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INTRODUCTION

It is critical for businesses to provide a safe environment for their employees and customers, and protect the company's interests. Whether you are hiring employees, working with independent contractors, or engaging volunteers, background checks can help make sure you have the right people who can impact your organization's success and the safety of your communities. Ultimately, background checks help you screen out risk and assist your business in retaining talent.

For many businesses, however, compliance with a myriad of federal, state, and local laws can be a daunting, and expensive, task. The Equal Employment Opportunity Commission ("EEOC") enforces Title VII of the Civil Rights Act of 1964 ("Title VII"), which prohibits employment discrimination based on race, gender, national origin and other bases. The Federal Trade Commission ("FTC") and Consumer Financial Protection Bureau ("CFPB") enforce the Fair Credit Reporting Act ("FCRA"),

the law which sets forth rules regarding what types of information can be provided to employers and the procedure for employers to follow if it conducts background checks via a third-party consumer reporting agency. Many states and local jurisdictions also have laws governing when employers can inquire about criminal history and what information can be considered.

Here is a primer on how businesses can properly conduct background checks, while using their limited resources efficiently.

CHAPTER 1

Decide Whether Your Company Will Conduct Background Checks and Create a Policy

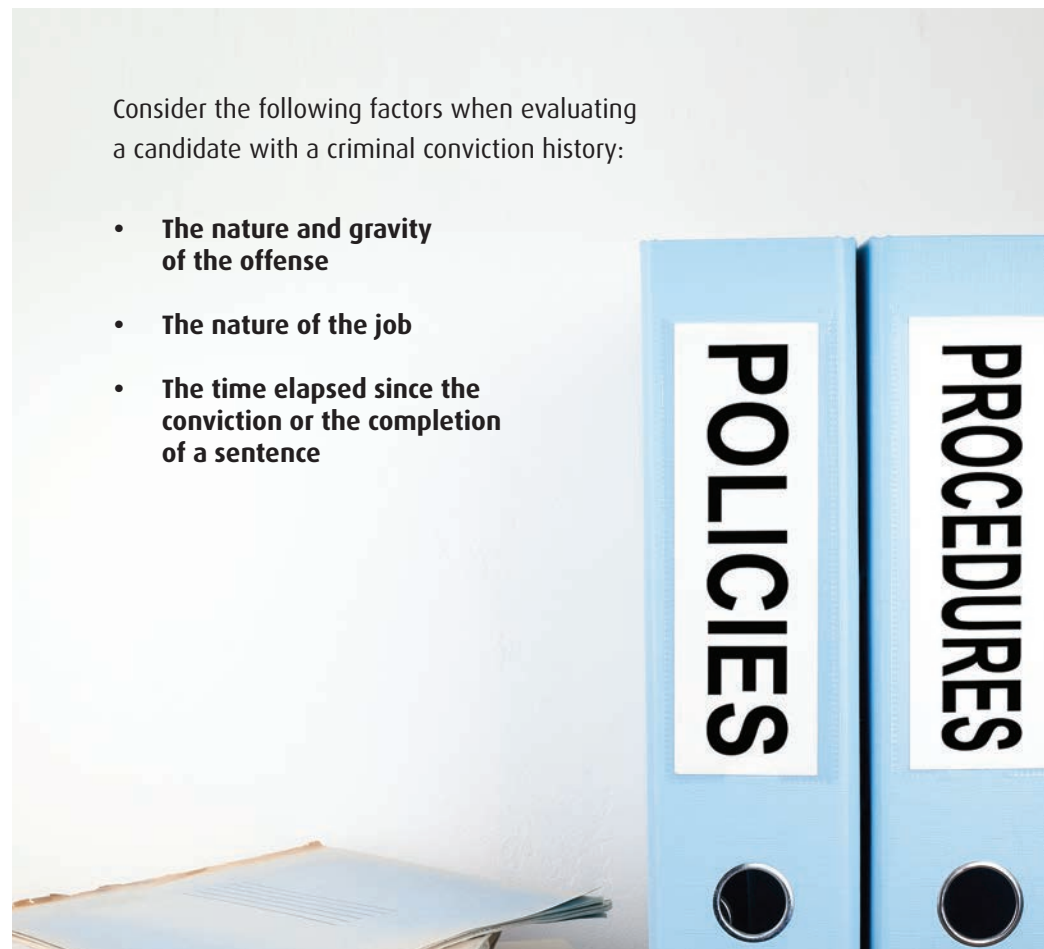
Most companies have high standards for hiring employees, working with independent contractors, or engaging volunteers, yet remain challenged by budget limitations. Especially for small or medium businesses where decisions are made on short timeframes, making the right hiring decision is vital to success. Once you decide that you want to conduct background checks, the first step to ensure your company's screening success is to develop a written policy.

