



NORTH RISK PARTNERS®

WAGNER, FALCONER & JUDD, LTD.

**LEGAL HIRING
PRACTICES: FROM
APPLICATION TO
BACKGROUND
SCREENING**

OCTOBER 2025

NORTH RISK WEBINARS | 2025

PRESENTERS



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LOGISTICS

This webinar is approved for 1.0 continuing education credit with HRCI & SHRM



Ask questions via the Questions box



Two-question survey at the end

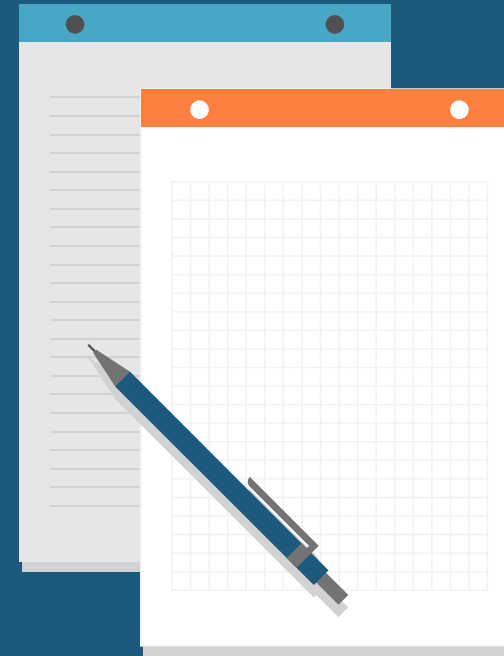


Webinar is recorded

✉ Follow-up email sent tomorrow with link to slides & recording!

AGENDA

- Importance of background checks
- Relevant laws
- Overview of applicant rights
- Employer best practices



IMPORTANCE OF BACKGROUND CHECKS

- Why conduct background checks?
 - Ensuring workplace safety
 - Protecting company assets
 - Reduce exposure to litigation
 - Verifying applicant information

NEGLIGENT HIRING

- What should we do to avoid a possible negligent hiring claim?
 - **Example:** John has numerous convictions for drunk driving and public intoxication. He “applies” to be a shuttle van driver for a bike tour company. He is hired without an application, without asking about his history, and without running a background check. John subsequently has an accident in the van injuring customers and it turns out that John was legally intoxicated.



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TYPES OF BACKGROUND CHECKS

- Criminal background checks
- Financial background checks

MINNESOTA LAW

Ban the Box: Minn. Stat. Ann. §§ 364.021(a)

Timing of Inquiry:

- Employers cannot ask about an applicant's criminal history until:
 - After the applicant has been selected for an interview, or
 - If no interview is conducted, after a conditional offer of employment has been made, or
 - The employer has a statutory duty to conduct a criminal history background check or consider an applicant's criminal history.



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MINNESOTA LAW

364.021 PUBLIC AND PRIVATE EMPLOYMENT; CONSIDERATION OF CRIMINAL RECORDS.

(a) A public or private employer may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for employment until the applicant has been selected for an interview by the employer or, if there is not an interview, before a conditional offer of employment is made to the applicant.

(b) This section does not apply to the Department of Corrections or to employers who have a statutory duty to conduct a criminal history background check or otherwise take into consideration a potential employee's criminal history during the hiring process.

(c) This section does not prohibit an employer from notifying applicants that law or the employer's policy will disqualify an individual with a particular criminal history background from employment in particular positions.

(d) An appointing authority may not inquire into or consider or require disclosure of the criminal record or criminal history of an applicant for appointment to multimember agencies, including boards, commissions, agencies, committees, councils, authorities, advisory task forces, and advisory councils, on an application form or, until the applicant has been selected for an interview by the appointing authority or is otherwise selected as a final candidate for appointment.



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MINNESOTA LAW

- Applicants do not have a private cause of action if an employer violates their rights under the Ban the Box law.
- However:
 - An applicant can file an administrative claim under the Minnesota Administrative Procedures Act if a public employer violates an applicant's rights.
 - An applicant can file a complaint with the Minnesota Commissioner of Human Rights if a private employer violates an applicant's rights.



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MINNESOTA LAW

Consumer Reports: Minn. Stat. Ann. §§ 13C.001 to 13C.04

Inclusion with Application:

- If a written employment application is used, the consumer report disclosure must be included in or accompany the application.

