Background Checks and the Fair Credit Reporting Act: Key Issues for North America Employers

April 8, 2015

What is the feeling of doing backgrounds for existing employees? Should they be done annually? Do we need to get authorization each time they are run?

Henry Perlowski (henry.perlowski@agg.com)

A: Absent compelling specific reasons to do checks more regularly, the FCRA would apply with respect to any check for employment purposes. Absent specific compelling reasons, I would not generally recommend doing checks annually because of costs/attendant risks. You may have specific business needs, e.g., a new account, specific employee issues, to do so. The FCRA would apply to any subsequent check.

Montserrat Miller (montserrat.miller@agg.com)

A: Conducting background checks for existing employees is a case by case analysis. A well written disclosure and authorization form can include evergreen language so that an employer could use the initial consent for future background screening purposes.

What is "mode of living"?

Montserrat Miller (montserrat.miller@agg.com)

A: It is one of the seven factors under the Fair Credit Reporting Act of the type of information that could make up a consumer report.
What about verifying driving records for CDL drivers? When checking a national trucking company, verifications are required to submit through an online company.

Jeff Siegel ([jsiegel@morganbrown.com](mailto:jsiegel@morganbrown.com))
A: Some professions mandate what information is part of the background check. The FCRA mandates how you obtain that information.

Montserrat Miller ([montserrat.miller@agg.com](mailto:montserrat.miller@agg.com))
A: The trucking industry has some unique FCRA requirements. For instance in section 604, for trucking purposes the disclosure and authorization can be done by telephone. Also, I'm not sure if you are referring to PSP or driving records under the DPPA.

Is the stand alone document separate from the authorization form the candidate fills out?

Jeff Siegel ([jsiegel@morganbrown.com](mailto:jsiegel@morganbrown.com))
A: Historically, the authorization and disclosure could be on the same sheet; however, there is litigation over this and some courts find that the authorization must be on one page and the disclosure must be on another.

Henry Perlowski ([henry.perlowski@agg.com](mailto:henry.perlowski@agg.com))
A: Following up on Jeff's response, the disclosure form is ripe for litigation fodder. A "foot fault" has resulted in many cases being filed.

Does "evergreen" mean that it is a one-time consent to run the background more often?

Jeff Siegel ([jsiegel@morganbrown.com](mailto:jsiegel@morganbrown.com))
A: Yes. It's a one-time consent to run it in the future. As discussed, this can't always be used.

Do these same requirements apply in Canada as well?

Henry Perlowski ([henry.perlowski@agg.com](mailto:henry.perlowski@agg.com))
A: Erin Kuzz will be speaking about Canada later in the presentation.
We are looking to engage a 3rd party to conduct background checks for us. They tell us as part of their marketing materials and presentations that they will handle all upfront consents (including state specific requirements) but when the contract comes. They put all liability on the customer (our company) for compliance with consent requirements. Is this normal?

Henry Perlowski (henry.perlowski@agg.com)

A: Understood -- the key is ensuring that their "forms" do not have latent litigation risk. We recommend vetting both the forms and the contract with the screening company (e.g., who indemnifies who). Regarding liability, I would want to negotiate up front.

Would you please provide the name of the 2 organizations Montserrat mentioned earlier? They are not on a slide. Thanks.

Henry Perlowski (henry.perlowski@agg.com)

A: NAPBS (National Association of Professional Background Screeners) and CDIA.

The reality is the screener (big name ones) refuse to given an indemnity and instead make the customer give one.

Henry Perlowski (henry.perlowski@agg.com)

A: Unfortunately, that is all about leverage/size of account, etc.

Speer v. Whole Food Market Group, Inc., March 30, 2015 decision is about simultaneous presentation of waiver and disclosure is not compliant with FCRA. What does that mean for practical purposes? Give disclosure at interview before conditional offer?

Montserrat Miller (montserrat.miller@agg.com)

A: Plaintiff's bar will allege that the disclosure and authorization is at issue because it was embedded in the employment application, included extraneous language like liability release language. So they will always allege it is not compliant. Each case is fact specific. A recent Whole Foods case settled, which often happens but that doesn't always help us because all we have are allegations.
From a ban the box perspective, if you are required by law to conduct a background check, and the recruiter/decision maker(s) do not have the ability to see the criminal history information, can you ask it during the application process?

Henry Perlowski (henry.perlowski@agg.com)
A: Mostly, the ban the box statutes focus on the language on the applications. I would not want to generally rely on "the decision-maker did not see it" (the answer).

Montserrat Miller (montserrat.miller@agg.com)
A: Agree with Henry and ban the box measures will also include exemptions in situations where there is a federal/state mandate to conduct a background check or certain disqualifying offenses.

