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BACKGROUND SCREENING:

*What You Need to Know
to Reduce Risk and Increase Return*

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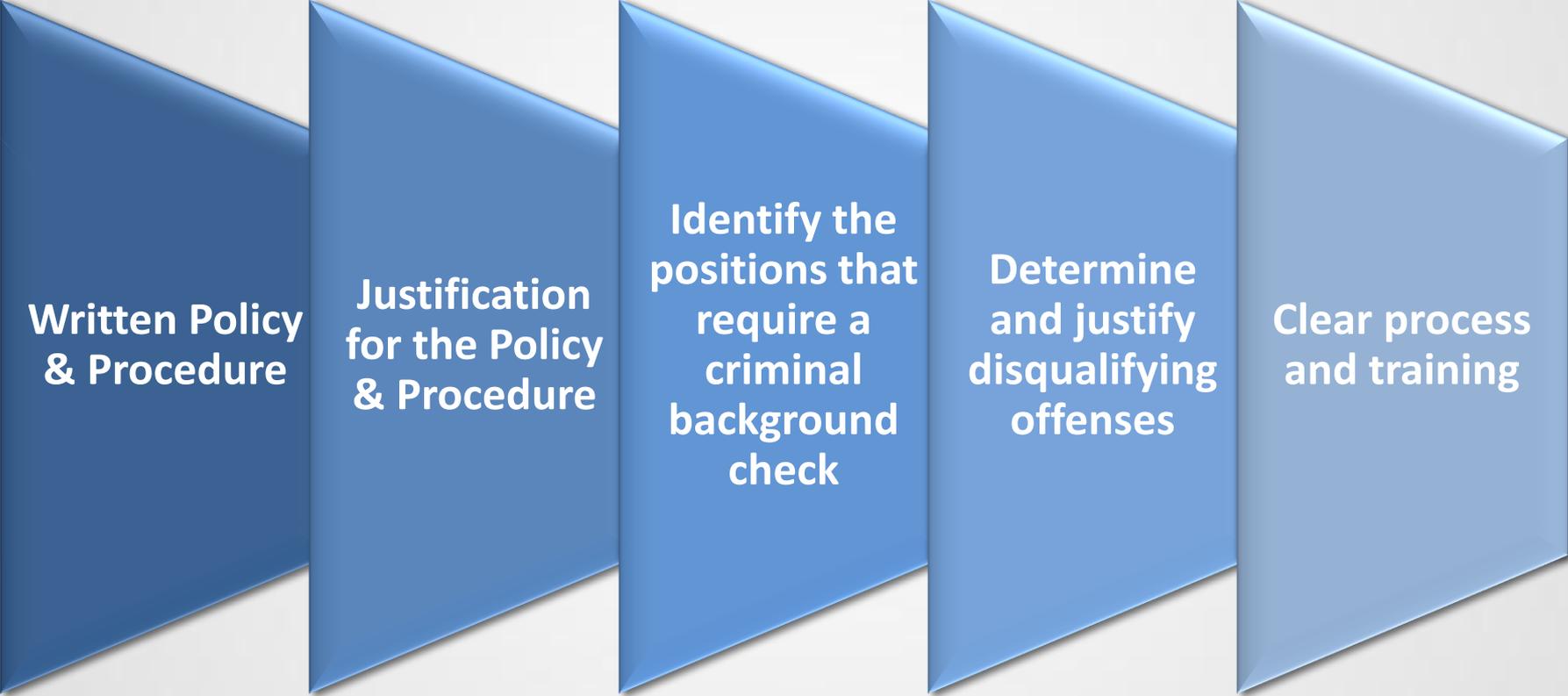


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Agenda

- ◆ Key Elements of a Screening Policy
- ◆ EEOC Guidelines – 2012 Updates
- ◆ Guidance, Directives and Best Practice
- ◆ Screening with a CRA
- ◆ Screening Options
- ◆ Using Adverse action

Key Elements of a Screening Policy



**Written Policy
& Procedure**

**Justification
for the Policy
& Procedure**

**Identify the
positions that
require a
criminal
background
check**

**Determine
and justify
disqualifying
offenses**

**Clear process
and training**

Background Screening

- ◆ Nationally, an estimated 65 million (or 1 in 5 adults) have a criminal record on file and most have been turned down for a job at some point because of their record.
- ◆ With the popularity of this legislation to ban this required disclosure still on the rise, conducting a thorough background check on a potential applicant grows even more important, as it might be the only way to ever know a potential employee's criminal history.