Any policy should be tailored to the unique needs of each company and the jobs within the company. The policy should detail the scope of background checks you will run, for example, **criminal, credit, employment verification, education verification, driving records**. Base the types of checks on the needs of your business, the positions for which you hire, the correlation or relatedness of a check to the person's ability to perform a job, and applicable legal requirements or limitations.

When considering criminal history as part of the assessment process, one pitfall to avoid is having a blanket policy automatically prohibiting your company from hiring an individual convicted of any offense at any time. Different considerations apply for different positions. For example, hiring restrictions based on criminal history will likely **be different for a delivery driver, a cashier, and employees that you send into customer's homes**.

Consider the following factors when evaluating a candidate with a criminal conviction history:

- **The nature and gravity of the offense**
- **The nature of the job**
- **The time elapsed since the conviction or the completion of a sentence**



CHAPTER 1: Decide Whether Your Company Will Conduct Background Checks and Create a Policy

Consider Creating a Hiring Matrix Within Any Policy

A hiring matrix (which can be a list of crimes and then preliminary decisions listed) can be a helpful guide to assist employers in determining whether to hire individuals with a criminal history, but should not be a substitute for a holistic individualized assessment of the candidate. Properly implemented, a hiring matrix can account for the nature and gravity of the offense, the nature of the job and the time elapsed since the conviction or completion of the sentence. Matrices can be challenged, however, and employers should be careful not to use a one-size-fits-all matrix for all positions companywide. Employers should also be cautious of including automatic disqualifications on a matrix, except in certain limited situations (such as where a particular disqualification is required by federal law).

What About Arrest-Related Inquiries?

In addition, employers should consider not asking about non-pending arrest records. The EEOC does not believe that arrest records, absent a conviction, are relevant to the hiring process and instead may demonstrate outright discrimination. For instances where arrests are pending a final resolution - whether that be a conviction, dismissal or other result, an employer may ask about the underlying conduct that led to the arrest and assess accordingly.

When to Ask About Criminal History?

Determine when your organization will ask a candidate, prospective contractor or interested volunteer about his or her criminal background. Should it be on the application? After the first interview? After a conditional offer? Certain state and local laws, referred to as “ban the box” laws, prohibit including the question on an application, and others prohibit asking until after the first interview or after a conditional offer. Federal law does not contain similar restrictions. The later in the hiring process your business asks the

question, perhaps the less likely the EEOC would be successful in pursuing a civil rights violation under Title VII and the more likely you are to comply with ban the box laws. **The best practice is to move your criminal history inquiry later in the hiring process.**

Conduct an Individualized Assessment

After reviewing these considerations, consider implementing a process that allows candidates an “opportunity to be heard” to establish why any potential exclusion should not apply to his or her circumstances.¹ **The EEOC suggests, and some states and local jurisdictions require, this “individualized assessment” approach when reviewing a candidate’s criminal history.** Factors the EEOC believes warrant consideration are:



The facts or circumstances surrounding the offense or conduct



The number of offenses for which the individual was convicted



Age at the time of conviction or release from incarceration



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



The length and consistency of employment history before and after the offense or conduct

CHAPTER 1: Decide Whether Your Company Will Conduct Background Checks and Create a Policy



Rehabilitation efforts, e.g., education or training



Employment or character references and any other information regarding fitness for the particular position



Whether the individual is bonded under a federal, state, or local bonding program

The person or people who conduct this analysis should be familiar with Title VII, the EEOC's guidance, the FCRA, and any state or local laws. Outline a plan to keep records of these decisions that include the reasoning behind the employer's adjudication decision.

