

ASSOCIATION OF CORPORATE COUNSEL

**Pre-employment Screening and Employment Verification – Vital Legal and Practical  
Considerations to Protect Your Organization  
February 20, 2008**

**Presented by ACC's Employment & Labor Law Committee and Jackson Lewis LLP**

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(Eric Reicin): Good afternoon, everyone. This is (Eric Reicin), senior vice president and deputy general counsel of Sallie Mae. On behalf of the ACC Employment Labor Committee welcoming you to today's webcast, which is entitled Pre-employment screening and employment verification.

This is a great topic, a fascinating topic. We have great speakers to speak with you today. I will chime in with some colored commentary throughout the program. We have Rich Greenberg who is a partner at Jackson Lewis, which is a true friend of the ACC employment labor committee.

Mr. Greenberg – Rich Greenberg has extensive experience in counseling. He takes seriously what was on his law degree, which is attorney, and counsel-in-law in addition to be an excellent attorney. He is an excellent counselor in handling employment law disputes and employment law issues.

He also works with client's business needs and culture changes, result to business transactions such as (MNA) work. But he also does a whole host of compliance on the alphabet soup of federal and state employment laws FMOA, FOSA, (FICRA), ADA, AD, ADEA had won and had new legal developments. And he has specific experience in what were talking about today, the background check process.

Also, we have presenting today is Chris McVey who is a managing attorney, Labor Law Group Admission North America. She also serves as Chief Counsel for (Tire) Centers LLC and is an Assistant General Counsel for Mission on North America.

And in this capacity, she is responsible mission one in 26 locations including – four of those locations are organized locations.

In addition to her law degree, she also is certified as an SPHR by (HHRN) and is a contributing author to South Carolina's Bar Labor and Employment Law for South Carolina lawyers. Again, I'm (Eric Reicin), I'm chief labor and litigation attorney at Sallie Mae as moderator.

We have a great program today. In order to ask questions, there's a box in your lower hand corner. We can ask – write those questions and at the end of the program, we will answer as many as we can. We also would like you, if at all possible, to fill up evaluation form after the program is over. Give us a chance to prove ourselves to you.

And I should give you notice now, but I'll also give you notice at the end of the next webcast will be on the new FMOA (post) regulations that came out on February 11<sup>th</sup> and there are some great material on the web regarding those but we will have a webcast on that coming in the next few weeks.

So here we are at the webcast outline. We have four major topics. (Stricter) credit reporting (Mac) at state law compliance. We have different types of pre-employment checks as well from considerations. I know, we haven't in (in the area) which I find it fascinating and really sort of cutting edge.

What do we do about sort of the noble issues, that litigation concerns surrounding racial discrimination, surrounding the fact that there are 41 million Americans with Facebook pages, Google searches and so forth and how do you deal with those cutting edge issues when your HR department is without knowing about it certain people's Facebook pages. And we also have a good program on (INI) requirements.

So with that, I'm going to turn it over to Rich first who is going to lead us in our first set.

Rich Greenberg: Thank you very much Eric. What I'd like to talk about in the next (heightened) 30 minutes is three subtopics. Just a basic refresher on the Fair Credit Reporting Act in related state laws, which provides the procedural overlay to the background, check process.

Then to talk about the different types of checks that are within a menu offered by most services that employers can consider and then to talk about disqualification. What can employers disqualified based on, what consideration should be taken into account and then as Eric mentioned to talk about some noble issues.

So turning to slide five just to refresh a couple of basic concepts on the Fair Credit Reporting Act. First, the Fair Credit Reporting Act in all of the many State Fair Credit Reporting Acts, generally only apply if there is a third party consumer reporting agency that's being used to conduct the check.

Outside then there which provide your business with background check results on applicants and/or employees. What are the specific requirements that are imposed by the FCRA.

First, as a condition for any of these consumer-reporting agencies to provide information to an employer is specifically written into the statute that all employers are required to sought an end-user agreement if the tax are being for employment purposes.

