



S3 Conference

Screening ❖ Safety ❖ Strategy

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Multi-State Screening: Practical Guide to Fair Chance and Ban the Box and New Claims on the Horizon

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HELLO!

I am Pam Devata

I am here because I love helping people learn about background screening and the FCRA!

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Laying the Foundation

What is going on in background screening?



- ❖ Decreased federal enforcement:
- ❖ CFPB—now only a shell organization
 - Rescinding of 67 pieces of guidance by CFPB
 - FCRA -FFD, accuracy guidance
 - Data protection
- ❖ Still “investigating” but many cases have dropped
- ❖ No “data brokers” rule
- ❖ With decreased federal legislation/enforcement, we often see increased state/local enforcement and legislation.
 - Private rights of action against data providers/furnishers/court researchers
 - State Attorneys’ Generals
 - EEO/administrative agencies getting involved (i.e., CA)



- ❖ EEOC criminal history guidance from 2012 premised on both disparate treatment and disparate impact
- ❖ Disparate impact involves a neutral policy that negatively or disproportionately impacts a protected group.
 - Guidance said Men, African Americans and Hispanic individuals were arrested and convicted more frequently than other groups, so use of criminal history = disparate impact
- ❖ The majority of class actions and systemic investigations by the EEOC relating to background checks (not related to the FCRA) were disparate impact.
- ❖ EEOC announced it is administratively closing ALL disparate impact investigations by Sept. 30, 2025
- ❖ Could lead to private rights of action but no longer EEOC claims



- ❖ After EEOC guidance, many states added Ban the Box/Fair Chance/Clean Slate laws with different requirements;
- ❖ Individualized assessment
- ❖ Not asking about criminal history until a specific time (i.e., after offer)
- ❖ Providing the specific information, analysis or summary of rights in pre-adverse action letters
 - For example: the specific conviction; why it is job related; why it creates unreasonable risk; a candidate's rights under the law to file a claim/charge, etc.
 - Waiting periods between action/letters
 - Specific analysis (NYC/LA city/LA County)



- ❖ Will you ask about criminal history? (Caution in LA county)
- ❖ Consider timing of individualized assessment:
 - On application
 - During interview
 - After interview
 - After background check completed
- ❖ Recordkeeping
 - worksheet
 - excel spreadsheet/master list
- ❖ May be able to use background company to assist in obtaining some information
 - education/employment information
 - request additional information in pre-adverse action
- ❖ Analysis must be given in Illinois and on city forms in New York City and Los Angeles (city and county)



❖ Assessment must be documented and provided to applicant before taking action in certain jurisdictions

Based on the factors above, we are considering rescinding our offer of employment because:

Describe how there is a link between the specific aspects of the Applicant's Criminal History with risks inherent in the duties of the Employment position.

Based on these factors, we may deny you the job because *(choose one or both below)*:

We believe there is a direct relationship between your criminal record and the job we offered to you, and the factors listed above do not lessen that relationship because:

Your criminal record creates an unreasonable risk to specific persons, the general public, or our property because:



Ask yourself:

Based on everything I know about this candidate, the position, and the conviction(s), do I think there is a risk the candidate will commit a crime while at work or on duty? Or that their ability to perform the essential functions of the job is impaired by their conviction? And, is my belief reasonable?



- ❖ What jurisdiction applies?
 - Where candidate lives AND will be working.
 - Some jurisdictions have look-back periods
 - 2010 conviction might be off limits in Philadelphia, San Francisco, Hawaii and Washington (depending on release/parole date)
- ❖ Facts and circumstances of the offense (misdemeanor/felony, what crime?)
- ❖ When was the offense?
 - Older convictions tilt the scale away from job-relatedness
- ❖ Age at the time? (e.g., irresponsible 18-year-old or more mature 35-year-old)
- ❖ Specific job duties
- ❖ Evidence of rehabilitation; work history; references
- ❖ How many offenses/convictions are there? (Pattern or aberration?)
- ❖ Severity (e.g., felony or misdemeanor)
- ❖ Punishment (e.g., prison time versus a slap on the wrist)
- ❖ Did the person self-identify



