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Trends and Risks

Criminal Background Checks

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Over the last several months, Driver iQ has been alerting our members to the ever changing legal trends in the background investigation industry. Our goal has been to provide "best practices" to avoid unnecessary and costly litigation. We'd like to take this opportunity as we begin a new year, to discuss two issues that will dominate background screening and should be carefully considered by trucking company executives:

1. The Pitfalls in Using Commercial Databases Exclusively for Criminal History Record Checks and
2. Best Practices in Criminal History Record Checks to Avoid Potential Civil Liability

Law suits, class action suits, civil penalties and background investigations are not words carriers want to hear in the same sentence. Recently the Federal Trade Commission (FTC) levied civil penalties of $2.6 million against HireRight (aka DAC Services) for Fair Credit Reporting Act (FCRA) (15 U.S.C. §1681 *et seq*.)[1] violations. These involved the reporting of stale criminal records from databases without properly providing a copy of the report contemporaneously to the applicant as required by the FCRA among other charges. (See 15 U.S.C. §1681k(a)(1).) That fine was on top of a settlement of $28,375,000 to a group of almost 700,000 plaintiffs in a class action suit filed against HireRight covering the same issues.

In November 2012, the courts ruled against another background investigation provider, General Information Services (GIS), invalidating their attempt to use a First Amendment defense for FCRA violations concerning the reporting of non-conviction record information that was more than 7 years old where a person makes or is expected to make less than $75,000 *per annum*. Yet to be decided are 3 cases[2] involving claims that GIS failed to provide notice or maintain strict procedures to ensure accuracy as mandated in 15 U.S.C. §1681k(a)(2). With the constitutional question resolved and a related stay lifted, that case will now move forward.

It is notable that these decisions and pending cases occurred in the same environment in which the Equal Employment Opportunity Commission (EEOC) in April of 2012 released new guidance (http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm) for employers using criminal histories. The requirement of an individual assessment that is contained in the April EEOC guidance *effectively enhances* the FCRA notification requirements and the practical implementation of those directives should be considered in tandem with the FCRA. It is notable to point out that the EEOC exercises

[1] The section numbers used here are United States Code section numbers as published by the U.S. Government Printing Office. They correspond to the traditional FCRA section numbers 601 through 629.

[2] *King v. General Information Services, Inc.*, Eastern Dist. Of Pennsylvania, 10-cv-06850
Robinson v. General Information Services, Inc., Eastern Dist. Of Pennsylvania, 11-cv-07782
Hutchinson v. General Information Services, Inc., Eastern Dist. Of Pennsylvania, 12-cv-03820

administrative law powers enabling it to launch distracting and financially crippling investigations and garner massive private settlements that are often not publicized. While a few multi-million dollar settlements were publicized in 2011, in its "Fiscal Year 2011 Performance and Accountability Report," the EEOC reported securing more than **$364.6 million dollars** through the administrative process -- a record high total. Since the details of these administrative procedures are not always made public, it is difficult to ascertain how many of the awards related to an alleged misuse of criminal history reports, but we know from the EEOC's "Strategic Plan for the Fiscal Years 2012 – 2016" that their number one objective is to "Combat employment discrimination through strategic law enforcement" (http://www.eeoc.gov/eeoc/plan/strategic_plan_12to16.cfm#diagram). In a draft EEOC document, the "Strategic Enforcement Plan," eliminating systemic barriers in recruitment and hiring is identified as a "Nationwide Priority," and employers' use of background screening will be targeted for attention, (http://www.eeoc.gov/eeoc/plan/sep_public_draft.cfm). To say this is a complex situation fraught with risk is an understatement.

HOW DID WE GET HERE?

To answer this question, one must first understand the history of background checks. As you know, criminal history record checks were once only obtained as the result of very expensive, labor intensive, on site research. It could take weeks for investigators to visit courts to comb through ancient, chronologically arranged index systems or massive docket books to ferret out criminal records. In those days, not too long ago, it took skill, specialized knowledge, a well developed proprietary network of investigators and persistence to craft an accurate background report. As computers entered the business world, they slowly penetrated the court system. More records became accessible by computer, reducing both the cost and research time required to complete a search. While most court systems could still only be accessed on site, a few started to make remote access available, once again reducing cost and time. Traditionally, certain public records had been available for bulk sale such as property records and certain civil records. Seeing a revenue opportunity, some courts started to make subsets of criminal record information, often just basic indexing records, available in bulk. As few background providers could justify the cost to purchase that data on their own, aggregators started buying that data, when available, for resale to background providers, and the "national" database was born.

