GoodHire

WHAT YOU CAN LEARN FROM OTHER COMPANIES' BACKGROUND CHECK MISTAKES

Compliance Lessons From Class Action Lawsuits

SUMMARY

Class-action lawsuits are expensive to litigate and settle. Recent high-profile lawsuits stemming from employers' failures to meet FCRA requirements, EEOC guidelines, and comply with ban-the-box laws have resulted in costly consequences. In organizations that make dozens (or hundreds) of hires each month, if one or more steps in the background-check process violates the law, it creates hundreds (or thousands) of potential plaintiffs. In this ebook, we'll take a closer look at recent class-action lawsuits, the errors relating to background checks that got those employers in hot water, and show how you can learn from other companies' mistakes.

AUTHOR

Elizabeth McLean

General Counsel, *GoodHire*

Elizabeth McLean is an FCRA-compliance attorney and General Counsel at GoodHire, an employment screening company. An expert in the background screening legal landscape, she follows new legislation and court decisions and advises the company on processes that follow compliance best practices.

CONTENTS

Steady Increase In Lawsuits & Enforcement Actions

The number of lawsuits filed over alleged FCRA violations has increased steadily each year since 2010. In 2018, **FCRA complaints reached a record 4,531**[1], while at the same time, per violation penalties for knowing violations of the Act also increased from $3,500 to $3,756 in 2016[2].

In terms of the number of lawsuits filed by the EEOC, in comparison to previous years, 2018 was a big one. Total merits filings were up more than 100% as compared to 2016. In fact, the EEOC filed more lawsuits in the month of September of 2018 than it did in all of the months of 2016 combined[3].

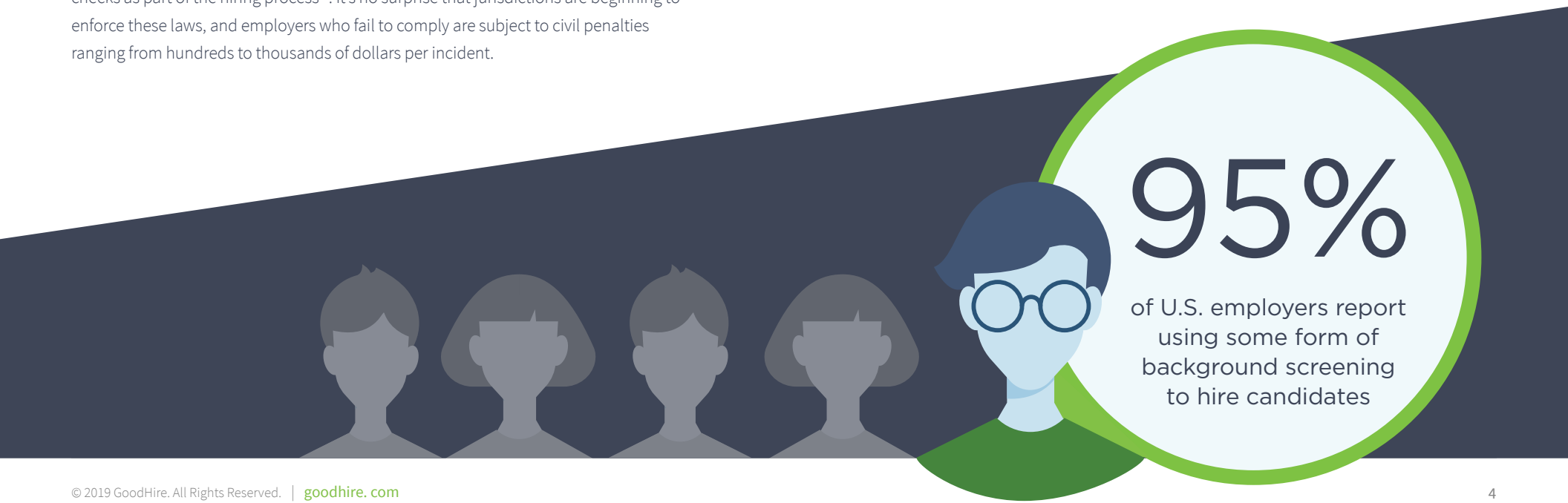
Moreover, 33 states and 150+ cities and counties have adopted ban-the-box laws, and the National Employment Law Project estimates that nearly three-fourths of the country lives in a jurisdiction that has a rule restricting how companies can use criminal background checks as part of the hiring process[4]. It's no surprise that jurisdictions are beginning to enforce these laws, and employers who fail to comply are subject to civil penalties ranging from hundreds to thousands of dollars per incident.

