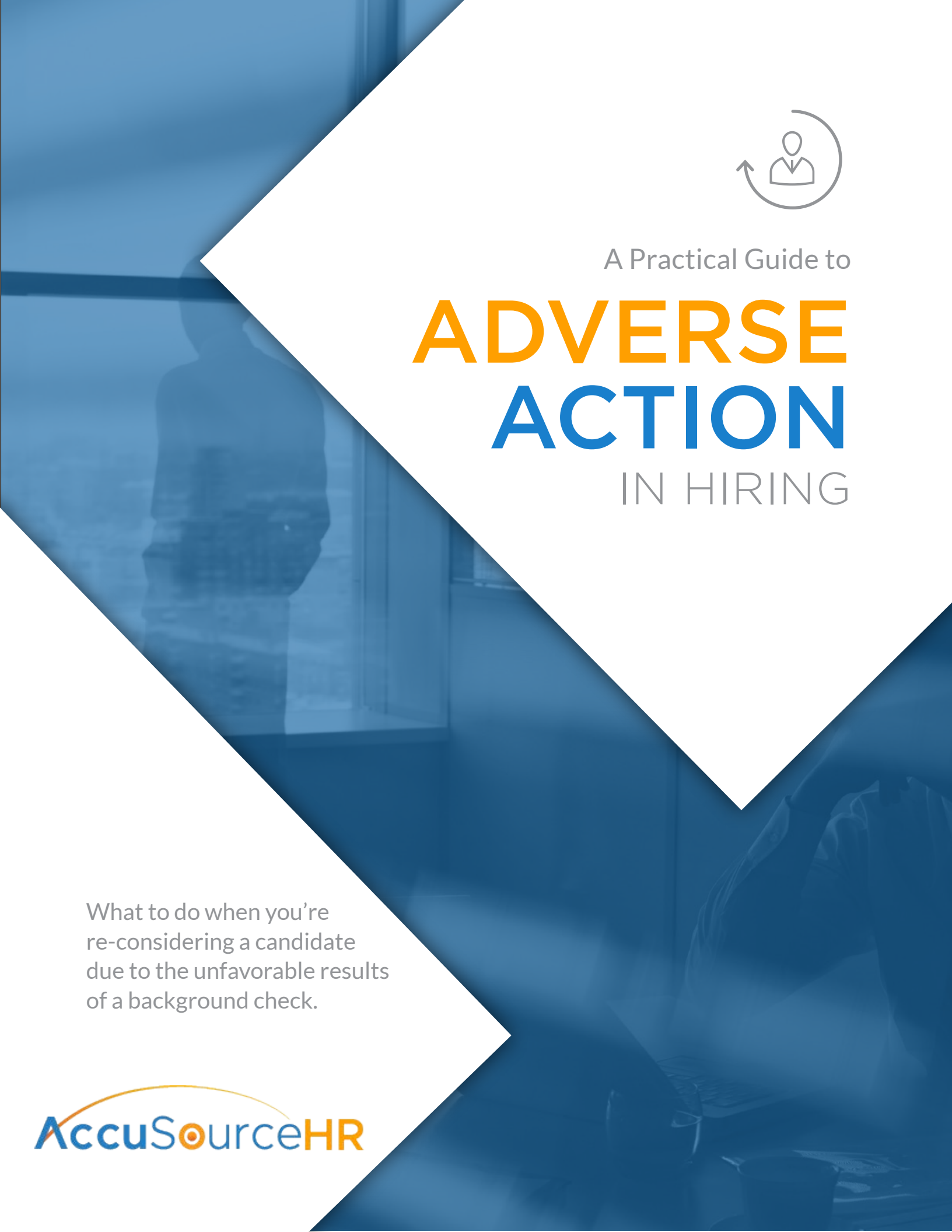


A Practical Guide to

ADVERSE ACTION IN HIRING

What to do when you're re-considering a candidate due to the unfavorable results of a background check.

AccuSourceHR

INTRODUCTION

Hiring has changed dramatically over the years. Not only in terms of how you source and attract new talent, but also in terms of how you evaluate prospective candidates and make your final hiring decisions.