Today, "proper" court research is conducted using a combination of methods, including searching old massive docket books, clerk assisted searches (generally in courts that do not have the funds to create a public view of their records), access to online official systems of records, remote access to court systems, and supplementing this research with various database offerings.

As court research has become "easier," natural market forces have driven the costs down to a fraction of their former level. This has reduced the costs to carriers for performing background checks and simultaneously has created the opportunity for great financial gain by background screening companies. The cost cutting involved has encouraged practices which lead to legal and financial liability. Unethical marketing has lead the unsophisticated buyer of criminal background checks to believe that there actually is a "national" criminal database and that it is fast, cheap, accurate, and has complete coverage.

While database searches can be both fast and cheap, there is simply no national database search that can also claim to be "complete and accurate." Even the gold standard for criminal data, the FBI's NCIC criminal database, aggregates data from the states and is missing dispositions on at least 60% of the records for the 28 states that could answer the question regarding the percent of dispositions reported. The remaining states could not even provide that statistic. (See the Bureau of Justice Statistics "Survey

of State Criminal History Information Systems, 2010.") Furthermore, the NCIC database is not accessible for commercial background investigations, except in certain very narrow circumstances through fingerprinting when required by federal or state regulations. Commercial databases are far worse. Most of them, when discounting sex offender information and counting only that data coming directly from individual courts or official state court administrations, have only scattered court information for most states and no information at all for 10 states.

By their very nature, database searches represent a single snapshot in time. "National" databases are comprised of many different sources, each having a different periodicity of update. Some updates may be only every 6 months or longer. Any database search ***on its own***, cannot be considered "up to date" or "current" which does not meet FCRA compliance obligations unless it is coupled with a copy of the report provided to the applicant *at the same time* it is provided to the employer OR an up to date criminal history search is performed.

Not only do database searches have different periods of update, but also the individual datasets themselves contain dissimilar data. A dataset from one source, for example, may include name and no other identifiers, another may contain arrest only information without disposition (the mere existence of which is unlawful to use in consideration of an employment decision), and yet a third may contain incarceration data without identifying the court that adjudicated the case and which has all the case information. Relying solely on "national" database information is a guarantee of receiving only partial information, at best. Therein lies the danger of error which may result in costly civil litigation.

Even if the issues of currency and variance in record content could be addressed, there is the issue of coverage. There are 94 U.S. Federal District courts, <u>none</u> of which are covered in these "national" datasets, and just under 3,100 counties housing state level offenses, plus over 30,000 incorporated towns and cities in the U.S., many of which house municipal level courts. Most of these state level and municipal courts are not fully represented or represented at all, in the "national" data sets.

Yet, with all these known shortcomings, some background firms and Internet sites continue to market "national" data as a standalone product. And we continue to see some employers with the impression that this is comparable solution. How is this allowed? The FCRA (15 U.S.C. §1681k) allows two reporting options:

- The first option (15 U.S.C. §1681k(a)(1)) is commonly referred to as "contemporaneous notice" and requires that at the time a report is made containing public record information, that the background screening company provides the candidate the specific details reported.
- The second option (15 U.S.C. §1681k(a)(2)) requires that the background screening company "maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date."

A reading of only section 613 of the FCRA would suggest that it's acceptable to be unconcerned about whether a report is complete and up to date as long as one sends out a letter advising what is being reported. That is precisely what some background companies do. Herein lies the potential liability.

There is an inherent contradiction and dangerous trap built into the FCRA for these background screening companies and their employer clients. Often overlooked by companies selling database reports, and their employer clients who use them, 15 U.S.C. §1681e(b) requires that whenever a consumer report (which a criminal history report is considered) is prepared that the preparer must follow reasonable procedures *to assure maximum possible accuracy*. **The question courts and the EEOC**

are beginning to ask is. "How can one rely on a product with known significant deficiencies like the "national" database standing alone and still pretend to be in compliance with 15 U.S.C. §1681e(b)?" One can assume that as regulatory agencies and plaintiff's bar become even more aggressive, the employer clients who require or enable such dangerous behavior will be dragged into court to answer for their actions as well.

HOW DO CONSCIENTIOUS CARRIERS AVOID BEING MIRED IN THIS LITIGIOUS ENVIRONMENT?

