



Why Compliance Matters in Background Screening

We will dive deep into the regulatory landscape that governs pre-employment background screening. From the application to the offer, to the decision to hire; attendees will learn what they need to know to protect the rights of the applicant while protecting themselves from costly litigation.

**Presented by:
Bryce R. Brewer**

MEET OUR OWNER




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ALASKAN WILDLIFE TRIVIA

- It is illegal to _____ to whisper to someone while they are moose hunting.
- While it is legal to shoot bears, waking a sleeping bear for the purpose of _____ is prohibited.
- It is considered an offense to feed _____ to a moose.
- Moose may not be _____ from an airplane.
- it is considered an offense to _____ a live moose out of a moving airplane.
- **Pinnacle Investigations Background Check Bonus:** If you kick a salmon out of the river during spawning season because you are a punk teenager, that offense is considered _____ a salmon.


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TODAY'S AGENDA

- The Background Check
- Ban The Box
- EEOC and Their Role in the Background Screening Process
- What to do With the Information Uncovered in the Background Screening Process
- How not to get sued, fined, written up, or fall asleep crying during the hiring process

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THE BACKGROUND CHECK

Are you currently using any of these services...

- Mandated State Background Check?
- Fingerprint / LiveScan Background Check?
- FBI Background Check?
- National Criminal Database?


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The Background Check

- ***What should a thorough background screening include?***
 - Social Security Association and Address History
 - Alias and Maiden Name Research
 - National Sex Offender Check
 - County Criminal Search (court of record)
 - Federal Courts Check
 - Additional Services
 - Employment Verification
 - Education / License Verification
 - References
 - Drug Screening
 - Others

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The Background Check

- What is in that background?
- What information is covered?
- When was it last updated and how old are the records?
- Does it have final disposition?
- What is the turnaround time?
- Does it include Federal Records?
- Does your CRA have FCRA certified staff?
- Does your applicants' Personally Identifiable Information travel overseas when a background screen is conducted?
- Is your screening company selling your applicants' info?

What about compliance?

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Ban The Box?

Some states and municipalities have recently passed "ban the box" laws.

The EEOC Guidance takes a cue from these state laws and recommends that employers do not ask about convictions on an initial application.

The consideration of criminal convictions should come later in the hiring process, not during the pre-interview process.

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FCRA DISCLOSURE UPDATES

Last Wednesday, 9/12, the Consumer Financial Protection Bureau passed an interim rule to amend the Summary of Rights Under the FCRA and the CFPB form Remediating the Effects of Identity Theft. The effective date for the new forms is **9/21/2018**.

The new Summary of Rights includes a section about Credit Freezes, and a few updates to the contact information listed.

The CFPB will still allow users to use the previous forms, issued November 2012 – as long as there is a supplemental document with the new information on it included in the same transmittal.

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THE EEOC

Educational Moment

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex, age or national origin.

It is also illegal to discriminate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.

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The EEOC

The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law. Their role in an investigation is to assess the allegations in the charge and then make a finding.

If they find that discrimination has occurred, they will try to settle the charge. If not successful, they have the authority to file a lawsuit to protect the rights of individuals and the interests of the public. The EEOC does not, however, file lawsuits in all cases where they find discrimination.

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The EEOC

When do EEOC Regulations come into effect?

- Hiring
- Retention
- Promotion
- Reassignment

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The EEOC

IS IT LEGAL?

- To use information uncovered through social media to make hiring decisions?
- To use information from a license, employment or educational verification to decide if you will hire an applicant?
- Create a quota for a specified ration or number of people from certain race, sex, religion, color, national origin or age must be hired?
- To use information from a criminal background check to decide if you are going to hire an applicant?

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The EEOC

Having a criminal record is not a protected basis in Title VII.

Whether consideration of criminal history violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin.

**Disparate Treatment
Disparate Impact**

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New EEOC Guidance


Disparate Treatment

When an employer treats criminal history information differently for different applicants or employees based on their race or national origin.

Disparate Impact

An employer's neutral policy or practice has the effect of disproportionately screening out individuals in a protected class, and the employer fails to demonstrate that the policy is job related.

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New EEOC Guidance

The guidance cites studies that show African Americans and Hispanics are arrested and convicted at a rate disproportionately higher than the general population.

- Approximately 1 in 17 White men will serve time in prison, 1 in 6 Hispanic men and 1 in 3 African American men.
- In 2010, 28% of all arrests were of African Americans, even though they only comprised about 14% of the general population.
- Hispanics were arrested for federal drug charges at a rate of 3 times their proportion to the general population


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History of EEOC Guidance

- In 1987, the EEOC issued a policy statement on the use of conviction records.
- The "Green Factors" (*Green v. Missouri Pacific Railroad, 1975*)
 - The nature and gravity of the offense or offenses;
 - The time that has passed since the conviction and/or completion of the sentence; and
 - The nature of the job held or sought.