It is increasingly quick and easy to find out information about a prospective candidate or job applicant through the use of database searches, web searches, and social media searches. The dangers of these fast, cheap, and/or easy data sources are well documented. And while some of these sources can play a role in employment screening as part of a comprehensive approach, did you know even a comprehensive, by-the-book background check can get you in trouble?

One of the major areas of governmental regulation and societal attention in recent years related to employment and hiring is the issue of adverse action.

What happens when you get an unfavorable background check result on a potential new employee or on an existing employee you are looking to retain or promote?

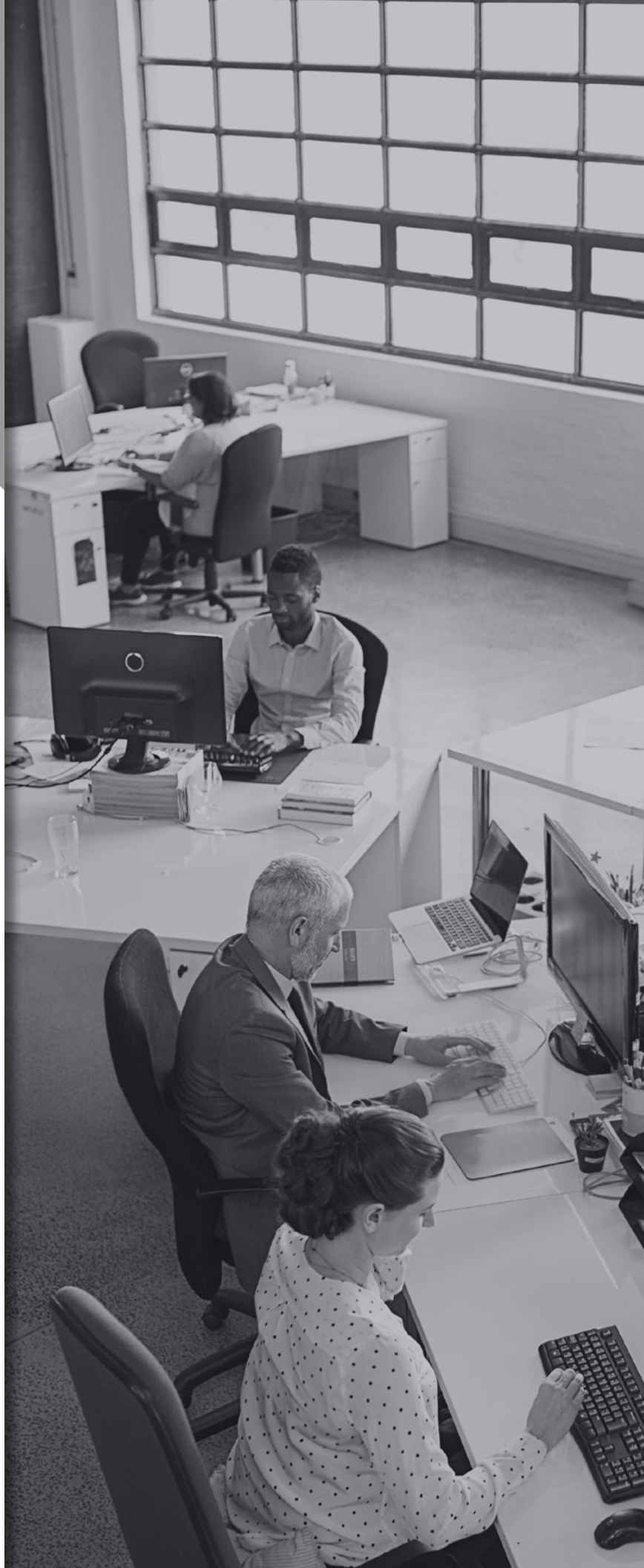
Adverse actions routinely occur at all levels of the organization. When a candidate or employee gives you a reason to change your mind about their job prospects you need to be able to guide the applicant through the adverse action process. This applies whether as a result of a prior criminal record, an incident on a driving record, or even a misstatement or lie on a resume.



