ASSOCIATION OF CORPORATE COUNSEL

TITLE: **Pre-Employment Screening and Employment Verification? Vital Legal and Practical Considerations to Protect Your Organization**

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PRESENTED BY: **ACC's Employment & Labor Law Committee**

SPONSORED BY: **Jackson Lewis LLP**

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Operator: Welcome to this ACC Webcast.

Eric Reicin: Good afternoon, everyone. This is Eric Reicin, Senior Vice President and Deputy General counsel of Sallie Mae, on behalf of the ACC Employment Labor Committee, welcoming you to today's Webcast which is entitled Pre-employment Screening and Employment Verification.

This is a great topic, a fascinating topic. We have great speakers to speak with you today. And I will chime in with some color commentary throughout the program. We have Rich Greenberg who is a partner at Jackson Lewis which is a true friend of the ACC employment labor committee.

Mr. Greenberg – Rich Greenberg has extensive experience in counseling. He takes seriously what was on his law degree which was attorney and counsel-at-law. In addition to (being) an excellent attorney, he's an excellent counselor in handling employment law disputes and employment law issues.

He also works with clients' business needs and culture changes, result of business transactions such as M&A work. But he also does a whole host of compliance on the alphabet soup of federal and state employment laws, FMLA, FLSA, FCRA, ADA, AD, ADEA, (and Warren) and new legal developments. And he has specific experience in what we're talking about today, the background check process.

Also, we have presenting today is Chris McVay who is a managing attorney, Labor Law Group at Michelin North America. She also serves as Chief Counsel for Tire Centres, LLC and is an Assistant General Counsel for Michelin North America.

And in these capacities, she is responsible for labor employment matters for merely 18,000 U.S. employees for Michelin in 26 locations including – four of those locations are organized locations.

In addition to her law degree, she also is certified as an SPHR by SHRN and is a contributing author to South Carolina's Bar Labor Employment Law for South Carolina lawyers.

Again, I'm Eric Reicin and I'm Chief Labor and Litigation Attorney at Sallie Mae, as moderator.

We have a great program today. In order to ask questions, there's a box in your lower left hand corner where you can ask – write those questions. And at the end of our program, we will answer as many as we can. We also would like you, if at all possible, to fill out the evaluation form after the program is over. Give us a chance to prove ourselves to you.

And I should give you notice now, but I'll also give you notice at the end, that the next Webcast will be on the new FMLA proposed regulations that came out on February 11th and there are some great materials on the Web regarding those but we will have a Webcast on that coming in the next few weeks.

So here we are at the Webcast outline. We have four major topics.

FCRA, Fair Credit Reporting Act and State Law Compliance.

We have different types of pre-employment checks (and relevant) considerations.

And then we have an area which I, in fact, find it fascinating and really sort of cutting-edge; what do we do about sort of the novel issues, the litigation concerns surrounding lifestyle discrimination, surrounding the fact that there are 41 million Americans with Facebook pages, Google searches and so forth and how do you deal with those cutting-edge issues when your HR department is, without you even knowing about it, searching people's Facebook pages.

And we also have a good program on I-9 requirements.

So with that, I'm going to turn it over to Rich first who is going to lead us in our first set.

Rich Greenberg: Thank you very much, Eric. What I'd like to talk about in the next probably around 30 minutes is three subtopics. Just a basic refresher on the Fair Credit Reporting Act and related state laws, which provides the procedural overlay for the background, check process. Then to talk about the different types of checks that are within a menu offered by most services that employers can consider.

And then to talk about disqualification. What can employers disqualify based on, what consideration should be taken into account.

And then as Eric mentioned to talk about some novel issues.

So turning to slide five just to refresh a couple of basic concepts on the Fair Credit Reporting Act.

First, the Fair Credit Reporting Act and all of the mini State Fair Credit Reporting Acts, generally only apply if there is a third party consumer reporting agency that's being used to conduct the checks -- an outside vendor which provides your business with background check results on applicants and/or employees.

What are the specific requirements that are imposed by the FCRA?

First, as a condition for any of these consumer reporting agencies to provide information to an employer it is specifically written into the statute that all (employee) are required to sign an end-user agreement if the checks are being done for employment purposes.

And basically that end-user agreement does two things, it confirms that the check is being done for employment purposes and also has the employer affirm that they are following the procedural requirements of the FCRA namely obtaining consent and following the pre-adverse and adverse action process that we're going to touch on in a second.

Turning to consent, the FCRA specifically requires that in order to run a background check on an applicant or an employee for employment purposes that they must be given a stand-alone document advising them that that check is going to be done.

The stand-alone document can't – does not need to be the document that they sign to authorize the check. That can be contained in the employment application as long as there's a separate stand-alone document that provides the basis and the notification that a third party is going to be doing the check.

For practical reasons just to ensure that it's all clear in one place – in one place and for litigation protection, in general, most companies and most consumer reporting agencies provides sample combined consent and disclosure forms so that's one clear document that acts as both the consent and the disclosure.

One interesting issue though which comes up in today's rapidly expanding technological world and also due to offsite operations is whether or not consent can be provided electronically as opposed to traditional signature. And it's a little bit of an unclear answer.

