




Association of Corporate Counsel
Delaware Valley (DELVACCA) Chapter

DELVACCA 2008 + 2010 Chapter of the Year

DELVACCA presents:
Employment Background Checks:
*What Every Employer Needs to Know
 Before Conducting Background Checks*









presented by:

Sean Hart, Esq.
 Office of General Counsel
 PPL Corporation
SMHart@pplweb.com

Michele Malloy, Esq.
 Shareholder
 Littler Mendelson, P.C.
Mmalloy@littler.com



AGENDA

- Applicable Statutes and Laws
- Equal Employment Opportunity Commission Guidance
- Pennsylvania Human Relations Commission's Initiative
- Fair Credit Reporting Act
- Informal Background Checks/Social Media

Policy Considerations

- Why does your company prohibit the hiring of applicants with convictions?
- Is this a position-sensitive policy, or an across the board prohibition
- Could you justify your hiring prohibitions for the position in question if required to do so?
 - What if the conviction was ten years ago?
 - What if the applicants had worked in your industry for years?
 - What if the employee had impeccable references?



Statutes and Laws: Background Checks




Pennsylvania

18 Pa. Cons. Stat. § 9125

Pennsylvania Statute on Employer Use of Criminal History Record Information

- Can only use job-related convictions in hiring
- Must notify rejected applicant in writing when rejection based in whole or in part on convictions
- Application to other adverse employment actions unclear

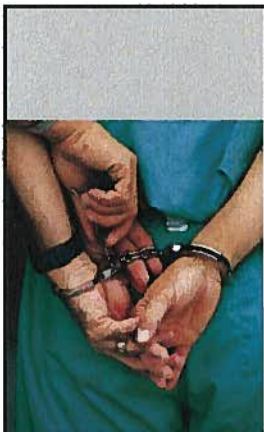




Pennsylvania

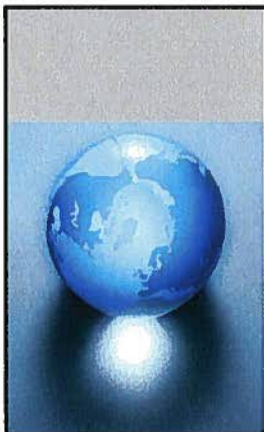
Philadelphia's Fair Criminal Record Screening Standards Act, Philadelphia Code 9-3500 et. seq.

- Enacted April 13, 2011
- Already effective
- Have you changed your HR practices as a result?



Key Provisions


- "Private employer" - any person, company, corporation, labor organization or association which employs ten or more persons within the City of Philadelphia.
- Prohibition against inquiries and adverse actions based on arrests/accusations not currently pending against an employee
- Prohibition against inquiry regarding criminal convictions during the "application process" before the first "interview"



Concerns for National Employers


Other states have also passed legislation regulating background checks...

- Massachusetts
- Connecticut (effective October 2011)
- Hawaii
- Maryland
- Washington
- Oregon
- Illinois



Action Steps

- Review employment application
- Review your Consumer Reporting Agency's practices
- Review your current practices and policies regarding background checks
- Training as necessary
- Keep up to date



Littler **ppi** **ACC AMERICA**

EEOC: What Is the EEOC's Position?

EEOC's Guidance

- Policy Statement on Issue of Conviction Records (2/4/87)
 - <http://www.eeoc.gov/policy/docs/convict1.html>
- Supplemental Policy Statement on Use of Statistics (7/29/87)
 - <http://www.eeoc.gov/policy/docs/convict2.html>
- Policy Guidance on Use of Arrest Records (9/7/90)
 - http://www.eeoc.gov/policy/docs/arrest_records.html

EEOC's Guidance

- EEOC Compliance Manual Chapter Addressing Race And Color Discrimination Incorporating Position on Arrest and Conviction Records (4/19/06)
 - <http://www.eeoc.gov/policy/docs/race-color.html#VIB2conviction>
- EEOC's E-Race Initiative Includes Issues On Arrests and Conviction (2/27/09)
 - <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm>
- EEOC's Enforcement Guidance (4/25/2012)
 - http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm



Job-Related and Consistent With Business Necessity

- The nature and gravity of the offense(s) for which the individual was convicted
- The time that has passed since the conviction and/or completion of the sentence
- The nature of the job held or sought

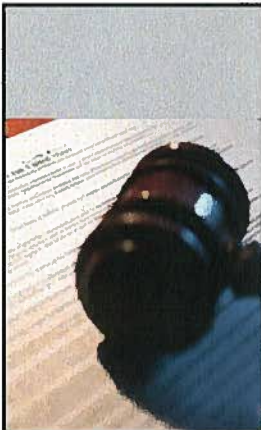
Lawsuit: *EEOC v. Freeman, D.Md.* No. 09-cv-02573

- A nationwide Title VII class action filed Sept. 30, 2009 against a Dallas-based convention & corporate events planning company
- EEOC claims that since 2001, company has rejected job applicants based on their credit histories or criminal records which:
 1. adversely impacted black, Hispanic and/ or male job applicants;
 2. is not job-related or consistent with business necessity; and
 3. less discriminatory alternative selections procedures exist.



Lawsuit: EEOC v. Peplemark Inc., W.D. Mich., No 08-cv-907

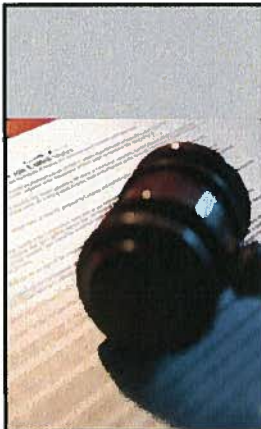
- A nationwide Title VII class action filed September 29, 2008 against a temporary staffing agency
- EEOC claims that company had a blanket policy of refusing to hire applicants with prior criminal convictions which had a disparate impact on Black applicants.



