

COMPLIANCE TO CONSIDER

Risky Business:

5 Common Background Screening Mistakes Made During
the Hiring Process

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INTRODUCTION

- “Ban the Box” and Fair Hiring Laws
- Use of Credit Information
- Salary History Inquiries
- Disclosure/Authorization Forms
- Automatic Exclusions/Fails
- FCRA Pre-Adverse Action Process
- Employment Drug Screening Practices



SKIT: CRIMINAL HISTORY

ABC HOSPITAL JANITOR EMPLOYMENT APPLICATION

3. CRIMINAL HISTORY INFORMATION

- | | | |
|--|-----|----|
| 1. Have you ever been arrested or convicted of a crime? | Yes | No |
| a. If yes, please list: _____ | | |
| 2. Are you willing to submit to a pre-employment background check? | Yes | No |



“BAN THE BOX”

- Aims to stop employers from not offering jobs to candidates based on a criminal record
- Removes criminal history question from employment application and delays it until later in the application process
 - Rationale – Ex-offenders need employment; people reform (the rest of the world thinks so); job offers should be based on your ability to do the job; and criminal records only come into play if they pose a specific risk
- “Ban the Box” is really all about timing
 - Can only ask about criminal records post-interview
 - Some say you can only ask after job offer
- Nearly all policies have exceptions for regulated positions
- Currently 24 states and over 100 localities have policies in place
- Potential federal legislation may be coming in the future

“BAN THE BOX” (INQUIRIES)

- Employers may still ask the criminal history question when it becomes lawful
 - It is likely in employers’ best interest to do so because they can eliminate candidates who are not truthful in their criminal record disclosures
 - See *McCorkle v. Schenker Logistics, Inc.*
 - Court held that it was lawful for an employer to withdraw an offer of employment when it discovered that the applicant intentionally misrepresented his criminal history by failing to disclose several convictions
 - The employer’s decision was based on the applicant’s misrepresentation, not on the criminal record information itself
- Be vigilant of some laws stating that employers cannot ask applicants to authorize a background check until later in the application process
 - *e.g.* NYC Fair Chance Act requiring employers to delay asking applicants for authorization to obtain a background check until after a conditional offer of employment is made

SKIT: CREDIT HISTORY

ABC HOSPITAL JANITOR EMPLOYMENT APPLICATION

4. CREDIT HISTORY INFORMATION

ABC Hospital obtains a credit report on all applicants and on all employees annually, regardless of position or job responsibilities.

1. Do you authorize ABC Hospital to obtain a credit report on your from one of the three major credit bureaus?

Yes

No



USE OF CREDIT INFORMATION

- At least 11 states and D.C. have passed laws prohibiting employers from pulling credit reports at all or restricting how and when employers may use them to make hiring or other employment decisions
 - CA, CO, CT, DE, HI, IL, MD, NV, OR, VT, WA
- New York City and Philadelphia recently made it an unlawful discriminatory practice for an employer to request or use an applicant's credit history for employment purposes
 - Exceptions for financial services, safety-sensitive positions and where required by law
 - May require revisions to background check authorization forms to remove "credit" authorization e.g. Philadelphia
- Federal legislation has been introduced that seeks to limit the use of credit reports under the "Equal Employment for All Act"
- Only obtain credit reports on prospective employees when necessary
 - Determine whether a credit report is necessary for a particular position by evaluating the responsibilities involved

SKIT: SALARY HISTORY INFORMATION

ABC HOSPITAL JANITOR EMPLOYMENT APPLICATION

5. EMPLOYMENT & SALARY HISTORY INFORMATION

Below please list your three most recent employers, and include complete salary and compensation information for each position (wage, commissions, bonuses, equity, etc.).



SALARY HISTORY INFORMATION

- Delaware, Oregon, Massachusetts, Philadelphia, and New York City have recently passed laws that prohibit employers from inquiring about applicants' salary history
 - Inquiry may be permissible after making a conditional offer that includes compensation, but only to verify the information
 - Salary history information should not be used to determine how much to pay an individual
- Be careful with employment verifications
 - Do not ask for documents to verify employment that may contain salary information (W-2s, pay stubs, etc.)
 - Employers in Rhode Island are prohibited from asking for W-2s and other tax related documents as a condition of employment
- Ensure that all versions of your employment applications and Applicant Tracking Systems are compliant (ATS)

SKIT: DISCLOSURE/AUTHORIZATION FORMS

ABC HOSPITAL
BACKGROUND CHECK AUTHORIZATION AND RELEASE

Please be advised that ABC Hospital may obtain a consumer report on your for employment purposes.