Until approximately 2000 – the year 2000, excuse me, the FTC, the Federal Trade Commission, the entity that enforces the Fair Credit Reporting Act was issuing opinion letters, and they indicated that an electronic signature definitely would be sufficient but whether or not a mouse click or something of a similar ilk would be dependent upon the circumstances.

We have never seen real litigation on this. But our strongest recommendation if you are using any form of electronic consent, is to ensure that you could demonstrate that there was a clear manifestation of intent that someone understood that a check was going to be conducted.

Turning to the next slide. There are two types of basic checks under the FCRA. There are basic consumer reports which are basically database checks. And there are investigative consumer reports.

Investigative consumer reports by definition involve interviews of friends, neighbors, et cetera to develop information regarding the applicant or employee's character, conduct, well-being. However, from a practical angle based on FCRA guidance it becomes an investigative report if a third party is being used to check references and that third party is asking any questions other than confirming that the person worked there and confirming their dates of employment and/or salary.

Simply put, a question such as, "Is the person eligible for rehire?" or, "Was this person a good employee," makes it a investigative report. And if it's an investigative report, a different type of consent form needs to be used where the individual is notified that they have the right to obtain information regarding the nature and scope of the report within a – within a short timeframe if they make a request.

So the first compliance issue one should we think about with their consent forms is making sure they have a proper consent form for the types of checks that they are doing, i.e., whether it's a consumer report or an investigative consumer report.

So moving down the procedural line, the individual signs the consent, the background check is done, there is no disqualifying information; in short, there are no further obligations under the FCRA or state law.

However, if there is disqualifying information, there are procedural requirements. And I note at this moment, I'm just focusing on the procedure. In a few moments, we're going to talk about some practical suggestions and how this ties into disqualification.

But in terms of the procedural requirements under the Fair Credit Reporting Act, if you're disqualifying someone from employment based on something that came up in the check, there's an obligation to provide that person with a pre-adverse action notice.

What that pre-adverse action notice is, is basically a letter that says, "We've made a conditional decision to disqualify you from further consideration for employment based on the information in the report." It's best if you delineate the specific information because the report could have loads of information. And then it basically says to the individual, "If you are contesting – if you wish to contest the accuracy of this information, please contact me, i.e., the company, and let us know that you're contesting the accuracy with a consumer reporting agency." And in general, the FTC recommends that you give the individual five days to do so.

It's a basic prerequisite for disqualification. And I just want to reiterate that the purpose of the pre-adverse action is not for someone to argue that, "No you shouldn't disqualify me based on this. It wasn't that important, it wasn't job related." It's solely for the purpose of the individual demonstrating that the information contained on the report is not their information. That there were two John Smiths, that something was transposed, or something of that ilk.

If the pre-adverse action notification is sent out and the person does not indicate that they are contesting the accuracy of the information at all, five days later the adverse action letter can go out. That basically just reiterates that the person consented to the check; we sent the pre-adverse action letter; we haven't heard from them and now they're officially, formally disqualified.

If the person had contested the accuracy of the information, obviously a lot of this depends on business needs, but in general, we recommend before setting a pre-adverse action that you give that person at least a couple of – a couple of days to try and clarify that information with a consumer reporting agency to see if it was accurate or not before issuing the adverse action.

A couple of (final) procedural issues under the Federal Fair Credit Reporting Act. Record keeping, we generally recommend that all records pertaining the background checks be kept for five years. There is no per se record-keeping requirement in the statute; however, since the potential statue of limitation is five years, we generally recommend that all records relevant to consent, relevant to pre-adverse action and adverse action compliance be kept for five years.

Finally destruction requirements. Among the various things that were included in the FACT Act, which was passed a couple of years ago, was a requirement that when consumer reports are destroyed, they need to be totally destroyed so they are incapable of being recreated.

Obviously, this was primarily for the purposes of avoiding identity theft. When you're dealing with paper, that's very easy. When we're dealing with entities that e-mail us reports that we put in our servers or things like that, that will often involve involvement of IT to ensure that when it's destroyed, it's truly destroyed and it's not on any hard drives or any similar type documents.

Moving to the next slide quickly touching on a couple of state law issues.

In general, the mini FCRA state laws track the Fair Credit Reporting Act but there are a few tangents we just wanted to mention.

Under California in general, a specific consent form is needed because in California among other requirements, the individual needs to be specifically told the nature and scope of the checks to be done as opposed to under federal law you can just say that a background check is going to be completed.

In Maine, Minnesota and Oklahoma, there are (tangents) regarding someone's ability to obtain a copy of the report. So that's something that should be built in to consent forms.

In Washington, Massachusetts and New Jersey, there are state summaries of rights and those state summaries of rights need to be sent along with the federal summary of rights, as applicable, when there's pre-adverse action or adverse action notifications.

I'm quickly just summarizing these just to provide a little bit of information as to that it isn't just a federal issue.

And then finally, the state of Washington just last year imposed a new requirement where if an employer is conducting credit checks that on the consent form the employer must include specific language as to why they're committed to conduct a consent – credit check.

Eric Reicin: Let me jump in there, this is Eric again, hi. On the credit check limitations in Washington state, that's actually an interesting issue. I think that you'll find over the next couple of years the EEOC will be looking a little bit more carefully about whether or not (to use) credit information in terms of hiring.

