.

SOCIAL MEDIA BACKGROUND CHECKS

Back in June, 2011 the Federal Trade Commission (FTC) granted approval for consumer reporting agencies to offer social media background checks to organizations. The FTC stipulated that any organization that uses social media background checks must comply with the already existing Fair Credit Reporting Act (FCRA) regulations. Basically, this means that the process needs to be treated the exact same as a criminal record check.

Contrary to ordinary background checks, social media data collected by a third party cannot be re-used for future searches. That means that social media background checks may only contain “live” content. Social media content databases cannot be used for employment purposes.

The truth is that most employers won't use a third party to run a social media background check on their applicants. Instead, most social media searches are done behind the scenes by the person responsible for hiring the applicant, whether that's the HR team or a supervisor. The problem is that these clandestine social media searches open organizations up to a lot of risk.

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40%

of employers use social media for screening applicants

43%

of employers found a reason not to hire because of social media content

SOCIAL NETWORKS FOR USED BY EMPLOYERS FOR SCREENING ⁶

76%

Facebook

53%

Twitter

48%

LinkedIn

The main issue with using social media content as a screening tool is that it is very difficult to judge the accuracy of the information.

- Can you verify that the social media account belongs to your applicant?
- Can you determine for certain that you understand the context of text and images (is the information sarcastic or satirical?)
- How do you un-ring the bell once you see protected class information such as religious or political affiliations?

⁶ <http://www.go-gulf.com/blog/social-media-pre-employment-screening/>

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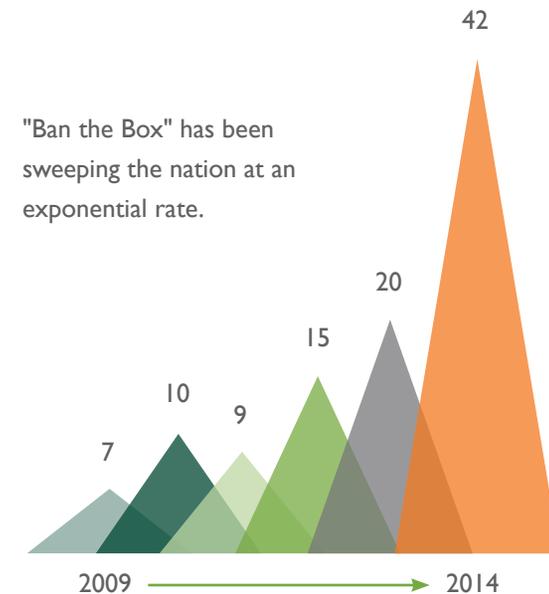
Organizations that choose to conduct social media searches on their applicants need to be careful with the information they capture. With social media, you gain access to not only information about the individual's character, but also possibly protected information that cannot be used as part of the hiring process.

Social media has become the norm in many organizations. While the easiest way to avoid this issue is to just stay away from it, we understand that may no longer be possible for some organizations at this point. The best defense is to outline clear policies and procedures on how social media can be used for employment and screening purposes.

“BAN THE BOX”

“Ban the Box,” or Fair Chance employment, legislation has been sweeping the nation over the last few years. 25 states and over 150 cities and counties have enacted “Ban the Box” laws and the number of jurisdictions enacting legislation is growing at an exponential rate.

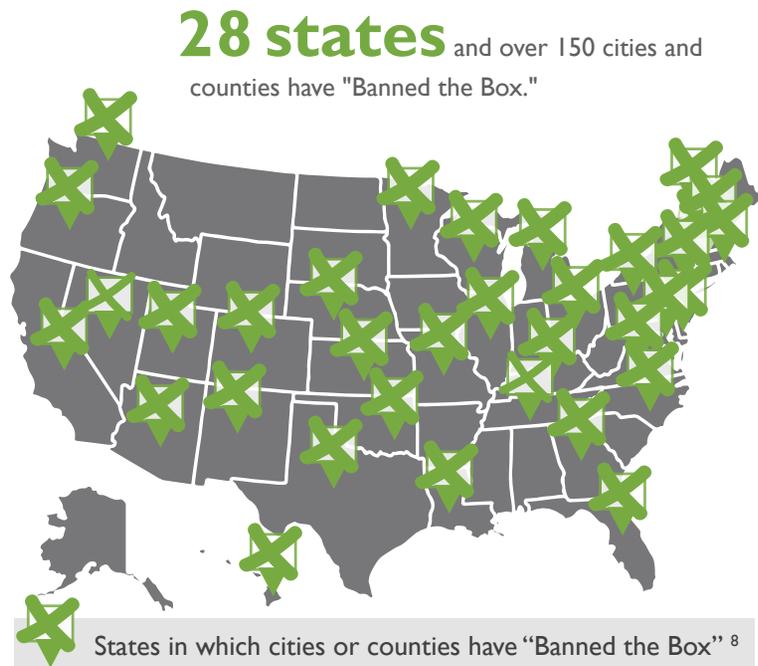
The goal behind these legislative trends is to remove barriers for individuals with criminal records in order to give them a better chance at finding employment after completing their sentences. The long term goal is to decrease the rate of recidivism. The way lawmakers are trying to accomplish this is by forcing employers to remove the question commonly seen on job applications that asks if a person has any criminal history in their past. The assumption is that when someone enters a criminal history in that “box,” their application will be automatically excluded regardless of qualifications.