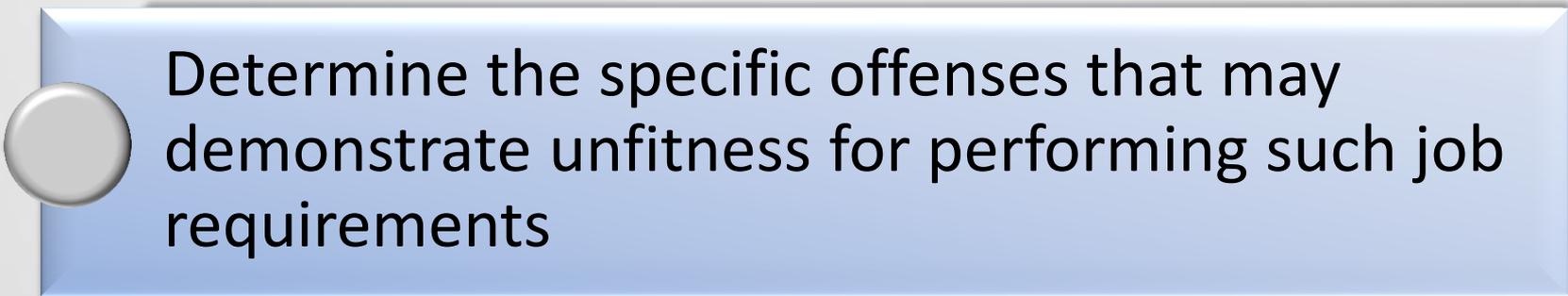
Key Elements of an Effective Screening Policy

- ◆ Adopting a Model Policy for Performing Pre-Employment Background Checks

Components:



