Background Checking & Drug and Alcohol Testing  
– Are You Compliant?

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THE MATERIALS INCLUDED IN THIS PRESENTATION ARE FOR INFORMATIONAL PURPOSES ONLY AND NOT FOR THE PURPOSE OF PROVIDING LEGAL ADVICE.
The Ubiquity of Background Checks

• According to a recent SHRM survey, 92% of employers perform background checks on job candidates
  – But, only 50% of these employers coordinate background checks with in-house counsel or outside legal counsel
Risks of Background Checks

• Failure to comply with applicable laws:
  – Federal & state FCRA
  – Title VII & state EEO laws
  – Ban-the-box laws
  – Social media laws
  – Right to privacy

• Potentially serious liability for class actions
Why Do a Background Check?

• Generally, to protect the workplace and the employer’s business & its customers/clients.
  – Embezzlement & theft
  – Violence

• To defend against claims of “negligent hiring.”
  – Liability may exist if the employer “knew or reasonably should have known” that the employment of an individual would create a foreseeable risk of danger to others

• May be required by law for certain industries & positions.
Fair Credit Reporting Act


- Enacted in 1970

- Previously, there were no federal restrictions on access to consumer credit information, and there was no way for a person to challenge the information in his/her credit report.

- Amended in 1996 to include employers & employment process
Fair Credit Reporting Act

• Purposes of the FCRA
  – Prevent *misuse* of sensitive consumer information by *limiting access* to only those with a *legitimate need* for it and the consent of the person whose records are sought
  – Ensure the *accuracy & integrity* of consumer information
Fair Credit Reporting Act

• “Employment purposes” = one of the permissible purposes under the FCRA

• “Employment purposes” when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.
  – Job applicants
  – Current employees
  – Independent contractors
• Regulated employers include:
  – Federal government,
  – State government,
  – Local & municipal governments, and
  – Private employers, regardless of size

• No “small employer” or non-profit exceptions
“Consumer Reporting Agency”

- **Defined as:** “any person which, for monetary fees, dues, or on a cooperative non-profit 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...”
  - Credit bureaus (Experian, Trans Union, Equifax)
  - Private investigators
  - Third-party background checking service
“Consumer Reporting Agency”

- **Employers** are **not** consumer reporting agencies
- A **state entity** that is required to keep certain information as a matter of public record is **not** a consumer reporting agency
Manner of Investigation

- Done in-house – *FCRA does not apply*
  - Using only info provided by applicant & government agencies
- Consumer Reporting Agency – *FCRA applies*
  - Includes credit bureaus, private investigators, and on-line background check companies
“Consumer Reports”

• **Defined as:** “Written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for...employment purposes.”

  – Not limited to credit reports
  – Any type of report prepared by a CRA, including motor vehicle records, criminal, educational and employment background and licenses
  – Reports containing information culled from databases or public records by a CRA
  – A document can be a consumer report only if it is prepared by a “consumer reporting agency.”
“Consumer Reports”

• Information **directly** from the consumer is generally **not** a consumer report.
  – Information provided by job applicant
  – Employer calling directly to verify previous employment or education
No consumer reporting agency may make any consumer report containing any of the following items of information:

- Bankruptcies that antedate the report by more than ten years.
- Civil suits, civil judgments, and records of arrest that antedate the report by more than seven years.
- Paid tax liens which antedate the report by more than seven years.
- Accounts placed for collection or charged to profit and loss which antedate the report by more than seven years.
- Any other adverse item of information, other than records of convictions of crimes, which antedates the report by more than seven years.

- Convictions can be reported indefinitely.
FCRA Requirements

• Pre-procurement requirements:
  • Disclosure/Notice
  • Authorization/Consent
  • Certification

• Pre-adverse action requirements:
  • Provide report and *Summary of Rights*
  • Wait

• Post-adverse action requirements:
  • Notice of adverse action
  • Information on CRA and consumer rights
Disclosure to the Consumer

• An employer may not obtain a consumer report unless: “a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes.”

• Requires a stand-alone document.
  – i.e., disclosure cannot be contained within job application

• Important not to clutter the disclosure with unrelated material
Authorization/Consent from the Consumer

• An employer may not obtain a consumer report unless: “the consumer has authorized in writing... the procurement of the report by that person.”