There was a hearing before the EEOC early in the spring where one of the witnesses talked about whether or not there was a disparate impact for using credit and FICO scores in hiring decisions and it's just something for everyone to think about.

We obviously, as part of this program, want to make sure we recognize that there are three types of people on the phone. There're probably the general counsels of companies that don't know that much about employment law. They are the people that supervise the employment lawyers. And then there are the hardcore employment lawyers also on the phone.

So we want to make sure that all three groups get something out of this program.

Chris, I have a question for you. We've just listened to Rich about the facts of what – how we're supposed to handle this. From a practical basis, you have 18,000 employees; you have 26 locations, how do you – as a practical basis structure for a large organization, how to comply with all these various state laws and FCRA?

Chris McVay: What we have done is we have contracted with one vendor who supplies our background check services nationwide. And that was part of our purchasing agreement with them was that they would make sure that they are in compliance with any state requirements for specific forms.

Eric Reicin: Or I imagine you could also talk to Jackson Lewis, who could help out as well.

Chris McVay: That's exactly right.

Eric Reicin: Rich, why don't go you ahead and (take us to) the next slide.

Rich Greenberg: Thank you very much, Eric. Just wanted to just build on one point that Eric had mentioned with the credit information. It is not always (is that) being an increased target of governmental watch but we have seen filed a couple of class action lawsuits alleging disparate impact and alleging that employers' consideration of credit is having an adverse impact on certain protected classes.

So we'll touch on this a little bit more in a couple of minutes but in terms of credit checks, we strongly recommend that companies really analyze whether or not someone's credit history is really relevant to the job that they're going to be holding and before disqualifying, that they really engage in an individualized analysis especially. Because as we all know, sometimes someone could have a bad credit history because they've been taking care of their family for years; God forbid, they had a parent pass away or they've been taking care of their whole family as opposed to them being a bad actor or someone incurring debt unnecessarily.

Sorry for the – to digress, but moving on to the next slide.

Disqualification. Oftentimes when I speak to clients, clients ask me, "OK, this information came back in the report. Does the FCRA allow me to disqualify based on this information?"

And my response is "Absolutely." Because the FCRA does not address disqualification at all. The FCRA solely addresses the process issues that we spoke about. It does not in any way address disqualification. To the extent, disqualification is addressed at all in the law; it's addressed by state laws or by federal anti-discrimination laws.

What types of (claims) do we need to be concerned about, when we're thinking about disqualification. To me there are three types of claims that we need to be considerate about. The first type are direct claims, there are some states for example, my home state of New York in regard to criminal checks that specifically say you can only disqualify someone based on their (criminal) history if it's job related.

So if an employer disqualified someone based on something that wasn't job related there could be a direct claim there under the New York Correction Law – under New York Human Rights Law for the employer's violation of the law.

But that's only one level of the analysis; there are two other levels of the analysis. In many (of the times) when people are disqualified, they are in protected classes and they could allege discrimination based on their protected class. And in defending that claim, the company would have to set fourth a legitimate nondiscriminatory basis for their decision making.

To pass muster especially with the increased focus of governmental agencies of these issues which I'm going to touch on more in a second, it's often vital to ensure that every decision passes the straight-face test.

So for example, if there was someone you disqualified because they had a drug possession conviction 25 years ago, but since then they've become a minister; they run rehabilitation programs, and they're an outstanding citizen, if that person alleged race discrimination, if they were minority it could be very difficult for the company to justify its decision in that regard.

The third type of claim would be a disparate impact claim. Oftentimes – and this is clear in EEOC guidance for many years, the EEOC has taken action against employers for having background check policies or disqualification policies that have an adverse impact on protected classifications. And an employer should always be careful about those types of things.

Two final points I want to make on this slide. First, it is strongly recommended, especially for criminal convictions and credit, that an employer not have any per se disqualification policy that to extent – that to the extent possible any written documentation indicates there is an individualized analysis.

Second, one thing I – the second thing I wanted to mention is the EEOC's new E-RACE Initiative. The EEOC has issued publications where they've indicated that one of their goals, building on what Eric said earlier, was to – was to stop discrimination that has a negative impact generally on people of protected classifications with conviction or arrest histories.

That raises a couple of issues because in general conviction and arrest are not protected classifications under federal law. To me, what that indicates is that the EEOC is going to take a much stronger focus on potential disparate impact claims and potential disparate treatment claims when employers are basing their actions based on criminal background check results and that companies should be well prepared to send their actions in that regard.

Eric Reicin: Rich, this is Eric. The EEOC compliance manual has three factors, the nature and gravity of offense or the offenses, the time that has passed since the conviction or completion of the sentence, and the nature of the job held or sought. So, that's where currently where EEOC is. And those of you who are (advanced) wonks on the phone, the case that – the most recent case, a Federal Appeals Court Case on this issue is the SEPTA Case, S-E-P-T-A versus J&D Jagicla Enterprises or it's easier just to look it up 479 F3rd 232, also known as the SEPTA case where a person who was going to be a bus driver for mentally disturbed and disabled individuals had a 40-year old second degree murder conviction and the Third Circuit in that case on the basis of expert testimony said that that was fine. But they had real problems because it really didn't matter because they thought that the plaintiff's experts weren't strong enough. They sort of reached out to the world to try and solve this problem. So look at that case, the SEPTA case 479 F3rd 232 to those of who are advanced on this program.