And this with end-user agreement does two things, the control is that the check is being done for employment purposes and also has the employer affirm that they are filing the procedural requirement of the FCRA mainly obtaining consent and filing pre-adverse and adverse action process that we're going to touch on in a second.

Turning to consent, the FCRA specifically requires that in order to run a background check on an applicant or an employee for employment purposes that they must be given a stand-alone document advising them that that check is going to be done.

These stand-alone documents can't – does not do the document that they signed to authorize the check. That can be contained in the employment application as well as this is a separate stand alone document that provides the basis and the notification that the third party is going to be doing the check.

For practical reasons just to ensure that it's all clear in one phase then one placed and for litigation protection in general, most companies and more consumer reporting agencies provides sample combined consented disclosure forms so that's when document that action both the consent and the disclosure.

One interesting issue though which comes up in today's rapidly expanding technological world and also due to offsite operations is whether or not consent can be provided electronically as opposed to traditional signature and it's a little bit of an unclear answer.

Until approximately 2000 – year 2000, excuse me, the FTC, the Federal Trade Commission, the entity that imposes the Fair Credit Report Act was issuing opinion letters and they indicated that an electronic signature definitely would be sufficient but whether or not a mouse click was something of a similar ilk would be dependent upon the circumstances.

We have never seen a real litigation on this but I (strongly) recommend if you are using any form of electronic consent is to ensure that you could demonstrate that there was a clear manifestation of intent that someone understood that a check was going to be conducted.

Going to the next slide. There are two types of basic checks under the FCRA. There are basic consumer reports, which are basically database checks, and there are investigative consumer reports.

Investigative consumer report by definition involves interviews of friends, neighbor et cetera to develop information regarding the applicant or employee's character, conduct and well-being.

However, from a practical angle based on FCRA guidance if at times in an investigative report, if a third party is being used to check references and that third party is asking any question other than confirming that the person work there and confirming the date of employment and/or salary.

Simply put a question such as is the person eligible for rehire? Or was this person or a good employee makes it an investigative report and if it is an investigative report, a different type of consent form needs to be used where the individual is notified that they have the right to obtain information regarding the nature and scope of the report within a short time frame if they make a request.

So the first complaint issue once you always think about what their consent form is making sure they have proper consent form for the types of check that they are doing i.e., whether it's a consumer report or an investigative consumer report.

So moving down the procedural line the individual sides and consent, the background check is done, they have no disqualifying information in short, there are no further obligation under the FCRA or State law.

However, if there's disqualifying information, there are procedural requirements and I know at this moment, I'm just focusing on the procedure. In a few moments, we're going to talk about some practical suggestion and how this ties into disqualification.

But in terms of the procedural requirements under the Fair Credit Reporting Act, if you're disqualifying someone from employment based on something that came in the check, there's an obligation to provide that person with a pre-adverse action notice.

What that pre-adverse action notice is basically a letter that says, we made a conditional decision to disqualify you from further consideration from employment based on the information in the report that could asks delineate a specific information to this.

The report could have loaded information and then it basically says to the individual, if you are contesting – If you wish to contest the accuracy of this information, please contact me, i.e., the company and let us know you're contesting the accuracy with the consumer reporting agency and in general, the FDC recommends that you give the individual five days to do so.

It's a basic prerequisite for disqualification and I just want to reiterate that the purpose of the pre-adverse action is not per se to argue that, no you should've disqualified me based on this. It wasn't that important, it wasn't job related. It is solely for the purpose of the individual demonstrating that the information contained on the report is not their information. That there were two John Smith, that something was transposed, was something about (it).

If the pre-adverse action notification is sent out and the person does not indicate that they are contesting the accuracy of the information at all, five days (later) the adverse action letter can go out, that continues to just reiterate that the person they can sent it to the check.

We've sent the pre-adverse action letter. We haven't heard from them and now they are officially and formally disqualified.