IN THIS GUIDE

You'll learn:

- ✓ The rationale behind the employment laws governing adverse action, beyond the letter of the law.
- ✓ What the law says about adverse action: An easy-to-follow summary of adverse action rules, when they apply, and how they can help avoid unintentional discrimination and promote fairness in your hiring process.
- ✓ A simple workflow for a FCRA-required adverse action process and EEOC-required individualized assessment.



WHAT THE LAWS SAY ABOUT ADVERSE ACTION

Let's start with the big picture. Employment laws cover a lot of ground, but the focus here is on the rules that govern taking adverse action against an applicant. Before we get into the nuts and bolts, it's helpful to understand the philosophy or principles behind these rules. Knowing this may help you in designing a fair hiring process even when the formal rules are murky or contradictory.

The basic purpose behind adverse action rules, and anti-discrimination employment laws (generally), is to improve the job-chances of people who are often filtered out of the application or hiring processes due to factors that may be discriminatory, inaccurate, or unfair.

5 key themes in these rules include:



1. FAIRNESS

The laws are designed to give otherwise disadvantaged applicants a fair chance at getting a job.



2. ACCURACY

Employers and consumer reporting agencies (CRAs) have a responsibility to ensure information used in the hiring process is accurate.



3. TARGETING

Background information should be collected and used only as needed to evaluate a candidate regarding the specific job in question.



4. INDIVIDUALIZATION

Candidates should be treated as individuals, not as members of a class, e.g., people who have committed a felony.



5. TRANSPARENCY

Candidates should be notified about the process and the information reported and given a meaningful opportunity to respond.

Adverse action employment law has been changing rapidly in recent years, and employers have been increasing their use of formal background checks in making hiring decisions, even for very routine jobs. These two trends are mutually reinforcing: as background checks become more prevalent, they face greater scrutiny for their impacts on hiring and laws are passed or applied to control those outcomes.

In fact, a recent wave of class action lawsuits has centered on the FCRA (Fair Credit Reporting Act) with claims that employers are not following adverse action requirements. The FCRA requires employers to follow a strict set of rules before they can reject a job applicant, reassign, terminate, demote an employee, or take any other negative action on the basis of information in a background check. We will go into more detail on this later.

Making sure your hiring process is in line with the 5 themes above will keep you a step ahead in this fast-moving scene. Your compliance will likely follow along with your basic purpose in hiring.

ADVERSE ACTION RULES YOU SHOULD KNOW

Remember, adverse action rules only apply when you are considering *not* hiring, retaining, or promoting an applicant or employee based on information found in a consumer report (background check). The following are rules you should know and incorporate into your adverse action workflow:

Fair Credit Reporting Act (FCRA)

What if the information you get in a report from a background screening agency causes or contributes to your decision to reject, reassign, or terminate an applicant or employee? You are now in the world of the Fair Credit Reporting Act (FCRA) rules on adverse action, and you need to understand and know what you're doing.





Here is a summary of the FCRA rules:

BEFORE ORDERING A BACKGROUND CHECK:

Before your order a background check using a third-party background screening agency (a "Consumer Reporting Agency," or CRA):

- Notify your job applicant or employee in *writing* with a *stand-alone document* that you are going to acquire the report and use it in making an employment decision.
- Obtain the applicant's written permission to perform the background check (which can be on the same document listed above).
- Certify to your background screening agency that you are in compliance with the FCRA rules.

Now, what if you want to take adverse action against an applicant or employee based on information in the background report?

BEFORE YOU TAKE ADVERSE ACTION:

- Notify the applicant that you may take adverse action based on the report, and give them a copy of the report. This is the pre-adverse action notice.
- Make sure the applicant has a copy of the FCRA's consumer rights document.
- Give the applicant enough time to provide rebuttal or mitigating information about the report.

Often the applicant's mitigating information is missing or doesn't convince you to change your mind, and you proceed with the adverse action. However, there is one more step.