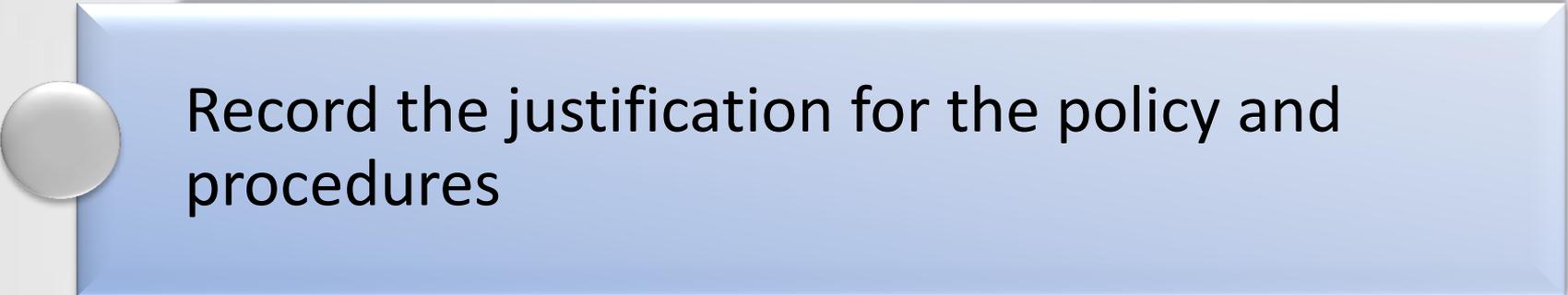
Identify essential job requirements



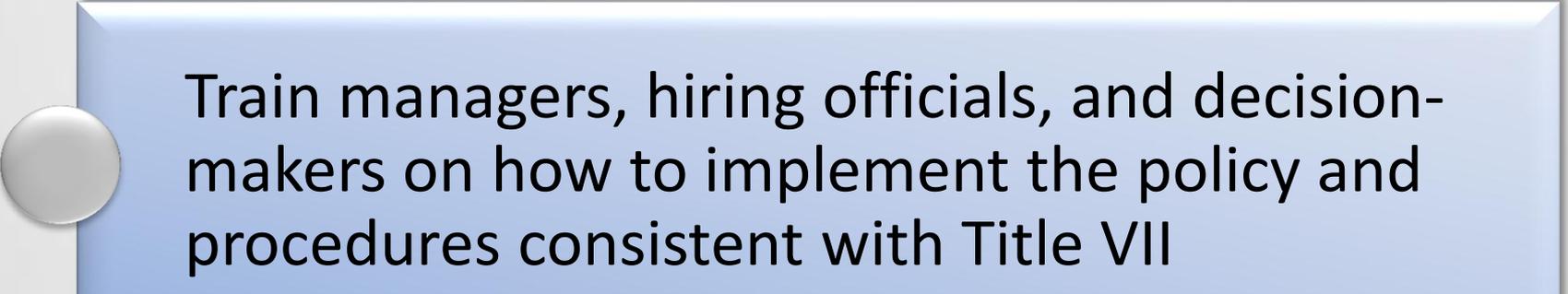
Determine the specific offenses that may demonstrate unfitness for performing such job requirements



Determine the duration of exclusions for criminal conduct based on all available evidence



Record the justification for the policy and procedures



Train managers, hiring officials, and decision-makers on how to implement the policy and procedures consistent with Title VII

The Legal Landscape, Including Enforcement, is Rapidly Changing

- ◆ Equal Employment Opportunity Commission:
EEOC Enforcement Guidance:

“Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. § 2000, *et seq.*”

(April 25, 2012)

Some Important Points

Use of an individual's criminal history in making employment decisions may, in some instances, violate Title VII

Violations can occur when employers treat criminal history differently for different applicants

An arrest does not establish criminal conduct has occurred

Even a neutral policy (e.g. excluding applicants from employment based upon certain criminal conduct) may disproportionately impact some individuals protected under Title VII

Adverse decisions may violate the law if not:

- (i) Job Related, and
- (ii) Consistent with business necessity

Employees' criminal record should be kept confidential and used only for intended purpose

National data can be used to support a finding that criminal record exclusions have a disparate impact based on race and national origin.

The national data provides a basis for the EEOC to investigate Title VII disparate impact charges challenging criminal record exclusions

“Job Related” and “Consistent with Business Necessity” Requirements

- ◆ Develop Targeted Screening that considers at least the following three factors:
 - (i) the nature and gravity of the crime;
 - (ii) the time elapsed since the crime and/or the completion of the sentence; and
 - (iii) the nature of the job held or sought.

These are the “**Green factors**” from *Greene v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1977)

Individualized Assessments May Help

- ◆ Facts and circumstances;
- ◆ Number of offenses;
- ◆ Age at time of conviction/release from prison;
- ◆ Post-conviction work record;
- ◆ Length/consistency of employment history;
- ◆ Rehabilitation efforts;
- ◆ Fitness for particular position.

U.S. Dept. of Labor's Office of Federal
Contract Compliance Programs,
Directive 306:

**“Complying with Nondiscrimination Provisions:
Criminal Record Restrictions and
Discrimination Based on Race and National
Origin”**

(January 29, 2013)

OFCCP's DIRECTIVE 306

OFCCP will follow/enforce EEOC's Enforcement Guidance issued on April 25, 2012:

“Accordingly, contractors should carefully consider their legal obligations before adopting such policies.”

law.

U.S. Dept. of Labor

Training and Employment Guidance

Letter No. 31-11

- ◆ Issued by Education and Training Administration (“ETA”) in conjunction with Civil Rights Center (“CRC”):

“The purpose of this Training and Employment Guidance Letter (TEGL) is to provide information about exclusions based on criminal records, and how they are relevant to the existing nondiscrimination obligations for the public workforce system and other entities (including the “covered entities” listed above) that receive federal financial assistance to operate Job Banks, to provide assistance to job seekers in locating and obtaining employment, and to assist employers by screening and referring qualified applicants.