• Most common practice to have the disclosure and authorization on the same stand-alone document.
  – The authorization, but not the disclosure, may be contained in the job employment application or other document.
Certification to CRA

• The simplest requirement
• Employer must certify to the CRA that information obtained will be used for employment purposes and that employer will follow the FCRA’s requirements.
  – Otherwise, the CRA may not legally provide information to the employer.
Adverse Employment Action under FCRA

• The most frequent issue of FCRA compliance

• “Adverse action” = “denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee”
  – In practice, this is a very broad definition.
“In Whole or In Part”

- FCRA applies when a consumer report is used “in whole or in part” to take an adverse employment action.

- Best practice is to follow FCRA requirements any time a consumer report is obtained, even if there is an independent basis for the employment decision.
  - e.g., dishonesty on the employment application
Pre-Adverse Action Notice

• **Before** taking an adverse action an employer must:
  – 1. **Provide** the applicant or employee with:
     • Copy of the consumer report, and
     • Copy of the Consumer Financial Protection Bureau’s *Summary of Rights under the FCRA*
  – 2. **Wait** before taking adverse action
     • FCRA is silent on how long an employer must wait between mailing the pre-adverse action and adverse action notices.
     • Case law requires a “reasonable” amount of time in order to allow person to dispute inaccuracies with the CRA (not necessarily the employer)
     • FTC has found 5 business days to be reasonable, although recent class action cases suggest that employers may want to wait more than 5 business days.

This requirement affords the applicant or employee with an opportunity to discuss the report with the employer before the employer takes adverse action.
Post-Adverse Action

- **After** taking an adverse action an employer must provide an “adverse action notice” with additional information regarding the CRA and the consumer’s rights:
  - Name, address, and phone number of the CRA who supplied the report
  - A statement that the consumer reporting agency 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
  - A statement that the consumer has the right to dispute with the CRA the accuracy or completeness of the information in the report, and
  - A statement that the consumer has a right to obtain a free copy of the consumer report from the CRA

The adverse action notice can be in writing or delivered orally or by electronic means.
FCRA Litigation

• Private right of action
• Increasing number of cases filed
• Statute of limitations
  – The earlier of 2 years after the date of plaintiff’s discovery of the violation, or 5 years after the date on which the violation occurred
• Negligent vs. willful – *i.e.*, knowingly or recklessly
• Damages/Relief:
  – Actual damages
  – Statutory damages if willful violation (between $100 and $1,000)
  – Possibility of punitive damages
  – Attorneys’ fees and costs
• Class actions
  – Retailers, restaurant chains, theater chains, manufacturers, financial institutions, transportation companies
    • $5.0 million by a transit provider
    • $3.0 million by a national pizza delivery chain
    • $2.75 million by a transportation company
FCRA Pitfalls

• Employer’s background check disclosure form contains language that is extraneous, *i.e.*, the disclosure is not limited to just the disclosure,

• The employer fails to provide any pre-adverse action notice, or

• The employer fails to wait an appropriate amount of time before taking adverse action against the individual (*i.e.*, by failing to hold the job open in the meantime)
Audit your background check policies & procedures to ensure that applicants & employees are being provided with an adequate amount of time to consider the information contained in their background check reports.

Review your agreements with CRAs.
  – Employers may outsource the process of mailing the notices, but the employer remains potentially liable under the statute.

Ensure that your are providing applicants with the most recent version of the *Summary of Rights* document.

Consider how to best record personnel decisions such that, if necessary, you can prove that the reason an applicant was rejected was because of a poor interview, failure to provide requested follow-up information, drug test failure, etc., rather than based – even in part – on the background report.
• The Job Applicant Fairness Act took effect in Maryland on October 1, 2011.

• It generally prohibits employers in Maryland from using a job applicant or employee's credit report to determine:
  – (1) whether to hire a job applicant;
  – (2) whether to terminate an employee; or
  – (3) the rate of pay or other conditions of employment for an employee.
The law does not apply to:

- Employers who are required by State or Federal law to consider an applicant or employee's credit report or credit history for the purpose of employment.
- Financial institutions that accept deposits that are insured by a Federal agency
  - In practical effect, this means most banks and publicly insured credit unions are excluded.
- Privately insured credit unions that are approved by the Maryland Commissioner of Financial Regulation.
- Employers and entities registered as investment advisors with the United States Securities and Exchange Commission ("SEC").
An employer covered by the law may use an employee or job applicant’s credit history or credit report in 2 limited circumstances.

- First, an employer may request or use a job applicant's credit report or credit history if the applicant has (a) received an offer of employment; and (b) the credit report will not be used to deny employment or to determine compensation or the terms and conditions of employment.

