



Penny Wise, Pound Foolish: Avoiding Background Screening Risks and Certain Other New Danger Zones

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New Coronavirus Issues

- **New Coronavirus PTO/FMLA Rights (Effective April 1)**
 - Applies to employers of **500 employees or LESS**.
 - Becomes relevant only if employees cannot **telework**.
 - Businesses to receive **tax credits** equal to payments made.
 - **PTO Provision:**
 - Up to **80 hours of paid PTO** at capped amounts
 - **Qualifying Criteria**
 1. Employee subject to “stay at home” order related to COVID-19
 2. Employee advised by health care provider to self-quarantine due to concerns associated with COVID-19
 3. Employee experiencing symptoms of COVID-19 and seeking medical diagnosis
 4. Employee caring for an individual subject to (1) or (2) above
 5. Employee caring for child if school or childcare unavailable due to COVID-19 precautions
 6. Employee experiencing substantially similar conditions specified by HHS

New Coronavirus Issues

- **New Coronavirus PTO/FMLA (Effective April 2)**
 - **Capped PTO Amounts:**
 - For the employee's own coronavirus-related conditions:
 - Regular rate of pay
 - Limited to \$511 per day and \$5,110 in total
 - For care of family members
 - 2/3 of regular rate of pay
 - Limited to \$200 per day and \$2000 total

New Coronavirus Issues

- **New Coronavirus PTO/FMLA (Effective April 2)**
 - **FMLA Provision:**
 - Up to 12 weeks of FMLA if caring for kids home from school due to COVID-19.
 - Likely can be intermittent leave.
 - Unlike usual FMLA, some payments required.
 - Capped at \$200 per day and \$10,000 in total

New Coronavirus Issues

- **Additional Steps Businesses Are Considering/Taking**
 - Allow employees to work remotely
 - Decrease hours for staff
 - Reduce pay for staff
 - Place some employees on unpaid admin leave with optional attempt to continue insurance
 - Convert some employees from salaried to hourly
 - Layoff some or all employees
 - Consider WARN notice possibility if covered
 - Competing priorities
 - Many providing some form of notice but not waiting 60 days

Avoiding Screening Problems

▪ Background Screening Class Actions Continue To Surge

- Increased expertise in plaintiff's bar
- Highly technical requirements
- Key ingredients for class actions (same procedures over and over)
- Some favorable case law for plaintiffs
- Eye-popping settlements
- Generous damage structure under federal and certain state law (e.g., California)

Avoiding Screening Problems

▪ Written Consent Paperwork

- The FCRA requires that applicants/employees receive “stand-alone” Disclosure
- Disclosure Example: ABC employer will obtain a consumer report on you for employment purposes.
- Plaintiffs’ attorneys: Disclosure invalid if includes “extraneous information”
- Class action cases continue to surge, particularly in California/New York.

Avoiding Screening Problems

▪ New 9th Circuit Case Provides Big Insights

– Ok to include in Disclosure:

- Statement that reports will be obtained
- Definition of consumer reports
- Examples of the types of information to be included in report
- Name of background screening company.

– Not OK to include in Disclosure:

- Discussion of individual's right to find out more info about "nature and scope" of investigative consumer report.
- Discussion of individual's right to access screening company's file.

– Double-check that Disclosure is clear and conspicuous

Avoiding Screening Problems

▪ Recent Consent-Related Settlements

- 7-Eleven paid **\$1.9 million** (class action lawsuit that claimed the company violated the FCRA by failing to provide a “standalone” notice of background checks).
- Delta Air Lines paid **\$2.3 million** (class action lawsuit that claimed the airlines failed to provide job applicants with a “standalone” background check disclosure in violation of the FCRA and related CA laws).
- Omnicare paid **\$1.3 million** (class action lawsuit that claimed the company failed to provide standalone disclosures as required by federal and state law.)
- A subsidiary of PepsiCo paid **\$1.2 million** (class action lawsuit that claimed the company violated the FCRA for its failure to make the necessary disclosures prior to obtaining background checks for employment purposes).
- Frito-Lay paid **\$2.4 million** (class action lawsuit that claimed the company violated the FCRA and state law by using improper disclosure forms).

Avoiding Screening Problems

Best Practice Pointers For Consent Forms

- Keep FCRA Disclosure very “short and sweet.”
- Consider removing information that could be deemed “extraneous” from Disclosure. For example:
 - State law notices
 - Discussion of “Investigative Consumer Report” rights
 - Discussion of individual’s right to get file info from CRA
 - Release of liability
 - At-will statements
 - “You better be honest” statements
 - References to federal notice entitled “A Summary of Your Rights...”

Avoiding Screening Problems

▪ Adverse Action Procedures

- **FCRA:** Employers must give specific notices before and after taking adverse action based on a background screening report from a third-party provider
 - 1st Step: Provide specific pre-adverse notice with copy of report and Summary of Rights
 - 2nd Step: Wait reasonable period of time
 - 3rd Step: Provide specific post-adverse action notice

Avoiding Screening Problems

▪ Recent AA-Related Settlements

- Wells Fargo paid **\$12 million** (class action lawsuit alleging company failed to meet pre-adverse action notification requirements prior to taking adverse employment action).
- K-Mart paid **\$3 million** (class action lawsuit alleging the company did not follow adverse action requirements prior to denying employment).
- Amazon paid **\$5 million** (class action lawsuit alleging in part that Amazon did not adequately comply with adverse action requirements).

Avoiding Screening Problems

Best Practice Pointers For AA Letters

- Make sure providing both pre- and post-AA letters to applicants - many only send post!
- Pre-adverse action letter should not say “have rejected”
- Try to avoid verbal comments to applicant before post-AA letter or train on what to say/not say.
- Exercise caution with matrices with “automatic” results.
- Don’t forget state/municipal law requirements!
 - Check applicable laws as to each applicant or develop thoughtful systematic process that accounts for laws



Thanks!

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**No
Compromises.**



**No
Surprises.**



**No
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Technology
You
Need



Compliance
You
Expect



Client Care
You
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No Surprises



Precise Scope



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