As I understand, if our company is NOT using a background check company, then we are not held to these steps and procedures? What are the legal risks if we do not do background checks at all during onboarding?

Henry Perlowski (henry.perlowski@agg.com)
A: Background checks are optional except for employers in certain industries. In a negligent hiring case, the lack of any checks could conceivably come up, but would not be dispositive. Checks mostly are used to avoid hiring the wrong person.

Mary Ellen Simonson (msimonson@lrrlaw.com)
A: One of the risks is a negligent hiring claim. The most obvious example, is if an individual you hire for a job that has duties involving children would have disclosed a criminal background on child molestation, that can open the company to above claim.

What are the guidelines for what results can be used to take adverse action when hiring?

Henry Perlowski (henry.perlowski@agg.com)
A: The information that can be used as the basis for adverse actions typically is prescribed by state law, the current EEOC guidance and applicable case under under various discrimination statutes. I would start by looking at the EEOC guidance.
Is there any truth to the new info spreading that you need to remove the "hold harmless" info from your Releases/Consent to obtain a check?

Montserrat Miller (montserrat.miller@agg.com)
A: If you are talking about release of liability language in your disclosure and authorization which the job applicant would review and sign to provide their consent -- yes. Both the FTC and the courts have said you cannot have release of liability language.

Our corporate office is in one state but we have locations nationwide. Am I hearing correctly that depending on the state, we need to be following laws based on where candidates apply?

Henry Perlowski (henry.perlowski@agg.com)
A: Yes.

Montserrat Miller (montserrat.miller@agg.com)
A: Agree with Henry. You can conduct background checks nationally and it'll fall under the FCRA if you use a background screener but you also need to be aware of state mandates. If you use a background screener, ask them how they do this for you.

What was the Oregon statute number please?

Henry Perlowski (henry.perlowski@agg.com)
A: 659A.320.

I understand Seattle has a ban the box ordinance and it is spreading nationally. We are located in a nearby city called Bellevue. Does it affect us?

Henry Perlowski (henry.perlowski@agg.com)
A: We would need to look at that law specifically. Probably not is my guess without looking at the law (as the City of Seattle would not have jurisdiction outside of the city limits).

Montserrat Miller (montserrat.miller@agg.com)
A: Agree with Henry and to my knowledge the two cities in the beautiful state of Washington are Seattle and Spokane. And yes, ban the box is spreading.
When a background credit check is ran, does it affect the applicant/employee's credit score?

Henry Perlowksi (henry.perlowski@agg.com)
    A: It logically should not.

Montserrat Miller (montserrat.miller@agg.com)
    A: Agree with Henry. It does not. When you request a background check for employment screening purposes it does not/should not include a credit score. Just a credit REPORT.

After you send a pre-adverse action notice based on a criminal background check, and the applicant sends a letter back disputing the information on the background check, what is the employer’s obligation?

Jeff Siegel (jsiegel@morganbrown.com)
    A: It will depend on what the letter/explanation says. The individual could claim that it's not his/her record; or that the circumstances of the conviction are explainable. My approach would be to read the explanation and consider it.

We can consider the good conduct document as a trustworthy one?

Jeff Siegel (jsiegel@morganbrown.com)
    A: In NY, yes.

Do you have a current list of ban-the-box jurisdictions (that apply to private employers), including states and cities? Cites would also be great. Tthanks.

Montserrat Miller (montserrat.miller@agg.com)
    A: The National Employment Law Project (NELP) has a good chart. It's called Ban the Box, April 2015. The state list for private employers -- HI, IL, MA, MN, NJ, RI

Anything strict on background checks in the state of Oklahoma that you may know of?

Jeff Siegel (jsiegel@morganbrown.com)
    A: Oklahoma has a mini-FRCA which requires you to give applicants an option of getting the consumer report.
Do emails count as "written consent"?

Montserrat Miller (montserrat.miller@agg.com)
A: The FCRA requires you provide the disclosure be in writing. And the individual must authorize such in writing. During the onboarding process you could send the notice electronically and receive it electronically.

Montserrat Miller (montserrat.miller@agg.com)
A: To be clear though, you should not just have an email which says, "go ahead and run a background check on me".

Should we apply the individual state laws based on where the applicant lives or where the applicants employment will be?

Henry Perlowski (henry.perlowski@agg.com)
A: I would generally advise following the more "employee" friendly at issue to best insulate risk.

Jeff Siegel (jsiegel@morganbrown.com)
A: Agree with Henry. Belt and suspenders. Follow both jurisdictions.

Our corporate office is in NY, someone may be hired by one of our offices in NC but will be doing work remotely at home or client site in OH, which state laws apply?

Henry Perlowski (henry.perlowski@agg.com)
A: Most likely the remote location.

