

Background Checks

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DISCLAIMER

- **The information contained herein is for training purposes only.**
- **It is not intended to be full legal advice on any issue, but rather to identify issues requiring legal analysis.**
- **In the event of a real situation involving a legal issue, we would need to evaluate all of the facts in light of the existing law in order to provide full legal advice.**

Background Checks: A Timely and Important Issue

- **#MeToo has raised awareness regarding harassment, assaults**
 - Surge in people publicly talking about their experiences with sexual harassment, assaults, other types of harassment....
- **Roger Ailes, to Charlie Rose, to Matt Lauer, Kevin Spacey, Al Franken, Mark Halperin, and many more**
- **Uptick in harassment claims and EEOC Class action investigations – trend likely to continue**
- **Organizations examining their cultures, codes of conduct, training, investigation protocols, background check processes**
 - We are receiving 3 – 4 inquiries on this per week

What is Considered a Background Check?

- **Identity verification:** Name, DOB, SS#
- **Address trace:** Personal and Business addresses
- **Criminal records:** Federal and State criminal court records, county felony and misdemeanor records, typically verified by in person court searches
- **Comprehensive Employee Screening:** Motor vehicle records, credit searches, federal and county civil search, bankruptcy court records, workers' compensation reports and global financial services authority checks
- **Registries:** Government Sanctions Registries, multi-state and single-state sex offender registry, OIG/GSA Sanctions and Registry, Fraud and Abuse Control Information Systems searches
- **Reference Verifications:** Employment, education credential/license verifications and international personal/professional verifications
- **Internet Searches:** Facebook, LinkedIn, Google search, etc.
- **Medical/Physical Screening:** Drug and alcohol screening, medical physical screening management

Why do Background Checks?

- **Morale**
- **Protection of people and property**
- **Risk Avoidance**
 - **OSHA General Safety Standard**
 - **Avoid harassment, bullying, assault, violence**
 - **Tort claims (negligence, intentional infliction of emotional distress)**
 - **Criminal/unethical conduct**
- **PR impact of allegations of inappropriate conduct**

Applicable Laws: Background Checks

- There are two main bodies of law relevant to background checks, the FCRA and EEO Laws
- FCRA (Federal, state corollaries) – govern uses of “Consumer Reports” to make employment decisions
 - Volunteer background checks MUST COMPLY with the FCRA
- EEO Laws (Federal, State and Local) – prohibits employment policies and decisions that result in disparate treatment of individuals in protected classes or disparate impact on protected classes
 - EEO Laws DO NOT apply to employers with less than 15 employees and to volunteers, but still provide *guidance* in best practices

Volunteer Background Checks & the FCRA

- The FCRA has been liberally interpreted by the Federal Trade Comm'n to apply to volunteers:

“Because the term ‘employment purposes’ is interpreted liberally to effectuate the broad remedial purpose of the FCRA, it may apply to situations where an entity uses individuals who are not technically employees to perform duties. Thus, it includes a trucking company that obtains consumer reports on individual drivers who own and operate their own equipment; a title insurance company that obtains consumer reports on individuals with whom it frequently enters into contracts to sell its insurance, examine title, and close real property transactions; or ***a nonprofit organization staffed in whole or in part by volunteers.***”

See: [FTC Staff Report with Summary of Interpretations, July 2011](#)

Fair Credit Reporting Act

- FCRA enforced by Federal Trade Comm'n, state corollaries – govern uses of “Consumer Reports”
- Federal FCRA defines Consumer Reports:
 - The term “**consumer report**” means any **written, oral, or other communication** of any information by a consumer reporting agency bearing on a consumer's **credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living** which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for:
 - *credit or insurance to be used primarily for personal, family, or household purposes*
 - *employment purposes; or*
 - *any other purpose authorized under 15 USCS § 1681(b)*

Fair Credit Reporting Act: Federal Law Requirements

- **Permissible purposes of Consumer Reports (15 U.S.C § 1681(b)) include:**
 - As instructed by the consumer in writing
 - For the extension of credit in a transaction or the review or collection of a consumer's account
 - **For employment purposes**
 - For the underwriting of insurance involving a consumer
 - To determine a consumer's eligibility for a license or other benefit granted by a governmental instrumentality as required by law
 - For use by a potential investor or servicer, or current insurer, in a valuation or assessment of the credit or prepayment risks associated with an existing credit obligation
 - When there is a legitimate business need, in connection with a business transaction that is initiated by the consumer or to determine whether the consumer continues to meet the terms of the account