Rich Greenberg: Thank you, Eric. So moving on to slide nine, now we just want to quickly address the various different types of checks that are generally in the menu and just to quickly mention certain things about them.

The first one and the one that – is almost universally done is the criminal background check. And there are various different forms whether you do a nationwide check, whether you look at certain localities. We already mentioned the concern with qualification with criminal background checks, but there are a couple of other things I just wanted to mention.

First, oftentimes, agencies offer a product called a nationwide database which is not up-to-date information. It's up-to-date as of the point that it's downloaded into the system, but in general that's only updated every few months.

So always make sure with your vendor that you are getting up-to-date information because there is actually specific requirements that individuals need to be told if decisions are not being based on up-to-date information.

Second, and this is a big frustration for many individuals, is that seven state laws limit the information that could be provided by consumer reporting agencies. Under federal law, criminal convictions can be reported in an unlimited – for an unlimited period of time and arrests can be reported for seven years. Many state laws, though, limit criminal convictions for a period of time; don't allow reporting of arrests, unless they're then pending. So there always needs to be an analysis of those issues.

Also, one final point on the disqualification building on what Eric said, there are three different types of things that come up in criminal background reports that need to be analyzed.

There are criminal convictions, arrests that didn't result in conviction, and pending arrests. And in a different analysis to each of the both federal and state law as to whether or not they could be used for disqualification.

Moving on to the next type of check, employment verifications, reference checks. In general, there are no significant issues posed by that, other than as mentioned earlier that if the entity is asking anything other than name, rank and serial number that that turns it into an investigative report.

Then there are educational verifications going forward any information regarding someone's educational past. And for both employment verifications and educational verifications, in general, if someone misrepresented the information that could be a basis for disqualification. And in general, that could be addressed directly through the pre-adverse action process, because it's very hard for someone to give an explanation – to explain away their conduct in that regard.

Moving on to the next slide, Social Security traces. Social Security traces are a very interesting issue because they're offered by many agencies. But what many agencies don't tell you is that they're not accessing the Social Security Administration database because they don't have the ability to access of the Social Security Administration database. So there are real questions as to whether or not, if you receive a negative trace what you can do with it.

Is it an aggressive angle that you can issue a pre-adverse action notice based on it? Or at least have a conversation similar to what you would do under the current new no-match regulations, not the proposed ones that are on hold. But there's also a line of thought that says that in general you can't require someone to show your Social Security card until within 72 hours after they start work. So how is someone ever going to be able to refute this information and that the employer maybe asking at its peril if it disqualifies based on one of these traces. So it's just something to consider.

I do know that there are other advantages to these checks. Oftentimes the they list other locations where people lived. You could find that other information about addresses and work locations and that may help you expand the scope of your criminal background check and you may find some other issues of which you were aware, but I just wanted to mention the issue.

Civil litigation checks. No per se illegality doing so, but of course you always need to be careful about finding information that could support discrimination claims. You could learn about people's protected classification, certain types of other protected conduct, and you always need to be careful about such. And I'm going to talk in a couple of minutes about workers compensation checks and specific issues that come up with them.

OFAC checks. OFAC stands for the Office of Foreign Asset and Control and oftentimes, these are called Terrorist Watch List checks. However, there are numerous problems with this list that's maintained by the government. And oftentimes a lot of people with, Arab descent, or Muslims – or Muslim descent have their names appear on this and there could be matches for example I think there was some jokes about Muhammad Ali being on the list.

So if a name comes up on an OFAC list, there is no per se prohibition on disqualification. However, we always recommend that in that situation rather than just going right to the pre-adverse action process, similar to what we recommend with the criminal background disqualification unless the person lied on their application, that you first have a conversation with them so that you could then say to yourself that we have made an individualized decision that this is job related.

A few other checks I want to mention, on the next slide, credit checks. Once again right now, other than in the state of Washington there is no per se limitation on credit checks. However, credit checks are something that makes us very nervous. As I've mentioned, the state of Washington actually has imposed specific legislation limiting when an employer can do credit checks. Further we've seem a couple of national class actions alleging disparate impacts with credit checks.

So we strongly recommend that if you universally use a credit check that you ensure that its job related and that you always give someone an opportunity to explain it before you just do an automatic disqualification. Obviously, if someone's in a high-finance position it's a much less slippery slope.

Sex offender checks. Most sex offender checks – excuse me, many states as well as in the federal sex offender database list various individuals who have been convicted of sex crimes. In general, these databases will pull up the same information as pulled up by a criminal report. However, sometimes criminal reports are limited to jurisdictions.

Unless the database specifically says that they cannot be used for employment purposes there are no per se disqualification restrictions. However, some of these databases, I believe specifically California if I'm not mistaken, impose specific limitations on their use for employment purposes. So that's something that always needs to be taken into account.

Eric Reicin: So let me ask you this question. Let's say your employers find one of the candidates on the sex offender list and because it was a military trial or something else it was not – it was not listed perhaps in your regular background – criminal background check which generally is by jurisdiction as you mentioned.

I guess the first part of the analysis would be, did they admit to in on the employment application but also you need to look at this database. I wonder if you could sort of talk about that a little further.

