



Staffing owners: 2021 updates in background screening, drug testing, & COVID-19 vaccination requirements

Let's begin the webinar with a little fun!

If you could select one word or phrase to describe 2021 thus far,
what would it be?

Please type your answer in the Q&A feed.

Topics of Discussion



- **Criminal History Reform: Trends and How to Reduce Risk with Background Screening**
- **Legalization of Marijuana and the Impact on Drug Testing**
- **COVID-19 Vaccinations and Testing in the Workplace**



Sheri Tischer

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Sheri brings to her role at [TCI Business Capital](#) over 15 years of front-line staffing experience and has an authentic passion for the industry. She is responsible for developing staffing industry partnerships and driving our payroll funding solutions throughout the nation.

Sheri's leadership experience and understanding of sales, recruiting, and operations in the staffing industry allow her to speak the language of staffing industry owners to better assist them in getting their financial needs met.

She is a member of the ASA Mentorship program and active with NAWBO-MN and MNRSA.





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Criminal History Reform: Trends and How to Reduce Risk with Background Screening

How to Reduce Hiring Risk

Compliance and Trends Update in Background Screening



Who Audits Consumer Reporting Agencies?



Federal Trade Commission

- Independent agency of the United States government, established in 1914 by the Federal Trade Commission Act



Consumer Financial Protection Bureau



- Agency of the United States government started by the FTC and responsible for consumer protection in the financial sector



Equal Employment Opportunity Commission



- Federal agency that administers and enforces civil rights laws against workplace discrimination

Fair Credit Reporting Act (FCRA)

The FCRA is a Consumer Protection Statute

- Passed by Congress in 1970
 - Amended by the Crediting Reporting Reform Act in 1996
 - Amended 2003 by the Fair and Accurate Credit Transactions Act (FACTA)

As federal law, it applies to everyone, in all states.