- Second, an employer may request or use a job applicant's credit report or credit history if the employer has a bona fide purpose for requesting or using the information that is substantially job-related and disclosed in writing to the applicant.
The Act provides some examples of job positions for which an employer may have a *bona fide, substantially job-related purpose* for using an employee or job applicant's credit report or credit history:

- A position that is *managerial* that sets the direction and control of a business, department, division, unit or agency of a business;
- A position that has *access to personal information of a customer, employee, or the employer.*
  - Personal information includes an individuals' first name or first initial and last name in combination with a social security number, driver's license number, financial account number, individual taxpayer identification number.
  - Personal information does not include personal information customarily provided in a retail transaction;
- A position that involves a *fiduciary responsibility* to the employer such as the authority to issue payments, collect debts, transfer money or enter into contracts;
• Bona fide, substantially job-related purpose, continued:
  – A position with an expense account or a corporate debit or credit card;
  – A position that has access to information such as formulas, programs, methods, techniques or processes that derive independent economic value, whether actual or potential that the employer maintains confidentiality on; or
  – A position that has access to confidential business information.
Employers are cautioned that the substantially job-related exception should be treated with care and interpreted narrowly.
For example, a job applicant or employee's credit history is not substantially job-related to a position that involves only possible or incidental exposure to personal financial information, such as in the case of a housekeeper, receptionist, clerk, or building custodian.

In contrast, a job applicant or employee's credit information may arguably be substantially job-related if an essential function of a position involves handling highly confidential financial information, such as in the case of a building manager who routinely reviews financial statements of potential renters, or an accountant or tax preparer.
The Job Applicant Fairness Act requires employers to provide job applicants or employees with written notice if they use their credit report or credit history for a *bona fide*, substantially job-related purpose.
West Virginia: Social Media Law

• Employee Personal Social Media (H.B. 4364)
  – Effective June 10, 2016
  – Codified at W. Va. Code § 21-5G-1
• Applies to applicants’ social media “personal account”

  – “Personal account” is defined as “an account, service or profile on a social networking website that is used by an employee or potential employee exclusively for personal communications unrelated to any business purposes of the employer.”
Employers are prohibited from:

- Requesting, requiring, coercing an applicant or employee to
  - Disclose a username, password or other authorization information that allows access to personal social media account
  - Access a personal media account in the employer’s presence
  - “Friend” the employer or an employment agency on their personal social media account

Employer may access information that is publicly available
Title VII and Background Checks

Title VII and Background Checks

- Protected classes under Title VII: race, color, religion, sex, or national origin
- Are criminal background checks discriminatory?
- Two basic types of discrimination claims
  - “Disparate Treatment” – intentional discrimination
  - “Disparate Impact” – facially neutral practice/requirement has discriminatory effect
Example: Disparate Treatment Based on Race. John, who is White, and Robert, who is African American, are both recent graduates of State University. They have similar educational backgrounds, skills, and work experience. They each pled guilty to charges of possessing and distributing marijuana as high school students, and neither of them had any subsequent contact with the criminal justice system.

After college, they both apply for employment with Office Jobs, Inc., which, after short intake interviews, obtains their consent to conduct a background check. Based on the outcome of the background check, which reveals their drug convictions, an Office Jobs, Inc., representative decides not to refer Robert for a follow-up interview. The representative remarked to a co-worker that Office Jobs, Inc., cannot afford to refer "these drug dealer types" to client companies. However, the same representative refers John for an interview, asserting that John's youth at the time of the conviction and his subsequent lack of contact with the criminal justice system make the conviction unimportant.

Office Jobs, Inc., has treated John and Robert differently based on race, in violation of Title VII.
**Example: Disparate Treatment Based on National Origin.** Tad, who is White, and Nelson, who is Latino, are both recent high school graduates with grade point averages above 4.0 and college plans. While Nelson has successfully worked full-time for a landscaping company during the summers, Tad only held occasional lawn-mowing and camp-counselor jobs. In an interview for a research job with Meaningful and Paid Internships, Inc. (MPII), Tad discloses that he pled guilty to a felony at age 16 for accessing his school's computer system over the course of several months without authorization and changing his classmates' grades. Nelson, in an interview with MPII, emphasizes his successful prior work experience, from which he has good references, but also discloses that, at age 16, he pled guilty to breaking and entering into his high school as part of a class prank that caused little damage to school property. Neither Tad nor Nelson had subsequent contact with the criminal justice system.