Rich Greenberg: I think you raised a couple of good issues. First, if someone lied on their employment application, you always have – you don't have to engage in all of this balancing because the person misrepresented -- almost every employment application has a language at the back that says I affirm that everything here is true and I have not omitted anything and if I did so I understand that it's grounds for immediate disqualification.

The one concern that you have here is that some of these databases specifically say that the information can't be used for employment purposes. So if that information is provided, if you're going to disqualify based on it, and I'm not as concerned about it in a misrepresentation situation although technically it could be an issue, one should always go back and either check the database themselves if they're publicly available or check with their consumer reporting agency to make sure that there's nothing that indicates on that database that it cannot be used for employment purposes.

Because in general, these databases weren't set up for employment purposes. They were set up for people to see whether or not in their neighborhood around their children there are any convicted sex criminals for lack of a better term of whom they should be aware.

Department of Motor Vehicle checks. Oftentimes employers do these on everyone. Our general recommendation once again while there's no per se standard is that we focus on job relatedness, and only disqualify someone based on a DMV background if there are – if – basically their job requires driving or if they're going to be driving a company car and the insurer won't insure them due to their driving history.

The final one are the other public sources, things like Google, LinkedIn, Friendster, Yahoo!, et cetera. And I'm just going to hold off all of those and touch those in a couple minutes when we go to the novel issues. And I believe Eric also has some interesting points that he'd like to make about that.

Eric Reicin: (We'll see how) interesting they are.

Rich Greenberg: I'm just being nice. A question – now turning to – I often get the question from clients, "OK. you talked about all these procedural issues earlier. What about if we run our own checks if we have our own (loss) prevention department that runs its own background checks that directly links in to criminal databases maintained by states. Do we need to worry about any of these FCRA issues?" The short answer is no. You would still need to worry about the disqualification issues that we talked about but you wouldn't have to worry about the FCRA issues, you wouldn't have to worry about the consent, the pre-adverse action and adverse action requirements at all.

There's an (unanswered) issue as to whether or not if the employer goes into one of these public databases like a nationwide database they purchase, whether or not the FCRA is then implicated. My thought is that it probably would be since the main purpose of the FCRA in this realm is to

prevent employees from being subject to adverse action based on these quote-unquote evil databases that are being maintained that may not contain accurate information with them.

But most employers who do this directly don't have that issue. They link directly into publicly available sources and items such as that, and not purchased databases so this issue doesn't really come up. If it does come up, it is something to consider.

Now let's turn to novel issues. The biggest one that comes up and not a week goes by where I don't get a question from a client that says, "We did a Google search, we did a Yahoo! search, we checked MySpace, we checked Friendster and we saw some things in there about this person that makes us not want to hire them. Can we choose not to hire them?"

The short answer is there is little to no law in this area right now whatsoever and in general, if you feel that you can pass the straight-face test, that this is job related, that this goes to character, that this goes to someone's ability to do the job, in general, you can disqualify the person based on those things.

Eric Reicin: What about the thirty-or-so states that have so-called lifestyle discrimination laws? Obviously, most of those are smokers' rights or so forth or marital rights – marital status discrimination. But what about sort of – what states should we really be looking out for?

Rich Greenberg: That's a perfect segue to my next point, Eric. Thank you.

As I mentioned, there are numerous states that have either legal activities laws or at the least smokers' rights laws. In those states and states that come to mind with concerns with those states are New York, California – no surprise, Colorado, North Dakota, Louisiana, and those are just – those are more the broader laws as opposed with just the anti – the smokers' rights laws. And I believe about 30 states, the last time I checked, have smokers' rights laws. That if information comes up there that we see, for example, we don't like the fact that someone smokes but the state has a smokers' rights law, in general, we can't take any action based on the fact that, that person is smoking except if we do an analysis under the law and there's a conflict of interest defense.

For example, New York has a broad legal activities law. That covers political activities, recreational activities, including smoking, but it has a conflict of interest defense. So, for example, the American Lung Association if they're fostering a non-smoking environment and they have a unequivocal policy that they won't hire smokers, they could probably pass muster under that conflict of interest defense.

But building on what Eric said, the biggest concern with this type of check in terms of liability is making sure two things. Number one, in terms of per se issues, that you're not disqualifying based on something that's protected activity under a state law; and then number two, that once again you're passing the straight-face test, especially with those with protected classifications because even though they may not be able to bring a direct claim, they could bring a disparate treatment claim based on race discrimination, age discrimination or something like that. And if the only defense that we could have for a 45-year-old is that there's a picture of him drinking underage when he was in a fraternity when he was age 20, which may be very difficult to overcome at least at the agency level.

Eric Reicin: Yes, I think there's some interesting – I think you're right. You know, my understanding is that there are about 100 million individuals that have personal Web pages. And if you don't think your HR directors are doing Google searches or Friendsters or Linksters or whatever-it-may-be – or LinkedIn, you're just missing the boat. At least one report told me that most people are doing this to verify work histories with, you know, somewhere upwards close to half of all applicants lie somewhere on their resumes. We're (learning) about their (aptitude) to fit within an organization but also issues related to negligent hiring and whether or not they knew or should have known

that they were unfit or unsafe. And finding applicants who published negative information about the company.

Now, you've got to be worried about the National Relations Act if it's sort of organizing activity as opposed to just merely saying nasty things about your company.