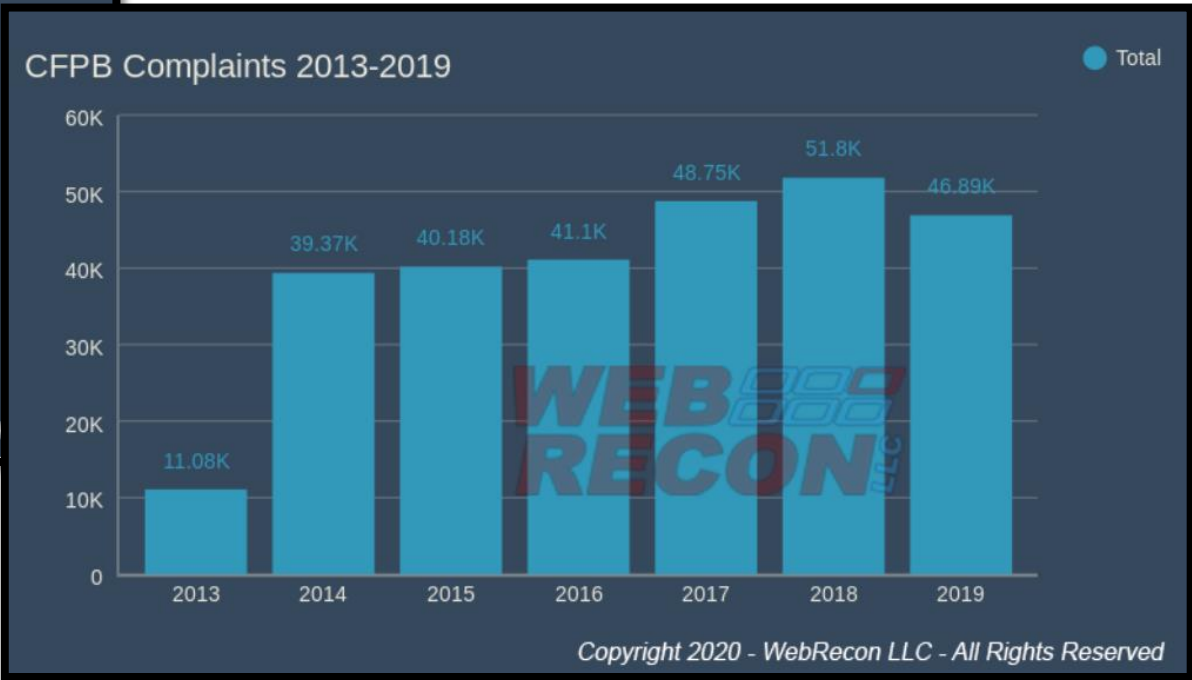
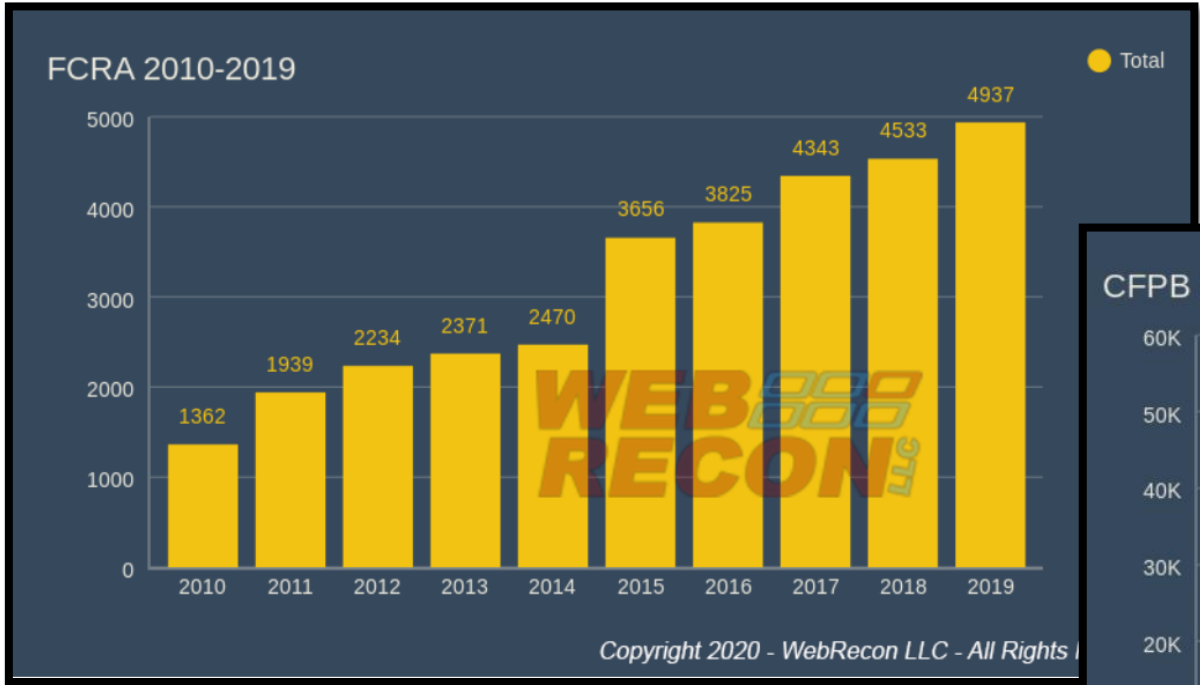
- However, states can (and some have) extend and expand upon the law

It is designed to:

- Ensure accurate information is reported
- Restrict/Limit what information is reported
- Provides a dispute mechanism for consumers