Should You Check Credit History?

There is no EEOC guidance on how to properly conduct a credit check. However, consider conducting a similar analysis analyzing the nature of the job, the nature of the negative information, and the time elapsed since the negative information arose to determine whether a hiring prohibition is job-related. Be familiar with state and local laws in 13 jurisdictions that limit an employer's use of credit-related background information for employment purposes, and in some cases also prescribe notice and review requirements.²

Discuss the Fair Credit Reporting Act and How You Will Comply

Your policy should address that you are familiar with the FCRA and state fair credit reporting laws, and outline how you will comply (see below for more information).



CHAPTER 2

Engage a Background Screening Company

The ideal background check is accurate, comprehensive, consistent, timely and, of course, legal. The work involved differs depending on the location of the candidate and where he or she has lived in the past; coordinating these factors can be difficult and labor intensive. For these reasons and more, many companies do not conduct their own background checks, and instead outsource this function to consumer reporting agencies (CRAs). If you rely on a CRA such as HireRight to run your background checks, you must comply with the FCRA and applicable state consumer reporting laws.

Key terms:

- ✓ **Consumer Report**
- ✓ **Consumer Reporting Agency**
- ✓ **Permissible Purpose**

Consumer Report

Consumer reports are defined as written, oral, or other communications by a CRA that bear upon a consumer's (e.g., candidate's or employee's) credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, and are used (or expected to be used) as a factor in establishing eligibility for a "permissible purpose," including "employment purposes."

Consumer Reporting Agency

Under the FCRA, a CRA is defined as any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. When an organization seeks any written, oral, or other communication (e.g., credit history, criminal records, driving records, etc.) from a CRA about a candidate or employee for "employment purposes," it must comply with certain notice requirements.

Permissible Purpose

This is an FCRA-approved reason for obtaining consumer reports and/or investigative consumer reports, which includes "employment purposes."



CHAPTER 3

What an Employer Needs to Do Under the FCRA *before* Running a Background Check

The FCRA imposes legal obligations on companies that obtain background check reports from CRAs for employment purposes, which protect candidates from being denied employment because of incomplete or inaccurate information in their consumer reports. Companies must ensure that an individual (i) knows that a background check is being conducted, (ii) consents to having a background check conducted, and (iii) is provided notification that information contained in the background check report may result in an adverse employment decision. Therefore, companies must obtain or provide the following:

Disclosure for Consumer Reports

Whenever an employer seeks to obtain a consumer report, the FCRA mandates that, before doing so, it must make a clear conspicuous written disclosure, separate from the application, to the candidate that a consumer report may be obtained.³ This disclosure must be given in a separate document before a check is requested.

Candidate Authorization

An employer must obtain the written authorization from the candidate prior to requesting a consumer report and/or investigative consumer report. Although the FTC has opined that the disclosure and authorization can be combined into one document, this has been subject to increased litigation.

Certification to CRAs

Before a CRA such as HireRight can provide a consumer report, the employer must certify to the CRA that it has provided the required written disclosure and obtained the required written authorization. The employer must also certify that the information being obtained will not be used in violation of any federal or state equal employment opportunity law or regulation. Lastly, the employer must certify that it will comply with any applicable adverse action requirements set forth in the FCRA, and described below.