Disclosure Details:

- The written disclosure must provide a checkbox for the applicant to request a copy of the consumer report.

Employer's Obligation:

- If the applicant requests a copy, the employer must request the report from the entity that prepared it and provide it to the applicant.

FAIR CREDIT REPORTING ACT

- The FCRA is a federal law that applies to criminal and financial background checks when an employer obtains a consumer report or an investigative consumer report to help determine whether the employer should hire an applicant.
- FCRA is a notification and disclosure law
- It covers any use of consumer reports related to employment, such as hiring, promotion, reassignment, or even deciding whether to keep someone on staff.



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FAIR CREDIT REPORTING ACT

Requirements for employers

- Communications covered by the FCRA
- Limitations on contents of report
- Disclosure
- Written consent
- Pre-adverse action notice
- Adverse action notice

FAIR CREDIT REPORTING ACT

Employers can face litigation under the FCRA:

- Private right of action by individuals
- Enforcement action by federal agencies (FTC, CFPB)

Damages capped at \$1,000 per violation; may include attorneys' fees, court costs, punitive damages

FTC civil penalties: \$2,500 per violation

Repeated violations can lead to substantial penalties

Additional penalties:

- Compliance monitoring, reporting, recordkeeping
- Criminal penalties for false pretenses: up to 2 years imprisonment, civil fine, or both



APPLICANT RIGHTS

- Right to consent
- Right to be informed
- Right to dispute inaccurate information



TITLE VII: APPLICANT RIGHTS

- Having a criminal record or criminal history is not a protected class under Title VII.
- However, an employer violates Title VII when employer's reliance on a criminal record to deny employment is based on race, color, religion, or national origin and results in either:
 - Disparate treatment of a job applicant; or
 - Disparate impact against a protected class of job applicants.



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TITLE VII: DISPARATE IMPACT

Disparate impact occurs when employer's reliance on a criminal record to deny employment is based on a protected class and results in either disparate treatment or disparate impact:

1. The employer's neutral policy or practice disproportionately screens out a protected class (race, color, religion, sex, or national origin); and
2. The employer fails to show its policy or practice is
 - a. job-related for the position in question, and
 - b. is consistent with business necessity.



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ARREST RECORDS

- Arrest records are treated differently
- The fact that a person was arrested is not proof that they committed a crime.
- An employer cannot refuse to hire people simply because they have been arrested.



TITLE VII: BEST PRACTICES

- Do not automatically exclude an applicant with a criminal record.
 - Rather, analyze the applicant's **conduct** underlying the crime and do so on an **individualized basis** for each applicant with a criminal record prior to rejection.
- Use a targeted screen that considers:
 1. The nature and gravity of the offense;
 2. The time that has passed since the offense and/or completion of the sentence;
 3. And the nature of job sought.
- Give an applicant the opportunity to provide mitigation information about his or her criminal record.



TITLE VII: BEST PRACTICES

- Follow the EEOC's guidance on having an employment **exclusion policy or practice** that is job related for the position in question and consistent with business necessity:
 - Identify essential job requirements and the actual circumstances under which the jobs are performed.
 - Determine the specific offenses that may demonstrate unfitness for performing such jobs; identify the criminal offenses based on all available evidence.
 - Determine the duration of exclusions for criminal conduct based on all available evidence and include an individualized assessment.
 - Record the justification for the policy and procedures.



TITLE VII: BEST PRACTICES

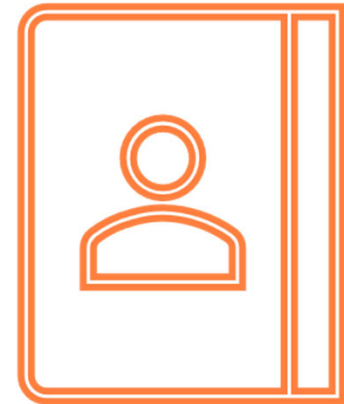
- EEOC Guidance (cont'd):
 - Note and keep a record of consultations and research considered in crafting the policy and procedures.
 - Train managers, hiring officials, and decisionmakers on how to implement the policy and procedures consistent with Title VII.
 - When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.



