

 COLLABORATE 2024

 First Advantage

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Legal Eagles

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MEET OUR SPEAKERS



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AGENDA



- **Disclosure and Authorization Overview**
- **New York City Nuances**
- **Access to Records**
- **LA County New Restrictions**
- **MA Credit Law**
- **Identity Tools**
- **Q&A**

DISCLOSURES AND AUTHORIZATIONS



- **Employers utilizing consumer reports for employment purposes must:**
- **Disclose in a document**—consisting of only the disclosure—that a consumer report may be obtained
 - Must be stand-alone and separate document
- **Obtain written authorization** from the individual prior to ordering the report
- But the statute then says the disclosure and authorization can be together equals **CONFUSION AND LITIGATION**



Some slow down on Litigation

Seeing “add on” claims in FLSA/ CA wage and hour cases

- Any “extraneous” will likely be challenged
- References to “inspection of files” or “notice and scope” may be problematic
- “Throughout” employment may be extraneous if in the Disclosure
- Authorization does not need to be separate
- State law information should not be included in disclosure
- Some GOOD case law for employers and MSJ rulings

ADVERSE ACTION PROCESS



- **Adverse Action** = any action taken based in whole or in part on the report, that is adverse to the consumer
- **Pre-Adverse Action** = Notice Before Taking Adverse Action
 - Copy of background report
 - Summary of Rights
 - State/local notices (sometimes reason for taking action; initial assessment in CA)
- **Waiting Period**
 - FTC has opined five days
 - State and local requirements may be more
- **Adverse Action-Very specific requirements**



- **Negligent Violations**

- Actual damages (back pay sometimes compensatory)
- Attorney's fees

- **Willful Violations**

- Actual damages **and** attorney's fees -or-
 - Statutory penalties **and** attorney's fees - \$100 to \$1,000 per violation; **and**
 - Punitive damages
- **Statute of limitations** is earlier of 2 years from “knew or should have known” or 5 years from report



- **Cannot mention criminal history** until after conditional offer
 - Offer must be solely conditioned upon criminal history/MVR records
 - Prohibited statements in job postings, applications, interviews, etc.
- **Two-stage background check process** OR separately analyze information
 - Clear non-criminal history components (e.g., education, credit, employment, drug test)
 - Non-criminal history FCRA forms
 - Make a conditional offer that can only be withdrawn due to (a) criminal history, (b) an ADA medical examination, or (c)
 - Order criminal history with criminal-only FCRA forms



- **Pending cases** now subject to individualized assessment that must be documented on the city's Fair Chance Act form
- **Must consider** whether applicant under 25 at the time
- **Applies to applicants** and incumbent employees
- **Commission believes** applies to anyone applying in NYC

NEW YORK CITY- COMPLIANCE OPTIONS



- **Only conduct criminal history**
 - Pros—easy to comply
 - Cons—may have contractual or other regulatory obligations
- **Education/employment, etc. internally without a third - party**
- **Order everything** and have CRA withhold the criminal results until review all other searches have been passed
- **Order all non-criminal and review** and then order criminal
- **Need to consider** what the disclosures say
 - If not getting Criminal; cannot say getting criminal.
 - “Clear and conspicuous” challenges

RECORD LIMITATIONS



- **Courts throughout the country are restricting access to certain information**
- **Most significant: LA county has removed access to ALL DOB at kiosks and online as of February 2024**
 - Previously limited DOB to only month and year
 - Makes it very hard for a CRA to “match” PII
- **Longer times to process information**
- **Employers may want to consider alternative processes or be prepared for delays**

How to Deal With Data restriction issues



- **Possible solutions/work-arounds**

- Don't run searches in these counties?
- Get self-disclosed information from candidate (but see upcoming restrictions in LA county)
- Consider Additional certification if checks are “unperformable” or not completed
- Tell the candidate that there may be additional searches not able to be performed
- Have candidate provide certified “no record” from court

- **Risk of negligent hiring /retention not doing anything**

- **Understand what you are getting and what you are not**

LA County Fair Chance Act



- **Effective September 3, 2024**
 - any employer with 5+ employees regardless of location
 - applies to when the physical location of work is in the county (including remote)
- **Private right of action for noncompliance**
- **Significant changes:**
 - job postings-must state qualified applicants will be considered
 - offer letters must list material job duties for a job where criminal history reasonably believes will have a direct/adverse/negative relationship (other specific reqs for regulated entities) and must list all types of info that will be run in addition to criminal history
 - adjudication of criminal history (must be documented in writing and must allow for additional information from applicant; sent via mail AND email)
 - cannot rescind offer because a background check is delayed or taking too long (with some exceptions—like undue burden and after 10 business days)
- **Applies to unincorporated areas of Los Angeles County**
- **Applies to contractors, free lance workers, employees, applicants, temporary workers**

LA County Fair Chance Act (con't)



- Employers must post notice of ordinance in every workplace/webpages
- **Cannot ask about criminal history until after conditional job offer and after criminal background check**
- **Can only ask 7 years back of information from date of disposition (with exceptions on vulnerable populations)**
 - Cannot ask about infractions
- Employer **must keep job open for at least 5 business days** after detailed pre adverse action with written assessment and if dispute, employer cannot fill position for 10 additional days
- Employers must evaluate additional information from applicant
- Adverse action cannot be taken until after second assessment and notification to submit a complaint for violations of the ordinance and must be sent within 30 days from the individual's initial notice
- Employers must keep records for **4 years**



MA Credit Law

- **If passed will be most restrictive Credit Law in Country**
- **Set to pass Senate and would go into effect January 1, 2025**
- **Prohibits any employer from running a credit check in employment unless:**
 - Required by federal or state law
 - Job requires national security clearance
- **Strict no retaliation provision**
- **Private right of action-Unfair trade practice under MA law**



ID Verification Tools

- **New tools/products to verify identity of candidates**
- **Different than I-9/Everify (and cannot be used for that purpose)**
- **Remote workers/COVID saw increase in “fraudulent applicants”**
 - One person doing an interview and another person showing up
 - Job shares or multiple employment
- **ID verification meant to confirm the person going through the process is the same person**
 - DL/ID and a selfie that checks biometric data for a match/verification
- **Should NOT be used for an employment decision**
 - Tool to determine if someone can use online candidate entry or more streamlined process
 - Think equivalent to global entry type.
 - Doesn't mean the person isn't the person but there may be more of a check the employer wants to do to validate identity.

EMPLOYER BEST PRACTICES



- **Monitor legal developments** – there are frequent changes/ guidance/ interpretation
- **Review all background-check related forms** and notices on a semi-annual or annual basis
- **Have a written policy**
 - Review policies, applications, and procedures for any offending practices



- **Consider asking about criminal history after conditional offer of employment**
 - Do **NOT** ask about sealed, expunged, restricted, juvenile or pardoned criminal records
 - Be careful now—LA County Fair Chance
- **Develop a process to gather information** about and document your individualized assessment
- **Train your employees on the law and best practices**

Questions?



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