But I think Richard makes a very good point is what you do when you go on someone's MySpace page and let's take the different scenario. Let's say, they're not, you know, when they were 20 years old, in a fraternity somewhere; hypothetically, you know, getting blasted on their – on a – on a Web page – it's you know, it was last week and it was they're out of control drunk and it could be the financial officer of your company. Or what about the scenario of whether or not, illegal drugs were involved in it?

Then think you have some interesting issues that are less legal depending on the state and they're more along the lines of whether this person is as good fit for the company and the culture of the organization. And it would have to be a very serious conversation between the in-house lawyer and the HR director or among the hiring person as well as to how you want to handle that.

Don't know, Chris, if you want to add to that at all.

Chris McVay: Well, it's interesting. I just had this issue today. We had an applicant who had a pretty extensive criminal background check but most of the convictions occurred before 1995 and a recent disorderly conduct and open container arrest. And the HR director didn't want to hire him because of the – basically the length of the record. And I cautioned them not to disqualify this person because most of the convictions were so old. And he's basically going to be a production employee, not in a – you know, a financial or a position of fiduciary responsibility to the company. So I'd do exactly what Rich says which is to advocate an individual analysis for each of those situations.

Eric Reicin: Yes. I think some of the HR professionals out there are getting creative. For example, I'm aware of one circumstance where people sign up for dating services. Where if you will go on the dating service and you find people that are on there, their dating service. You can find out all sorts of information about the individuals' likes or dislikes, whether they're optimists or whether they're pessimists, whether they like walks on the beach and pina coladas or they like something else.

And honestly, you know, depending upon the information you find, ((inaudible)) you find information about protected-class issues possibly but also you're finding out information that may be relevant for the job. And it's, you know, that I'd like to say the cow's out of the barn you've already won one second prize at the fair, the question is how do you manage it legally and how do you deal with those sorts of issues.

But I think this an issue for in-house counsel, especially in employment law area where we're going to see more laws soon. It may not be this year, it may be in the next year but it's going to be – I think there's going to be more law out there dealing with this issues, primarily, at the state level. Although I would notice that on December 3rd, the EEOC put out a fact sheet, primarily on employment tests and selection procedures. But I know that they're looking at this issue.

There was again this hearing back on May 16th, 2007, which dealt with employment tests and selection procedures but I know that this is an issue for a number of the commissioners right now. So, let's see how where that goes as we go forward.

Rich Greenberg: Thanks, Eric. I'm moving into Chris' time, so I'm just going to quickly go through my last couple of slides because I think that we touched on most of the issues. Some of the major litigations concerns that I've seen are applying minimum credit standards to all due to the concern about job-relatedness, due to Washington state law which could be a harbinger of future

legislation, and due to disparate impact concerns; (personal) disqualification standards especially in regard to criminal and credit; the importance of speaking with an individual if something negative comes up especially regarding criminal or credit and there wasn't a lie in the application; so we could pass the straight-face test in terms of saying that we did an individualized analysis, and that we clearly had a legitimate non-discriminatory basis for our decision.

And in this regard one of the most frustrating things I see is on employment applications. Nothing drives me crazier than an employment application that just asks someone to reveal felonies or just felonies within the last five years. Because while some states impose some limitations, in general, the far majority states allow you to ask have you ever been convicted of a crime that has not been sealed. And the broader that question is the more that you can – the more likely it is that if someone misrepresents that you're going to be able to get them on that misrepresentation and not need to engage in such an individualized analysis.

Finally, touching on a couple of other things that I've seen. I've mentioned before the concerns with civil litigation checks, specifically workers compensation checks. You know, oftentimes clients run workers compensation through third – through third-party agencies but by doing so, they learn that people may have disabilities and then they've opened the door to a potential disability discrimination claim if they don't hire that person. And that's a major concern.

Second, one thing that we see often now in the financial industry, in the tech industry, that before people are allowed to go on site to certain entities that that entity wants to either run a background check or at least see the background check that was run on that person. I strongly recommend that background check results not be disclosed. Certifications can be disclosed if there was no issues but the background check results not be disclosed unless there is a clear authorization from the employee.

And along the same lines going back to the confidentiality identity theft issues, you know, most of the time, these reports contain Social Security number, full name and an address. And almost any hacker in the world can get credit cards with that information, often can get into bank accounts. And that there be very, very strong measures maintained to maintain the confidentiality of all of this acquired information.

I thank you all for your time.

And now, I'm going to – and I look forward to questions to the end. And now I'm going to turn it to Chris to discuss some I-9 issues.

Chris McVay: Thank you, Rich. I appreciate it. I'm going to go quickly so that we have allow some time at the end of our presentation for your questions.

Obviously, one of the – one of the issues when analyzing an applicant for employment is whether or not they meet the I-9 requirements of the United States government. Most of you know that the I-9 is the document that individuals are required to complete and it verifies that the – that the individual who is applying for your job is who they say they are. That's the identity piece and that they are eligible to work in the United States, the employment authorization piece.

Obviously, you must fully complete the form within 72 hours of the start of the employee's employment. Certain parts of the I-9 had to be completed the very first day that the employee shows up. And if you, and I'm going to talk about e-verifying a little bit but if you are a participant in e-verify program, the entire verification process has to be completed on the first day.