Litigation and Risk

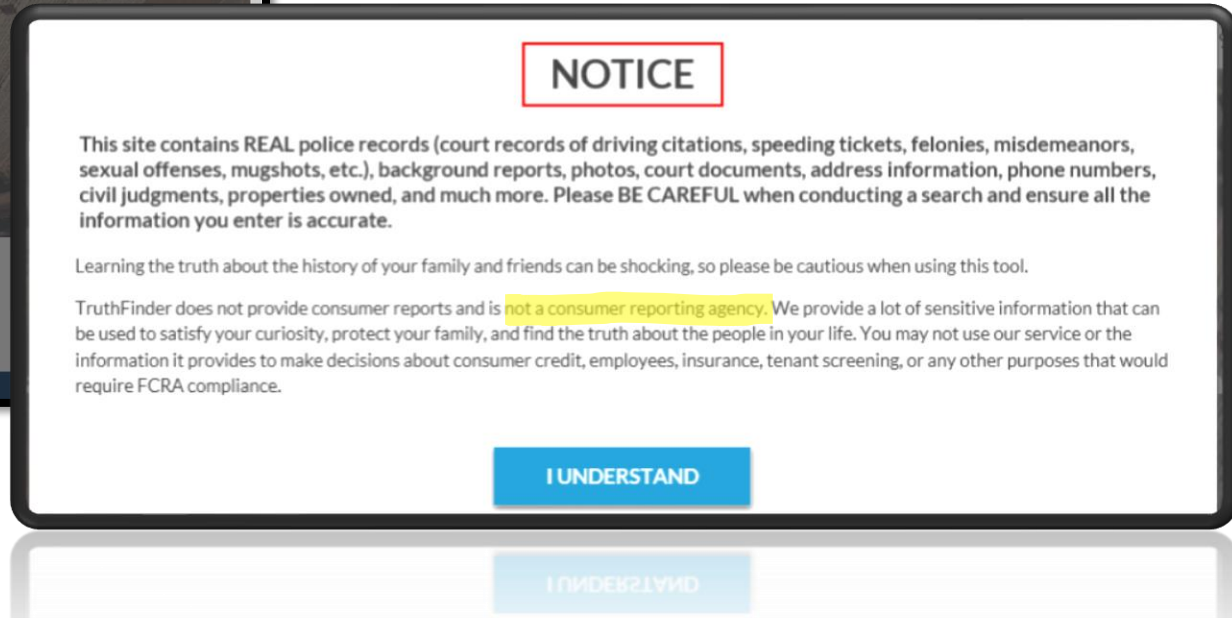
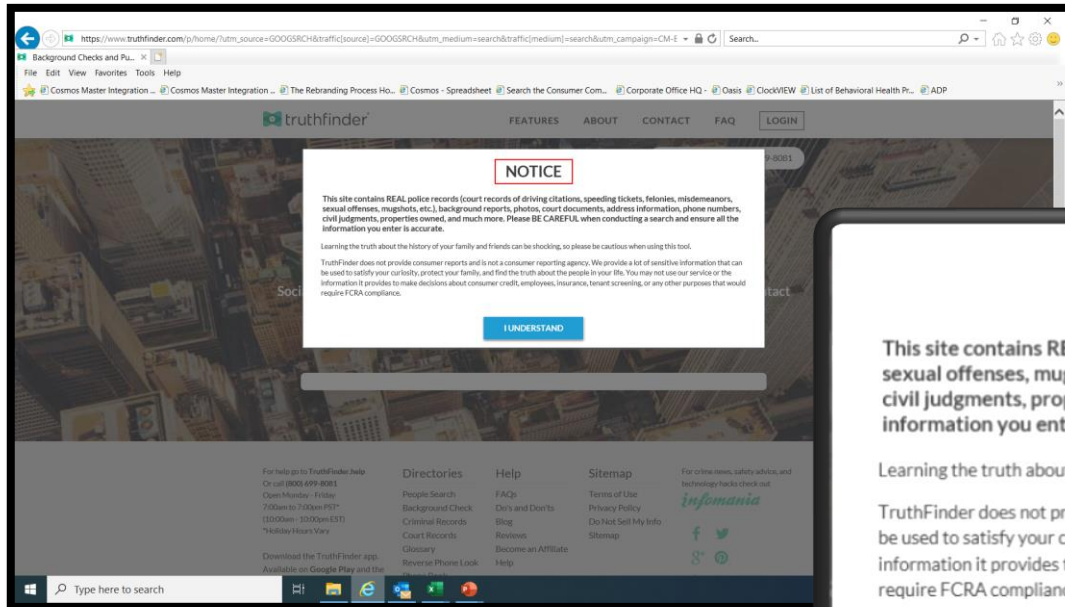


Why The Risk?

- ▶ **Increase as plaintiff attorneys understand the laws and educating public**
 - 1/3 of the U.S. population (100 million people), have some kind of criminal record (U.S. Department of Justice)
- ▶ **Laws more fragmented through cities/municipalities**
 - Industry is more technical, complex and in many cases pose challenges for even the most well-intentioned of employers (JDSupra, 2018)
- ▶ **Increase in settlements: (FCRA includes no liability cap)**
 - Up to \$1,000 per person
 - Attorneys Fees / Court Costs
 - Damages (\$1.8M settlements)



Why not use an Online screening firm?



Many online screening firms are not legally following the federal (FCRA) and state laws which could end up with class action lawsuits for the screening firm AND client!

