

CRIMINAL RECORDS


What to Do When Your Applicant Has One



CRIMINAL RECORDS 2

So, your background report returned with a criminal record...

- o Statistically speaking, you are very likely to come across a criminal record at some point
 - 1 in 4 American adults has a criminal record (source: [nelp.org](#))
 - Most are for minor/petty offenses
- o The majority of background screening-related lawsuits stem from mishandled criminal records
- o This presentation will cover the different Laws that factor into your decision-making process
 - Required compliance steps for a defensible program



Compliant Background Screening Practices | Validity Screening Solutions

WHAT YOU SHOULD ALREADY HAVE DONE

01

SECTION

“BAN THE BOX” CONSIDERATIONS 7

Did you get your criminal conviction information from a job application?

- Missouri statewide “Ban the Box” signed April 11, 2016
 - Affects state agencies
- Kansas City, MO – Public Employers
- Kansas City and Wyandotte County, KS – Public Employers
- St. Louis, MO – Public Employers
- Columbia, MO – Private Employers

23 states and DC have passed or plan to pass “Ban the Box” laws

Compliant Background Screening Practices | Validity Screening Solutions

“BAN THE BOX” CONSIDERATIONS 8

A few things to know...

- Self-reporting isn't a reliable method of screening applicants with prior convictions
- “Ban the Box” laws don't remove your ability to conduct background checks
 - May include stipulations
 - When you may conduct them
 - What information may be considered
 - What sources may be used
 - Additional disclosure requirements

23 of the top 50 largest employers in “Ban the Box” jurisdictions

Compliant Background Screening Practices | Validity Screening Solutions

MAKING THE HIRING DECISION

SECTION 02

10

REVIEW YOUR COMPANY POLICY

- o Review and understand your company policy before making any hiring decisions
 - Decision Matrix
- o Understand the data presented
 - Felony vs. Misdemeanor
 - Disposition
 - Defendant identification
 - Why report says "clear" when applicant reported a conviction in their application

Compliant Background Screening Practices | Validity Screening Solutions

11

EEOC GUIDANCE (APRIL 2012)

- o "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (No. 915.002) – approved April 25, 2012
 - Consolidation/update of previous guidance document
 - Outlines what the EEOC considers discriminatory practices for employment screening

Compliant Background Screening Practices | Validity Screening Solutions

12

EEOC GUIDANCE

- o Cannot make hiring decision based on protected classes
 - Race
 - National origin
 - Color
 - Sex
 - Religion
 - Disability
 - Genetic information (including family medical history)
 - Or age (40 or older)

Compliant Background Screening Practices | Validity Screening Solutions

EEOC GUIDANCE: CRIMINAL RECORDS 13

- o Information from any source cannot be used to discriminate in violation of federal laws
 - Apply same standards for everyone
 - Consider every applicant on a "case-by-case" basis
 - Be careful when basing hiring decisions on criminal history that may be more common among people of protected groups
 - Exceptions based on disabilities: give applicant opportunity to demonstrate ability to perform job functions
- o Use of arrest vs. conviction records
 - EEOC strongly discourages the use of arrest records
 - FCRA prohibits the use of arrest records

Compliant Background Screening Practices | Validity Screening Solutions

DISPARATE TREATMENT VS. DISPARATE IMPACT 14

- o Disparate Treatment
 - An employer violates Title VII if the employer treats criminal history information differently for different applicants or employees based on their race or national origin
- o Disparate Impact
 - Plaintiff demonstrates that the employer's neutral employment screening process disproportionately excludes a protected group and the employer fails to demonstrate that the policy or practice is "job related for the position in question and consistent with business necessity"
 - If an employer successfully demonstrates that its policy or practice is job related and consistent with business necessity, the plaintiff may still prevail by demonstrating that there is a less discriminatory "alternative employment practice" that serves the employer's goals as effectively as the challenged criminal record exclusion

Compliant Background Screening Practices | Validity Screening Solutions

JOB RELATEDNESS AND BUSINESS NECESSITY 15

- o Three relevant factors:
 - The nature and gravity of the offense or conduct
 - The time that has passed since the offense or conduct and/or completion of the sentence
 - The nature of the job held or sought

Compliant Background Screening Practices | Validity Screening Solutions

STATE AND FEDERAL EXCLUSIONS 16

- o Specific to certain industries:
 - Healthcare, schools, federal/Missouri government contracts
- o Title VII does not preempt federal laws and regulations
 - If an exclusion goes beyond federally imposed restriction, it would be subject to Title VII analysis
- o State and local laws or regulations are preempted by Title VII if they "purport to require or permit the doing of any act which would be an unlawful employment practice"
 - If an employer's exclusionary policy or practice is not job related and consistent with business necessity, the fact that it was adopted to comply with a state or local law or regulation does not shield the employer from Title VII liability
- o How might this factor into your Decision Matrix?