If the person that contacted the accuracy of the information, others will allow us (to depend) on business needs but in general, we recommend before setting a pre-adverse action that you give that person at least a couple of days to try and clarify that information with the consumer reporting agency to see if it was accurate or not before issuing the adverse action.

A couple of (filer) procedural issues although the Federal Fair Credit Reporting Act record keeping, we generally recommend that all records containing the background check be kept for five years. There is no per se record keeping requirement in the statute, however, since the potential statute of limitation is five years we generally recommend that all records

relevant to consent, relevant to pre-adverse action and adverse action component be kept for five years.

So other reconstruction requirements, among the various things that was included in the (fact) act which was passed a couple of years ago was the requirement that one consumer report to destroy, they need to be totally destroyed so they are incapable of being recreated.

Obviously this was primarily for the purposes of avoiding identity theft, where they deal with (paper) that's very easy when we deal with entities that e-mail us reports that we put in our servers or things like that, that will often involve involvement of (IT) to ensure that when it's destroyed, it's truly destroyed and is not on any hard drives or any similar type documents.

Moving to our next slide quickly touching on a couple of State law issues in general, the (mini) (SUOA) stabilized track the Fair Credit Reporting Act but there are a few (changes) we just wanted to mention.

Under California in general, a specific consent form is needed thus, in California among other requirements, the individual needs to be specifically told the nature and scope of the checks to be done as opposed to the federal law you can just say that a background check is going to be completed.

In Maine, Minnesota and Oklahoma there are (tangents) regarding someone's ability to obtain a copy of the report. So that's something that should be built in to consent forms. In Washington, Massachusetts and New Jersey, there are State summaries of rights and they state summaries of rights due to be said along with the federal summary of rights as the act below when there is pre-adverse action or adverse action notifications. I'm quickly just summarizing these just to provide a little bit of information as to that it isn't just a federal issue.

And then finally, at the state of Washington just last year imposed a new requirement whereas an employer is conducting credit checks that all the consent forms the employer must include specific language as to why they're permitted to conduct the consent – credit check.

(Eric Reicin): Let me jump in there, this is Eric again, hi. On the credit to limitations in Washington State that's actually an interesting issue. I think that you'll find in the next couple of years the (EEOC) will be looking a little more carefully about whether or not to use credit information in terms of hiring.

There was a hearing before the (EEOC) early in the spring where one of the witnesses talked about whether our ((inaudible)) impact. We are using credit and (vital) scores in hiring decisions and it's just something far more to think about.

We obviously, as part of its program, want to make sure we recognize the three types of people. The following are private general counsels of companies that know that much about employment law. They are the people that supervise the employment lawyers and that they are the hardcore employment lawyers also on the job.

So I want to make sure that all three groups get something out of this program. Who has other question for you? We've just listened to Rich about the facts of how we are supposed to handle this from a practical basis. You have 18,000 employees you have 26 locations, as a practical base of structure for a large organization, how do you comply with all these various state laws and ((inaudible)).

Chris McVey: What we have done is we have contracted with one vendor who supplies our background check services nationwide and that was part of our purchasing agreement with them was that they would make sure that they are in compliance with any state requirement for specific form.

(Eric Reicin): Or imagine you could also talk to (Jeff) and (Louis) could help out as well.

Chris McVey: That's exactly right.

(Eric Reicin): Why don't go ahead and pick us a next line.

Rich Greenberg: Thank you very much Eric. I just wanted to just (bade) on one point that Eric had mentioned with the credit information. It's not always (is that) being an increased target of governmental watch but we exceed (south) a couple of cross action lawsuits alleging despite impact and alleging that employees consideration of credit is having an adverse impact on certain protected classes.

So we'll touch of this – a little bit more in a couple of minutes but in terms of credit checks, we strongly recommend that companies really analyze whether or not someone's credit history is really relevant to the job that they're going to be holding and before disqualifying that they really gauge in an individualized analysis especially because as we all know, sometimes someone could have a bad credit history because they have been taking care of their family for years.