Fair Credit Reporting Act: Federal Law Requirements

- **Before Background Check:**
 - give notice to applicant of the background check
 - obtain written consent before background check
 - provide applicant a disclosure of rights under FCRA
- **FCRA Notice Requirements:**
 - **clear and conspicuous**
 - in a document that consists solely of the disclosure

Fair Credit Reporting Act: Federal Law Requirements, Cont'd

FCRA Disclosure



BACKGROUND CHECK DISCLOSURE AND AUTHORIZATION FORM

In the interest of maintaining the safety and security of our customers, employees and property, _____ (the "Company") will order a "consumer report" (a background report) or "investigative consumer report" on you in connection with your employment application, and if you are hired, or if you already work for the Company, may order additional background reports on you for employment purposes.

The background check company, _____ (the "Background Check Company"), will prepare the background report for the Company. The Background Check Company is located at _____, and can be reached by phone at _____ or at their Internet Web site address _____.

The background report may contain information concerning your character, general reputation, personal characteristics, mode of living, and credit standing. The types of information that may be ordered include but are not limited to: Social Security number verification; criminal, public, educational and, as appropriate, driving records checks; verification of prior employment; reference, licensing and certification checks; credit reports; drug testing results; and, if applicable, worker's compensation injuries. Workers' compensation information will only be requested in compliance with federal Americans with Disabilities Act and/or any other applicable federal, state or local laws and only after a conditional job offer is made. Credit history will only be requested when permitted by law and where such information is substantially related to the duties and responsibilities of the position for which you are applying. The information may be obtained from private and public record sources, including personal interviews with your associates, friends, and neighbors. (An "investigative consumer report" is a background report that includes information from such personal interviews, except in California where that term means any background report that is not a credit report.) The nature and scope of the most common form of investigative consumer report is an investigation into your education and/or employment history conducted by the Background Check Company or another outside organization.

You may request more information about the nature and scope of an investigative consumer report, if any, by telephoning the Company at _____. A summary of your rights under the Fair Credit Reporting Act is also being provided to you with this form.

The Fair Credit Reporting Act gives you specific rights in dealing with consumer reporting agencies. You will find these rights summarized on A Summary of Your Rights Under the Fair Credit Reporting Act and A Summary of Your Rights Under the Provisions of California Civil Code Section 1786.22 for California residents.

State Specific
Notices



STATE LAW NOTICES

If you live or work for the Company in the states listed below, please note the following:

CALIFORNIA: You may view the file that the Background Check Company has for you, and order a copy of the file, upon submitting proper identification and paying copying costs, by coming to their offices, during normal business hours and on reasonable notice, or by certified mail or mail. You may also ask for a file-summary by telephone. The Background Check Company can answer questions about information in your file, including any coded information. If you come in person, another person can come with you, so long as that person can show proper identification.

MAINE: If you ask us, you have the right to know whether the Company ordered an investigative consumer report on you. You may request the name, address, and telephone number of the nearest office for the Background Check Company. You will get this information within 5 business days of our receipt of your request. You have the right to ask the Background Check Company for a free copy of the report.

MARYLAND: If the Company obtains credit history information on you, it will be used to evaluate whether you would present an unacceptable risk of theft or other dishonest behavior in the job for which you are being considered.

MASSACHUSETTS/NEW JERSEY: If you submit a request to us in writing, you have the right to know whether the Company ordered an investigative consumer report from the Background Check Company. You may inspect and order a free copy of the report by contacting the Background Check Company.

MINNESOTA: If you submit a request to us in writing, you have the right to get from the Company a complete and accurate disclosure of the nature and scope of the consumer report or investigative consumer report ordered, if any.

NEW YORK: If you submit a request to us in writing, you have the right to know whether the Company ordered a consumer report or an investigative consumer report from the Background Check Company, and you will be provided with the name and address of the Background Check Company. You may inspect and order a free copy of the reports by contacting the Background Check Company. By signing below, you certify you have received a copy of Article 23A of the New York Correction Law is being provided with this form.