I-9 documents must be presented to the employer within 72 hours and employers must look at the document that applicants present and at least visually verify that they look authentic. There's no requirement that an employer verify that they are authentic but they have to on their face at least look authentic.

You'll see here on the screen that there is a note that there are two schools of thought as to whether or not employers should copy and retain back-up documents. The main issue there is that there is no requirement that employers keep those documents but if you want to have some kind of proof down the road that those documents that you reviewed looked authentic, certainly helps to have copies of them available for review by your inspector.

Employers can request to see Social Security cards on the first day of employment for payroll purposes. It's also worthwhile to note that you must maintain copies of I-9s for three years or one-year pass termination date, whichever is longer.

Moving on to the next slide, most folks know that a new I-9 form was issued by the U.S. Citizenship and Immigration Service. The date on that form is June 5th, 2007. It wasn't actually released until December 26th of 2007, but all employers must be using that new form now. So, if you are using an old form that you have photocopied a thousand times and haven't updated lately, if you get audited by the federal government, you will be subject to penalties if you are not using the new form.

The major differences on the new form is that they have removed five eligible documents from List A which is the list that verifies identity and eligibility to work and they have also added one to that list. The USCIS has also issued a new handbook for employers that include instructions for completing the Form I-9. And for those of you who are interested, it is available on the Web and it contains examples of competed I-9 forms and up-to-date color copies of various acceptable documents.

The note – this is a change from the old form. If the employer participates in the e-verify program, the employee does not have to provide a Social Security number in Section One of Form I-9. Practically speaking, I don't know how often that will happen. I don't know how many employees and/or applicants are going to know whether the employer participates in that program but if you are a participant and somebody refuses to provide their Social Security number for I-9 purposes, you cannot require them to do so. If you are re-verifying an employee, you have to use the new I-9 form with its updated list of acceptable documents.

None of the previous versions of the form are valid anymore, either whether in English or in Spanish. The new form is available in English and in Spanish but only employers in Puerto Rico may require their employees to complete the Spanish version for their records.

Now, e-verify is a program sponsored by the federal government with the intention of assisting employers in ensuring that their new hires are lawfully eligible to work in the United States. As you see on the screen, the participation in the program is not mandatory generally although the Bush administration has announced intention to require participation for all federal contractors doing business with the government. There is some concern at this point over how well that system will work when they add up to six million employers if all employers are required to participate in the program. The basic pilot that ran had about 13,000 employers in it and I think they had some issues with the quality of the information in the database.

Participation through e-verify can be done directly or through a third party and companies that sign up to use this process have to sign a memorandum of understanding and attest that they will comply with certain procedures. Now, the e-verify program, the federal government is looking at expanding it to include a photo component, in which they will compare photos of applicants that have been submitted for other purposes, for example visas and passports. The government would like to coordinate their database with state driver's license databases and their intention is to go to the states and request access to those database so they can compare those pictures.

One issue that we are watching closely is how the federal government's requirements on immigration coordinate with state laws. Many states across the country have passed legislation

that directly addresses employers within their jurisdiction to verify eligibility, separated apart from what the federal government requires.

One of the first cases that came out was in Pennsylvania where the state issued a law regarding certain verification requirements that, excuse me – the city of Hazleton issued the regulation and it was eventually enjoined by a federal court there, saying that it had been pre-empted by the Immigration – and Immigration Reform and Control Act. That issue is still up in the air.

If you read the news today, the Supreme Court refused to hear a case yesterday that was Van Elk versus Reyes. This was an appeal from a California Court of Appeals decision where the plaintiffs there claimed that the defendant, an employer in the state of California, had failed to pay them prevailing wages but the plaintiffs were illegal immigrants. And the U.S. Supreme Court refused to hear the case. So, we have not gotten any additional guidance on the IRCA preemption issue.

Just to highlight one state in particular, Arizona passed last summer the Legal Arizona Workers' Act that required all Arizona employers within their boundaries to participate in the e-verify program. There are several lawsuits that were filed challenging the legality of law but a federal judge dismissed those. So right now, that law is still in effect. And any employer within the state of Arizona who transacts business there has a business license issued by an agency within Arizona and employs one or more individuals who perform work in that state must participate in the e-verify program.

Another example to be aware of, in July of 2006, Colorado enacted a law that tightened up the requirement for employers on verifying the identity and eligibility of new hired employees. In Colorado, employers have to complete and affirmation of legal work status form, a specific form that the Colorado Department of Labor has issued. They have to examine the work status of any newly hired employee. This is one of the states that require that you retain a copy of federal Form I-9 identity documents, which is in addition to what the federal government requires. But this form is one where the employer basically attests that the forms have not been altered or falsified, and that they, the employer, have not knowingly hired an – hired an unauthorized alien.

Now, the form has to be maintained in either written or electronic copy in the employee's federal Form I-9 with documents. And employers who fail to comply with this requirement are subject to monetary penalties that you see listed there.

Another example very quickly, Illinois on the other hand, went to the other extreme and said "Employers, you can not participate in e-verify because the Social Security Administration and the Department of Homeland Security have to make a final determination on their non-confirmation notices."

The Bush administration stepped in and said, "You're interfering with our ability to manage immigration issues," so they sued the state of Illinois. The state of Illinois backed down and right now, Illinois employers are still eligible to participate in the e-verify program without fear that the state is going to proceed with some enforcement action against them.

