

Top 5 Background Check Trends for 2016

Mike McCarty
CEO

Mike.mccarty@safehiringsolutions.com

317-745-6946



Presenter Background

- Founder/CEO Safe Hiring Solutions
- Co Founder/ CEO RefLynk & SafeVisitor
- President IABS
- Violent Crime Detective Metro Nashville PD
- Provide violence prevention training/ consulting:
 - U.S. Dept of Justice
 - U.S. Dept of Defense
 - U.S. Homeland Security
 - Federal Law Enforcement Training Center
 - National Sheriff's Assoc
 - Indiana Law Enforcement Training Academy
 - Numerous State Attorney General Offices



About SHS

- Headquartered Danville, IN
- 4,0000+ clients
- Inc 5000 Fastest Growing Privately Held Co.
- Founding Member IABS
 - Raise standards of background screening
 - Actively involved in legislature on issues related to background screening
 - Involved at federal level on screening issues



Common theme with 2016 trends...

Compliant Background Checks



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Pendulum Shift

Sweeping legislation at federal, state and local level aimed at helping ex-offenders find employment that:

- Restricts reporting
- Delays conversations about criminal history
- Expungement

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What does that mean for HR

- Danged if you do....
- Danged if you don't

Very tough position to navigate as HR

Selecting Right Screening Partner Critical

Truth about background screening industry:

- Highly unregulated
- No standard of care
- Reliance on incomplete databases
- 7 yr limitations
- Alias names

Best Practices in Background Screening

Core Criminal Package

- SSN Verification
- National Criminal Database
- National Sex Offender
- County Criminal Search
- Federal Criminal Search

Additional Solutions

- BMV Records
- Employment Credit Report
- Child Abuse Registry
- Employment Verifications
- Character Reference Checks
- RefLynk



5 Trends in Background Screening



#1 “Ban the Box”

- Removes questions on application concerning criminal history
- Removes valuable integrity tool for employers who compare screening reports against applications
- Theory-
 - Ex- offenders being disenfranchised
 - Criminal history preventing opportunity to interview
- Does NOT:
 - Prevent asking about criminal history during interview
 - Conducting criminal background checks
- 100+ Municipalities/ 21 states have adopted



#2 EEOC



- EEOC 2012-16 Strategic Plan
 - Approved 4/25/12
 - 4-1 vote
- Guidance effective immediately
- Game plan for the EEOC field offices



Guidance replaced:



- 1987 EEOC Policy Statement regarding conviction records
 - Zero tolerance policies
 - 3 pronged approach
- 1990 Policy Guidance on the Consideration of Arrest Records



Disparate Impact



- Disparate Impact holds that employment practice might be discriminatory & illegal if they have a disproportionate **adverse impact** on members of a minority group.
- Prohibits employers from using a “facially neutral” policy that has an adverse impact on a protected class.



Facially Neutral



- Facially neutral policy:
 - Does NOT appear to be discriminatory on its face;
 - Rather is one that is discriminatory in its application.
- Burden is on employer to show policy is:
 - Job related
 - Consistent with business necessity
- EEOC interested in who is being denied based on background check

Case law...



- Green v. MO Pacific Railroad (1977)
 - Zero tolerance policies discriminatory
 - 3 pronged approach
- El v. SEPTA
 - Murder 40 yrs ago
 - Policy no violence
 - 3rd Circuit Ct in favor of SEPTA



Old Guidance...



Employer could demonstrate Title VII compliance by using 3 factors with background checks:

1. Nature & gravity of crime;
2. Time that has passed since conviction/completion of sentence; and
3. Nature of job held or sought



New Guidance

Title VII of Civil Rights Act of 1964

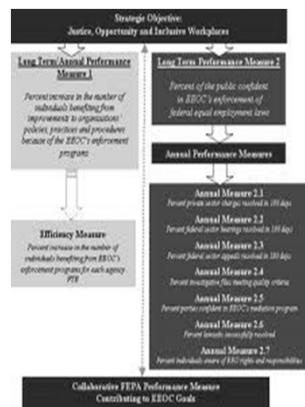
- Employers with 15 + Employees
- No Discrimination in Terms or Conditions of Employment Based on Race, Color, Sex, Religion or National Origin
- Remedies: Reinstatement, Backpay and Benefits, Legal Fees, Compensatory and Punitive Damages (limited - employer size)
- Defenses: BFOQ, Bona Fide Seniority System

Now employers may satisfy Title VII by using **internal policy** if it is “narrowly tailored”

- ❑ Targeted screens based on Green Factors (3 prongs)
- ❑ Individualized Assessment



Individualized Assessment



1. Facts surrounding conviction (allowing candidate to explain)
2. Number of convictions
3. Age at time of conviction/ release
4. Performed same type of work POST conviction with same or similar employer with no issues
5. Consistency of employment history before & after conviction
6. Rehab efforts (training, education)
7. References



#3 Fair Credit Reporting Act

- ❑ Yes it applies even if you don't use credit info
- ❑ FCRA applies if you pay a 3rd party vendor like SHS
- ❑ Specific requirements:
 - Disclosure & Authorization (written or electronic)

If taking adverse action based in "whole or part" on a background screening report:

- ❑ Pre-Adverse Action Letter, Copy of Report, Summary of Rights under FCRA
- ❑ Adverse Action Letter



Willful Non- Compliance of FCRA



Hunter, et al v. First Transit Inc.