AFTER YOU TAKE ADVERSE ACTION:

You must notify the applicant *orally, in writing, or electronically* including:

- ✓ Contact information for the background screening agency you used.
- ✓ A statement that you (the employer) made the adverse action decision, not the agency.
- ✓ That the applicant has a right to a free copy of the report used if they contact the agency within 60 days.

The FCRA rules governing the use of background reports are very prescriptive and detailed. That's one of the reasons they are prone to being the source of class action lawsuits. They are clear enough that lawyers can see when they are violated, and you don't want to leave yourself open to this.



Equal Employment Opportunity Commission (EEOC) Guidelines

EEOC guidelines are not as prescriptively detailed as FCRA rules. However, you need to take the guidelines seriously as organizations have been sued based on them.

The EEOC has issued guidelines on just about every HR employment issue under the sun, but the one we care about here is the Enforcement Guidance on the use of arrest and conviction records. Background information on these is still a wide-cast net since about one in four American adults has a criminal record of some kind.

The EEOC arrest and conviction guidelines implement a portion of Title VII of the Civil Rights Act of 1964. In other words, the main objective is anti-discrimination, especially regarding race, in using criminal records to make a decision about someone.

A summary of the Enforcement Guidance might be that criminal background information should only be used to exclude someone fairly. This broad generality has been developed in several doctrines that have become standard parts of employment law.

3 Key Aspects the of EEOC Guidelines:



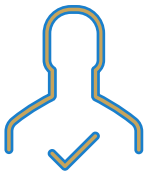
JOB-RELATED AND BUSINESS NECESSITY

The background information used should be job-related and a business necessity. A conviction for negligent homicide while driving wouldn't necessarily exclude an applicant for a job behind a cash register.



THE GREEN FACTORS

The applicant should be evaluated using a targeted criminal records screen based on the 3 key criteria that emerged from the Green v. Missouri Pacific Railroad court case: *The nature of the crime; time elapsed since the conviction and/or time served; and the nature of the job.*



INDIVIDUALIZED ASSESSMENTS

Employers should conduct an individualized assessment on applicants who might be excluded based on criminal history (as found in the targeted screen). These applicants would be notified about their potential exclusion, and given a chance to provide contrary or mitigating information about the criminal history.

Employers do have the right to use criminal history in making employment decisions. For example, if the subject of an individualized assessment does not respond to notification of potential exclusion, an employer is free to proceed based on the information at hand and the above criteria.

That said, employers should be sure that criminal history used to exclude is accurate and relevant to that specific individual for that specific job. Blanket exclusions of applicants based on a thin, vague report of criminal history are a serious no-no, and one way to get the attention of the EEOC or a plaintiff's attorney aiming to prove a case of disparate impact discrimination.

Ban the Box

Speaking of prohibiting blanket exclusions, the core purpose of Ban the Box (BTB) laws is to prevent unfair exclusions from jobs of people who have a criminal history. There are many variations in the exact details of the various laws, but this central objective is common to all of them.

If someone is keeping track of trending legislation, BTB should be on the short list. As this reliably-updated list by SHRM (sign in required) shows, somewhere in the vicinity of 200 state and local jurisdictions have passed some form of this law, and additions keep coming. You should learn about the Ban the Box law(s) near you.

In BTB, applicability is commonly defined by the size and/or type of employer (public vs. private). For example, under the newly expanded California law, all employers, public and private, with 5 or more employees are covered.

Although BTB began in Hawaii in 1998 as a movement to remove the checkbox from job applications (as in, check here if you have a felony conviction), it has evolved into much more complex models. Borrowing freely from both FCRA and EEOC concepts, jurisdictions frequently include features like these:

- ✓ Outright ban on seeking criminal history records until the first live interview, or more commonly, a contingent offer of employment.
- ✓ Time limits on how far back checks can reach, typically 7 years.
- ✓ Prohibition on using arrest records.
- ✓ A mandate to do an individualized assessment if criminal history is a factor in the hiring decision.