...restrictions based on criminal history records may have a disparate impact on members of a particular race or national origin, in violation of federal antidiscrimination laws.”

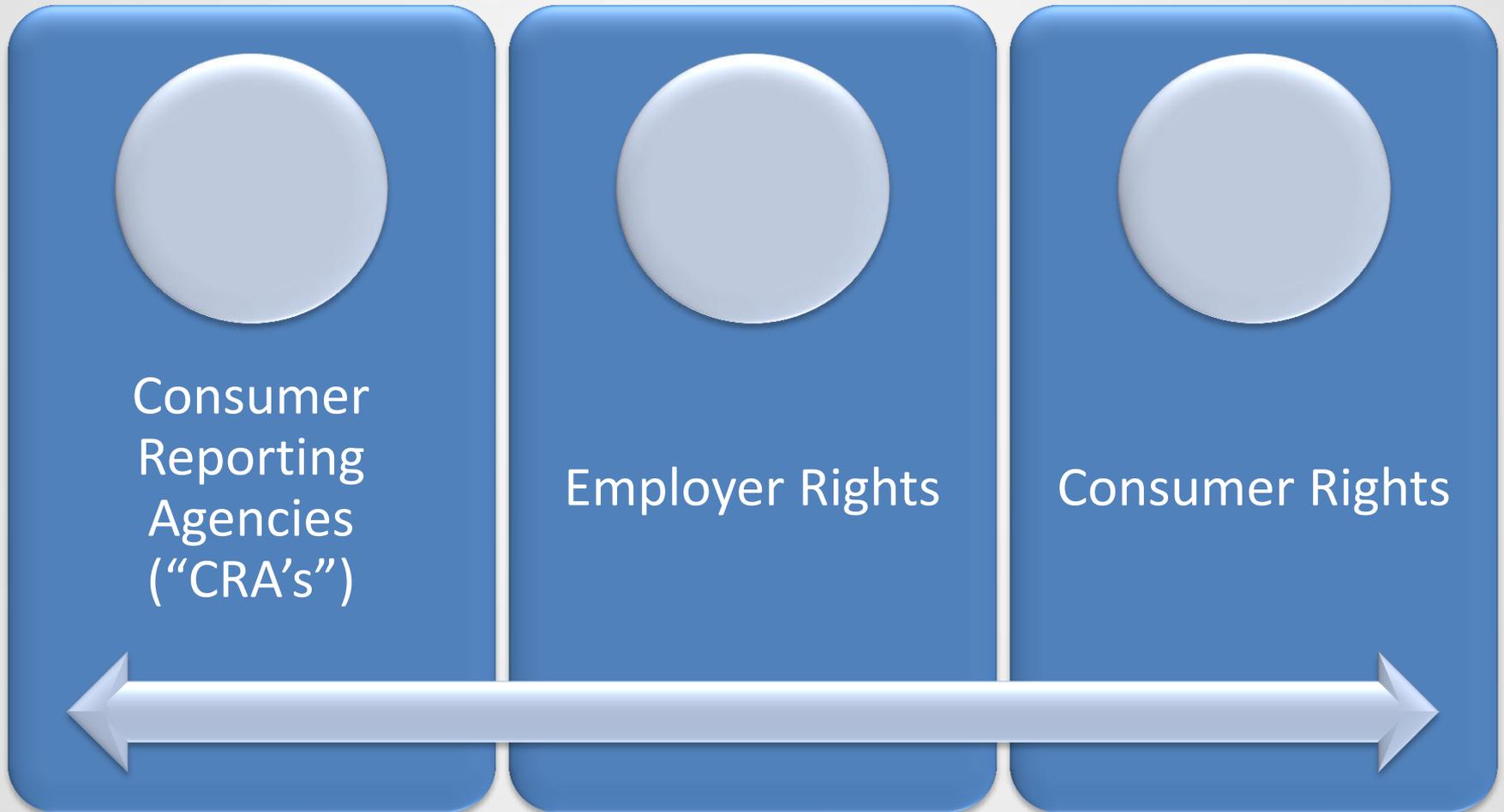
EEOC, OFCCP

- ◆ EEOC and OFCCP both recommend that contractors, as a general rule, refrain from inquiring about convictions on job applications
- ◆ Practice Note: If your job application is online, and is non-compliant, you may be an easy target for enforcement audits by state and/or federal authorities