The hiring manager at MPII invites Tad for a 2nd interview, despite his criminal record. However, the same hiring manager sends Nelson a rejection notice, saying to a colleague that Nelson is only qualified to do manual labor and, moreover, that he has a criminal record. In light of the evidence showing that Nelson's and Tad's educational backgrounds are similar, that Nelson's work experience is more extensive, and that Tad's criminal conduct is more indicative of untrustworthiness, MPII has failed to state a legitimate, non-discriminatory reason for rejecting Nelson.

If Nelson filed a Title VII charge alleging disparate treatment based on national origin, the EEOC would find reasonable cause to believe that discrimination occurred.
EEOC’s position on criminal background checks

- Usually have a discriminatory impact, particularly on the basis of race & national origin
- Must be job related and consistent with business necessity
• Increasing number of Americans with criminal records in the working-age population
  – In 1991, only 1.8% of Americans had served time in prison
  – In 2001, % rose to 2.7% (1 in 37 adults)
  – By the end of 2007, % rose to 3.2% (1 in every 31 adults)

• Disproportionately high incarceration rates of African Americans and Hispanics, particularly men.
  – African Americans and Hispanics are arrested at a rate that is 2 to 3 times their proportion of the general population
  – 1 in 17 (Caucasian men) vs. 1 in 6 (Hispanic men) vs. 1 in 3 (African American men)

• Employers’ use of criminal background screening results in “disparate impact” discrimination against African Americans and Hispanics.
Title VII and Background Checks

• A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-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.
Title VII and Background Checks

- **The Green factors (8th Cir. 1975):**
  - 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

- In practice, whether a particular criminal conviction will disqualify an applicant depends on the crime and the job sought
• Arrests vs. convictions
  – The mere fact of an arrest does not establish that criminal conduct has occurred.
  – An arrest, however, may in some circumstances trigger an inquiry into whether the conduct underlying the arrest justifies an adverse employment action.
  – Title VII calls for a fact-based analysis to determine if an exclusionary policy or practice is job related and consistent with business necessity.
  – Therefore, an exclusion based on an arrest, in itself, is not job related and consistent with business necessity.
Example: Exclusion Is Not Job Related and Consistent with Business Necessity.
The National Equipment Rental Company uses the Internet to accept job applications for all positions. All applicants must answer certain questions before they are permitted to submit their online application, including "have you ever been convicted of a crime?" If the applicant answers "yes," the online application process automatically terminates, and the applicant sees a screen that simply says "Thank you for your interest. We cannot continue to process your application at this time."

The Company does not have a record of the reasons why it adopted this exclusion, and it does not have information to show that convictions for all offenses render all applicants unacceptable risks in all of its jobs, which range from warehouse work, to delivery, to management positions.

If a Title VII charge were filed based on these facts, and there was a disparate impact on a Title VII-protected basis, the EEOC would find reasonable cause to believe that the blanket exclusion was not job-related and consistent with business necessity because the risks associated with all convictions are not pertinent to all of the Company's jobs.
Consider the nature of the crime, the time elapsed, and the nature of the job (the three *Green* factors).

Then, provide an opportunity for an *individualized assessment* for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

The *individualized assessment* would consist of notice to the individual that he has been screened out because of a criminal conviction; an *opportunity* for the individual to demonstrate that the exclusion should not be applied due to his particular circumstances; and *consideration* by the employer as to whether the additional information provided by the individual warrants an exception to the exclusion and shows that the policy as applied is not job related and consistent with business necessity.
EEOC Guidance lists possible factors to consider as part of an individual assessment, including:

- Circumstances surrounding the offense or conduct
- Number of offenses
- Age at the time of the conviction or release from prison
- Did the applicant perform the same type of work post-conviction without incidents of criminal conduct?
- The length and consistency of employment history before and after the offense or conduct
- Rehabilitation efforts, e.g., education/training
- Employment or character references, and other information regarding fitness for the particular position
Title VII and Background Checks

• **Arrests:**
  • An arrest should not be grounds for adverse action.
  • The facts underlying the arrest can be the basis for an adverse action.

• **Convictions:**
  • “Any convictions = no job” is no longer acceptable.
  • Inquire about criminal history when *conditional* offer is made, and *not* on job application.

