

# **Looking Ahead: 10 Trends in the Applicant Screening Industry**

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# Introduction

## 10 Trends in the Applicant Screening Industry

1. Ban the Box
2. Social Media Screening
3. Credit Information Increasingly Disfavored
4. FCRA Requirements for Using Consumer Reports in Employment
5. Disclosure/Authorization Forms
6. Applicant Tracking Systems
7. Destruction of Documents
8. Automatic Exclusions/Fails
9. Health Data Breaches
10. Medical Marijuana



# Trend 1: Ban the Box

- “Ban the Box” aimed at stopping employers from not offering jobs to candidates based on a criminal record
- 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 after interview
  - Some say you can only ask after job offer
- Nearly all have exceptions for regulated positions
- Currently 18 states and over 100 localities have policies in place\*
- Potential federal legislation coming in the future

\*As of 7/29/2015



# Trend 1: 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
- *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 criminal convictions
  - The employer's decision was based on the applicant's misrepresentation, not on the criminal record information itself



## Trend 2: Social Media Screening

- NLRB and EEOC strongly advise employers against using social media searches during the applicant screening process
- Can potentially result in the employer learning protected information and thus open it up to discrimination lawsuits
  - e.g., based on religion or age
- Information that is found is often unverifiable and unreliable; lacks the protections required by the Fair Credit Reporting Act



## Trend 3: Credit Information Increasingly Disfavored

- At least eleven states 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
- 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



# Trend 4: FCRA Requirements for Using Consumer Reports

- Must make disclosure and receive authorization from the consumer
  - Must be in a “stand-alone” document
- Must provide pre-adverse action notice and a copy of consumer report prior to taking adverse action
  - *Marcum v. Dolgencorp*
  - *Brown v. Lowe’s*
  - *Mohamed v. Uber Technologies Inc.*
- Other requirements under FCRA



# Trend 5: Disclosure/Authorization Forms

- Must be a stand-alone document – Disclosure and authorization can be on the same form, but nothing else
- 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*



# Trend 6: Applicant Tracking Systems

- Must still comply with FCRA when outsourcing certain functions to third-party vendors
- Do not rely on vendor to ensure that all FCRA requirements are met
- Make sure all forms provided by your vendor comply with all FCRA requirements as well, including the stand-alone disclosure and authorization form
- Case
  - *Brown v. Delhaize America*



# Trend 7: Destruction of Documents

- The Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) and accompanying regulations provide federal guidelines on the proper disposal of consumer reports
- States also have laws that govern the proper disposal of sensitive consumer information (including consumer reports)
  - Most recently in Delaware
- Generally must burn, shred or otherwise destroy the document or electronic media containing consumer information to make it unreadable or indecipherable



## Trend 8: 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
- Case
  - *EEOC v. BMW & Dollar General*



# Trend 9: Health Data Breaches

- Recent attempts to hold healthcare providers liable under the FCRA for health data breaches
- Courts are starting to dismiss such actions, finding that healthcare providers are not considered “consumer reporting agencies” under the FCRA
  - This was the outcome in a recent federal case against a network of affiliated doctors and hospitals
- Providers should still encrypt and protect private patient information to avoid liability under other statutes



# Trend 10: Medical Marijuana

- A total of 23 states, D.C. and Guam now allow for comprehensive medical marijuana and cannabis programs
  - AK, AZ, CA, CO, CT, DE, HI, IL, ME, MA, MD, MI, MN, MT, NV, NH, NJ, NM, NY, OR, RI, VT, WA
- Some states provide civil protections to medical marijuana users
  - AZ, CT, DE, IL, ME, MN, NV, NY, RI
- Some states have laws that expressly provide that an employer has no obligation to accommodate use or permit employees to report to work under the influence
  - CA, CT, MA, NJ



# Conclusion

High-profile lawsuits will continue - It is critical to keep your screening process compliant

Key takeaways:

- “Ban the Box” laws postponing criminal record inquiries will become even more prevalent
- Tread carefully if searching social media to avoid protected information
- Obtain credit reports on applicants only when necessary
- Ensure that your background check disclosure form is truly “stand-alone”
- Continue to comply with all FCRA requirements, even when utilizing a vendor
- When disposing of consumer reports and other sensitive consumer information, ensure your procedures comply with all legal requirements
- Do away with “automatic exclusions” based on criminal records
- Make sure that private patient information is encrypted and protected
- Be vigilant of new trend in medical marijuana laws providing users with civil protections





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