Clean Slate Laws Across the Nation

12 States with Clean Slate Laws:

2018: PA

2019: UT, NJ

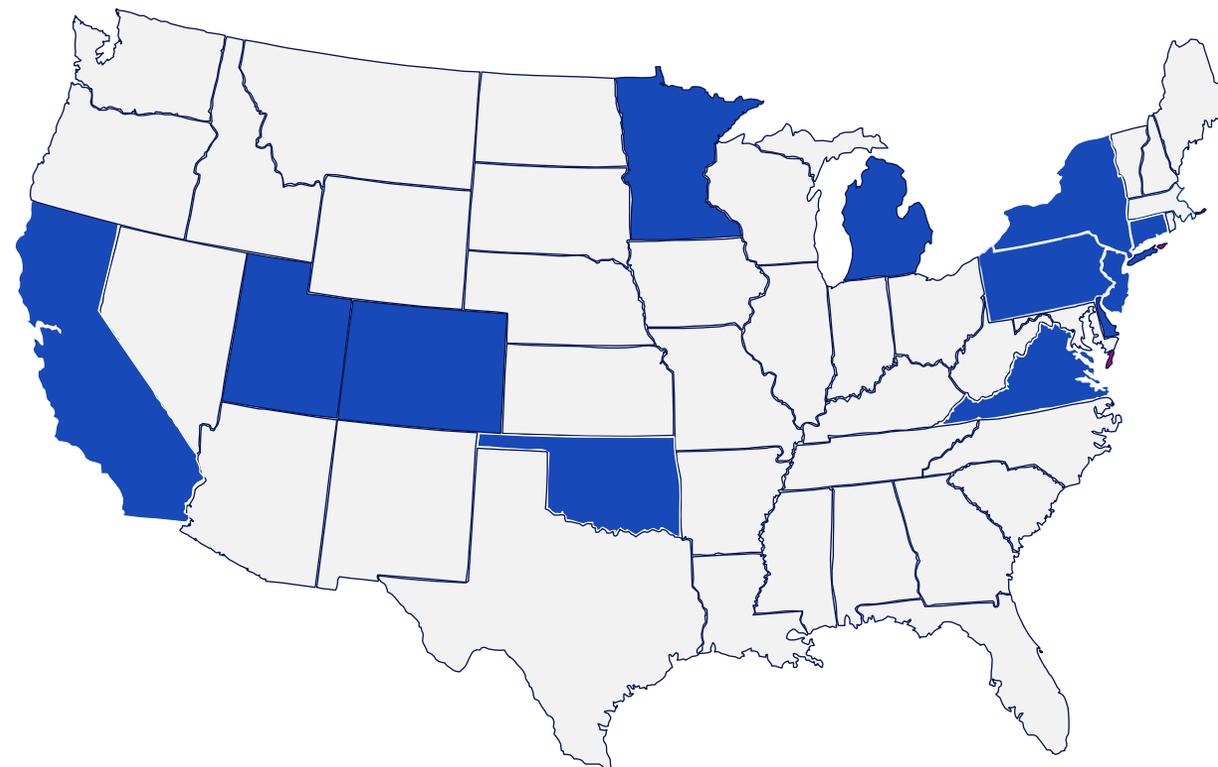
2020: MI, CT

2021: DE, VA,

2022: OK, CO, CA

2023: MN, NY

More States and Localities with Pending Legislation (e.g., KY, MO, RI, HI)



What Criminal Records May Be “Cleared” Through Clean Slate Laws



Records eligible for clearance vary by jurisdiction, but include:

- ❖ Most non-conviction records
- ❖ Many misdemeanor convictions (after shorter wait period)
- ❖ Many non-violent felony convictions (after longer wait period)

Records not eligible for clearance:

- ❖ Individual has not completed sentence
- ❖ Individual has a new criminal record before the end of wait period
- ❖ Violent and/or sex-related convictions

- ❖ You still may get these

2023 NY Clean Slate Act amended the NY Fair Chance Act.

- ❖ Effective November 16, 2024
- ❖ Eligible misdemeanor records sealed 3 years after completion of sentence
- ❖ Eligible felonies sealed 8 years after completion of sentence
- ❖ Not eligible: Class A felonies, other violent felonies, sex offenses, other convictions requiring registration as sex offender
- ❖ Still accessible: Where “relevant and necessary” for certain positions where the law requires background checks and/or for positions with responsibility for safety of vulnerable populations
- ❖ Requires an employer to give a copy of the report/record regardless if taking action as well as the FAQs or language to amend a record
 - [FAQs-CHRI-Access.pdf](#)



- ❖ Attempt to broaden definition of “Employer”
 - Fair Chance Act Laws
 - Ban the Box Laws
- ❖ Many laws require additional individualized assessment.
- ❖ Argument is similar to “old” NY argument from 2014 Consent Decree (grading red/disqualify)
- ❖ If a CRA is grading/adjudicating/applying a status, there is a possible claim.
- ❖ Multiple charges in CA: CRD charges alleging violations of FCA
- ❖ Be careful of permissible purpose, site access as non-FCRA
 - gig economy website/platform
 - physical locations



THANKS!
Any questions?

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