

Background Checks and ATS

—
Building a Compliant Process
and Mitigating Risk





Dillon Wuerth

Business Development
Manager

dillon@newtonsoftware.com

newton Session Expert

Dillon Wuerth has spent his entire career helping organizations make their recruitment initiatives more efficient and effective. After spending 2+ years at job search engine Simply Hired, Dillon came to Newton in 2014 as the first sales hire. Since then he has consulted hundreds of businesses about their hiring practices. Now he manages partnerships and the technical side of Newton's 2-click background check integration. He looks forward to leveraging this knowledge to provide answers to all your questions!



Elizabeth McLean

FCRA Compliance Analyst
& Attorney

elizabeth@goodhire.com

GoodHire.

Session Expert

At GoodHire, Elizabeth McLean monitors all things FCRA and EEOC. She follows new legislation and court decisions and advises the company on processes that follow compliance best practices. Elizabeth graduated from the University of North Carolina School of Law with Honors, and she holds an advanced FCRA certification from the National Association of Professional Background Screeners. She is a complete background screening nerd and hopes to answer a lot of questions during our Q&A!

DISCLAIMER

The information presented today is not legal advice, and should not be relied upon as such. Please consult your own attorney to ensure your policies and procedure are compliant and up to industry-standard.

Today's Agenda

1. How to create a screening policy
2. FCRA litigation and top 2 risks today
3. EEOC trends and impact to you
4. Ban the box risks
5. Q&A

New to Background Screening?

Background screening is an easy way to protect your company!

What to keep in mind when creating a background screening policy:

- Who are you screening?
- What criminal activity will affect your hiring decision?
- When will you conduct your screening?
- Where will you go for reliable background checks?
- What tools will you need in order to conduct background checks?
- How will you implement a process that complies with ALL applicable law (Federal, state, local)?

Creating a Screening Policy

Who are you screen?

- Current employees?
- Former employees?
- BOTH?

Screening uniformly is key! Arbitrary application of background screens can lead to EEOC issues.

Creating a Screening Policy

What criminal activity is relevant?

- Varies by industry (Driving records for transportation companies, credit reports for financial institutions, etc.)
- EEOC recommends employers consider records directly related to the job
- Might want to consider only looking at convictions and pending arrests
- NO BLANKET POLICIES!!!

Creating a Screening Policy

When will you screen?

- Timing varies, depending on your preference
- Under Federal law, employers can screen at any point after obtaining consent
- Ban the Box laws may restrict timing, however
- If you'd like to screen throughout the course of employment, use an "evergreen clause" in your initial consent form

Creating a Screening Policy

Where will you go for reliable checks?

- Partner with a Consumer Reporting Agency (CRA) that advocates for employers AND employees
- Use a CRA that is staffed with experts on compliance, Federal and State laws, Ban the Box laws, and EEO laws
- Consider using a CRA that has achieved NAPBS certification

Creating a Screening Policy

What tools will you need to conduct background checks?

- Background Check Consent Form (Disclosure and Authorization)
- Pre-adverse Action Template
- Final Adverse Action Template
- Written Description of your Background Screening Policy
- A safe place to store background check consent forms and documents
- A trusted sources for guidance: attorney, HR expert, background screening company

Creating a Screening Policy

How will you comply with ALL applicable laws?

- Work with an attorney and/or consult federal, state, and local laws regularly
- EEOC guidance: https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm
- NELP:
<http://nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide>
- FCRA:
<https://www.ftc.gov/enforcement/rules/rulemaking-regulatory-reform-proceedings/fair-credit-reporting-act>

FCRA Litigation is Powerful

If a Credit Reporting Agency (CRA) performs your employment screening, it must comply with the Fair Credit Reporting Act (FCRA).

If no CRA is used, the FCRA does not apply.

Plaintiffs' attorneys can easily win.

Minimal Effort

+

Straightforward Evidence

=

6 Figure Settlements

#1 Risk: Non-compliant disclosure

Disclosure document – The employer cannot obtain a background report unless “**a clear and conspicuous disclosure** has been made... in a document that consists **solely of the disclosure**” (15 U.S.C. 1681b(2)(A)(i))

✔ Disclosure **can** include information related to the background check (e.g. personal information to be collected, the CRA running the check, rights under the FCRA, etc.)

✘ Disclosure **cannot** include information unrelated to the background check (e.g. prior conviction questions, **release of liability**, information about work schedules, etc.)

#2 Risk: Adverse Action Violations

If an employer has procured a background report on an applicant from a CRA, and it intends to take “adverse action” (rejection, demotion, etc.) based on information therein, **it must follow the Adverse Action process set out in the FCRA.**

1.

Pre-Adverse Action Letter, including a copy of the report and summary of rights

2.

Must wait 5 business days

3.

Adverse Action Letter

HOT: Increases enforcement of Title VII

In 2012 EEOC announced their intent to strengthen enforcement measures of disparate impact discrimination.

EEOC pays attention to employers' background screening policies!

“With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.”

No Relief from Disparate Claims

- **BUT WAIT!**
 - EEOC v. BMW is considered an EEOC victory. Settlement resulted in a \$1.6 million payout to class of claimants and injunction against current background screening policy. (September, 2015)
- Victory against BMW will likely add new vigor to the EEOC's campaign
- Follow best practices to avoid EEOC attention

Best Practices: Avoid EEOC Attention

1.