In addition, some BTB laws include additional or stricter adverse action rules. These may include pre-adverse action notifications or the length of time an applicant has to respond to adverse information.

A COMPLIANT ADVERSE ACTION WORKFLOW

Combining the legal requirements into a single standard process is not possible due to Ban the Box variations. In other words, you'll need to adjust this workflow based on your state and local requirements. However, there is a logical order of steps that provides a general framework, within which variations can be added.

Let's assume you have moved along in the hiring process to the point where you have narrowed candidates down to those you might want to hire, and you have done the initial live interview and possibly made a contingent offer of employment. You have received candidates' written permission to perform a professional background check, and the initial reports have come back to you. Based on these reports, you have determined that one or more of your candidates might be excluded.

Your adverse action process starts now.



STEP ONE: Pre-Adverse Action and Waiting Period

BEFORE you take adverse action, you should:

- ✓ Send a pre-adverse action notice to the candidate telling him or her that you may exclude based on the content of a background report, and that they have the right to respond to this information.
- ✓ Include a copy of the report in the notice.
- ✓ Include a copy of the FCRA document "A Summary of your Rights Under the Fair Credit Reporting Act."
- ✓ Allow sufficient time for the candidate to review the evidence and provide rebuttal or mitigating information in response. FCRA specifies no fixed length of time, but many people recommend at least 5 business days; a few Ban the Box laws require up to 10 business days.



STEP TWO: Individualized Assessment with a Targeted Screen

If your candidate might be excluded due to a criminal offense, and the offense is job-related and denial is a business necessity, the next step is to do a **targeted screen using the Green criteria:**

- ✓ When did the offense occur? Many Ban the Box laws would prohibit using any offense that happened 7 or more years ago, without subsequent violations, in the evaluation.
- ✓ Is the crime related to the job that is being applied for?

A candidate who passes the targeted screen, and is otherwise quali ied, should be hired. Ex-offenders have proven to be good employees for many organizations.

If the screen raises the criminal offense to a higher level of risk, the next step is to perform an individualized assessment. This kind of personalized research is also required in many versions of Ban the Box, so again, check with your local laws and a local, quali ied attorney.

- ✓ Confirm with the candidate that they are at risk of exclusion based on the criminal background report. Make it clear that no adverse action has yet occurred, and they are still being considered for hire.
- ✓ Notify them that they have the right to rebut or mitigate the report by supplying additional information. There is no fixed definition of what this information might be; employers need to be open to anything, and evaluate it. Examples of mitigating factors are: circumstances of the crime; evidence of rehabilitation; evidence of success in other, similar jobs; candidates' efforts to acquire education or skills; and so forth.
- ✓ Allow sufficient time for the candidate to gather and supply information. Again, there are no fixed rules about this period, but a minimum of 5 business days would normally be "reasonable"; check your local Ban the Box laws for consistency, as some require longer timeframes.

STEP THREE: Final Adverse Action Notice

When you have completed all of these steps, and the information you have still suggests excluding the individual, you can take the adverse action. At this point, we re-engage with the FCRA procedures. Your next required step is to send a written **adverse action notice.**

- ✓ Notify the candidate that you have rejected them based in whole or in part on the background report. Some BTB laws require greater specificity with respect to the reason for rejection.
- ✓ Include the name and contact information for the agency that provided the report.
- ✓ Tell the candidate that you, the employer, made the decision to exclude, not the background screening agency.
- ✓ Tell the candidate they have the right to dispute the information in the report.
- ✓ Tell the candidate they have the right to a free copy of the report if they request it from the screening agency within 60 days.

Following this workflow and making it an automatic, institutionalized part of your hiring and retention processes, will help to keep you on the right side of the law and ensure you are making better employment-related decisions.



CONCLUSION

The entire hiring process is a funnel that begins with your outreach to the pool of potential job candidates. As you move through the funnel, you will narrow down to the point that you may have only one or a few candidates left who require the detailed research. What's important is that you have a well-defined process for handling employment screening results that are not what you had hoped. Here, fairness and due diligence balance to help you make the best hiring decisions.

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