



# Background Checks in 2014 and Beyond: FCRA, “Ban the Box,” and Other Trends

## Presented by

- Fred Rivera
- Amy Kunkel-Patterson

# Agenda

- Fair Credit Reporting Act
- “Ban the Box” Movement (Criminal Checks)
- EEOC Enforcement
- Best Practices



# Use of Credit History as a Screen

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- Proposed federal legislation to prohibit the use of credit checks in employment: “Equal Employment for All Act of 2013” (S. 1837, Sen. Warren/H.R. 645)
- Many states and localities restrict the use of credit history in employment
- EEOC’s position:
  - “Inquiry into an applicant's current or past assets, liabilities, or credit rating, ... generally should be avoided because they tend to impact more adversely on minorities and females. Exceptions exist if the employer can show that such information is essential to the particular job in question.”

# Fair Credit Reporting Act Overview

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- 15 U.S.C. § 1681
- Employee background checks performed by “credit reporting agency”
- Consumer reports and investigative consumer reports
- Strict notice and certification requirements
- Harsh penalties

# Fair Credit Reporting Act - Overview

- Consumer Reporting Agency (15 U.S.C. § 1681a(f))
  - Third-party
  - For profit
  - Regularly engages in assembling or evaluating consumer credit information for third-parties

  
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# Fair Credit Reporting Act-Overview

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- Consumer reports
  - Any communication by a consumer reporting agency
  - About an a consumer’s “credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living”
  - Used for employment purposes

# Fair Credit Reporting Act - Notice and Certification Requirement

- Employer duties:
  - “Clear and conspicuous” written disclosure
  - Written authorization from employee/applicant
  - Employer certification to CRA
    - Provided required disclosures
    - Obtained written consent
    - Will not use information in violation of any EEO law
    - Will comply with “adverse action” requirements

# Fair Credit Reporting Act – Adverse Action Notice Requirements

- Before taking adverse action based on report, employer must provide:
  - copy of report
  - summary of rights from consumer reporting agency
- Employer must allow employee/applicant time to correct or clarify report – but how much time?



# Fair Credit Reporting Act-Adverse Action Notice Requirements

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- After taking adverse action, employer must provide:
  - Oral, written, or electronic notice of adverse action
  - Identify CRA
  - Statement that CRA did not make decision
  - Notice of right to obtain free of report

# Fair Credit Reporting Act – Investigative Consumer Reports

- Report on consumer's character, general reputation, personal characteristics, or mode of living through personal interviews
- Enhanced written disclosures:
  - Pre-investigation notice
  - Employee/applicant may request additional disclosure about nature/scope



## Remedies for Violating FCRA Provisions

- Right of action for negligent or willful non-compliance
- “Willfulness” = Knowing or intentional violations; or violations in reckless disregard of the law
- Actual damages and attorney’s fees and costs
- If “willful” statutory damages up to \$1000 and punitive damages available
- Class action fodder



# State Consumer Reporting Laws - Washington

- Additions to FCRA include
  - Prohibition regarding individual's credit; exceptions
  - Notice of consumer rights before adverse action
- National, one-size-fits-all approach isn't possible
- Disclosure/authorization forms must include additional requirements under state law

## Recent FCRA Class Actions – LexisNexis (3/13 E.D.Pa.)

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- LexisNexis adjudicated candidates for new position or promotion
- “Noncompetitive” adjudication was adverse action
- Involved ESTEEM, a “Retail Theft Contributory Database”
- Alleged LexisNexis violated notice requirements by conducting adjudication without giving notice of contents of ESTEEM report

# Recent FCRA Class Actions—Swift Transportation & HireRight (8/13 E.D.Va.)

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- HireRight conducted pre-employment background checks for employer
- Failed to obtain applicant authorization
- Failed to advise of FCRA rights
- Failed to provide pre-adverse action notices
- Failed to provide post-adverse action notices within three days
- Class of 10,000+

\* Plaintiffs represented by Consumer Litigation Associates, P.C.

## Recent FCRA Class Actions – The Walt Disney Company (11/13, L.A. County)

- Sterling Testing Systems conducted background checks
- Disney allegedly failed to provide pre- and post-adverse action notices itself or to contract with Sterling to do so
- Based on incorrect information provided by Sterling, WD denied employment based on charges that were dismissed or not prosecuted in violation of state law
- Class of 1,000+

# “Ban the Box” Movement

*Eliminating “Have you ever been convicted of a crime...”*

**ABCD Company** **Applicant Information** Page 1

Applicant Name \_\_\_\_\_  
 Home Phone \_\_\_\_\_ Cell Phone \_\_\_\_\_  
 Email Address \_\_\_\_\_ SSN: \_\_\_\_\_  
 Current Address: Number and street \_\_\_\_\_  
 City \_\_\_\_\_ State & Zip \_\_\_\_\_

