

***Third Thursday* –Crowell & Moring’s Labor & Employment Update**

October 23, 2014

The webinar will begin shortly. Please stand by.

Today's Presenters



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Conducting Background Checks: New Compliance Challenges and Litigation Risks

Today's Discussion

- Background checks – FCRA compliance
- EEOC initiatives
- Ban the Box
- Private party class action
- Questions and Comments

Background Check Basics

- Fair Credit Reporting Act
 - Covers any collection of “consumer reports”
 - Mandates specific steps employers must follow when conducting background checks
 - Limits the time that adverse information may be reported by consumer reporting agencies
 - Failure to comply can result in civil liability or FTC penalties
- State and local laws
 - May require background checks for certain industries
 - Additional procedural requirements beyond the FCRA

FRCA Limits on Reported Information

15 U.S.C. § 1681c, with some exceptions, prohibits reporting of:

“(1) Cases under title 11 or under the **Bankruptcy** Act that, from the date of entry of the order for relief or the date of adjudication, as the case may be, antedate the report by more than **10 years**.

(2) Civil suits, **civil judgments**, and **records of arrest** that, from date of entry, antedate the report by more than **seven years** or until the governing statute of limitations has expired, whichever is the longer period.

[. . .]

(5) **Any other adverse item** of information, other than **records of convictions of crimes** which antedates the report by more than **seven years. . . .”**

FCRA Compliance

- Before conducting background check
 - Disclosure, “Summary of Rights,” and employee’s written authorization
- Before taking adverse employment action
 - Letter, copy of background check report, “Summary of Rights”
- When taking adverse employment action
 - Notification, another copy of the report, “Summary of Rights”
- After process is complete
 - Keep copies of written authorization
 - Destroy all “consumer information”

Background Check Pitfalls

- Agency vs. independent research
- “Investigative Consumer Reports”
- Credit reports
- Reports containing information that may/should not be considered for employment purposes

EEOC Enforcement Guidance

- EEOC updated Guidance on criminal background checks in 2012
- Guidance distinguishes between disparate treatment and disparate impact discrimination
- Employers may be liable if a facially neutral policy disproportionately impacts a protected group -- unless policy is “**job related**” and consistent with “**business necessity**”

EEOC Enforcement Guidance

According to the EEOC:

- Disparate impact is not presumed but national data on arrest and conviction rates on for minorities supports a finding of disparate impact
- Evidence of a racially balanced workforce is not enough to disprove disparate impact

EEOC Enforcement Guidance

- Establishing “Job Relatedness” and “Business Necessity”
 - “Validate” Background Check Procedure or
 - Conduct “Targeted Screens” using the three *Green* Factors and
 - Conduct “Individualized Assessments” in most cases

EEOC Litigation Tactics

- Aggressive, but unsuccessful
- *EEOC v. Freeman* (D. Md., Decided 2013)
 - Case dismissed in favor of employer
 - Sued employer for use of background check policy similar to the EEOC’s own policy
 - Expert report was plagued with errors and erroneous information.
 - EEOC’s pursuit of baseless background check cases presents employers with a “Hobson’s choice”

EEOC Litigation Tactics

- *EEOC v. Kaplan* (2013)
 - Court excluded expert witness's statistical evidence as unreliable
 - Without expert testimony, EEOC could not establish a *prima facie* case of disparate impact. Therefore, case dismissed.
 - 6th Circuit Affirmed
 - Opinion included a blistering opening paragraph criticizing the EEOC

Pending EEOC Cases

- EEOC v. BMW (D.S.C.)
- EEOC v. Dollar General (N.D. Ill.)
- Both cases filed in June 2013
- EEOC alleges background check policies had a disproportionate impact on African-American job applicants.
- Both cases are in discovery.