Compliant Background Screening Practices | Validity Screening Solutions

WHY SHOULD EMPLOYERS CARE? 17

Several types of damages available under Title VII




- o Back pay
- o Pre- and post-judgment interest
- o Front pay (or reinstatement)
- o Compensatory and punitive damages
 - Left to the discretion of the jury
 - Statutory limits according to size of employer
 - o \$50,000 for 15 – 100 employees
 - o \$100,000 for 101 – 200 employees
 - o \$200,000 for 201 – 500 employees
 - o \$300,000 for more than 500 employees
- o Attorneys' fees for prevailing plaintiffs (no limit)
- o Other claims, other damages

Compliant Background Screening Practices | Validity Screening Solutions

89,385 EEOC CHARGES FILED IN 2015 18

What they have in common:


- Long, drawn out cases
- Unwanted media attention

	\$1.6 Million Settlement
	\$32,500 Settlement
	Recordkeeping case filed July 10, 2015

Compliant Background Screening Practices | Validity Screening Solutions





DECISION TIME 19


Could a criminal record in the applicant's background prevent him/her from being hired?



Compliant Background Screening Practices | Validity Screening Solutions




PRE-ADVERSE ACTION 20

-  Pre-Adverse Action letter
-  Copy of applicant's consumer report
-  Summary of Your Rights Under the Fair Credit Reporting Act
-  Remediating the Effects of Identity Theft



Compliant Background Screening Practices | Validity Screening Solutions

STATE SPECIFIC REQUIREMENTS 21


-  NY | Article 23-A of NY Correctional Law
-  NJ | Summary of Your Rights under the New Jersey Fair Credit Reporting Act
-  WA | Summary of Your Rights under the Washington Fair Credit Reporting Act
-  MA | Information Concerning the Process for Correcting a Criminal Record in Massachusetts
-  MA | Copy of Background Check Policy



Compliant Background Screening Practices | Validity Screening Solutions

WHY IT'S IMPORTANT - FALSE POSITIVES 22

- o Inaccuracies in the court's record
 - Clerical errors
 - Expunged records
- o Pre-adverse action/disputes process was created to account for this issue



Compliant Background Screening Practices | Validity Screening Solutions


WAITING PERIOD 23

- o Must wait a "reasonable period" after sending Pre-Adverse Action notification before taking Adverse Action
 - FCRA doesn't state what constitutes a "reasonable period" of time
 - We recommend 5 business days (accounting for mailing time)

Compliant Background Screening Practices | Validity Screening Solutions

ADVERSE ACTION 24

- o Adverse Action Letter
- o Copy of applicant's consumer report
- o Summary of Your Rights Under the Fair Credit Reporting Act



Compliant Background Screening Practices | Validity Screening Solutions

25

ADMINISTRATIVE REQUIREMENTS

SECTION 03

26

DATA RETENTION & DISPOSAL

- o Statute of Limitations
 - FCRA = 5 years after the date of a consumer report
 - Other common law, screening-related statutes = Maximum 6 years after the date of the consumer report
- o Disclosure & Authorization plus Consumer Report
 - Retain records for a minimum of 5 years for ALL (Validity recommends 6 years)
- o Consider maintaining all background-related documents (reports, releases, etc.) separate from personnel files
- o Once record keeping requirements are satisfied disposal must be done securely
 - Shredding
 - Disposing of electronic information so it cannot be read or reconstructed

Compliant Background Screening Practices | Validity Screening Solutions

27

FTC & EEOC ON SOCIAL MEDIA

What to do if you find something on Facebook that would prevent the applicant from getting hired


- o Use same compliance steps as any other background checks
- o Special considerations for content accuracy



Compliant Background Screening Practices | Validity Screening Solutions

RESOURCES 28

- o The Companion Guide to Compliant Background Screening Practices
- o Joint Publication of the EEOC and FTC on best practices for background screening
 - Available through EEOC or FTC website






Compliant Background Screening Practices | Validity Screening Solutions

QUESTIONS?



DARREN DUPRIEST

 913.322.5902
  ddupriest@validityscreening.com
 www.validityscreening.com