CHAPTER 4

What an Employer Must Do Under the FCRA After Receiving a Consumer Report

Pre-Adverse Action Notification:

Before taking any adverse action, an employer must notify the individual they are considering taking an adverse action based in whole or in part on information contained in the consumer report. It must provide the candidate with: (1) a copy of the consumer report obtained from the CRA; and (2) a summary of the consumer's rights under the FCRA, which can be found at <https://www.hireright.com/PDFs/FTCCConsumerRights.pdf> and any local or state specific notices.⁴

Adverse Action Waiting Period

After providing the pre-adverse action notice, an employer must wait a "reasonable period of time" before taking the adverse action. The FTC has informally opined that a five business day waiting period is reasonable, but that also has been a source of litigation in recent years. The FCRA is clear that candidates should be given the "opportunity to be heard," allowing them to correct or challenge incorrect information on a consumer report before the organization actually takes adverse action. During this time, if the candidate contacts you seeking to "appeal" the company's decision, this may be a good time to conduct the individualized assessment recommended by the EEOC, if you haven't already done so or if the candidate provides additional information.

Note, however, that if your business is located in Philadelphia, PA or San Francisco, CA, you must wait 10 or seven days, respectively, before taking adverse action.

Adverse Action Notification

After waiting a "reasonable period of time," or the time period mandated by local law, an employer must provide the candidate with:



Notice of the adverse action taken



The name, address, and toll free telephone number of the CRA that furnished the consumer report



A statement that the CRA did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken



Notice of the consumer's right to obtain a free copy of the consumer report from the CRA within 60 days



Notice of the consumer's right to dispute the accuracy or completeness of any information in the consumer report furnished by the CRA. There also may be additional state or local requirements.

CHAPTER 5

State and Local Ban-the-Box Laws

Ban-the-box laws limit when an employer may permissibly ask about an individual's criminal history. Often, employers ask about an individual's criminal history on an employment application. The trend in the law is to prohibit this practice. Each ban-the-box law prohibits any covered employer from asking about criminal history until after a first interview or conditional offer. However, each state and local law is nuanced as to what can be asked, and when it can be asked. In addition, several of such laws impose additional obligations on employers regarding the inquiry into (e.g., ordering a background check) and use of criminal history information for employment purposes, including the need to provide individualized notices or assessments as applicable. The adjacent chart describes the question of "when" an employer may inquire about criminal histories. Consult with your legal counsel to determine whether your organization is subject to any of these ban-the-box laws.

Jurisdiction	When Employers May Ask About Criminal History
Austin, TX	After conditional offer
Baltimore, MD	After conditional offer
Buffalo, NY	After first interview
California	After conditional offer
Columbia, MO	After conditional offer
Connecticut	After initial written application is submitted
Hawaii	After conditional offer
Illinois	After selection for first interview
Kansas City, MO	After interview and deemed qualified for position
Los Angeles, CA	After conditional offer
Massachusetts	After initial interview
Minnesota	After initial interview
Montgomery County, MD	After initial interview
New Jersey	After initial interview
New York City, NY	After conditional offer
Oregon	After initial interview
Philadelphia, PA	After conditional offer
Portland, OR	After conditional offer
Prince George's County, MD	After initial interview
Rhode Island	After initial interview
Rochester, NY	After initial interview
San Francisco, CA	After first live interview
Seattle, WA	After initial screening of applications
Spokane, WA	After conditional offer
Washington, D.C.	After initial interview or conditional offer

CHAPTER 6

Best Practices

Conducting background checks for employment purposes is an extremely important tool for many businesses. The following are some best practices for all employers:

Review Job Descriptions

Employers should review the requirements of each position and determine whether a background check is necessary for that position. Review and consider narrowing the positions for which you are running credit reports and make sure that the information requested from each candidate is relevant to the specific position for which the candidate applies.

Review Policies and Procedures

Review background screening policies and procedures and develop processes to ensure that all the necessary notices and disclosures are being provided to candidates in compliance with Title VII and the FCRA.

