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Ignorance is Not a Defense - What Employers Should Know to Avoid Costly Background Check Litigation

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Agenda

- Fair Credit Reporting Act (FCRA)
- Financial Information
- Criminal History
- Disparate Impact

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FCRA - Consumer Report

- Written or oral communication from a CRA about the applicant's:
 - credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living
 - which is used or expected to be used in deciding on their employment
- CRA: person or company that seeks monetary fees or acts for a cooperative nonprofit basis to regularly provide consumers' background information to third parties

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Consumer Report Procedures

- **Pre-Report:** Written notice and authorization before getting report
 - Stand-alone requirement
 - Clear and conspicuous
 - Encompass all possible information that you will gather and when you will gather it

Consumer Report Procedures

- **Pre-Adverse Action:** Copy of report and summary of rights (<https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>)
- **Post-Adverse Action:** Written notice of:
 - CRA contact information
 - Right to receive additional free report
 - Statement that CRA did not take adverse action
 - State that consumer has right to dispute information

Violations of FCRA

- Monetary penalties
- Actual damages
- Costs
- Attorney fees
- Punitive damages for willful violations
- Potential class actions

Be Aware of Comparable State Requirements

- Arizona
- California
- Georgia
- Maine
- Massachusetts
- Minnesota
- New Jersey
- New York
- Oklahoma
- Washington

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Financial Informational and Criminal Records: The Substance

- Important defense to "negligent hiring"
- Presumption that employers who conducted background checks exercised reasonable care when making a hiring decision

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Credit History

- In some states and municipalities, employers limited to considering credit for:
 1. Management positions
 2. Positions with access to financial or confidential information
 3. Positions with access to large amounts of money (e.g. \$2,500)

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Bankruptcy and Garnishments

- The Bankruptcy Act prevents employers from discriminating against individuals because they are (1) a debtor under the Act, (2) have been insolvent prior to commencement of Act proceeding, or (3) has not paid a debt that is dischargeable under the Act
- The Federal Consumer Credit Protection Act typically does not allow employer to discharge employee for single wage garnishment or any wage garnishment arising from spousal or child support obligations

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Criminal Background Checks

- State and local jurisdictions often prohibit employers from seeking criminal history until after:
 1. An initial screening but during first interview;
 2. The first interview; or
 3. Presenting a conditional offer of employment

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Disparate Impact

- Disparate Impact = neutral policy creates disproportionate impact on protected group
- The EEOC issued revised enforcement guidance in 2012 on the use of criminal arrest and conviction records in employment, and this guidance may serve as a basis for how to collect financial information
- Employer must demonstrate "business necessity"

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Two circumstances will consistently meet the “business necessity” defense

1. The employer validates the background screen for the position in question per the Uniform Guidelines on Employee Selection Procedures if data about screening information as related to subsequent work performance is available and validation is possible.
 - Severe lack of data for this method

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Two circumstances will consistently meet the “business necessity” defense

2. The employer develops a targeted screen considering the crime, the time elapsed since, and the nature of the job, AND provides an opportunity for an individualized assessment.

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Targeted Screens

- Consider the following:
 - Nature of the screening information,
 - Time elapsed, and
 - Nature of the job
- Conduct an “individualized assessment” to determine if job-related and consistent with business necessity

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Individualized Assessment

- Individualized assessment generally means that an employer:
 - Informs the individual he may be excluded because of evidence of past criminal conduct;
 - Provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and
 - Considers whether the individual's additional information supports or undermines the exclusion.

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Less Discriminatory Alternative

- A Title VII plaintiff may prevail despite an employer's successful "business necessity" defense if the plaintiff identifies an "alternative employment practice" that (1) serves the employer's legitimate goals, and (2) results in less disparate impact.

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Employer Best Practices

- Make individualized job analysis and criteria as to job relatedness.
- Eliminate policies that have blanket exclusions.
- Train hiring officials and decision-makers on how to implement policies and procedures.

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Employer Best Practices

- Limit inquiries to records related to the position in question.
- Keep information about criminal records and financial information confidential, and only use the information for its intended purpose.
- Know your state as well as federal obligations.

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Questions?

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