New Laws & Regulations Add Complexity to Compliance

While coverage of FCRA and EEOC violation cases typically focuses on their financial fallout, it's important to remember that these actions also have reputational costs to your company and its brand. No matter what the eventual outcomes may be, high profile suits and settlements bring unfavorable publicity and can dissuade good candidates from ever applying.

95% of U.S. employers report[5] **using some form of background screening to hire candidates.** Whether you do it yourself or use a third-party vendor to run a background check, you still have to follow applicable laws that regulate employment screening.

Yet the complex web of federal, state, and local laws governing background check do's and don'ts makes compliance difficult—**one misstep has the potential to result in steep consequences**, including the threat of class action lawsuits that can wind up costing your company millions of dollars in fines and damages.



You Can Learn From Other Companies' Mistakes

Recent lawsuits stemming from FCRA & EEOC missteps, as well as ban-the-box violations, provide valuable compliance lessons you can start using immediately.

In the following pages, we'll take a closer look at the three areas of compliance where employers need to take special care when running background checks; highlight relevant case law and show you where the company made mistakes; share lessons learned; and provide compliance tips and best practices to help you follow the law and mitigate risk.

3 AREAS

WHERE EMPLOYERS NEED TO TAKE NOTICE

1. Fair Credit Reporting Act
2. Equal Employment Opportunity Commission
3. Ban-The-Box Laws

FACT

FCRA complaints reached a record **4,531 in 2018**, rising in number every year since 2011[6], with the largest verdict ever — a **whopping $60 million** — levied against TransUnion, LLC, in June 2017[7]

FCRA Compliance Failures
& How To Avoid Them

The Fair Credit Reporting Act (FCRA) of 1970 is federal legislation that was passed with the goal of promoting fairness, accuracy, and confidentiality in background checks and other consumer reports. Among the intended goals of the legislation is to protect consumers from the inclusion of inaccurate information in their credit reports and background checks.

The FCRA sets out requirements for employment screeners (like GoodHire) which the law calls consumer reporting agencies (CRAs). The FCRA also sets rules that the employers who use the reports must follow.

In the past few years, employers of all sizes have been hit with class-action lawsuits that allege FCRA violations, and these can add up quickly. Employers can be forced to pay up to $1,000 for each violation, which may not seem like much until you consider that large employers may process thousands of applications a month.

Most FCRA-Related Lawsuits Arise From Two Primary Violations

1. Failure to provide compliant background check disclosure and authorization forms (also called a consent form).

2. Failure to follow the three-step adverse action process the FCRA requires anytime an employer intends to take unfavorable action (e.g. deciding not to hire or promote) based on the results of a background check.

WHAT NOT TO DO

Let's take a look at recent cases where employers have been taken to court for FCRA compliance failures that can serve as examples of what NOT to do — and the lessons to be learned from their mistakes.

Petco's
Missteps Result In **$1.2 Million Settlement**

In August 2018, after a two-year trial in a case that affects more than 37,000 job applicants, the pet-supply retailer agreed to pay $1.2 million to settle a class-action suit. In the case of Feist et al. v. Petco Animal Supplies, Inc., the lawsuit was based on two allegations—one on consent form non-compliance, and the other on improper follow-through of adverse action procedures.

MISTAKES MADE

Consent form allegation (37,279 class members)
The consent form allegation contended that the consent form was not clear and conspicuous in a standalone document because of size of font and its inclusion in a larger application.

Adverse action allegation (52 class members)
Neither pre-adverse action notice, report copy, or final adverse action notice were sent to the candidate prior to the adjudication by Petco.

While there was no official finding of wrongdoing by Petco (the case was ultimately settled before judgment), the result was that **Petco was forced to pay $1.2 million** into a settlement fund.

WHAT YOU CAN LEARN

1. Keep your consent forms separate from job applications and make sure the language is clear, in large print, and on its own form.

2. When information in a background check report may be used as a basis for rejection of a candidate, be sure to send a pre-adverse action notice along with a copy of the candidate's background check results and the FCRA Summary of Rights document.

Stanford

Faces Potential Fines In **The Millions... Again**

Stanford University faces potential statutory damages of $1,000 for each violation of the FCRA for the class of individuals estimated to include more than 1,000 job applicants who applied to work at Stanford University and had a consumer report obtained on their background since August 16, 2015. The University may also face punitive damages, court costs, and attorneys' fees.