Scope of EEOC Investigations

EEOC v. Watkins Motor Lines, Inc., (7th Cir. 2009)

- Circuit court reversed district court and ordered enforcement of subpoena where EEOC pursued pattern and practice investigation despite Complainant's desire to withdraw charge.



Scope of EEOC Investigations

EEOC v. Aaron's Inc., (N.D.Ill. 4/11/11)

- Judge found that information sought by the subpoena—applicant data, including race and criminal background checks performed—was relevant to EEOC's investigation of an individual race discrimination charge alleging that company's policy of conducting such checks discriminates against black applicants.

PHRC – The Pennsylvania Human Relations Commission Weighs In: Proposed Guidance



Proposed Guidelines




The Disparate Impact Discrimination Implications of the Denial of Employment Based on a Criminal Record

- Introduced in 2009
- Emphasis is on policy and justification underlying hiring prohibitions

Do Employers Have to Follow the Guidance?




- The Proposed Guidelines are not final
- The Proposed Guidelines do not have the same force as law
- But . . . The PHRC will be using them in its investigations
- Could lead to protracted investigations, extensive document requests
- Danger of finding additional vulnerabilities





What Is the Guidance?

- Presumption of disparate impact
- Presumption can be rebutted
- Employers have the burden of showing that the hiring prohibitions are a business necessity
 - levels of "empirical proof"
 - "unacceptable level of risk"



Practical Measures

- Review your hiring policies
- Review relevant laws applicable to your industry
- Determine whether an across the board policy makes sense for your company
- If necessary, revise your policy

Littler  

Fair Credit Reporting Act


Credit Score Ratings

Credit Score	Description
760 - 849	Excellent
700 - 759	Great
660 - 699	Good
	Average



Who Has Reviewed Their FCRA Compliance Recently?

- Are you obtaining appropriate consent?
- Are you sending out pre-adverse action letters?
- Are you sending adverse action letters?
- Do you know if your background check company is doing this?




What Is the FCRA?

A federal consumer protection statute that regulates the disclosure, use and destruction of "consumer reports."

FCRA's guiding principles

- Privacy
- Accuracy
- Fairness



Four Basic Steps for Compliance

- Disclosure
- Certification
- Pre-Adverse Action Notice
- Post-Adverse Action Notice

Step 1: Disclosure & Written Consent

Before ordering the report:

- Disclose in *separate document* that consumer report may be requested for employment purposes (not on employment application)
- Obtain job applicant's or employee's written consent
 - Can be included in the same document as the separate disclosure

Step 2: Certification to the Consumer Reporting Agency

- Disclosures and consents have been made and obtained.
- Pre-adverse action disclosures will be made, if required.
- Additional investigative consumer report disclosures made, if applicable.
- Further disclosure concerning investigative consumer reports, if requested.
- Employer will use information in report in compliance with all federal and state Equal Employment Opportunity (EEO) laws.

Step 3: Pre-Adverse Action Notice

Enclose:

- Copy of the consumer report obtained from the consumer reporting agency
- Federal Trade Commission's (FTC) Summary of Consumer's Rights Notice
- Include a statement that adverse action is contemplated
- Allow a reasonable time to submit a dispute with the employer (5-6 business days)

Step 4: Post-Adverse Action Notice

The consumer reporting agency's name and contact information.

A statement that:

- Adverse action will be taken;
- The consumer reporting agency is not the decision-maker and cannot provide the reason for the decision;
- The consumer has the right to obtain free copy; and
- The consumer has the right to dispute the accuracy of the report with the consumer reporting agency.




Action Steps

- Review FCRA procedures with HR Personnel
- Review current disclosure and consent documents for compliance
- Audit Pre- and Post-Adverse Action Notices



Informal Background Checks/Social Media





Questions for the Audience

- Do you have a social media/electronic resources policy?
- Have you ever used social media to research an applicant?
- Do you have a policy regulating "informal background checks"?
- Anyone use a vendor to check social media information?

Background

- **92%** of companies hiring in 2010 used, or planned to recruit through, social media sites
- **46%** of companies plan to invest more in recruiting through social networks
- **58%** of companies have successfully hired applicants through a social networking site
- **31%** of candidates disclose their social networking presence when applying for a job

Source: 2010 JobVite Social Recruitment Survey (6/10)

Pros and Cons


Pros:

<p>Access to adverse information not typically available</p> <ul style="list-style-type: none"> • Illegal drug use • Poor work ethic • Poor writing/communication skills • Negative feelings about previous employers • Racist or discriminatory tendencies 	<p>Access to positive information not typically available</p> <ul style="list-style-type: none"> • Video/music • Other expressions of creativity • Network of friends • Positive values
---	--

Pros and Cons

Cons:

- "False positives"
- Access to information regarding protected characteristics
- Access to information not allowed during hiring or too soon
- Thorny FCRA issues if third-party provider is used to search
- Lack of HR policies creates confusion, inconsistency



Action Steps

- Establish protocol for searching social media
 - To search or not to search? If so, when?
 - Non-decision maker-screening?
 - Opportunity to correct/explain?
 - Screen applicants in a uniform manner
 - List of social media sites that will be searched
 - List of lawful information about applicants desired from every search



Action Steps

- Train hiring/interviewing personnel
- Don't "friend" applicants
- Time to review your social media/electronic resources policy and training?