How w  
 Positio  
 If hired  
 Can yo  
**Person**  
 Have y  
 If yes,  
 If hired

**Have you ever been convicted of a criminal offense (felony or misdemeanor)?**  Y  N  
**If yes, please state the nature of the crime(s), when and where convicted and disposition of the case.** \_\_\_\_\_

Are you over the age of 18? If und \_\_\_\_\_  Y or  N  
 If hired, would you be able to pre \_\_\_\_\_ citizenship or proof of your  
 legal right to work in the United S \_\_\_\_\_  
 If hired, are you willing to submit \_\_\_\_\_ a controlled substance test?  Y or  N  
 Have you ever been convicted \_\_\_\_\_ a criminal offense (felony or misdemeanor)?  Y  N  
 If yes, please state the nature of the crime(s), when and where convicted and  
 disposition of the case. \_\_\_\_\_

(Note: No applicant will be denied employment solely on the grounds of conviction of a  
 criminal offense.)

**Education, Training and Experience**

**High School:** Name: \_\_\_\_\_ Years completed: \_\_\_\_\_  
 Address: \_\_\_\_\_ City, state, zip: \_\_\_\_\_  
 Did you graduate?  Y or  N Degree / diploma earned: \_\_\_\_\_

**College / University:**  
 School name: \_\_\_\_\_ Years completed: \_\_\_\_\_  
 Address: \_\_\_\_\_ City, state, zip: \_\_\_\_\_  
 Did you graduate?  Y or  N Degree / diploma earned: \_\_\_\_\_

**Vocational School:** Name: \_\_\_\_\_ Years completed: \_\_\_\_\_  
 Address: \_\_\_\_\_ City, state, zip: \_\_\_\_\_  
 Did you graduate?  Y or  N Degree / diploma earned: \_\_\_\_\_

**Additional Information**  
 Do you have any other experience, training, qualifications, or skills which you feel  
 should be brought to our attention, in the case that they make you especially suited for  
 working with us?  Y or  N  
 If yes, please explain \_\_\_\_\_



# “Ban the Box” Movement

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- Why ban the box?
  - High incarceration rates
  - Racial disparities in incarceration rates have disproportionate impact on minority communities
  - Data suggests inability to obtain employment increases recidivism

## “Ban the Box” Movement

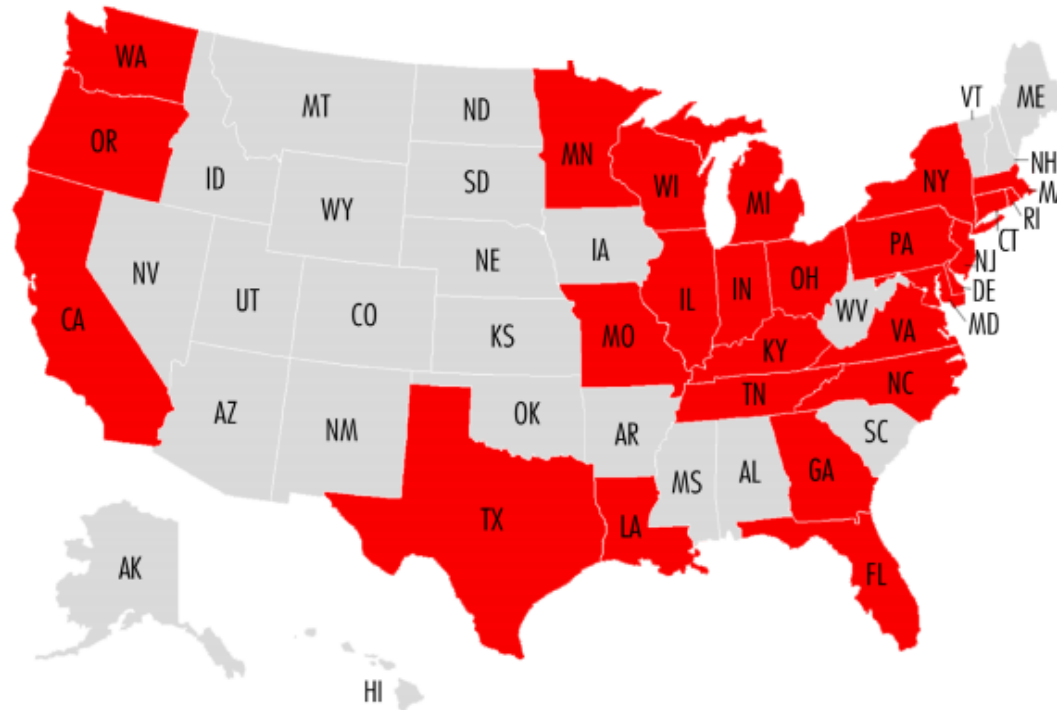
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- There is no FEDERAL law prohibiting employers from asking about criminal history on job applications
- Active state/local movement
- Cities have passed “ban the box” ordinances; many limited to public employment
- A few cities have “banned the box” for all employers, public and private