So, in light of the new I-9 forms, in light of the Bush administration's stated intention to increase enforcement in this area, this is a time where employers should be taking an opportunity to audit your existing I-9's, make sure that you are using the new I-9 forms and that you don't have old copies of the old I-9 forms still circulating and being used. Consider using the e-verify program and with the issue of contractors, you want to make sure that your contractors are taking steps to verify the identity and eligibility – employment eligibility of their employers.

And as Rich said earlier, we don't advocate that you, you know, require review of all those documents for co-employment purposes but we do require certification from contractors that they

have completed those checks and have taken all the necessary steps to verify eligibility and identity, authenticity. That …

Eric Reicin: Thank you, Chris. We are going to take some questions now. If you want to ask a question, use the box in your left-hand side. And we have a number of questions already out there. So, I think we'll go quickly. Others will be a little bit longer. And I'm sure Rich would be happy to talk to talk you individually if your question is not answered here at Jackson Lewis up in New York.

One easy question or one simple question that was asked, not to denigrate that question whatsoever, but it's a question that a lot of people do ask this question, HR folks, especially in particular, people who aren't law employment specialists. If the employee lives in Connecticut and the employer is in New York or some other state, which state law applies, Rich?

Rich Greenberg: I think that there's a – there's a two part analysis to that question. First in terms of the procedural requirements in terms of the Consumer Report Act Laws, the consent forms in general, I would always recommend applying the most protective law because a lot of the times these laws are drafted to say that we want to protect our citizens.

In terms of the disqualification laws, I feel pretty comfortable that the disqualification laws are premised on where the person is working and that you could focus on just the disqualification laws that would be applicable in the work location. However, I do note) that this is an area where there is not a well developed set of case law, so you could be acting a bit of your own peril, but that's the advice I've been giving for about 10, 12 years now, and not having any clients have specific negative experiences in that regard.

Eric Reicin: OK. Another question from the field is – (there may be a mistake) in the manner which it was presented but the question was asked. Can you always ask whether the applicant has ever been convicted of a crime?

I think one of the factors that you need to make sure is whether in that particular state, there is a prohibition for that. So, you watch out in Massachusetts. You need to watch out in California. You need to watch out for juvenile records, for sealed records. Those sorts of things, Rich, I don't know if you want to …

Rich Greenberg: Correct. (Eric) pretty much just answered to the question. I apologize because maybe I was speaking too fast in the end. What I said is unless the state law imposes a specific requirement, and there is only about 10 states mainly the ones that Eric mentioned that imposed such a requirement, there is no indication on a broad question, have you ever been convicted of a crime that has not been sealed or expunged.

But as Eric mentioned, there are certain states, California, Massachusetts, Illinois, where you have to have the specific language about expunged and sealed juvenile convictions. There is a limitation. But there are many national employers that I worked with that just nationally say, "Just tell us about felonies, or just tell us about things within the last five years," which I think is very limiting to them.

Eric Reicin: OK, There's another question of – going back to slide 12, that I just moved for the group on the phone. What are examples of the databases that FCRA may apply if the employers run their own checks?

Rich Greenberg: The biggest one that comes to my mind would be if an employer on its own purchased one of these national databases. Because the national databases is sort of a download of criminal information provided to you by a third party that allegedly acquired it as of X-date from – you know allegedly from the specific state databases that are maintained for example by correctional departments. And because of the logic of the FCRA that there are these databases

out there that may not be accurate, someone should have the opportunity to contest the accuracy of the information, there could be an argument there that that database creates an FCRA issue. I have never seen any case law on it but since you know, we have high-level professionals on the phone; I just wanted to raise the issue.

Eric Reicin: There's another question about physical screening as pre-employment qualifications for capability to perform job-specific activities. And in answering that question, you have to be mindful of the Americans with Disabilities Act and the state FEPs, which – and there is a whole series of guidance on the EEOC Website with respect to that. But basically for physical screening, you cannot do medical tests prior to the pre-offer stage under the ADA. Once the offer is made, then you can do the physical screening that may be necessary for the …

Operator: All participants have been muted but you may un-mute your line by pressing star six.

Eric Reicin: Sorry about that interruption, ladies and gentlemen. I'm not familiar with that, technical difficulties.

So I would look at the ADA and the state FEPs with respect to that and I think we have time for, may be one more question based on the technical item.

And that question would be – there's a question about a link for states smoker rights law and lifestyle laws. And I assume Jackson Lewis has put together something on lifestyle laws and smokers' rights laws. Is there a place on your Web site that we can look for that, Rich?

Rich Greenberg: I'm not sure we have it publicly posted but it's something that I can put together and have issued here, that we could put on any response that we're putting out.

Eric Reicin: OK. Well, I guess we're very close to the end of our time. Let's virtually thank and give a virtual applause to Rich and Chris. Thank you for – Jackson Lewis for putting together the PowerPoint and Rich and Chris for putting together a wonderful program.

Again, our next Webcast for the ACC Employment and Labor Committee will be in early March based upon the February 11th announcement of the Department of Labor, new FMLA proposed regulations which changes the underlying FMLA but also provides information on the new military leave law that was recently signed into law by President Bush. And this concludes our Webcast discussion this afternoon.

Thank you for joining.

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