Criminal conviction review must include consideration of:

Nature/gravity of the offense, the time that has passed since the offense and/or completion of the sentence, and the nature of the job sought.

2.

Perform an Individualized Assessment:

Ask for information which may show rehabilitation, good character, successful performance of similar work post-conviction. Give them the opportunity to make their case.

3.

Limit the scope of your background screenings: 7-10 years is average.

7-10 years is average; use a background check company that clearly adheres to this

4.

“Ban the Box” from your application process

HOT: Ban the Box

- Ban the Box is a movement geared toward giving ex-offenders a better chance at employment. The typical law requires employers to remove the box from their employment applications which asks applicants about their conviction history. The hope is that the protections given under Ban the Box laws will reduce the recidivism rate.
- 24 states have passed Ban the Box legislation. 9 of these impose restrictions on private employers.
- It is important to note that Ban the Box laws vary greatly in their requirements.

HOT: State-Level BTB Legislation

State (Year reform was adopted)	Relevant Statutes and Policy	Employers: Private and Public (State: S, Licensing: L, Cities and Counties: C)		Job-Related Screening*	Limits information (Arrests not leading to convictions: "Arrests"; Expunged or similar: "Expunged"; Time limit on record: "Time limit")*	Notification of denial: N; Copy of record: C*
California (2010, 2013)	Cal. Lab. Code § 432.9	—	Public (S, C)	—	Arrests, Expunged, Time limit	—
Colorado (2012)	Colo. Rev. Stat. § 24-5-101	—	Public (S, L)	"Direct relationship" between conviction and job	Arrests, Expunged	—
Connecticut (2010)	Conn. Gen. Stat. § 46a-80	—	Public (S, L**)	Consider nature of crime and relationship to the job	Arrests, Expunged	N, C
Delaware (2014)	Del. Code tit. 19, § 711(g); Del. Code tit. 29, § 6909B	—	Public (S, C)	Consider nature of offense and job	—	—
Georgia (2015)	Executive Order	—	Public (S)	—	—	—
Hawaii (1998)	Haw. Rev. Stat. §§ 378-2, 378-2.5	Private	Public (S, C)	Conviction bears "rational relationship" to position	Time limit	—
Illinois (2013, 2014)	820 Ill. Comp. Stat. § 75; Executive Order 1 (2013)	Private	Public (S)	—	—	—
Maryland (2013)	Md. Code Ann., State Pers. & Pens. § 2-203	—	Public (S)	—	—	—
Massachusetts (2010)	Mass. Gen. Laws ch. 151B, § 4 (9 ½); ch. 6, §§ 171A, 172	Private	Public (S, L**, C)	—	Time limit	N, C
Minnesota (2009, 2013)	Minn. Stat. § 364	Private	Public (S, L**, C)	Conviction "directly relates" to position	Arrests, Expunged	N
Missouri (2016)	Executive Order 16-04	—	Public (S, L)	—	—	—

Source: [National Employment Law Project](#)

HOT: State-Level BTB Legislation

Banned the Box in Private Employment: Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont

Nebraska (2014)	Neb. Rev. Stat. § 48-202	—	Public (S, C)	—	—	—
New Jersey (2014)	N.J. Stat. Ann. § 34:6B-11 to 19	Private	Public (S, C)	—	Expunged	—
New Mexico (2010)	N.M. Stat. §§ 28-2-1 to 28-2-6	—	Public (S, L**, C)	Conviction “directly relates” to employment	Arrests	N
New York (2015)	Executive action HR-29 Administrative Policy;	—	Public (S)	—	—	—
Ohio (2015)	HB 56	—	Public (S, C)	Sufficient nexus between conviction and position***	Sealed or Expunged***	N***
Oklahoma (2016)	Executive Order 2016-03	—	Public (S)	—	—	—
Oregon (2015)	HB 3025; 2015 Or. Laws Ch. 559	Private	Public (S, C)	—	—	—
Rhode Island (2013)	R.I. Gen. Laws §§ 28-5-6, 28-5-7	Private	Public (S, C)	—	Arrests	—
Tennessee (2016)	SB 2440	—	Public (S)	Consider specific duties and responsibilities of position	—	—
Vermont (2015)	Executive Order 03-15	—	Public (S)	—	—	—
Virginia (2015)	Executive Order 41	—	Public (S)	Conviction must be job-related	—	—
Wisconsin (2016)	AB 373	—	Public (S)	—	—	—

Source: [National Employment Law Project](#)

Avoiding Ban The Box Violations

- **Remove prior conviction questions from your applications**

Ban the Box laws will continue to spread, and it's only a matter of time before most states enact a version of the law. The EEOC views prior conviction questions with suspicion, so delaying criminal inquiries until later in the hiring process is proactive.

- **Or provide room for applicant to add context**

If your organization insists on keeping the question on its application, request that the applicant elaborate on any circumstances he/she feels should be considered.

- **Stay abreast of legislative updates**

Q & A Session

Have a question that we didn't cover today? Contact us at
info@newtonsoftware.com