MISTAKES MADE

The Stanford case contends that the inclusion of a release of liability in the application form was a violation of the FCRA requirement that disclosures be clear, conspicuous, and in a document consisting solely of the disclosure. This isn't the first time that Stanford has faced FCRA claims for improper or lacking disclosures in their application forms. In 2015, Stanford faced almost exactly the same claims from another applicant.

WHAT YOU CAN LEARN

1. Inform your applicants in writing that a background check will be run for employment purposes (electronic forms are allowed). And do so in a very clear way:

- Do not provide the disclosure within the job application.
- Do not provide it in small font.
- Do not sandwich it between information related to the duties of the job.

2. The disclosure MUST be provided in a document that contains only information about the background check. You can obtain authorization, or a signature, on this same page, but you shouldn't include any information that's unrelated to the background check

Avis Fails To Follow Proper FCRA Procedures, **Settles For $2.7 Million**

On November 17, 2017, car rental company Avis settled a suit filed two years earlier alleging improper background check procedures, including failure to provide adverse action notices and proper FCRA disclosures [8]. The final settlement amount was $2.7 million.

MISTAKES MADE

The plaintiff claimed she lost her job at Avis because of a number of improper background check procedures, including failure to provide an adverse action notice and stand-alone disclosure, as well as the inclusion of a two decades-old citation for alcohol possession that should have been removed from the applicant's background report under the statute. The plaintiff was **joined by 45,000 individuals in the class action lawsuit**, each of whom received cash payouts or other compensation ranging from between $20 to $695.

WHAT YOU CAN LEARN

1. Make sure your disclosure forms are clear and compliant, with disclosures presented in a stand-alone document. The disclosure statement cannot be mixed in among a stack of documents or a mass of fine print.

2. Always provide clear and timely adverse action notices following the three-step adverse action notification process that includes sending the candidate a copy of their background check results and the FCRA Summary of Rights.

TIP

To mitigate potential legal risk, work with a CRA (like GoodHire) that offers law-based record filtering, which automatically applies federal, state, and local law compliance filters to remove records from applicant reports that cannot be used legally by employers to make hiring decisions.

FCRA Compliance Takeaways & Best Practices

To stay FCRA compliant, there are a few important best practices to remember regarding background check disclosure and authorization forms, and steps to follow when adverse action is taken.

Disclosure & Authorization Forms

1. Employers must provide **clear and conspicuous disclosure**, meaning they must inform the candidate in writing that they intend to run the background check.

CLEAR: The disclosure form must be easy to understand, using simple, and direct language while also paying close attention to punctuation. No legalese or corporate jargon.

CONSPICUOUS: The background-check disclosure form should be prominent and sufficiently attention-getting so that the candidate cannot overlook it. The disclosure cannot be buriedin fine print or embedded in a job application form. It should be presented in writing in a standalone document: An FCRA-compliant background-check disclosure must be provided in a printable form for review, on page(s) specifically for that purpose.

2. Employers must provide proper **authorization** to ensure the applicant has acknowledged and authorized the background check. It can be presented as a self-contained document or jointly with an FCRA disclosure form. FCRA background-check authorizations may be used to capture the job candidate's full name, address and Social Security number, and any other personal information required to conduct the background check.

It's important to note, however, that personal information and background data should NOT be included on the disclosure form because the biographical data itself is not related to informing the consumer that a background check will be run. A form with the disclosure, authorization, AND the candidate's biographical data is likely to be the basis of a lawsuit.

The FCRA authorization must be signed by the job applicant, either in print or electronically. The employer should keep the original signed form and provide a copy to the applicant.

3-Step Adverse Action Process

1. Send out a pre-adverse action notice.
This is a letter that informs the applicant that the background check is under review and a decision is pending. You must provide a copy of the applicant's background report and an FCRA document called the "Summary of Rights" along with the notice.

2. Wait five business days.
After providing the pre-adverse notice, you must provide time for the candidate to respond (to dispute the information, for example). Five business days is usually considered adequate.

3. Send the final adverse action notice.
After waiting five days, if you still want to reject the applicant, you must send the final adverse action notice. This notice must:

- Inform the applicant of the adverse action (denial of employment)
- Notify the applicant that the decision was based, at least in part, on the background check
- Include the contact information for the CRA that performed the background check and a statement that the CRA was not the decision maker
- Inform the applicant of his or her right to request a free copy of the report within 60 days and of the right to dispute inaccurate information

As a best practice, keep a record of all pre-adverse and post-adverse action notices sent, along with the dates sent. If you're handling the process yourself and you haven't contracted with your CRA to send the notices on your behalf, you may want to consider sending these notices by certified mail.