Managing your background investigation program is managing risk. Since different companies, and different positions within companies, have different levels of risk and risk tolerance, each company and position may require background checks of a different scope. The clear path to avoid being mired in litigation is to never allow a background provider to sell you a standalone "national" database search without verification of results by going to official government repositories. Working with your background company and legal counsel is the best way to define background search parameters, but the following basic principles apply:

1. Databases of criminal records that are not official government repositories of record must only be used as "pointers" to identify possible criminal record information for verification;
2. Criminal searches must be conducted through official government repositories;
3. When using database searches, always verify possible records found with searches of the appropriate official government repositories to ensure accurate, complete and up to date information;
4. Criminal records should be reported only in accordance with the FCRA and applicable state and local laws;
5. With legal counsel, identify in advance those offenses that are not relevant to the position and require that your background provider not report those offenses and non-convictions so as not to taint reports with irrelevant information that could create avoidable litigation (and in any case <u>never</u> report "arrest only" information that has not reached the stage of prosecution pending);
6. Require that criminal records be reported only if a minimum of 2 unique identifiers (such as name and date of birth or name and social security number) match the candidate, and those records are verified by the provider;
7. Ensure that you have a robust and compliant means to comply with FCRA notifications and EEOC guidance regarding individual assessment.

All these points are critical, but the last is often overlooked or handled poorly. Such oversight may result in litigation. The FCRA has detailed procedures for:

1. Employer notification to candidates of receipt of information from a CRA (Consumer Reporting Agency) that may result in an adverse action (pre-adverse notification[3]) ((15 U.S.C. § 1681b(b)(3)),
2. CRA's handling of cases in which information might be disputed (15 U.S.C. § 1681i) that is coupled with the requirement that the consumer be given a copy of the report and the Summary of Rights **prior** to the employer taking any adverse employment action based in whole or in part on the background report (15 U.S.C. § 1681b(b)(3)), and
3. Notification of adverse action by the employer (15 U.S.C. § 1681m).

[3] Pre-Adverse action letters for trucking companies are not required if the carrier does not have a physical interactions with driver, e.g., all contact is handled electronically.

The FCRA's provisions specifically address the question of accuracy to afford the applicant (i.e., the consumer) an opportunity to see and correct inaccurate, incomplete or out of date information **before** a final hiring decision is made, although there is a carve out from this provision for the transportation industry if certain conditions are met. That exception notwithstanding, there is a serious problem when recruiters or hiring managers are allowed to make final decisions without allowing an opportunity for the candidate to review the report and if disputed, have the report re-investigated by the background company. In order to prevent an actionable oversight, system controls should be enforced to prevent premature decisions. Even though, from a legal perspective, pre-adverse (for non-DOT regulated or for regulated companies having direct contact with the applicant) and adverse notification is the responsibility of the employer (15 U.S.C § 1681b and m), while dispute resolution is the responsibility of the CRA (15 U.S.C. § 1681i), the proper execution of these processes requires careful coordination between the CRA and the employer to ensure it takes place as intended by the FCRA.

Although the EEOC guidance on use of criminal record information was published in April 2012, some employers are still developing policies and procedures to implement it. The EEOC guidance enhances the FCRA dispute process:

- The FCRA dispute process is concerned about possible factual inaccuracies,
- The EEOC guidance provides a process in which a candidate can show evidence of rehabilitation, productive behavior since the conviction or incarceration, and explain why he or she deserves an opportunity for the job despite the previous transgression prior to making any adverse hiring decision.

Note that there is no carve out for DOT regulated companies in the EEOC guidance.

The EEOC provides guidance regarding the factors that should be considered and requires an individualized assessment of those factors before a final hiring decision is made. As with the FCRA process, there are clear steps in providing notice and gathering required information. Once again, the key to avoiding litigation is to develop a structured, gated process that carefully guides the hiring manager through the correct steps while not allowing a missed or premature step. A well designed and implemented rules-based system will guide hiring managers through intricate legal requirements while protecting them and the company against avoidable legal complications.

This paper has pointed out the shortcomings of the "national" database when used as a **standalone product**. Driver iQ believes very strongly that the judicious use of database searches is a required element **as part of** a thorough criminal background check. It should not be the **only** part. The key to remember is that the databases have gaps in coverage, and unverified, raw results can be at best misleading, and at worst an entrée to a law suit or other enforcement action. Use database searches wisely and require that your background provider *always* commit to verifying any potentially adverse information that they may reveal. The legal risks created by insufficient planning regarding the use of background investigations can be mitigated by understanding best practices and implementing strong, rules based controls on the conduct and subsequent evaluation of background investigations. With the proper planning and implementation of best practices by legal counsel, your background provider and company stakeholders, some of which are discussed in this paper, you will be ensuring FCRA and EEOC compliance and significantly reducing your risk of costly litigation. We look forward to answering any questions you might have.