Ban The Box – Trend Update

Question on application:

- “Have you ever been convicted of a misdemeanor and/or felony?”

Over 150 municipalities and 36 states and DC

14 states and 20 cities/counties extend laws to private employers

- Laws add more teeth – EEOC Guidelines

► Tools

Useful Links

- [NELP Reference](#) (October 2020)
- [Nolo Legal State Directory](#)
- Google: “your state ban-the-box laws”



Salary Verification Restriction – Trend Update

- Restriction at asking for salary verifications

- ▶ FEDERAL - Use of Salary History – 9th Circuit Court Decision (Feb 2019)
- ▶ Massachusetts, Hawaii, California, Colorado, Connecticut, Delaware, Illinois, Maine, New York, Rhode Island, Oregon, Philadelphia and Kansas City, Missouri, New Jersey, Vermont, Washington



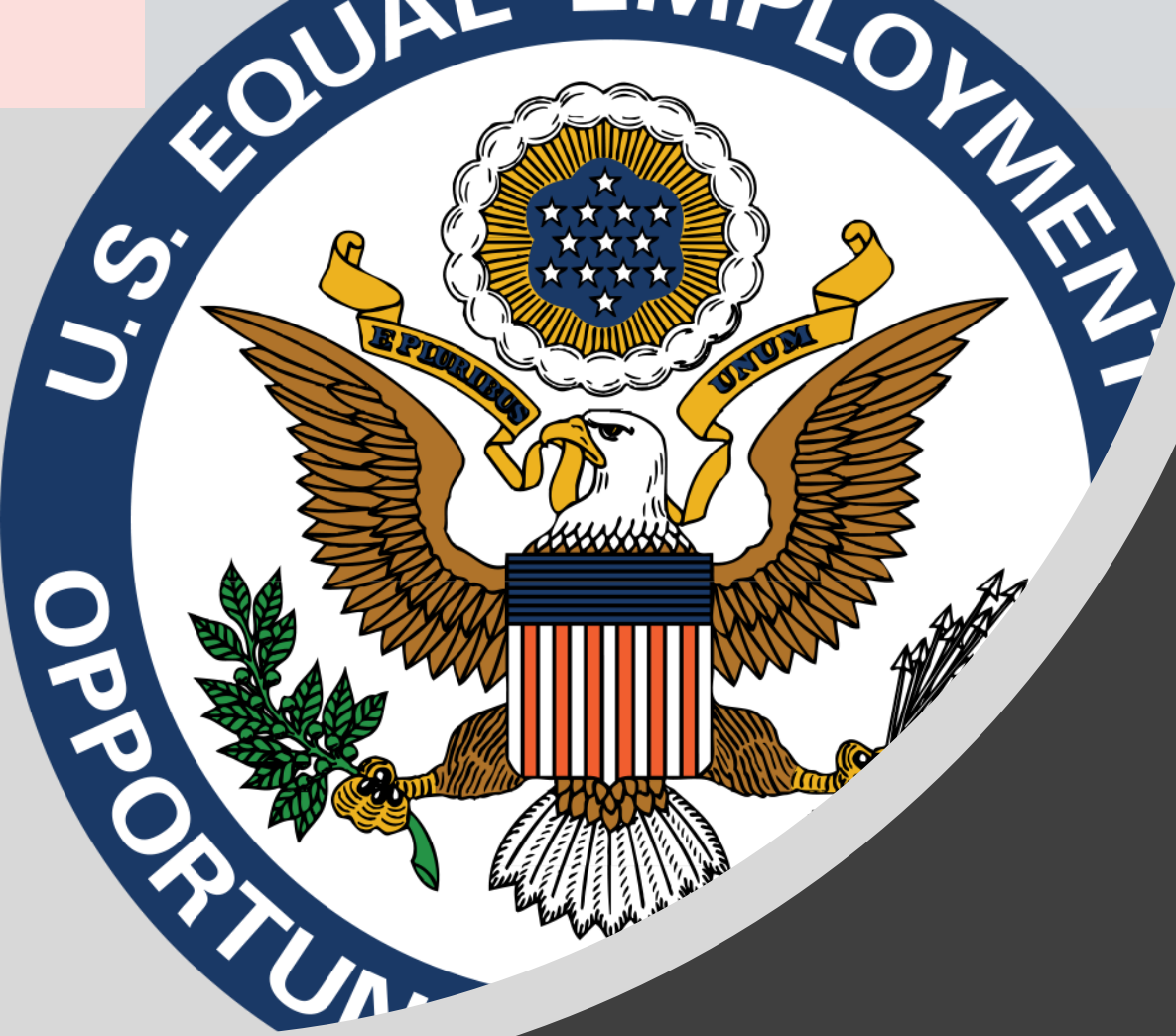
- Cincinnati, OH and other cities/municipalities (San Francisco)
- New York, Westchester, and Albany, Suffolk County – “..Prohibits an employer from inquiring about a candidate’s salary history during all stages of the employment process.”