- ❑ Failed to provide disclosures to applicants BEFORE running background check;
- ❑ Failed to follow two-step adverse action process when denied employment

\$5.9 Million Settlement



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Recent FCRA Lawsuits/ Settlements

- Domino's Pizza \$2.5 Million
 - Running checks without authorization
 - Not providing Pre-Adverse Action information
- K-Mart \$3 Million for FCRA Violations
- Walt Disney Company- Pending

CRA's Sued for FCRA Violations

- First Choice Screening- Pending
- HireRight \$2.6 Million- multiple FCRA violations



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Technical Violation Lawsuits Exploding

- ***Graham v. Michaels Stores Inc.***, Case No. 2:14-cv-07563, U.S. District Court for the District of New Jersey Dec. 4, 2014: The complaint alleges that the craft store chain violated both the New Jersey Fair Credit Reporting Act (NJFCRA) and the Fair Credit Reporting Act (FCRA). According to Graham, the company violated the requirement of providing a stand-alone disclosure. According to the complaint, the disclosure was part of the application form, included a space to list prior employers, and contained ten different state notices. The two classes identified in the pleading include all those who applied to Michaels through the online job portal in the two years prior to the suit, and all New Jersey applicants who applied in a six year window prior to the suit.

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FCRA Con't

- *Peikoff v. Paramount Pictures Corporation*, Case No. 3:15-cv-00068, in the U.S. District Court for the Northern District of California, January 7, 2015: Peikoff alleges that Paramount violated the FCRA provision requiring a disclosure in a document that “consists solely of the disclosure.” The complaint alleges that the disclosure form included a release from liability: “Further, I release all parties and persons from all liability from any damages that may result from furnishing such information to Paramount as well as from any use or disclosure of such information by Paramount of any of its agents, employees or representatives.”

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FCRA Con't

- *Doe v. Express Services, Inc.; Express Employment Prof.; and Palisade Services, Inc.* CASE NO. 3:15-cv-00232, U.S. District Court, Northern Dist. CA, January 15, 2015: While not a class action, this case fits the mold and illustrates how staffing companies can be targeted as well as traditional employers. According to the complaint, Express is the fourth-largest employment staffing company in the United States. The Plaintiff was recruited by Express for a job, and in the hiring process was given a “Disclosure Authorization” that did not disclose the name, address, and telephone number for the employee screening company, nor did it have a box for Doe to check to indicate that he would like to receive a copy of any consumer report that would be prepared. The plaintiff alleges violations of the FCRA and California’s Investigative Consumer Reporting Agencies Act (“ICRAA”). The complaint also alleges that the Defendant did not provide Doe with a copy of his report until *after* taking adverse action, and that it never provided a Summary of Rights.

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#4 Social Media Background Checks

- Recent terrorist attacks have placed pressure on social media screening
- How many of you do some type of social media checking?
 - Google
 - Facebook

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Be careful....there can be legal implications:

- Discrimination- seeing protected information like marital status, age, race, etc.
- Privacy- Yes even the internet has a reasonable expectation of privacy since most sites require friending
- Authenticity-How do you know it is your candidate? Common names?



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Social Media Concerns

- How do you verify information?
- How do you know it is your candidate?
- How do you know that your candidate is not operating online under an assumed identity?
- 21 states have restricted use of social media checks



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#5 Reference Checks

- “Fast Track Hiring”
 - Need to place people yesterday
 - No time for reference checks
- Low unemployment/ competitive market for talent- especially in high turnover positions
- Chipotle kicked this off last fall by hiring 4,000 people in one day

Problems with Tradition Reference Checks

- Labor intensive
 - Phone calls
 - Voicemails
- Documenting information correctly
- Slow...not returning calls
- Policies
 - Name
 - Rank
 - Serial #

Why Reference Checks Important

- 80% of sex offenders do NOT have a criminal history
- Reveals information would not receive via background check
 - To Catch a Predator Northern IN
 - TX teacher solicited child for sex
 - Not prosecuted= no crim history
 - Reference check reveals behavior
- Competencies can reveal areas of coaching

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Technology like RefLynk

- Automates reference checking process
- Allows to ask much more 20+ questions
- Text-based
- Candidate driven- avoids company policies of B2B
- Fast
- Cheap (could dollars a candidate)
- Reference Anonymity
- Data aggregated by reference relationship
- Quickly digest large amounts of feedback

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Conclusion

- Review policies concerning FCRA/ EEOC
- Review background screening program to ensure:
 - Best practice use of screening program
 - Quality reference checks

CRITICAL- Partnering with a Screening Firm that:

- Committed to FCRA, Federal/State/ Local Compliance
- Provides training/ communication on issues impacting background screening
- NOT just an aggregator of data



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Questions?

Mike McCarty

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317-745-6946

888-215-8296 toll free

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www.safehiringsolutions.com