FAIR CREDIT REPORTING ACT

- ◆ Requires the employer to obtain the applicant's permission before asking a background screening company for a criminal history report
- ◆ Requires the employer to provide the applicant with a copy of the report and a summary of the applicant's rights before the employer takes an adverse action (such as denying an application for employment) based on information in the criminal history report

Considerations Under FCRA



Screening with a CRA

Choosing a Background Screening Partner

What is your responsibility and what is theirs?

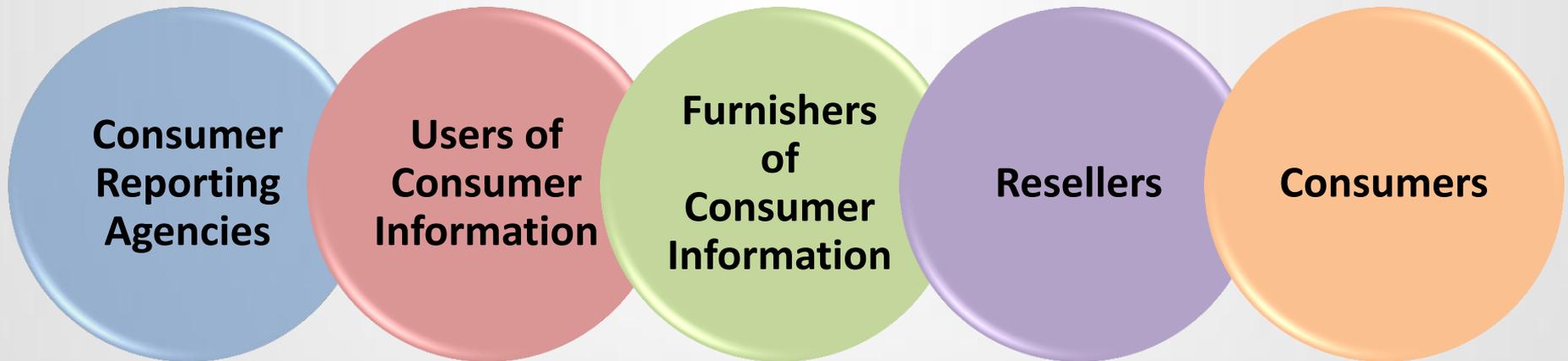
What Should Be included in the Background Check?

The Fair Credit Reporting Act

FCRA

15 U.S.C. 1681 et seq.

The FCRA addresses the rights and obligations of five groups:



FCRA

15 U.S.C. 1681 et seq.

- ❖ The FCRA does not pertain only to credit reports but to the entire consumer report
- ❖ Until recently, the Federal Trade Commission had primary enforcement authority. This authority is now shared with The Consumer Financial Protection Bureau.
- ❖ The FCRA includes a “private right of action,” so private litigants can bring lawsuits for FCRA violations.

Employer Responsibility Under the FCRA

- ◆ Permissible Purpose
- ◆ Disclosure
- ◆ Consent
- ◆ Comply with state and federal laws and regulations
- ◆ Pre-adverse Action
- ◆ Summary of Rights
- ◆ Adverse Action

CRA Responsibility

Under the FCRA

- ◆ Maintain reasonable procedures to assure maximum possible accuracy, including maintaining “strict procedures” to insure that the public record information is “complete and up to date.”
- ◆ 15 USC §1681k
- ◆ Sell only to end users with a “permissible purpose”
- ◆ Conduct Reinvestigations
- ◆ Make disclosures to consumers

Choosing a Background Screening Partner

- ◆ Member of NAPBS?
- ◆ Scope of Services
- ◆ Training
- ◆ Clear Reporting?
- ◆ Employees FCRA Certified?
- ◆ Compliance Support
- ◆ Reinvestigation Process
- ◆ Communication