- (October 2018) lawsuit filed by the EEOC in Denton County, TX
 - Denton County Public Health Department agreed to pay \$115,000 to a female doctor after federal court ruled violations of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964
- (January 2019) pay discrimination lawsuit filed \$36,802 in monetary relief
 - Maryland Insurance Administration had paid three female fraud investigators lower salaries than it paid to several male fraud investigators, all performing equal work



How to Reduce Risk! Trends in Litigation





EEOC – “Guidance Factors” April 25, 2012 (Requirements)

- Criminal
 - Review “nature and gravity” of the offense
 - Substantially job related / standardized
 - Severity of the offense
 - How long ago it occurred
 - Is person a repeat offender
- No “blanket” policies / no hire rules
 - ~~A felony conviction is an immediate disqualification~~
- Reduce Risk By:
 - Speaking with Legal and have a program in place
 - Case by case basis – yet standardized
 - Training for hiring process/procedures



Standardize Your Program

► Issue

- Lack of consistency with background screening program
 - ✓ A la carte items ordered on some applicants but not others going out for same position
 - ✓ Risk of perceived discrimination and potential litigation

► Solution:

- Keep process consistent through ordering packages



Compliant Forms

(#1 – Disclosure/Authorization)

- **Disclosure & Authorization Forms**

- Federal and State Compliant Language
- No “Extraneous Language” and no liability waiver
- Candidate to Sign Prior to Conducting Background Check
- “Solely of the Disclosure and Authorization”
 - Delta \$2.3M, Petco \$1.2M, Omnicare (CVS) -\$1.3M, Marriott Ownership Resorts, Pepsi, Walmart, Petco, Chipotle, UBER -\$7.5M, Chuck E Cheese -\$1.7M, Sears, O’Reilly Auto Parts, Swift Transportation -\$4.4M, Closetmaid -\$1.8M, Uber, Whole Foods -\$803K, Sprint

- **Solution:**

- Use a compliant and separate Disclosure/Authorization form
- Keep this form pure of the legal language; with no additional “extraneous” language
- Can be automated (E-Form) as long as following requirements



Compliant Forms

(#2 – Summary of Rights)

- ▶ **Federal Law**
 - Give The Candidate a copy of their rights
 - Revised September 12, 2018
 - Responding to several high-profile breaches – providing free national security freezes and freeze releases
 - “Solely of Rights Document”
- ▶ **Solution:**
 - Provided when giving the disclosure and authorization on its own form.
 - Do not staple with other documents

Adverse Action Process -

Any decision by an “End User” that has a negative impact on the consumer.

- Examples:

- Denying employment (rescinding conditional offer)
- Terminating employment (existing or new hire)
- Denying promotion, transfer, etc.