Other Opposition to the EEOC

- July 2013 Letter signed by nine Attorneys General opposing EEOC's position on background checks
- June 2014 Testimony before the House Subcommittee on Workforce Protections arguing that 2012 Guidance should be withdrawn

What This Means For Employers

- Still awaiting Court guidance
- EEOC will continue to pursue employers based on its 2012 Enforcement Guidance
- Employers must weigh the risks of using v. not using background checks
- Employers should consider a privileged review of background check policies

A Peek Into Ban-the-Box Requirements

- Ban the Box in general
- Survey of various state and local ban-the-box laws
- Focus on the San Francisco Fair Chance Ordinance and other examples
- A complication: employers may be mandated to examine conviction records
- Impact on recruitment, employee selection and beyond
- Best practices

Ban-the-Box Mandates: General Principles

- What is Ban the Box?
- Evidence cited in support
- Coverage of the various laws vary greatly
- Great variations in types of requirements and prohibitions, including the following:
 - Stated exclusions based on criminal record prohibited
 - Timing of questioning/consideration restricted
 - Individualized assessment
 - Provision of the criminal background report
 - Penalties

San Francisco Fair Chance Ordinance

- Stated Policy
- Coverage
- Absolute prohibition on certain inquiries
- Delay in required disclosure by applicants
- Provision of Notice to Job Applicants and Employees
- Individualized assessment
- Notice before adverse action
- Mandatory reconsideration if employer receives certain information
- Notification of any final adverse action

Employers May Be Required to Inquire Into Conviction Records

- Ban-the-box requirements must co-exist with applicable federal, state or local law compelling conviction history inquiries:
 - U.S.D.O.T. drivers application for employment
 - Certain banking and financial industry professionals
 - Regulated positions under state law
- Preemption
 - Expressly recognized in certain ban-the-box laws
 - Preemption under well-recognized federal law

Impact of Ban-the Box Restrictions on Recruitment, Employee Selection and Beyond

- Employment advertisements
- Position descriptions/job requirements
- Employment applications: on-line and otherwise
- Interview/selection procedures
- Conditional offers of employment
- Training
- Postings
- Documentation
- Ban-the-box requirements vs. conviction-focused governmental requirements
- Potential Litigation

Thinking Outside the Box - Best Practices

- Identify applicable ban-the-box requirements.
- Identify government contracting activity implicating mandates.
- Multi-state employers: weigh the pros and cons of one company-wide system, complying with all applicable jurisdictions, or multiple systems, doing only the necessary.
- Review/revise recruitment and selection procedures.
- Develop guidelines, and conduct training, in the applicable principles.
- Post-conditional offer interplay between criminal records and medical inquiries/examinations.
- Support your approach to ban-the-box compliance.

FCRA Class Actions

- Next Generation Litigation: FCRA class actions alleging invalid authorizations
- Several large employers have been targeted
- On-line recruiting processes
- Commonly used forms

FCRA Class Actions

- Statutory Provisions (Section 1681(b)(b)(2))
 - “Clear and conspicuous written disclosure”
 - Written authorization in a document that “consists solely of the disclosure”
 - Additional disclosures in the event of an “adverse action”
 - “willful misconduct” standard

FCRA Class Actions

- The stand-alone disclosure
 - Release and waivers
 - Indemnification
- Including other terms in the disclosure
 - At will employment
 - Consent to drug testing
 - Consent to transfer of personal information
- “Downstream Violations”

FCRA Class Actions

- Recent complaints:
 - Gezahegne v. Whole Foods Markets California
 - Reardon v. Closetmaid Corporation
 - Plaster v. UBS Financial Services
- Singleton v. Domino's Pizza, LLC
 - \$2.5M settlement
 - 6700 class members
 - Successful applicants, too

FCRA Class Actions

- Sample Disclosure:
 - I authorize all corporations, credit agencies, financial institutions, educational institutions, courts, law enforcement agencies, former employers, business associates and/or any other person and/or entity to release information that they may have about me to any of the companies referenced above, and I release the companies and persons disclosing this information from any liability and responsibility in doing so.

FCRA Class Actions

- Litigation Issues
 - Scope of class
 - Statute of limitations
 - Advice of counsel or other ways to demonstrate a “not objectively unreasonable” interpretation of statutory provisions
 - remedies
 - State law analogues to FCRA

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