CRA Restrictions Under Section 605

- ❖ Bankruptcy cases that antedate the report by more than 10 years;
- ❖ Paid tax liens that antedate the report by more than 7 years;
- ❖ Accounts placed for collection or charged to profit and loss that antedate the report by more than 7 years;
- ❖ Civil suits, civil judgments, and records of arrest that antedate the report by more than 7 years;
- ❖ Any other adverse information, other than records of convictions, which antedate the report by more than 7 years;
- ❖ Any arrest record older than 7 years;
- ❖ For employees reasonably expected to earn \$75,000 or more per year, the above time limits do not apply.

Background Check Options

Identity
Searches

County

State

Federal

“National”

CORI

MA Criminal Offender Record Information (“CORI”)

- ❖ Direct access for Employers via iCORI
 - ❖ Felony records for 10 years following disposition of the felony;
 - ❖ Misdemeanor records for 5 years following the disposition of the misdemeanor;
 - ❖ Pending criminal charges (presumption of innocence);

- ◆ Convictions for murder, voluntary manslaughter, involuntary manslaughter, and certain sex offenses available permanently;
- ◆ **Ban the “Box”** – Effective November 4, 2010, ***MA law prohibits use of a questions on a job application to ask if the applicant has ever been convicted of a crime;***
- ◆ The law does not prevent employers from making decisions based upon an applicant’s criminal history;
- ◆ Must show CORI record to applicant in an interview before questioning the applicant about the record and give applicant the opportunity to explain;

- ❖ Most employers will need to provide an applicant with a copy of the applicant's criminal record before making an adverse decision based upon a criminal record;
- ❖ Recordkeeping requirements:
 - ❖ If you conduct 5 or more criminal background checks a year, employer must maintain a written CORI policy stating the employer's procedure for use of CORI records;
 - ❖ Most employers will be prohibited from keeping CORI records for more than seven (7) years

COUNTY, STATE AND FEDERAL LAWS

- ❖ Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records (Feb. 6, 2012)
- ❖ States “banning the box” include Minnesota, New Mexico, Hawaii, Connecticut, and Massachusetts;
- ❖ Legislation pending in other states, including Rhode Island;

More than 40 major U.S. Cities Have “Banned the Box”.

Cambridge, Worcester and Boston, MA (among others) have adopted Fair Hiring Practices:

- ❖ Banned the box;
- ❖ Background check only for otherwise qualified candidates;
- ❖ Only required for some positions;
- ❖ Policies applies to vendors/contractors doing business with the City;
- ❖ Incorporates EEOC language into selected criteria;
- ❖ Right to appeal denial of employment.

USE OF ADVERSE INFORMATION ON A CONSUMER REPORT

- ◆ Adverse Action:
 - ❖ CRA Role
 - ❖ Employer Role
 - ❖ Legal Obligations
- ◆ Decision-making

CLOSING COMMENTS/QUESTIONS

- ◆ Need to Know EEOC's suggested "Best Practices" and other applicable enforcement guidance
- ◆ Should Have a Model Policy that Fits Your Organization
- ◆ Carefully consider selection of your CRA
- ◆ Make sure you have Appropriate Legal Review
- ◆ Training is Essential

RESOURCES ONLINE

- ◆ EEOC Enforcement Guidance

http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf

- ◆ OFCCP Directive No. 306

<http://www.dol.gov/ofccp/regs/compliance/directives/dir306.htm>

RESOURCES ONLINE

- ◆ Training and Employment Guidance No. 31-11
http://wdr.doleta.gov/directives/corr_doc.cfm?DOCN=9230
- ◆ Ban the Box: Major U.S. Cities and Counties Adopt Fair Hiring Policies to Remove Unfair Barriers to Employment of People with Criminal Records (Feb. 6, 2012), available at:
http://nelp.3cdn.net/abddb6b65a14826f92_n5m6bz5bp.pdf

RESOURCES ONLINE

- ◆ FTC What Employers Need To Know

<http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>

- ◆ FCRA

<http://www.ftc.gov/os/statutes/031224fcra.pdf>

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