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History of EEOC Guidance

In 1990, the EEOC issued a policy statement on the use of arrest records.

According to this statement, employers must consider the following before using arrest records to make an employment decision:

- the likelihood the individual engaged in the conduct arrested for;
- job relatedness

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New EEOC Guidance

April 25, 2012 the EEOC issued the enforcement guidance
Passed by a 4 – 1 Vote

“Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964”

The guidance updates and consolidates all prior policy statements, and therefore supersedes the EEOC’s previous guidance on these issues.

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New EEOC Guidance

This is not a law, but employers are advised to follow the EEOC guidance for hiring purposes and evaluating criminal history.

EEOC is currently investigating “hundreds” of cases involving illegal use of criminal history in the employment process (according to the EEOC)

EEOC Sending a Message: EEOC’s high profile \$3.13 million settlement with Pepsi in 2012 in a hiring discrimination case over the use of criminal backgrounds.

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INFORMATION UNCOVERED


CRIMINAL HISTORY RECORDS

The guidance also addresses concerns about inaccuracies and incompleteness of some criminal records.

CRA’s have a responsibility to ensure “maximum possible accuracy” when reporting public records. Make sure your background screening company is not reporting records from databases or statewide repositories, and refraining from literal searches when possible.

“Searching county courthouse records typically provides the most complete criminal history”

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Information Uncovered

ARREST RECORDS

- An exclusion based on an arrest itself is not job related and consistent with business necessity.
- However, the conduct surrounding the arrest may be considered for employment if the conduct makes the individual unfit for the position.
- The conduct – not the arrest – is relevant for employment purposes.
- Pending Charges were not addressed in the EEOC Guidance

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Information Uncovered

CONVICTION RECORDS

The Guidance does not impose a restriction on considering recent convictions, or only a specified list of offenses.

It reinforces the Green factors and gives more insight to the 1987 Guidance (including new factors to be considered), advises against bright line policies, and reinforces “job relatedness and business necessity.”

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Information Uncovered


CONVICTION RECORDS

(i) the nature and gravity of the offense or offenses (which the EEOC explains may be evaluating the harm caused, the legal elements of the a crime, and the classification, *i.e.* misdemeanor or felony);

(ii) the time that has passed since the conviction and/or completion of the sentence (which the EEOC explains as looking at particular facts and circumstances and evaluating studies of recidivism); and

(iii) the nature of the job held or sought (which the EEOC explains requires more than examining just the job title, but also specific duties, essential functions, and environment).

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Conviction Records

JRBN
Job Relatedness and Business Necessity

El v. SEPTA (2007) introduces “business necessity” when making adverse hiring decisions.

The employer needs to show that their policy operates to effectively link specific criminal conduct and it’s dangers with the particular job position.

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Conviction Records

There are 2 circumstances in which the EEOC believes an employer will consistently meet the JRBN defense.

- 1. Validation of criminal conduct**
Validation studies are “rare at the time of this drafting”
- 2. Individualized Assessments**
Targeted screen considering the three *Green* factors, followed by an individualized assessment for those excluded by the screen.


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Assess Me!

- 1. Assess Your Presenter**
Lets make some snap judgments!
- 2. Assess a Stranger**
More snap judgments on HR professionals!
- 3. Assess a Neighbor**
Snap judgments on someone you will see tomorrow too!

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INDIVIDUALIZED ASSESSMENTS

Using Decision Matrices to develop a targeted screen

Job Position	Type of Offense	Severity of Offense	Timeframe Since Completion of Sentence/Probation/Parole	Recommended Action
Clerk 1	Offenses against people (murder, manslaughter, sexual assault, assault)	Felony	5 Years	Individualized Assessment
		Misdemeanor	3 Years	Individualized Assessment
Clerk 2	Offenses against property (theft, forgery, worthless checks, shoplifting)	Felony	Anytime	Decline
		Misdemeanor	Anytime	Decline

This is an example for informational purposes. This is not legal advice and this matrix should not be used for the purposes of developing targeted screens.

New Guidance from the EEOC
Presented by: Sabrina Sawyer




Individualized Assessments

The Individualized Assessment suggests that the Pre-Adverse Action and Adverse Action procedures defined by the FCRA may not be enough.

Employer should wait 5 days after sending the Pre-Adverse Action notice, before actually taking adverse action, so an individual can contest or explain the conduct.

The EEOC Guidance suggests employers take a more proactive role.

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Individualized Assessments

Relevant evidence to be considered:

- The facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post conviction with the same or a different employer, with no known incidents of criminal conduct;

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Individualized Assessments

Relevant evidence to be considered:

- The length and consistency of employment history before and after the offense or conduct;
- Rehabilitation efforts, e.g., education/training;
- Employment or character references and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.