By signing below, you authorize ABC Hospital to obtain a consumer report on you.

By signing below, you also release ABC Hospital from any liability during the background check process and agree to the terms contained in ABC Hospital's employee handbook.

Name: _____

Sign: _____ Date: _____



DISCLOSURE/AUTHORIZATION FORMS

- Must be a standalone document – Disclosure and authorization can be on the same form, but nothing else
 - Best practice is to separate out the disclosure and the authorization into two separate forms to avoid any issues
- It is not a “release” – Do not include a release, waiver of liability or any other language
- Make sure all employment applications are compliant, including online applications
- Cases:
 - *Knights v. Publix Super Markets Inc.*
 - *Fernandez v. Home Depot*
 - *Peikoff v. Paramount Pictures*

SKIT: ASSESSING CRIMINAL RECORDS

BEST BACKGROUND SCREENER, INC.		APPLICANT SCREENING REPORT
Applicant Screening Consumer Report		
County Criminal		Review
Source Searched:	Los Angeles County Superior Court	
Records Covered:	Felony & Misdemeanor	
Search Results:	Records found	
Offense / Filing Date:	08/15/2008	
Charge:	Count 1: Disorderly conduct	
Charge Type:	Misdemeanor	
Disposition Date:	09/11/2008	
Disposition:	Guilty	
Sentence:	Fine/costs \$110.00 - paid	
Federal Criminal		Review
Source Searched:	US District Court - Central District of California, Los Angeles (Western Division)	
Records Covered:	Felony & Misdemeanor	
Search Results:	Records found	
Offense / Filing Date:	12/25/2008	
Charge:	Count 1: Bank Fraud	
Charge Type:	Felony	
Disposition Date:	12/25/2009	
Disposition:	Guilty	
Sentence:	Fine/costs \$100,000.00 - paid; 3 years jail; Credit for time served	



AUTOMATIC EXCLUSIONS/FAILS

- EEOC issued revised guidance in April 2012 on the use of criminal records in employment decisions
- Employers should avoid “blanket” exclusion policies that automatically exclude candidates based on certain pre-determined criminal convictions
- Such policies have a “disparate impact” on minorities and are considered discriminatory and a violation of Title VII by the EEOC
- EEOC encourages employers to make an “individualized assessment” of each candidate
 - Use *Green* factors to assess the offense or conduct—nature and gravity of the offense, the time that has passed, and the nature of the job held or sought
- Various states’ fair hiring laws also require individualized assessments
- Case:
 - *EEOC v. BMW & Dollar General*
- No auto-triggers for pre-adverse action notices
 - New York Attorney General Eric Schneiderman secured agreements with four background screening firms that would prohibit them from automatically disqualifying applicants with convictions on behalf of employers

FCRA PRE-ADVERSE ACTION REQUIREMENTS

- Must provide pre-adverse action notice and a copy of consumer report prior to taking adverse action
 - Remember—application of “pre-adverse” policy in everyday HR practice is critical
- Cases:
 - *Marcum v. Dolgencorp (Dollar General)*
 - *Brown v. Lowe’s*
 - *Mohamed v. Uber Technologies Inc.*

EMPLOYMENT DRUG SCREENING PRACTICES

- Be aware of Americans with Disabilities Act (ADA) requirements, including providing reasonable accommodations during the drug testing process for individuals with disabilities
 - See EEOC cases against Wal-Mart & Kmart
- The FCRA applies to employment drug testing when results are communicated to you by a third-party consumer reporting agency
 - See *FTC Staff Opinion Letter to Islinger (June 9, 1998)*
- Some states have laws requiring employers to notify applicants and employees about their drug test results
- Be vigilant of the 12 states with laws that protect medical marijuana users in the employment context through anti-discrimination or reasonable accommodation provisions
 - AR, AZ, CT, DE, IL, ME, MN, NV, NY, PA, RI, WV
 - Recent case in Rhode Island protected a medical marijuana user (*See Callaghan v. Darlington Fabrics Corp.*, May 23, 2017)

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