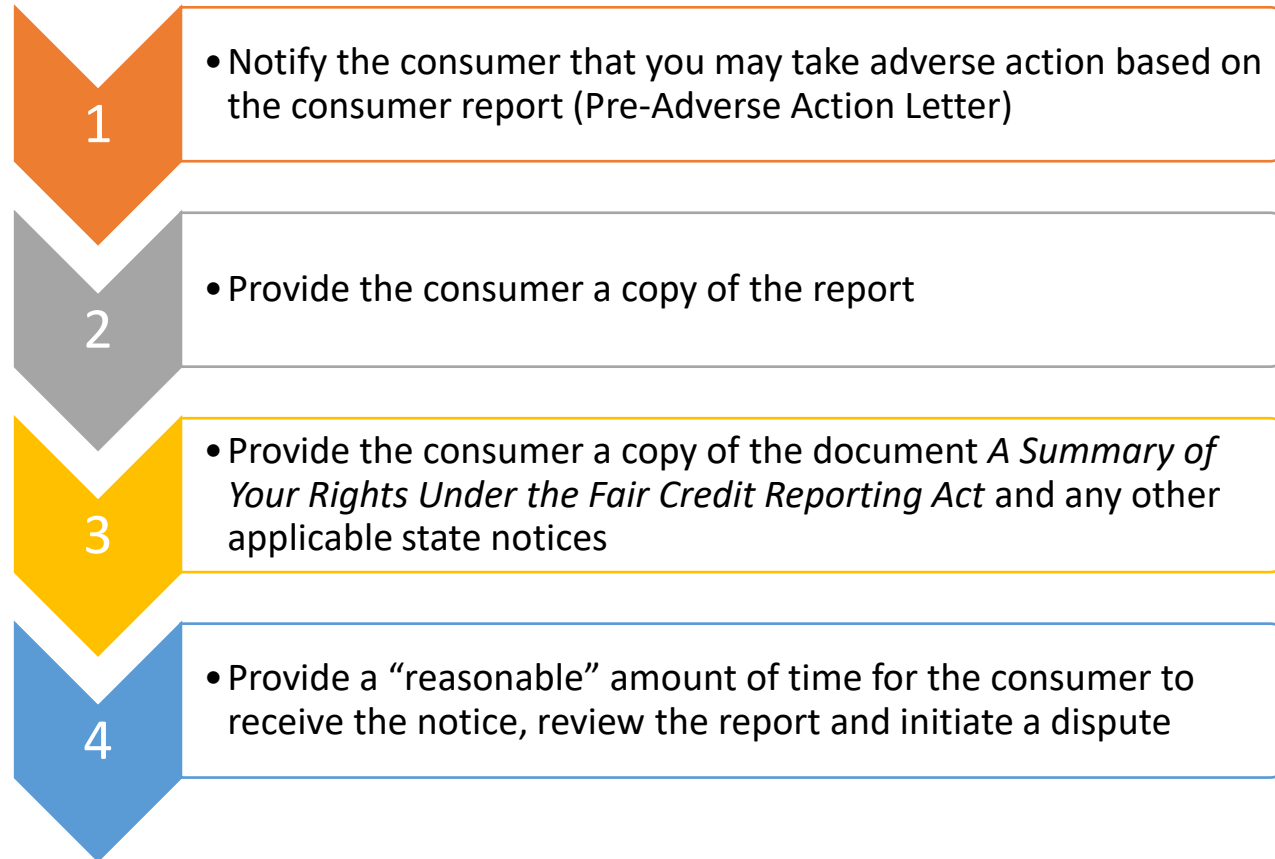
Why does the law require this process?

- To provide the opportunity for the consumer to dispute any information that may be incomplete or inaccurate
 - Identity theft, common/limited identifiers, human error



