COMPLIANT BACKGROUND SCREENING PRACTICES



THE COMPANION GUIDE

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Introduction

Background screening compliance is an often overlooked aspect of the hiring process. In recent years, there has been an uptick in Fair Credit Reporting Act-related litigation that suggests this area needs more attention. 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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WHY THE INCREASE IN LITIGATION?

Simply put, there is a lot of money to be made from Fair Credit Reporting Act (FCRA) 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 and/or 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); however, when you multiply that by 400 class members and add attorney's fees, this number swells. Employers will also have to pay the attorney's fees if they lose.

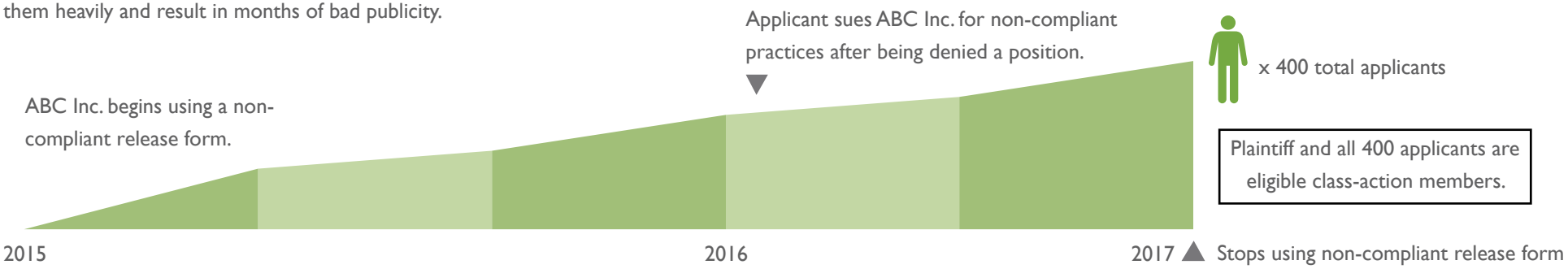
Because of the cost associated with lengthy trials, most employers who are sued for FCRA violations will choose to settle as opposed to going to court. Attorneys know this and count on it. That is why these cases have been so successful. They know that if you have a problem in your release form, they then have the legal standing to bring a case forward. If you are not able to get the case dismissed immediately, the outcome is not 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 has not 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

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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. Simply, 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 your organization.

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 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 may be fined heavily for their mistakes.

Instant Checkmate, TruthFinder, and three related companies were required by the FTC to pay a $5.8 million penalty. The decision settled allegations that they violated the FCRA, including failure to comply with Section 607(a) of the FCRA.[1]

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 does not enforce the FCRA, they are an important agency to mention when speaking of employment screening compliance. The EEOC pursues discrimination cases based on several different federal laws. Below is an example of some of the laws the EEOC oversees.[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] FTC Says TruthFinder, Instant Checkmate Deceived Users About Background Report Accuracy, Violated FCRA While Marketing Reports for Employee and Tenant Screening
[2] Employment Background Screening Company to Pay $2.6 Million Penalty for Multiple Violations of the Fair Credit Reporting Act
[3] Laws Enforced by EEOC, US Equal Employment Opportunity Commission

Beginning the Background Screening Process

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STEP 1: 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 FCRA and Labor/Employment Law.

PROCEDURES

You will also want to list the compliance steps for following the FCRA. (Do not worry, we will get to that)

EEOC GUIDELINES

In April 2012, the EEOC released 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 does not necessarily mean that the individual was convicted of a crime. If there is not a conviction record associated with the same incident, an employer should not 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, https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions

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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. To view the sample decision matrix click here.

KEY	
Pass/Acceptable	
Review	

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Since each offense needs to be considered on a case-by-case basis, it is 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 of the job held or sought
- Nature and gravity of the offense
- Time that has passed since the offense or completion of the sentence

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.

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.