Jeff Siegel (jsiegel@morganbrown.com)
A: The only caveat I’d add is that the NYSDHR and NYC Human Rights Commission are aggressively enforcing their own laws. I would be mindful that an aggressive individual could attempt to claim that NY law applies because that is where the company is located.

Remote location if home or remote location at client site in another state?

Henry Perlowski (henry.perlowski@agg.com)
A: If the person is working from home, that location very likely applies. That probably is the answer regardless.
In most cases, does the Background check 3rd party get consent? Or is the responsibility on the employer?

Montserrat Miller (montserrat.miller@agg.com)
A: Yes, they should. Speak to your background screener about this. Consent is a key requirement. If they are not familiar with the FCRA and state laws, consider a new background screening company.

Jeff Siegel (jsiegel@morganbrown.com)
A: The release of liability language on an application? Recall that under the FCRA, the release should not be on the FCRA disclosure or authorization.

Is there somewhere I can find the law regarding the release of liability language information to provide to my employer?

Henry Perlowski (henry.perlowski@agg.com)
A: There are a number of cases where release language has been used to negate otherwise valid consents.

Montserrat Miller (montserrat.miller@agg.com)
A: One of the more relevant cases is Reardon v. ClosetMaid Corp. from 2013. Also Singleton v. Domino’s Pizza from 2012. Also, there are FTC advisory opinion letters.

Can you provide a resource for a novice HR professional to become familiar with OK state law related to background checks?

Montserrat Miller (montserrat.miller@agg.com)
A: If you work with a third party background screener please talk to them about the Oklahoma law. One thing is that on the disclosure and authorization form there should be a box which allows an applicant to request a copy of the report provided to the e/er.

Can you recommend a background check company? Basically the rockstar of the industry?

Montserrat Miller (montserrat.miller@agg.com)
A: We represent background screening companies as well as employers who use reports so this is a delicate question. If you email me offline I’m happy to give you recommendations and you can choose based on your needs.
An applicant checks the No box on whether they have been convicted, but the subsequent background check shows they have been convicted. Is it appropriate to deny them employment based on the fact they lied on the application?

Jeff Siegel (jsiegel@morganbrown.com)
A: In general, yes; however, the exception is whether you could ask for the conviction in the first place. Some laws protect employees from having to answer a question that the employer was not permitted to ask. And adding onto that, yes, lying on an application is a separate reason for not hiring.

Henry Perlowski (henry.perlowski@agg.com)
A: I agree with Jeff’s response. Also, I would want to have application language that includes good language that false information is a disqualifying event.

We are in NYS. Clients (banking collections) are located throughout US require to not hire for any felonies, 2 or more misdemeanors, violent crimes, weapons, and others. Previously we did only fiduciary crimes although they no longer allow this. Are we ok?

Henry Perlowski (henry.perlowski@agg.com)
A: I would want to look for any specific exemptions that may apply to your specific business. The problem is that the without any exemption, the law is the law. You may want to get that question reviewed so that you can advise on negotiations.

Jeff Siegel (jsiegel@morganbrown.com)
A: The NY law has a carve out for statutes that prohibit employment in areas due to convictions. For instance, the FDIC rules. I’m not sure what the basis for the client’s decision that felonies or 2 or more misdemeanors/crimes/weapons came from? Henry said it well, and slightly before me.

When you are hiring people from other states to provide services via web such as an adjunct faculty member that provides online teaching, what states guidelines should you be in compliance with?

Henry Perlowski (henry.perlowski@agg.com)
A: Where the employee resides is the default rule for that employee.
Are there different considerations to be made for Canadian Residents who will be interning in the US?

Erin Kuzz (ekuzz@sherrardkuzz.com)
   A: You should find out what the requirements are both in the jurisdiction where the intern is from and the location where he/she will be interning in Canada; to be safe, he/she should comply with both.

In reference to the box that the applicant has the option to request a copy of the report provided to the e/er... if they do not elect to get a copy, should we send them a copy anyway?

Montserrat Miller (montserrat.miller@agg.com)
   A: The state boxes in the disclosure and authorization form must be checked in order for the requirement to kick in or the applicant will be instructed to contact the background screener. During the pre-adverse action step you must provide a copy.

If you rely on the 3d party background check provider to conduct the criminal check and do not also ask for the candidate to provide information about convictions or pending matters on a post-offer document, do you expose yourself to negligent hiring claim?

Henry Perlowski (henry.perlowski@agg.com)
   A: Negligent hiring claims are very hard to prove. I generally would not worry about them unless you are ignoring obvious information or are seeking obviously risky applicants (e.g., the boss's son with 3 DUIs is hired as a driver). And the third-party check helps again unless obvious information is ignored.