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REFUSING TO HIRE

- What happens if after receiving the background check, we decide not to hire the candidate?
 - Determine how the applicant's criminal history relates to the responsibilities of the job.
 - Consider the nature of the crime, when the crime occurred and what job they are applying for.



REFUSING TO HIRE - STEP 1



Send **Pre-Adverse Action Letter** informing the candidate that an adverse employment decision may be made based on something in their report.



Include a copy of the **background check report** for the candidate to review and address possible inaccuracies.



Include a written summary of the applicant's **rights under the FCRA.**



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PRELIMINARY NOTICE OF ADVERSE ACTION

Dear [Applicant Name],

Enclosed is a consumer report that we requested in connection with your application for employment with our company. In accordance with the federal Fair Credit Reporting Act (FCRA), also enclosed is a copy of your rights under the Act.

Due, in part, to the contents of this consumer report, a decision is pending regarding your application for employment. As required under the FCRA, we are notifying you in advance of any adverse action being taken.

You have the right to dispute the accuracy of the information in this report by contacting the consumer reporting agency listed below directly. The consumer reporting agency did not, however, make this employment decision and cannot provide specific reasons for the decision.

[Consumer Reporting Agency Name]
[Consumer Reporting Agency Address]
[Toll-free phone number of Consumer Reporting Agency]

Enclosures:

Copy of Consumer Agency Report

[A Summary of Your Rights Under the Fair Credit and Reporting Act](#)

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REFUSING TO HIRE - STEP 2

- Final Adverse Action Letter
- This adverse action notice must:
 - Include a summary of the applicant's FCRA-protected right to dispute the accuracy or completeness of the background check's findings directly with the agency that performed it.
 - Provide notice of the adverse action to the consumer.
 - Provide the consumer with contact information for the CRA that prepared the report.
 - Dispose of background check results securely.



FCRA VIOLATIONS

- Applicants have a private cause of action if employer violates the FCRA.

Negligent Violation

- Applicant can recover actual damages, attorney fees, and costs if employer negligently violates FCRA.

Willful Violation

- Applicant can recover actual damages, attorney fees, costs, and statutory damages (ranging from \$100 - \$1,000 per violation) if an employer willfully violates the FCRA.
 - Low burden to prove willful violation because employers are required to certify their compliance with the FCRA before obtaining a consumer report.



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FCRA: BEST PRACTICES

- Do not include information about Minnesota's background check laws in the FCRA stand-alone disclosure notice.
- The stand-alone disclosure can be included with the job application.
- Send the pre-adverse action notice to an applicant at least five business days before sending the post-adverse action notice



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FCRA BEST PRACTICES CONT'D

- Hire a consumer reporting agency that uses a certification provision in their agreements that require employers to certify they complied with the FCRA.
 - Employers must certify that:
 - they provided the stand-alone disclosure to an applicant;
 - it received the applicant's written permission to obtain a consumer report;
 - It has or will comply with all of the FCRA requirements; and
 - It will not discriminate against an applicant or misuse applicant information.



COMMON ERRORS

- “We consider candidates with a criminal records so long as there is no violent crime in their history.”
- Not meeting with the employee to discuss their criminal history

BEST PRACTICES

- If an applicant or third party voluntarily discloses criminal background information about the applicant, an employer must ignore the disclosure until the employer selects the applicant for an interview or extends a conditional job offer.
- **Questions to avoid on a job application:**
 - Have you ever been arrested or convicted?
 - Have you ever been convicted of a felony?
 - Have you been convicted or plead guilty to a crime?
 - Have you had any driving violations besides parking tickets?

BEST PRACTICES

01

Obtain proper consent

02

Use a consistent process

03

Document the decision-making process

04

Conduct individualized assessments

05

Provide required opportunities for explanation



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QUESTIONS?



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*First interaction with the HR hotline via
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UPCOMING WEBINARS

Employer Essentials



Watch your inbox
for invitations

Thursday, Oct. 30 | 11:00 a.m. to 12:00 p.m.

Countdown to Compliance: Be Prepared for MN Paid Leave*

Thursday, Nov. 6 | 11:00 a.m. to 12:00 p.m.

The Federal Drug & Alcohol Program: Ensuring a Safe Workplace

Thursday, Nov. 20 | 11:00 a.m. to 12:00 p.m.

Cyber Vulnerability Management: Safeguarding Your Organization

**For MN Employers*