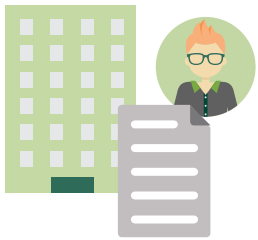
Example:



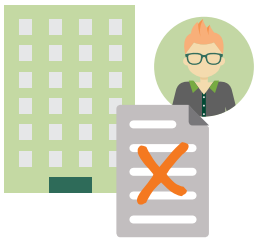
ABC Inc. implements a policy to screen applicants who have a high school diploma or equivalent.



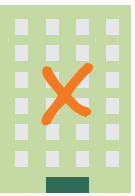
If they are unable to verify the diploma, the applicant will not be offered a job.



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



The international applicant's diploma couldn'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 will need to train those who will be involved in the hiring process on how to follow it. For managers and supervisors, it is 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 allowance of 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. It is not 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 are 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 does not include erroneous information
- Disclosure and Authorization does not 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 is not 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.

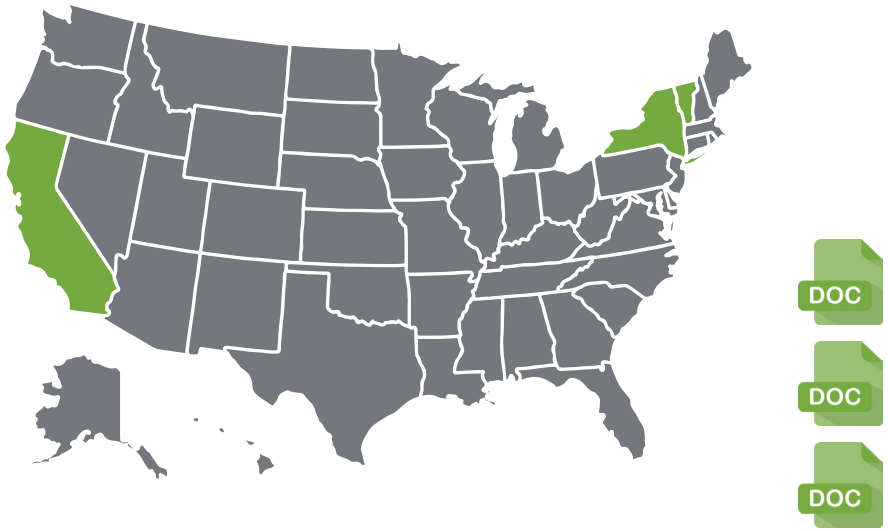
The Disclosure and Authorization should both be stand-alone documents.

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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.



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.

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

Making the Hiring Decision

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Once you have 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 time 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 OR ANY NEGATIVE INFORMATION?

The most important thing to remember if a consumer report comes back with negative information or 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 the offense in the report would preclude the person from being hired, promoted, etc.

If the offense is not 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 of the job held or sought
- Nature and gravity of the offense
- Time that has passed since the offense or completion of the sentence

Once you have 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.

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WHY IT IS IMPORTANT

There are circumstances in which the information on a background check could be incorrect. Most CRAs have extremely high 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 Applicant, 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 public 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.

As you can see through the example, there are instances in which incorrect results make it into the background check report. This is why it is 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:

DOC Copy of the applicant's consumer report

DOC Summary of Your Rights under the Fair Credit Reporting Act

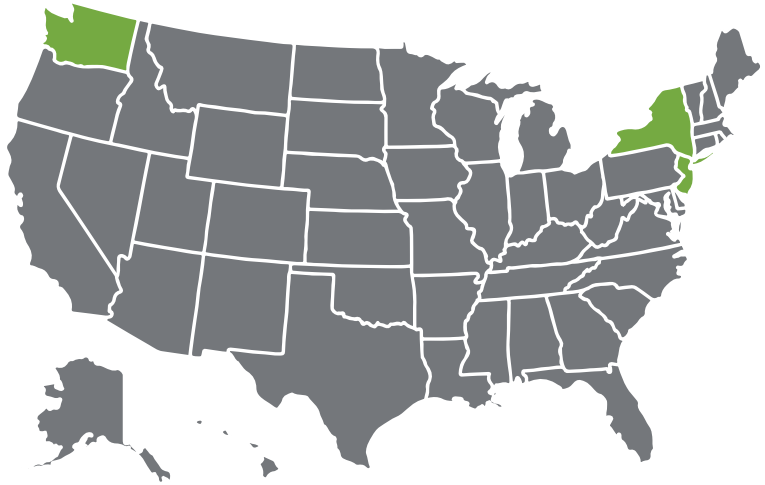
DOC Remedying the Effects of Identity Theft

Always ensure that the applicant is aware that they are entitled to a free copy of their background report. 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 documents to an individual if your organization operates in or the individual resides in that state.