Comply with the EEOC Guidance

Remember the EEOC's guidance and when reviewing a candidate's criminal history information, and should also consider:



The nature and gravity of the offense



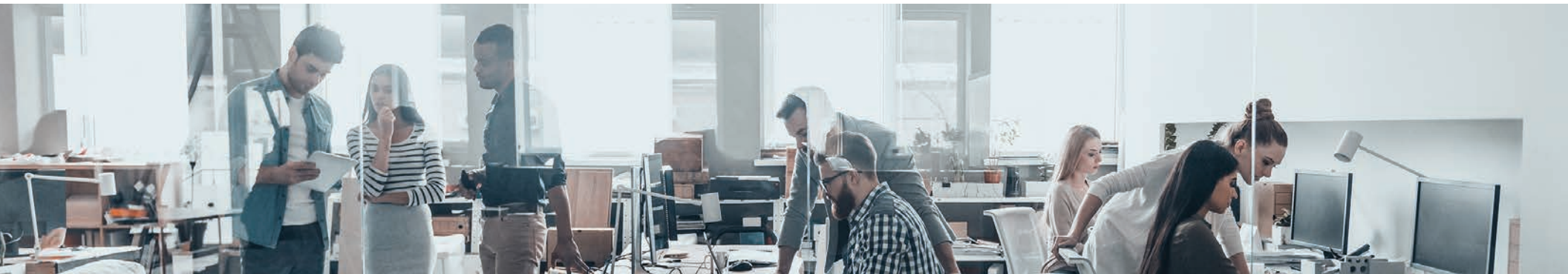
The amount of time passed since the conviction and/or completion of the sentence



The nature of the job held or sought



Apply the EEOC's individualized assessment factors. Determine how your organization will allow candidates to explain special circumstances surrounding their criminal conviction history information so you can conduct an individualized assessment.



CHAPTER 6: Best Practices

Consider the Timing of Background Checks

Determine when to inquire about an individual's criminal history and when to conduct a background check (i.e., after making conditional offers of employment or after an interview). Even then, businesses should not automatically rescind an offer if they find something concerning in the background check, but rather consider asking that person about the negative information. There may be a legitimate explanation, such as identity theft, for the negative information. There could also be an error on the report.

Review Disclosure Statements and Authorizations

Carefully review disclosure and authorization forms for compliance on a regular basis. Consider eliminating any extraneous information from the disclosure form, including a release of liability from the candidate, and consider separating the disclosure form from the authorization form.

Comply with Pre-Adverse and Adverse Action Notice Requirements

Employers must also review their procedures for ensuring that pre-adverse action and post-adverse action notices are provided in accordance with the FCRA and state and local laws, including all the necessary federal and state enclosures. Employers must also ensure they provide candidates with copies of their consumer report and give them a reasonable opportunity to dispute the accuracy of the reports, before the adverse action is taken.

Comply with State Requirements:

Be aware of the laws in the states in which your company operates. This includes state laws requiring “job relatedness” for criminal and credit background checks, ban-the-box laws, laws concerning the timing of background checks, and laws concerning state- and local-specific notices/disclosures to be provided to candidates.



About HireRight

HireRight delivers global background checks, drug testing, employment, and education verification services through an innovative platform to help companies hire the right candidates, so they can grow successfully, and efficiently—no matter their size or where they operate. HireRight offers extensive screening solutions that can be tailored to the unique needs of the organization, giving employers additional peace of mind about their people and vetting processes. HireRight's platform can be integrated with existing HR platforms, making it easy to use and giving candidates the best possible experience.

HireRight is headquartered in Irvine, CA, with offices around the globe. Learn more at www.HireRight.com.

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¹ And some local jurisdictions, such as Los Angeles, New York and San Francisco, require that organizations conduct an individualized assessment.

² As of the date of this paper, the 13 jurisdictions that have a restriction on an employer's right to use credit reports include: California, Colorado, Connecticut, the District of Columbia, Hawaii, Illinois, Maryland, Nevada, New York City (NY), Oregon, Philadelphia (PA), Vermont and Washington.

³ FCRA §604(b)(2)(B) allows for alternative disclosure and authorization methods for employers considering candidates for certain transportation positions.

⁴ A number of states and local jurisdictions, including but not limited to, California, New York (and New York City), Massachusetts, Washington and New Jersey, require additional consumer reporting law notices. (Note this is not an exhaustive list of any state or local notice requirements.)