Adverse Action: 4 Easy Steps – Pre-Adverse Forms

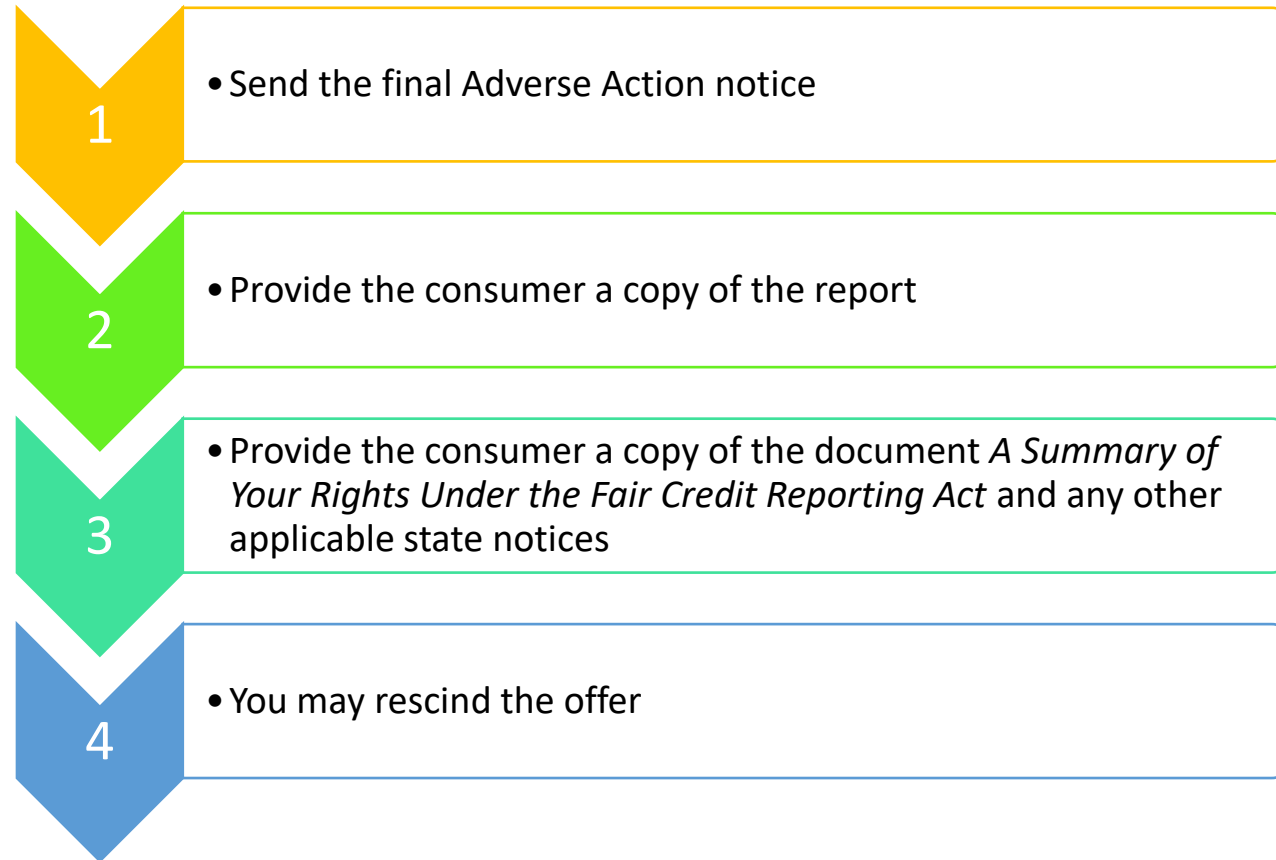
Before taking any adverse action, you must:



5 to 10
business days

Adverse Action: 4 Easy Steps – Final Adverse Forms

IF the candidate does not dispute within the “reasonable amount of time” then:



Adverse Action: Dispute Process

► If Dispute

- Background Screening Firm will be contacted by candidate and discuss dispute with candidate updating client (documented)
- 30-day process (to hold requisition open) as per federal law
- Update to report and client if any changes from dispute
- Staffing firm process (still hireable for another position) – Speak with Legal



Legalization of Marijuana and the Impact on Drug Testing



Trends in Drug Testing

- Essential or Not
- What's popular
- What to consider
- COVID-19



Essential or Not?

- Workplace safety
- Deterrence
- Liability
- Cost

Note: Staffing owners are doing what the client companies desire.





What is the 2nd most commonly found drug in Drug Tests?

Barbiturates

Benzodiazepines

Ecstasy

Methamphetamine/Amphetamines



What's Popular

Methamphetamines/Amphetamines

- Single use: 1-4 days
- Heavy use: 1 week
- Emotional/Cognitive/Physical Problems
- Toxic Fumes= Health hazard



[NIH](#)





What is the most commonly found drug in Drug Tests?

Cocaine

Fentanyl

Marijuana

Oxycodone



What's Popular

Marijuana

- Most commonly used drug
- Stores in fat/30 plus days
- CBD Oil
- 55% more industrial accidents
- 85% more injuries
- 75% more absenteeism
- Legalized in states

[Quest](#)



Where is it legal?