New York - Article 23-A of the NY Correction Law

New Jersey - Summary of Your Rights Under the New Jersey Fair Credit Reporting Act

Washington - Summary of Your Rights Under the Washington Fair Credit Reporting Act

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

STEP 7: WAITING PERIOD

The FCRA only dictates that an employer should wait a "reasonable amount of time"[5] between Pre-Adverse and Adverse Action. We recommend a minimum five to seven-business day waiting period (accounting for mailing time), however, be aware that some regions may require as long as 10-days. Check with your legal counsel to determine the best waiting period for your organization based on applicable state laws

To clarify, this is giving the applicant five to seven business 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

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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 of information contained within their consumer report - including the name and contact information for the agency that provided the report.

It is important to indicate to the applicant that your organization made the employment decision, not the CRA you used to supply the information.

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

Include the following additional documents with the Adverse Action notice when sending it to the applicant:

- Copy of the applicant's consumer report
- Summary of 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 is not 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.

DOC California Notice Regarding Credit Checks

DOC Massachusetts Notice Regarding Credit Checks

The following jurisdictions have laws that require the Pre-Adverse and/or Adverse Action letter to detail the specific items contained within the report that contributed to the Adverse Action decision:



WHY IT IS 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 do not understand their rights under the FCRA and do not have any complaints about a non-compliant disclosure form so long as they get the job. It is 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 may 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

THE SALVATION ARMY

A class-action lawsuit was filed against The Salvation Army. The plaintiffs in the case alleged The Salvation Army conducted background checks without proper disclosure and obtaining authorization. The claims included the disclosure was not in capital letters or boldface, contained multiple state law notices, and did not include a summary of rights. The Salvation Army agreed to pay $1.87 million to resolve the claim.[6]

Walgreens

The plaintiff claimed they were sent two rejection emails within the same day. They later became aware of the Pre-Adverse letter. They claimed they were not given an opportunity to respond to the letter or dispute information in the consumer report. The plaintiff initiated a class-action lawsuit. Walgreens did not admit any wrongdoing. However, they did agree to pay a maximum settlement of $2.25 million.[7]

BARNES & NOBLE

The Plaintiff initiated a class action lawsuit against Barnes & Noble alleging claims that they violated the FCRA by obtaining consumer reports for employment purposes without first providing the required disclosures. Barnes and Noble denied the claims, but agreed to a $600,000 settlement.[8]

[6]Parker v. The Salvation Army, et al., Case No. 20-civ-04787, in the Superior Court of the State of California for San Mateo County http://www.parkerfcrasettlement.com/
[7]Helwig v. Walgreen Co., Case No. 1:22-cv-01670, in U.S. District Court for the Northern District of Illinois https://www.walgreensfcrasettlement.com/
[8]Vicki Hebert v. Barnes & Noble Inc., Case No. 37-2019-00007178-CU-MC-CTL, in the Superior Court of the State of California for the County of San Diego http://hebertclassaction.com/

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ADMINISTRATIVE REQUIREMENTS

Once you have completed the background screening process, there are a couple additional things to 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 screening-related documents that are 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 (5) years after the date of the consumer report, or two (2) years from when a consumer becomes aware of the issue, whichever is less. However, there are other common law and background screening-related statutes that can have up to a six-year statute of limitations. Records must be retained for a minimum of five (5) years, which is also the recommended retention period by our organization.

Retain background screening related documents for a minimum of five (5) 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 recommended retention period, that they are disposed of in a way so they cannot be read or reconstructed. This applies to both paper and electronic documents.