OREGON: If the Company obtains credit history information on you, it will be used to evaluate whether you would present an unacceptable risk of theft or other dishonest behavior in the job for which you are being considered.

WASHINGTON STATE: If you submit a request to us in writing, you have the right to get from the Company a complete and accurate disclosure of the nature and scope of the investigative consumer report we ordered, if any. You also have the right to ask the Background Check Company for a written summary of your rights under the Washington Fair Credit Reporting Act. If the Company obtains information bearing on your credit worthiness, credit standing or credit capacity, it will be used to evaluate whether you would present an unacceptable risk of theft or other dishonest behavior in the job for which you are being considered.

Fair Credit Reporting Act: Federal Law Requirements, Cont'd

- **Courts have held that “solely” means nothing else on the page.**
 - Recent 9th Circuit Decision (Alaska, Arizona, California, and Hawaii)
 - Gilbert v. Cal. Check Cashing Stores, LLC, 913 F.3d 1169
 - Employer found liable
 - Potential for Class Actions
 - May allow for statutory damages
- **Best Practices**
 - Place FCRA Disclosure on separate form
 - Place state specific notices on separate forms (many states, including California, mirror FCRA “solely” requirement as well)
 - Verify any provider of FCRA notices complies with these practices

Fair Credit Reporting Act: Federal Law Requirements, Cont'd

- **Before adverse employment action, inform applicant:**
 - of the results
 - give notice including copy of report relied on **and** summary of rights
 - allow applicant to explain results
- **After adverse employment action, inform applicant:**
 - of the decision
 - name address and phone no. of co. that provided the report
 - the reporting company providing the report did not make the hiring decision and can't give specific reasons for it
 - applicant has right to dispute the accuracy or completeness of the report and to get an additional free report from that co. w/in 60 days

EEO Laws

- Federal law, state corollaries
- Apply in employment context ONLY
- EEO Laws DO NOT apply to employers with less than 15 employees and to volunteers (can provide guidance)
- **Federal EEO laws enforced by EEOC:** prohibit discrimination based on race, color, national origin, sex/gender, religion, disability; genetic information, family medical history, and age (40 or older).
- **State & Local Laws:** additional protected classes & req'ts

EEO Laws: Criminal Background Checks

APPLICANT <small>* See Privacy Act Notice on Back</small>		LEAVE BLANK		TYPE OR PRINT ALL INFORMATION IN BLACK				FBI		LEAVE BLANK	
FD-258 (Rev. 5-15-17) 11110-0046		SIGNATURE OF PERSON FINGERPRINTED		LAST NAME NAM		FIRST NAME		MIDDLE NAME			
RESIDENCE OF PERSON FINGERPRINTED		ALIASES AKA		O R I						DATE OF BIRTH DOB Month Day Year	
DATE		SIGNATURE OF OFFICIAL TAKING FINGERPRINTS		CITIZENSHIP CTZ		SEX		RACE		HGT.	
EMPLOYER AND ADDRESS		YOUR NO. OCA		UNIVERSAL CONTROL NO. UCN		WGT.		EYES		HAIR	
REASON FINGERPRINTED		ARMED FORCES NO. MNU		SOCIAL SECURITY NO. SOC		PLACE OF BIRTH POB		CLASS		REF.	
		MISCELLANEOUS NO. MNU				LEAVE BLANK					
1. R. THUMB		2. R. INDEX		3. R. MIDDLE		4. R. RING		5. R. LITTLE			
6. L. THUMB		7. L. INDEX		8. L. MIDDLE		9. L. RING		10. L. LITTLE			
LEFT FOUR FINGERS TAKEN SIMULTANEOUSLY				L. THUMB		R. THUMB		RIGHT FOUR FINGERS TAKEN SIMULTANEOUSLY			

EEO Laws: Criminal Background Checks, Cont'd

- **FBI, State Criminal Records Check**
 - Fingerprint based, high accuracy
 - Long processing times
 - Uncommon for most employment positions
 - Sometimes used for professional licensure, federal employment, armed security
- **Public Criminal Records Check**
 - Information based (Name, Addresses, SS#, etc.)
 - Error prone due to identification mismatch, incomplete information
 - Fast processing times
 - By far most common type through background check companies