EEOC Compliance Failures & How To Avoid Them

Since 2012, the Equal Employment Opportunities Commission has increased its enforcement efforts against employers for violations of Title VII of the Civil Rights Act of 1964. This statute prohibits employer discrimination based on race, color, religion, sex, or national origin.

There are two types of discrimination in Title VII claims:

1. **Disparate treatment, in which an employer intentionally discriminates against a protected group.**

2. **Disparate impact discrimination, in which an employer's actions result in unintended discrimination against a protected group.**

When it comes to background screening, the EEOC has alleged **disparate impact discrimination** against employers whose screening policies result in disproportionate adverse treatment toward a protected group, usually a racial minority.

In order for plaintiffs to succeed on a Title VII discrimination claim based on background screening, **they must show two things:**

1. The checks "disproportionately screen out a protected group"
2. The "employer does not demonstrate that the screening practice is job-related for the positions in question and consistent with business necessity"

Following are two class-action lawsuits where employers have been taken to court for EEOC compliance failures that can serve as examples of what NOT to do and the lessons to be learned from their mistakes.

> *With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a protected group and the employer does not demonstrate that the policy or practice is job related for the positions in question and consistent with business necessity.*

"Disparate Impact Discrimination and Criminal Records," EEOC Enforcement Guidelines, 4.25.2012

Target Gets Hit With $3.7 Million Settlement

A class-action lawsuit filed in the Southern District of New York claimed that retail giant Target's use of criminal background checks violated Title VII by disproportionally excluding Black and Hispanic applicants ("disparate impact") from obtaining employment. The complaint alleged that after Target extends a conditional offer of employment to an applicant, a third-party vendor conducts a criminal background check on the applicant. The results of the criminal background check are then compared to Target's hiring guidelines, which screen out applicants who have been convicted of certain crimes involving violence, theft, or controlled substances in the seven years prior to the application. The company agreed to a **$3.7 million settlement** on May 14, 2018 [9].

MISTAKES MADE

While Target has been proactive in removing criminal history questions from their applications, they still used criminal background information obtained by a third-party screening vendor to disqualify otherwise qualified candidates. Specifically, in this case, they were found to have violated Title VII because they disproportionately excluded Black and Hispanic applicants from obtaining employment and failed to "show that the background screening policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."

WHAT YOU CAN LEARN

Perform individualized assessments on job applicants, narrow categories of offenses that bar employment, and tailor background screening criteria to the specific role being hired for.

Feds Order **BMW** To Pay **$1.6 Million In Discrimination Suit**

The lawsuit alleged that BMW excluded African-American logistics workers from employment at a disproportionate rate when a new contractor applied BMW's criminal conviction records guidelines to existing logistics employees. The result of the case was a consent decree that **ordered BMW to pay $1.6 million** and provide job opportunities to alleged victims of race discrimination, along with up to 90 African-American applicants who BMW's contractor refused to hire based on BMW's previous conviction records guidelines [10]. BMW also agreed to provide training on using criminal history screening in a manner consistent with Title VII.

MISTAKES MADE

BMW was alleged to have violated Title VII by implementing and utilizing a criminal background check policy that disproportionately screened out African Americans from jobs, and rejected job applicants with convictions without considering whether the conviction was job-related and consistent with business necessity.

As EEOC general counsel, P. David Lopez stated at the time, "EEOC has been clear that while a company may choose to use criminal history as a screening device in employment, Title VII requires that when a criminal background screen results in the disproportionate exclusion of African-Americans from job opportunities, the employer must evaluate whether the policy is job related and consistent with a business necessity. [11]"

WHAT YOU CAN LEARN

1. If running checks on current employees or contractors, consider each candidate's/employee's on-the-job performance and success in the role before dismissing current employees who have been functioning successfully in that role.

2. Ensure background screening criteria is narrowly tailored for each specific role and that candidates are assessed individually.

EEOC Compliance Takeaways & Best Practices

The outcomes of recent class-action lawsuits can teach us clear guidelines and steps employers need to take in order to maintain EEOC compliance, especially when considering an applicant's criminal history as a disqualifying factor.