• **Engage in a case-by-case analysis:**
  • Nature and gravity of offense or conduct;
  • Time that has passed since the offense or conduct occurred /sentence was completed;
  • Nature of the job held or sought.
  • Provide applicant/employee an opportunity to explain circumstances.
  • In practice, the individualized assessment dialogue can be initiated as part of the FCRA pre-adverse action notice.
Update job descriptions so it is apparent why criminal background screening is job-related and consistent with business necessity.

Examples:
- Handles money or account information
- Serves alcoholic beverages
- Has access to sensitive financial information
- Has access to customer’s valuables/homes
- Works in close proximity to small children or to elderly
- Security position
- Inventory control position
- Operation of motor vehicle
- Has access to medical supplies and pharmaceuticals
Best Practices

• Applicant fills out initial application for employment.
  – The initial application does not ask if the applicant has been convicted of a crime.
  – Formerly, the initial application asked whether applicant had ever been convicted of a crime that had not been expunged.
• Now, in those jurisdictions where allowed, we only ask about criminal convictions after the applicant successfully completes a first interview with the hiring manager(s).
• After a contingent offer is made, HR runs background check via third-party vendor (CRA) (after consent is obtained)
• If a felony conviction appears, HR contacts Legal to assist with individualized assessment
Best Practices

• Legal offers recommendations on how to proceed
• If company intends to rescind offer, applicant is placed into FCRA process.
  – Pre-adverse action notice
  – Individualized assessment
  – Adverse action notice
• HR does not typically share background results with business/hiring managers
• “Ban the Box” refers to the question on an application about past criminal record and a box for “Yes” or “No.”

Currently, there is no statewide "ban the box" law in Maryland that governs private employers.
Pre-Employment Drug & Alcohol Testing
Alcohol Testing –
- Considered a “medical examination” under ADA
- Not allowed pre-offer

Drug Testing –
- Testing for illegal drug is not considered a “medical examination” under ADA
- A drug test for illegal drugs and legal drugs is considered a “medical examination”
  - A pre-offer drug test can only include a test for the 5 illegal drug panels.
  - A pre-offer drug test cannot include testing for legal drug panels (i.e., the 9 or 10 panel tests).
  - Drug testing for legal drugs can only be administered after a conditional job offer has been extended.
• An employer who requires any person to be tested for job-related reasons for the use or abuse of any controlled dangerous substance or alcohol shall:
  – Have the specimen tested by a certified laboratory
  – At the time of testing, at the person’s request, inform the person of the name and address of the laboratory that will test the specimen.
An employer may use a **preliminary screening procedure** to test a job applicant for the use or abuse of any controlled dangerous substance.

“**Preliminary screening procedure**” means a controlled dangerous substance test that uses a single-use test device that:
- Is easily portable and can be administered at a work site or other appropriate collection site;
- Meets the requirements of the FDA for commercial distribution; and
- Meets generally accepted cutoff levels such as those in the federal Substance Abuse and Mental Health Services Administration Guidelines for drug–free workplace testing programs.

An employer using preliminary screening procedures shall establish a **program to train** individuals to collect specimens and perform controlled dangerous substance tests in the workplace.

If the result of a preliminary screening procedure is **positive**, the employer shall submit the specimen for testing by a laboratory.

Testing shall be done at the **employer’s cost**.
An employer that uses a preliminary screening procedure to test specimens for the use or abuse of a controlled dangerous substance shall:

- Use a single-use test device
- Collect, handle, store, and ship each specimen in a manner that:
  - Maintains the specimen donor’s identity and confidentiality and the physical integrity of the specimen; and
  - Precludes contamination of the specimen; and
- Maintain a written record of the chain of custody of each specimen from the time that the specimen is collected until the time that the specimen is no longer needed for retesting.
Permitted specimens for pre-employment testing:

- Blood
- Urine
- Saliva
- Hair

- Breath alcohol testing is **not** permitted!
Where an applicant has tested positive, he/she may request independent testing of the same specimen for verification of the test results by a different certified laboratory.

The applicant may be required to pay the cost of an independent test.
• Where an applicant tests positive for the use of any controlled dangerous substance or alcohol, the employer shall, after confirmation of the test result, provide the applicant with:
  – A copy of the laboratory test indicating the test results;
  – A copy of the employer’s written policy on the use or abuse of controlled dangerous substances or alcohol;
  – A statement that the applicant may request independent testing of the same sample for verification of the test result.

• This information shall be delivered:
  – Either in person or by certified mail; and
  – Within 30 days from the date the test was performed.
Pre-Employment Drug & Alcohol Testing
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