Number of jurisdictions adopting "Ban the Box" reforms ⁷

⁷ <http://www.nelp.org/content/uploads/2015/01/Report-Federal-Fair-Chance-Hiring-Agenda.pdf>

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Some "Ban the Box" laws only limit an employer's ability to ask about a criminal conviction in an employment application. For these areas, the employer's ability to run background checks is unaffected. Other "Ban the Box" laws can impact if and when a background can be run on new applicants. A few recent laws have gone even further by limiting an employer's ability to search for information on social media or through public records.

The important thing for employers to know about "Ban the Box" legislation is that each jurisdiction that enacts new legislation has its own spin. New laws may impact everyone in that jurisdiction or perhaps just government employees. They may state that you can't ask about criminal convictions at all or maybe you just have to wait until after the initial interview.

Since there is very little standardization between the different laws, it is impossible to have a "one size fits all" compliance guide on the subject. If and when "Ban the Box" is passed in your area, you will need to consult with legal counsel to assess how your screening program will be impacted.

CONCLUSION

As with any area of legal compliance, employment screening compliance can be a moving target. We strive to provide you with all the compliance and legislative updates you need to maintain compliance with federal, state, and local laws. Ultimately though, it is up to you to make sure your program stays compliant. Because of things like social media and "Ban the Box," a policy that an attorney signed off on five years ago may be already out of date. The steps outlined in this compliance guide are meant to help you follow that moving target, giving your program a foundation to build on. As the legal landscape changes, you will be able to flexibly move along with it.

⁸ <http://www.nelp.org/campaign/ensuring-fair-chance-to-work/>

Additional Resources

BACKGROUND CHECKS:WHAT EMPLOYERS NEED TO KNOW

Joint publication of the EEOC and FTC

DISPOSING OF CONSUMER REPORT INFORMATION? RULE TELLS HOW

FTC guidance on disposal of consumer report information

ARREST AND CONVICTION RECORDS IN EMPLOYMENT BROCHURE

EEOC best practices guidelines for use of arrest and conviction records in employment

THE FAIR CREDIT REPORTING ACT 15 USC § 1681 ET SEQ

Printable text of the Fair Credit Reporting Act

FCRA 50 STATE COMPLIANCE PACKET

List of state-level FCRA requirements created by SeyFarth Shaw LLP

PREVENTING DISCRIMINATION IS GOOD BUSINESS

EEOC fact sheet on employment screening best practices for small businesses

BAN THE BOX: U.S. CITIES, COUNTIES, AND STATES ADOPT FAIR HIRING POLICIES

National Employment Law Project's Guide to Ban the Box. While it has some bias, it is the most in-depth guide to "Ban the Box" legislation.

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COMPLIANCE DOCUMENTS

SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT

REMEDYING THE EFFECTS OF IDENTITY THEFT

ARTICLE 23-A OF THE NY CORRECTION LAW

NOTICE REGARDING CREDIT CHECKS PER CALIFORNIA LAW

NOTICE REGARDING CREDIT CHECKS PER VERMONT LAW

SUMMARY OF YOUR RIGHTS UNDER THE NEW JERSEY FAIR CREDIT REPORTING ACT

SUMMARY OF YOUR RIGHTS UNDER THE WASHINGTON FAIR CREDIT REPORTING ACT

INFORMATION CONCERNING THE PROCESS FOR CORRECTING A CRIMINAL RECORD IN MASSACHUSETTS

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