1 Follow the Nature/Time/Nature Factor

Background screening policies that result in discrimination can be compliant as long as you can demonstrate business necessity and relevance to the job. To demonstrate this, consider the "Green factors," named for the case in which they were announced (Green v. Missouri Pacific Railroad), the Green factors include:

- The nature and gravity of the offense
- The time elapsed since the offense
- The nature of the job sought

2 Conduct Individualized Assessments

Perform individualized assessments for any applicants who have criminal records. This means you should:

- Ask for more information about the offense to get context
- Give applicants the opportunity to explain any mitigating circumstances.

Even if you determine the applicant is not a good fit, documenting this process can help protect you from a Title VII suit.

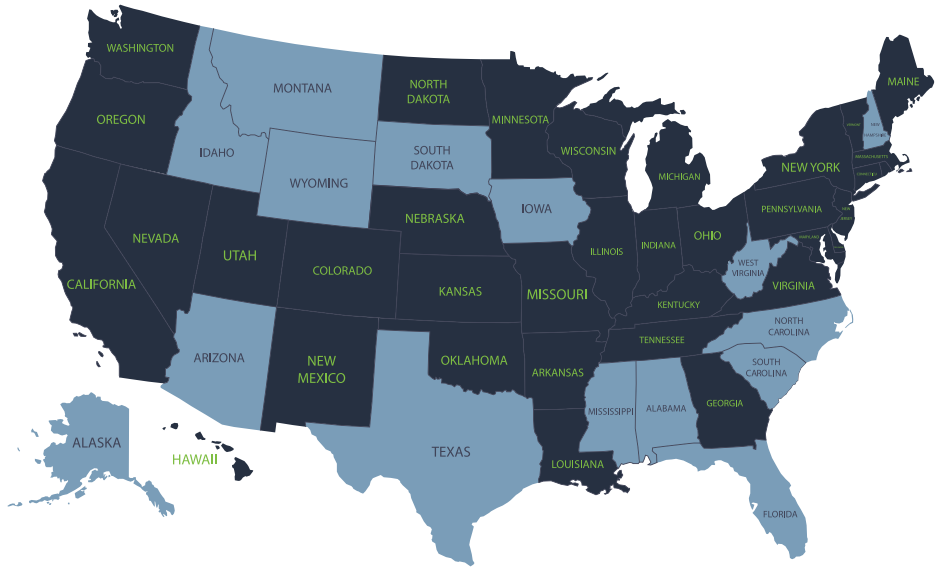
Fair Hiring Laws & Ban-The-Box Compliance Violations

Arising in the late-1990's and early 2000's, the ban-the-box movement aims to give ex-offenders a better chance at employment. These laws, also called fair hiring laws, typically require employers to remove from their employment applications the "box" that asks applicants about their conviction history. The hope is that protections given under ban-the-box laws will increase employment opportunities for the 1 in 4 American adults in the U.S. with a conviction history, thereby improving their social standing and reducing recidivism.

Ban-the-box laws vary by state and city. Some legislation restricts only public employers from asking about criminal history, while some restrict both public and private employers. Others only prohibit employers from asking for criminal record history on the application. Other states go further and require employers to wait until after the first interview or after a conditional offer to inquire into criminal history. Still other regulations require employers to send specific notices or reasons as to what led to an "adverse action," such as deciding not to hire or promote someone.

35 STATES **150+ CITIES & COUNTIES**

HAVE BAN-THE-BOX LAWS IN PLACE



Source: National Employment Law Project, 2018

ALDO Fined $120,000 For Ban-The-Box Violations

On June 19, 2018, New York Attorney General Barbara Underwood announced a settlement with Aldo Group Inc., a global shoe and accessories retailer, requiring the company to "ban the box" and remove criminal history questions from their initial employment application [12]. In addition to taking steps to comply with New York State laws, Aldo was also forced to **pay $120,000 in penalties and costs** to the state.

MISTAKES MADE

Aldo distributed employment applications inquiring about the criminal history of prospective applicants in its New York City stores—a violation of the New York City Fair Chance Act, which took effect in January 2017. Further, the company did not have consistent policies or procedures specifying whether and how managerial employees should evaluate the criminal records of applicants and employees.

WHAT YOU CAN LEARN

1. Keep up with ban-the-box legislation. If you're not already in a state or city with fair hiring laws, you could be soon.

2. Have a company-wide employment screening policy in place, and exercise the utmost caution when asking about applicants' criminal background or arrest history, especially early in the application process.