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Individualized Assessments

If a tight nexus is established between criminal conduct and a particular position, an employer could justify a screen based entirely on the *Green* factors, so the individualized assessment isn't required in all circumstances.

However, individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on an individual.


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HOW TO SLEEP AT NIGHT

How do I lay my head down on the pillow at night and not worry I am going to be sued, fined or just generally hated like Toby Flenderson?

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ADVERSE ACTION

Just A Reminder

Pre-Adverse Action Letter
Further, the employer must provide the applicant/employee with a copy of his/her background report, a copy of "A Summary of Your Rights under the Fair Credit Reporting Act," and a reasonable period of time to dispute the accuracy or completeness of information in the report. This allows the applicant to respond to the findings and dispute any inaccuracies.

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ADVERSE ACTION

Just A Reminder

Adverse Action Letter
If, after a reasonable amount of time, the applicant has not appealed the pre-adverse action letter, you must proceed with your adverse action letter obligations by sending official notice. This notice may be given only after you have followed the required pre-adverse action process and the applicant/employee has had the opportunity to dispute.

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ADVERSE ACTION

Just A Reminder

Required Information

- *State that the adverse action is based either in whole or part on information contained in the background report provided by the CRA.*
- *Name, address, and toll free telephone number of the CRA you used.*
- *Statement that the CRA supplying the background report had no hand in the decision to take adverse action and cannot give specific reasons for it.*
- *Notice of applicant's right to dispute the accuracy or completeness of the provided information (covered in the Pre-Adverse action).*
- *Notice of applicant's right to another free consumer report. This is provided upon request of the CRA within 60 days.*

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Federal, State and Local Laws

The EEOC's new guidance does acknowledge that compliance with Federal Laws disqualifying convicted individuals from certain occupations is a defense to charges of discrimination.

However, the EEOC opinion is that compliance with state and local laws, is not a defense to discrimination claims.

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Best Practices

- Eliminate policies or practices that exclude people from employment based on any criminal record;
- Train managers, hiring officials, and decision-makers about Title VII and its prohibition on employment discrimination;
- Develop a narrowly tailored written policy and procedures for screening for criminal records;
- Identify essential job requirements and the actual circumstances under which the jobs are performed;

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Best Practices

- Determine the specific offenses that may demonstrate unfitness for performing such jobs;
- Identify the criminal offenses based on all available evidence;
- Determine the duration of exclusions for criminal conduct based on all available evidence;
- Record the justification for the policy and procedures;
- Note and keep a record of consultations and research considered in crafting the policy and procedures;

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Best Practices

- Train managers, hiring officials, and decision-makers on how to implement the policy and procedures consistent with Title VII;
- When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity; and
- Keep information about the criminal records of applicants and employees confidential (only use it for the purposes for which it was intended).

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SHRM Statement

"SHRM considers criminal background checks an appropriate tool to help employers make informed hiring decisions while ensuring the safety and well-being of their employees and customers.

We appreciate the bipartisan nature in which the guidance was developed. SHRM recognizes that the EEOC held hearings and met with stakeholder groups on the use of criminal background checks in hiring, but we continue to believe that a public comment period should have been part of the development of the guidance.

SHRM is pleased that the guidance does not appear to impose a one-size-fits-all set of rules on employers and seems to take into consideration that every employer will have different needs and concerns in the use of criminal background checks in hiring."

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NAPBS

The National Association of Professional Background Screeners is a non-profit trade association representing more than 700 member companies that offer background screening.

"NAPBS supports and promotes criminal background checks as an appropriate and necessary tool to help employers make informed hiring decisions and ensure the safety and well-being of their staff and customers..."

While we continue to believe the process would have benefited from greater transparency, such as through public notice and comment process, we recognize and appreciate the bipartisan manner in which the guidance was developed. We look forward to continuing to work with the Commission on this issue as we more carefully review the guidance..."


New Guidance from the EEOC
Presented by: Sabrina Sawyer



Challenges for Employers

- While having a criminal record is not a protected basis under Title VII, the guidance appears to give ex-offenders the status of a protected group
- “Relevant criminal matters” is difficult to define, and the EEOC offers no examples
- Puts the burden on the employer to consider the nature and gravity of an offense
- Opens the door for “professional litigants”

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Challenges for Employers

What Next?

Unlike Congress, the EEOC does not have the authority to create statutes. However, they can make it difficult and costly for employers that choose not to follow the Guidance.


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EEOC Enforcement Guidance

- Work with Legal Counsel to develop hiring policies and procedures, including a targeted screen considering the *Green* factors
- Conduct Individualized Assessments on applicants with disqualifying criminal history
- Train employees on hiring practices
- Follow your procedures
- Call Pinnacle with questions

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**Questions
&
Answers**

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