SHRED



PULVERIZE



INCINERATE

Additional Compliance Considerations

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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.

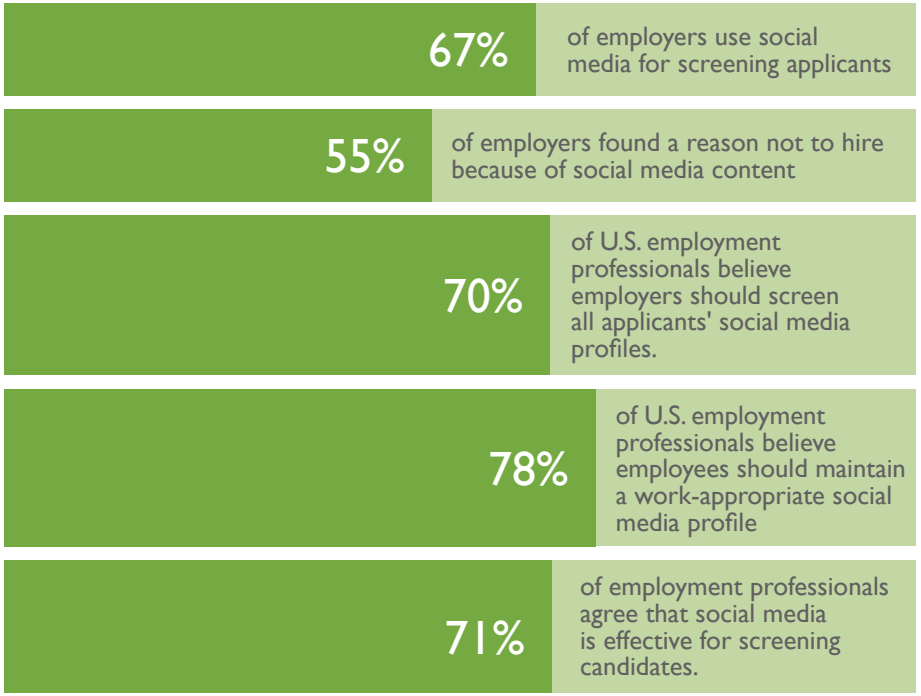
SOCIAL MEDIA BACKGROUND CHECKS

In June 2011, the FTC granted approval for CRAs 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 FCRA regulations. 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 will not 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 is the HR team or a supervisor. The problem is that these clandestine social media searches open organizations up to a lot of risk.

HOW EMPLOYERS USE SOCIAL MEDIA IN HIRING[9]



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 affiliations?

[9] "71% of Hiring Decision-Makers Agree Social Media is Effective for Screening Applicants," https://www.prweb.com/releases/71-of-hiring-decision-makers-agree-social-media-is-effective-for-screening-applicants-815808007.html

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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.

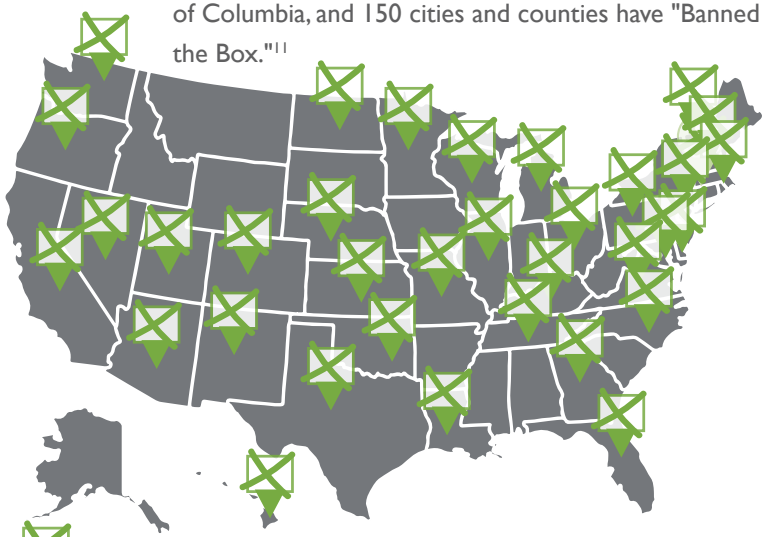
Social media has become the norm in many organizations. While the easiest way to avoid this issue is to stay away from it, we understand that may no longer be possible for some organizations at this point. The best defense is to outline clear policies and procedures on how social media can be used for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