21 Businesses Cited For Ban-The-Box Violations In Massachusetts

In June 2015, Massachusetts Attorney General Maura Healey cited 21 national and local employers for violating the state's ban-the-box law [13], enacted in 2010, which prohibits both public and private employers from asking about job candidates' criminal backgrounds on employment applications. Under agreements with the Attorney General's office, three of the companies were required to take steps to come into compliance with the law and to pay $5,000; the other businesses received warnings that they must take immediate action to comply with Massachusetts law.

MISTAKES MADE

The 21 businesses cited for violations were identified as having violated the law by asking whether job applicants have been "convicted of violating the law, whether they have been convicted of a crime or offense other than a minor traffic violation, and if they have ever been convicted of a felony" [14]. Of those companies cited, four were large employers with locations in multiple states, including Five Guys, Edible Arrangements, L'Occitane, and The Walking Company.

WHAT YOU CAN LEARN

Always stay abreast of new developments in background screening laws that apply in the jurisdiction where your company is located, as well as where your candidates are located, especially with regard to new ban-the-box laws that are gaining steam nationwide.

Ban-The-Box Compliance Takeaways & Best Practices

Thirty-three states have passed ban-the-box legislation, and many of these have extended the restrictions to include private employers. Even privately-owned small businesses need to pay attention to this trend. Follow these best practices for ban-the-box awareness and compliance.

Remove prior conviction questions from your applications

Ban-the-box laws will continue to spread and it's only a matter of time before most states enact a version of the law. Further, since the EEOC views prior conviction questions with suspicion, we recommend removing or holding off on asking prior conviction questions until later in the hiring process.

Stay abreast of legislative updates

New laws and amendments are cropping up across the country every day, so it's important to stay on top of the latest developments, on both a state and local level, that may affect your organization.

Provide opportunity for applicants to add context

If your organization insists upon keeping the question in its application, in jurisdictions where it's legal, be sure to provide space for the applicant to elaborate on any circumstances surrounding the criminal record that he or she feels should be considered.

Utilize a screening partner that is a compliance expert

Work with a screener that incorporates targeted screens and individualized assessments into its adverse action flow.

According To HR Executive

GoodHire's background check solution is a great way to allow applicants to provide additional background on prior convictions:

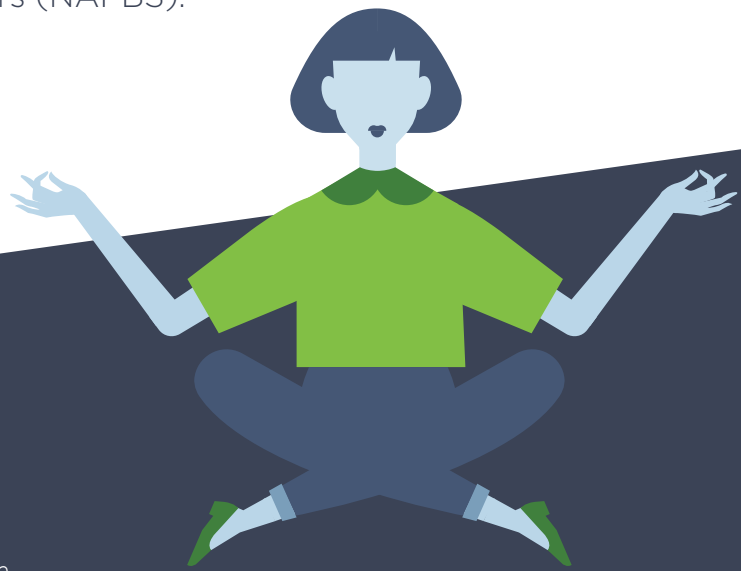
*"**GoodHire's Comments for Context feature** is especially helpful, in that it allows candidates with criminal records an opportunity to share a more complete story that goes beyond court records. This feature should make conversations about criminal records easier for applicants and hiring managers alike, and enables employers to make better-informed hiring decisions as well."*

CONCLUSION

While adhering to compliance laws and regulations to avoid scrutiny by the FCRA and EEOC, and reduce your risk of background check compliance-related lawsuits is a priority, the laws governing background checks and employment screening are many and varied, and staying on top of compliance challenges can be a daunting task for even the most diligent of HR professionals.

Always be as clear and honest as you can be in your disclosures, carefully follow adverse action procedures, and consider removing criminal history questions entirely to both avoid ban-the-box compliance headaches and support fair chance hiring efforts.

For help with these best practices and more, consider using a CRA like GoodHire that is accredited by the National Association of Professional Background Screeners (NAPBS). Our legal experts stay on top of all the latest legal developments, and our background check solution features built-in compliance workflows to **give you peace of mind**.



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