Forbes



Key Points

- Check the laws in your state
- Know terms of hiring regards to Marijuana and Medical Marijuana
- Some states, employers can deny even with medical card
- **Tailor your tests**
- Drug-free workplace--check the law
- ADA requires tolerance for disabilities
- Some owners do not test at all since it is legal
- Some owners test because it is legal
- **Tailor your tests**



[Blog](#)



Things to consider for drug testing company:

- Easy to read and understand results
- Quick turnaround time
- Web Based application/Online Portal
- Cost Effective
- Customer Service



COVID-19

Substance Use Disorder (lifetime **SUD**) were 1.5 times more likely to have COVID-19

Opioid use disorder (**OD**) were 2.4 times more likely to have COVID-19

Cocaine use disorder (1.6 times) more likely to have COVID-19

Alcohol use disorder (1.4 times) more likely to have COVID-19

Tobacco use disorder (smoking or vaping; 1.3 times) more likely to have COVID-19

Patients with lifetime SUD diagnoses also experienced more **severe outcomes** from COVID-19 than others, including *hospitalization* (41% versus 30%) and *death* (9.6% versus 6.6%)



COVID-19 Vaccinations in the Workplace

COVID Vaccines and the ADA

- Mandatory?
 - Generally, they can be, subject to law, including the ADA.
 - Medical Examination?
 - Generally, no, as the administration of the vaccine itself is not seeking medical information about an employee.
 - Asking if someone has been vaccinated is not a disability-related inquiry. **MUST STOP THERE THOUGH.**
 - Free to encourage voluntary vaccinations

COVID Vaccines and the ADA

- Proceed with Caution!
 - Eliciting medical information will be subject to ADA disability-related inquiries.
- CDC has stated health care providers should ask certain questions before administering.
 - If the employer requires a vaccine to be administered by the employer or a third party with whom the employer has contracted with, and pre-screening questions are asked, then such will be subject to the ADA disability-related inquiries.
 - “Job-related and consistent with business necessity”

COVID Vaccines and the ADA

- How to avoid “job-related and consistent with business necessity” requirement
 - First circumstance
 - Employer offers voluntary vaccines
 - Employee’s decision to answer pre-screening questions must be voluntary
 - If employee refuses to answer, then no vaccine and no retaliation by employer
 - Second Circumstance
 - Employee receives a vaccine from a third party, such as CVS or Walgreens, that does not have a contract with employer

ADA and TITLE VII ISSUES

- DIRECT THREAT STANDARD
 - ADA permits a direct threat standard: “A requirement that an individual shall not pose a direct threat to the health or safety of individuals in a workplace.”
 - If the policy tends to screen out or does screen out an individual with a disability, must show that an unvaccinated employee poses a direct threat – “significant risk of substantial harm to the health and safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.” Or in other words, a conclusion that an individual would expose others to COVID.
 - To make this determination, employers must use the four factors as guidance:
 - The duration of the risk
 - The nature and severity of the potential harm
 - The likelihood that the potential harm will occur
 - The imminence of potential harm

ADA and TITLE VII ISSUES

- ACCOMMODATION
 - Even if a direct threat is found
 - Cannot necessarily exclude from entering workplace
 - Still must run through accommodation process/interactive process
 - Ways to accommodate
 - Give and take conversation
 - Must provide unless undue hardship
- RELIGIOUS ACCOMMODATIONS
 - Sincerely held religious belief, practice or observance
 - Must provide accommodation unless undue hardship
- IF no accommodation can be provided, then can exclude and potentially terminate --- this is a minefield though

GENETIC INFORMATION NONDISCRIMINATION ACT

- Generally, the same analysis as under the ADA
- Cannot use genetic information to make determinations
- Pre-screening questions could trigger a violation of GINA

LEGAL ISSUES

- EEOC is merely guidance and not binding
- The FDA has an obligation to:

[E]nsure that recipients of the vaccine under an EUA are informed, to the extent practicable under the applicable circumstances, that FDA has authorized the emergency use of the vaccine, of the known and potential benefits and risks, the extent to which such benefits and risks are unknown, that they have the option to accept or refuse the vaccine, and of any available alternatives to the product.

- The question that then follows, is a refusal a protected activity?

LEGAL ISSUES

- OSHA – no mandate yet, but has indicated employers may require vaccinations.
 - Section 11(c) of OSHA may protect an employee who refuses a vaccine under a vaccine program if there is a reasonable belief of a health or safety concern
 - Also, employees can allege that if employers do not have a vaccine program, they are not providing a safe work environment as required by Section 5(a)(1) of OSHA
- State law considerations

PRACTICAL CONSIDERATIONS

- Availability of vaccine
- How does it protect? Can you still be a carrier?
- Public perception
- Financial and employment incentives
- Who pays?



Employers trust Universal Background Screening to Deliver Hire Quality

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