EEOC Guidance: Use of Arrest/Charge/Conviction Records

- **Use of arrest or charge records as basis for employment action is *per se discriminatory* (violation of EEO laws)**
 - Disproportionate number of minorities arrested and charged
 - even so called “neutral policies” are inherently discriminatory (e.g., no felonies)
- **Use of conviction records as basis for employment action is *per se discriminatory* UNLESS:**
 - “job related and consistent with business necessity”

EEOC: “Job Related and Consistent with Business Necessity”

- **The conduct underlying a conviction, even after considering mitigating factors, calls into material question the applicant’s ability or trustworthiness to perform the essential functions of the job, such as:**
 - Accounting applicant convicted of theft or fraud
 - Childcare applicant convicted of offense involving child
 - Pharmacy sales applicant convicted of drug charges
 - Security applicant convicted of theft or assault
 - Applicant convicted of computer espionage – essential function involves access to valuable proprietary information
 - DWI - essential function involves operating motor vehicle

See: [EEOC & FTC - Background Checks: What Employers Need to Know](#)

EEOC Guidance: Examples of Mitigating factors

- **Inaccuracies in record**
- **Circumstances of offense**
- **Age at time of offense**
- **Length of time since offense and applicant's changed circumstances since then**
- **Rehabilitation efforts**
- **Evidence of performance of similar work since offense with no known incident**
- **Employment history before/after offense**
- **Employment/character references**

EEOC Guidance: Individualized Assessment

- **Do you have to consider all the factors?**
- **Are some factors more important than others?**
- **Can you give some factors more weight than others?**

Red Flags for Violations of Law

- **Verbal or written biased statements (e.g., stereotypes)**
- **Use of standard criteria that are not job related and consistent with business necessity (e.g., no felonies, no drug convictions, etc.)**
- **Applicants with similar background treated differently**
- **Protected applicants not chosen in proportion to their representation in the qualified applicant pool**
- **Workforce does not reflect community OR team reporting to decision-maker does not reflect community**

Best Practices

- **BG check occurs post-offer (offer made pending results)**
- **No blanket criminal record exclusions unless required for security clearance for government contract**
- **Do not consider (better: ask not to receive) arrests or charges**
- **Consider limiting how far back in time the report goes**
 - Length of time since offense is mitigating factor
 - Courts: amt. of time that has passed is probative of risk posed
 - EEOC: does not endorse a specific time period
- **Some companies require background checks only for certain jobs**

Best Practices, Cont'd

- **Use Position-Specific criteria**
 - Consider what types of criminal behavior would be job related and consistent with business necessity, based on the position (e.g., access, safety, supervision, etc.)
 - (e.g., drug charges may not be relevant to maintenance job, but may be relevant to a job that handles money)
 - Identifying in advance avoids implication of influence by protected class status
- **Train Reviewer(s) to understand reports, and sort out convictions that are not “job related and consistent with business necessity”**
- **Get legal advice if decision-maker believes that a report is “job related and consistent with business necessity”**

Best Practices, Cont'd

- **Individualized assessment before adverse action**
 - Review full background check report
 - Consider mitigating factors
 - Provide opportunity for applicant to explain and provide evidence of mitigating factors
 - Seriously consider the information provided by the applicant before making a decision to take an adverse action

Best Practices, Cont'd

- **Keep info confidential (need to know basis)**
- **Keep records for at least one year (29 C.F.R. § 1602.14)**
 - Two years for federal contractors that have at least 150 employees and a government contract of at least \$150,000.)
 - If the applicant or employee sends a demand letter or files a charge of discrimination, maintain the records until the case is concluded (litigation hold).
- **Destroy records by burning, pulverizing, or shredding when appropriate**

Applicant says:

“I want to mention something that may show up on my background check...”

STOP...

What do you say next?

REMEMBER: If applicant has any questions or concerns, HR needs to **IMMEDIATELY** intervene.

Applicant says:

“I know I didn’t get the job because of my background check...”

STOP...

What do you say next?

REMEMBER: If applicant has any questions or concerns, HR needs to **IMMEDIATELY** intervene.

QUESTIONS?



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