



# **Being Smart About Background Checks As Legal Risk Grows**

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# **HOW IS THE LEGAL ENVIRONMENT CHANGING?**






# Increased Regulatory Attention

- The EEOC has become more focused on background screening.
  - Various states have regulated use of credit history information.
  - “Ban the Box” and “Fair Chance Act” laws have surged at state/local level.
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# Background Screening Cases Spiking!

- Background screening cases have sharply increased in recent years.
  - National commentators have described background screening cases as:
    - A new “boom”
    - “On the rise”
    - Giving rise to “Professional Plaintiffs”
  - Particular “Hot Spots”: CA, NY, FL, PA, WI
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# Big Settlements!

- *Postmates* (\$2.5 million settlement for alleged procedural violations during background checks of applicants/employees)
  - *First Transit, Inc.* (\$5.9 million settlement for alleged procedural violations during background checks of applicants/employees)
  - *Vitran Express, Inc.* (\$2.6 million settlement for alleged procedural violations during background checks of applicants/employees)
  - *Pepsi* (\$3.1 million settlement for use of criminal background check results in manner that allegedly disadvantaged minorities)
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# **WHAT CAN EMPLOYERS DO TO LIMIT RISKS?**





# Limiting Background Screening Risks

## Tip #1: Review and Revise Written Consent Paperwork.


- **FCRA:** Applicants/employees must receive “stand-alone” disclosure announcing background check.
  - Plaintiffs’ attorneys: Disclosure invalid if includes “extraneous information.”
  - Ninth Circuit Court decisions likely to spur more cases!
  - **Example Targets**—Whole Foods, Publix, UBS, Domino’s, Barnes & Noble
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# Limiting Background Screening Risks

## Tip #1 (Cont'd)

### Best Practice Pointers For Employers

- Avoid including “Disclosure” in employment application or as part of larger document.
  - Consider removing information that could be deemed “extraneous” from Disclosure. Examples:
    - Release of liability
    - At-will statements or general discussion of application process
    - Discussion of unrelated “rights” under the FCRA
    - State law notices
    - “This is only a sample document”
  - NYC: Consider unique two-stage form set for NYC.
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# Limiting Background Screening Risks

## Tip #2: Double-Check Summary of Rights Notice.

- **FCRA:** Up-to-date Summary of Rights must be provided at specific times in background screening process.
- **Example target:** K-Mart.


### Best Practice Pointers For Employers

- Make sure using correct notice—many are not!
  - New notice required as of September 2018.
  - Double-check providing at correct times.
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# Limiting Background Screening Risks


## Tip #3: Confirm Compliance With FCRA 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.
    - 1<sup>st</sup> Step: Provide specific pre-adverse notice with copy of report and Summary of Rights.
    - 2<sup>nd</sup> Step: Wait reasonable period of time.
    - 3<sup>rd</sup> Step: Provide specific post-adverse action notice.
  - Frequent lawsuits attacking employers in this area!
  - **Example targets:** Amazon, Disney, Swift Transportation, U.S. Xpress.
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# Limiting Background Screening Risks

## Tip #3 (Cont'd)


- **State laws:** Increasingly requiring that employers supply even more information during adverse action process.
    - **NYC:** Full page analysis of various factors required at pre-AA stage.
    - **Los Angeles:** Full page analysis of various factors at pre- and post-AA stage.
    - **Illinois:** Provide rationale for disqualification based on criminal history.
    - **Numerous others** (e.g., California, Seattle, Philadelphia): Identify part of the report causing adverse action at AA stage.
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# Limiting Background Screening Risks

## Tip #3 (Cont'd)

### Best Practice Pointers For Employers

- If relying upon screening company to send out notices, make sure communication to screening company is consistent/accurate.
  - Provide both pre- and post-AA letters to applicants. Many only send post!
  - Pre-adverse action letter should not say “have rejected.”
  - Preferable if internal documents do not say “have rejected” or “disqualified” at pre-adverse action stage.
  - Don’t forget state law requirements—Increasingly challenging!!
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# Limiting Background Screening Risks

## Tip #4: Develop Thoughtful Approach For Analyzing Criminal History Information.

- **EEOC:** Use of criminal history information can have a disparate impact on minorities.
- **EEOC's guidance** suggests that employers should:
  - Make preliminary assessment of relationship between job and crime ("Green Factors").
  - Give individuals a chance to explain why they should not be excluded despite relevance of conviction ("Individualized Assessment").
- Numerous **states and municipalities** also restrict what criminal history information employers can use (e.g., CA, IL, NY, MA, LA, WI, PA, Seattle, SF).
- **California, Illinois, and New York** effectively now require "Individualized Assessments" — Expect more jurisdictions to follow!
- **Example Targets:** Pepsi, BMW, Dollar General

# Limiting Background Screening Risks

## Tip # 4 (Cont'd)

### **Best Practice Pointers For Employers**

- Avoid blanket policy barring the hiring of felons/convicts.
- Unless pending, avoid arrests that did not result in conviction.
- Best to analyze whether criminal history information is job-related and to give greater “weight” to more recent crimes.
- Consider “easy” individualized assessment that does not unduly disrupt hiring process, but recognize jurisdictions that require detailed individualized assessments (e.g., NYC, Los Angeles)
- Take caution with criminal history “matrices” that suggest certain categories of people automatically excluded.
- Track changes in state/municipal laws or work with attorneys that do!




# Limiting Background Screening Risks

## Tip #5: Limit Use of Credit Reports

- **EEOC:** Use of credit reports is nearly always impermissible if it has a disparate impact on minorities
- At least 10 states have enacted laws limiting the use of credit history information and/or requiring specific written notifications.
- Several cities also imposing credit screening restrictions (e.g., NYC and DC).
- **Example targets:** Freeman, Kaplan Higher Education.

### Best Practice Pointers For Employers

- Most employers should limit credit checks to — at most — a handful of finance-related positions.
  - Understand and account for state/municipal law issues.
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# Limiting Background Screening Risks

## Tip #6: Analyze EPLI Policy

- Insurance coverage is not guaranteed even if employer has EPLI policy.

### **Best Practice Pointers For Employers**

- Check whether exclusions specifically carve out:
  - FCRA claims
  - Consumer-protection claims
  - Privacy-related claims
  - Claims that allege recklessness or willfulness
  - Class action claims
- Check maximum coverage number.



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**Technology  
You  
Need**



**Compliance  
You  
Expect**



**Client Care  
You  
Deserve**

**Don't settle for a bad experience.**

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