FAIR CHANCE AND "BAN THE BOX"

Fair Chance Ordinances, also referred to as "Ban the Box," have been sweeping the nation over the last few years. Over 37 states and 150 cities and counties have enacted "Ban the Box" laws and the number of jurisdictions enacting legislation is growing at an exponential rate.[10]

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. Lawmakers are trying to accomplish this by forcing employers to remove the Yes or No box that accompanies the question commonly seen on job applications that asks about an individual's criminal history. The assumption is that when someone checks Yes in that box, their application will be automatically excluded regardless of qualifications.

Over 37 states, the District of Columbia, and 150 cities and counties have "Banned the Box."[11]



States in which cities or counties have "Banned the Box"

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 cannot 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

[10] "Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies," https://www.nelp.org/insights-research/ban-the-box-fair-chance-hiring-state-and-local-guide/

[11] "Workers with Records: Reclaiming Rights, Dreams, and Dignity, https://www.nelp.org/explore-the-issues/workers-with-records/

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Box is passed in your area, you will need to consult with legal counsel to assess how your screening program will be impacted.

"CLEAN SLATE" AND EXPUNGEMENT

Over recent years, more states have enacted laws that allow for the expungement of certain criminal offenses. A number of these laws involve a process that would automatically expunge eligible offenses; therefore, removing the manual process of applying for expungement via the court system. These laws are commonly referred to as "Clean Slate." As of January 2025, 12 states have enacted Clean Slate laws.[12] Similar to Fair Chance and Ban the Box, Clean Slate aims to reduce the barriers that individuals with criminal history often encounter when applying for jobs, housing, and education.

Ideally, the automatic expungement of records would result in a reduced turnaround time for criminal searches. However, certain states have encountered the opposite issue. In the absence of effective implementation plans for expunging eligible records, Clean Slate can contribute to court delays as court clerks and other personnel identify and expunge eligible convictions.

Like Fair Chance and Ban the Box laws, it is impossible to have a "one size fits all" compliance guide. If and when a Clean Slate law is passed in your jurisdiction, consult with qualified legal counsel to assess the possible impact on your background screening program.

DATA PRIVACY

Another area of legislation gaining traction across the nation is data privacy. Generally speaking, data privacy laws govern how personal data is collected, used, and stored. These laws aim to protect individuals by establishing legal framework that ensures they have control over their data. Additionally, these laws also ensure businesses handle personal data responsibly.

Pertaining to the background screening industry, data privacy laws may establish requirements for retention policies, access controls, security measure, and additional consent and disclosure obligations. Certain states have implemented additional privacy laws affecting background checks. In May 2021, the California Court of Appeals ruled that California Rules of Court, Rule 2.507 mandates the redaction of an individual's full date of birth and driver's license information from public records.[13] Consequently, several California courts have removed dates of birth from online public access terminals, resulting in significant delays for public record searches.

As data privacy remains a prominent topic among state legislatures, employers should stay informed about any new laws in their jurisdiction. If a data privacy law is passed in any of the jurisdictions your company operates, please consult with qualified legal counsel to review policies and procedures.

CONCLUSION

As with any area of legal compliance, employment screening compliance can be a moving target. We strive to provide you with necessary compliance and legislative updates help to maintain compliance with federal, state, and local laws. Ultimately though, it is up to your organization 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.

[12] "Clean Slate in States," https://www.cleanslateinitiative.org/states

[13] "Another Privacy Headache for California: Court of Appeal Ruling Will Slow Down Criminal Background Checks Throughout California," https://www.littler.com/news-analysis/asap/anotherprivacy-headache-california-court-appeal-ruling-will-slow-down-criminal

Additional Resources

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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

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.

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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