# “Ban the Box” Movement

*A grassroots campaign and trend*

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■ STATES WHERE CITIES OR COUNTIES HAVE BANNED THE BOX

# “Ban the Box” Movement- City of Seattle Job Assistance Ordinance

- Background checks and inquiries about applicant’s criminal history may only be made after
  - (1) completing an initial screening to eliminate unqualified applicants, or
  - (2) making a conditional offer of employment
- Employer must inform applicant of the information upon which rejection is based and provide an opportunity to explain or correct that information

# “Ban the Box” Movement- City of Seattle Job Assistance Ordinance

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- Must hold the position open for at least two business days to allow the applicant to explain or correct the criminal history information
- Exceptions for certain industries and positions

# “Ban the Box” Movement - City of Seattle Job Assistance Ordinance

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- 1st violation – notice of infraction
- 2nd violation – monetary penalty up to \$750, payable to the charging party
- 3rd violation – monetary penalty of up to \$1,000, payable to the charging party, plus Agency's attorney's fees
- No remedies, damages, or affirmative relief

# EEOC Enforcement

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- EEOC's "Best Practices"
  - Match specific offenses demonstrating unfitness for particular jobs
  - Identify criminal offenses on all available evidence
  - Include individualized assessments
  - Record the justification for the policy and procedures
- Recent litigation regarding disparate impact theory

# EEOC Enforcement Litigation

*EEOC v. Dolgencorp, LLC* (N.D. Ill. 2013)

## “Disparate Impact” Theory Under Title VII:

- A facially neutral employment practice (criminal history screens)
  - Has unjustified adverse impact on a protected class (race-Black)
  - Does not require discriminatory intent, only application or effect
- Plaintiff must only prove adverse impact
- Defendant has burden to show justification (business necessity)
- EEOC’s theory: Black applicants have higher incarceration rates; therefore, screening for criminal history adversely impacts them
- EEOC’s approach: Employers screening criminal history must justify their exclusionary decisions



# EEOC Enforcement Litigation

## What Constitutes “Adverse Impact?”

- “A substantially different rate of selection in hiring, promotion or other employment decision which works to the disadvantage of members of a protected class.”
  - The “4/5 Rule:” (Hint: It is not really a “rule” at all)
    - Definition: A selection rate for any protected group which is less than 4/5 (80%) of the rate for the group with the highest rate
    - Simple, non-statistical estimation subject to error, favored by federal agencies (such as EEOC) for use as evidence of disparate impact
    - Passing the 4/5 Rule does not mean there is no disparate impact
    - Failing the 4/5 Rule does not mean there is disparate impact—but the burden of proof otherwise shifts to the employer
  - Statistical (standard deviation) tests may also be used, but require large sample sizes to be meaningful

# Significant EEOC Losses

## *Concerning Disparate Impact Litigation*

- *EEOC v. Freeman* (D. Md. 2013)
  - Alleged: Freeman’s policy of conducting criminal/credit background checks, as a whole, produces a disparate impact on African Americans, Hispanics, and men
  - Trial Court: EEOC failed to supply the court with reliable expert witness testimony, resulting in summary judgment on disparate impact claims
    - EEOC also “failed to identify the specific policy or policies causing the alleged disparate impact”
    - “Statistical analysis must isolate and identify the discrete element in the hiring process that produces the discriminatory outcome.”
  - “The story of the present action has been that of a theory in search of facts to support it.” - Roger Titus, U.S. District Judge (D. Md.)
  - EEOC is appealing to the Fourth Circuit
- So far, EEOC has zero wins in its background check litigation
  - Expect that it will try to learn from these failures and continue to push

## States Pan EEOC Suits

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- 9 state Attorney Generals signed letter to the EEOC:
  - AGs “troubled” by the EEOC’s apparent attempt to affect the “illegitimate expansion of Title VII protection to former criminals”
  - “individualized consideration” of criminal history in hiring “would create far more opportunity for racial discrimination than the nondiscretionary screening” processes at issue

# Practical Advice

## *For Navigating the Background Check Minefield*

- Eliminate the “Box” on all paper and electronic applications
- Carefully vet reputation of any CRA before retaining
- Ensure contract with CRA includes appropriate indemnification provisions
- Conduct independent legal review of forms, even if provided by CRA
- Consider using CRA to issue notices but develop coordinating protocol
- Establish central point of contact for background check responsibilities and coordinate with HR if separate from HR
- Do not conduct background checks until a “conditional” offer of employment is made
- Conduct a Background Check Audit
  - Enlist legal counsel to cloak audit, if possible, under privilege
  - Review current practices for use of criminal records
  - Develop sound and consistent procedures for hiring exclusions and terminations based on criminal records