Because (the day) their parent passed away they've been taking care of their whole family as opposed to them being a bad actor or someone incurring debt unnecessarily. Sorry for the (digress) but moving on to the next slide.

Disqualification, often times when I speak to clients, clients ask me, OK this information came back in the report that the (FCRA) allowed me to disqualify based on this information.

And my response is, absolutely because the (FCRA) does not address disqualification at all. The (FCRA) solely addresses the processed issues that we spoke about. It does not in any way address disqualification to the extent disqualification is addressed in all of (the world), it is addressed by State law or by Federal anti-discrimination laws.

What types of (clients) do we need to be concerned about, when we're I am thinking about disqualification. ((inaudible)) three types of claims that we need to be considerate about. The first type are direct claims, there are some states for example, my home state in New York in regard to criminal check that specifically says you could always disqualify someone based on their (accrual) history if it's job related.

So if an employee disqualifies someone based on something that wasn't job related there could be a direct claim there, under the New York Correction Laws – on the New York Human Rights Laws for the employer's violation of the law.

But that's only one level of the analysis, there's two other levels of the analysis. In many (other times), some people are disqualified they are in protected classes and they could elect discrimination based on their protected class. And in defending that claim, the company would have to set forth a legitimate nondiscriminatory (data) for their decision-making.

((inaudible)) especially with the increased focus of governmental agencies of these issues which I'm going to touch on more in a second. It's often vital to ensure that our decision pattern is a straight (face test).

So for example, if there was someone you disqualified because they had a drug possession conviction 25 years ago but since then they've become administered they went to a rehabilitation programs and they are an outstanding citizen if that person alleged race discrimination, if they were minority it could be very difficult for the company to justify it's decision in that regard.

The fourth type of claim would be a ((inaudible)) claim. Often times, at the end is clearly an (ESC) guidance ((inaudible)) the (ESC) attention action that gets the employers to having background check policy, the disqualification policies that have an adverse impact on protected classification and the employer should always be careful about those types of things.

Two power points I want to make on this slide, first if you strongly recommended a (statutory) for criminal conviction and credit now the employer do not have any ((inaudible)) disqualification policy that to extent – that the extent possible any written documentation indicates there the individualized analysis.

Second, the second thing I wanted to mention is the (EOCs) new (raised) initiative. The (EOC) issued a publication where they've indicated that one of their goals is doing what Eric said earlier was to stop discrimination that has a negative impact generally of people of protected classifications with (conviction) to (arrest) histories.

That way it is a public issue because in general conviction was – but not protected classification by the Federal law. ((inaudible)) indicates is that the (EOC) is going to take a much stronger focus on potential ((inaudible)) claims and potential ((inaudible)) treatment claims when employers are basing their actions based on criminal background checks results and the company should be well prepared to send their action in that regard.

(Eric Reicin): Rich, this is Eric, the (EOC) compliance manual has three factors, the nature of gravity of defenses, the target is passed in for the conviction or completion in the sense given the actual ((inaudible)) sought. So, that's what currently (EOC) is and those of you who advanced (walks) on the phone.

The most recent case of Federal Appeals Court Case on this issue is the (Septa) Case versus (J&D) Jagicla Enterprises or just look it up 479 F 3rd 232, also known as the Septa case where a person who is going to be a bus driver for the mentally disturbed and disabled

individuals had a 40-year old second degree murder conviction and the third circuit in that case on the basis of expert testimony said that that was fine but they had real problems because it really don't matter because they thought that the plaintiff's expert weren't strong enough. They sort of reached out to the world to try and solve this problem. So look at that case, the Septa case 479 F 3<sup>rd</sup> 232 to those of who are on ((inaudible)) program.

Rich Greenberg: Thank you Eric. So moving on to slide nine, now we just want to quickly address the various different types of checks that are generally in the menu and just to quickly mention certain things about them.

The first one is almost universally done in the criminal background check and there's various different forms whether you do a nationwide check, whether you look at certain locality. We already mentioned the conservative qualifications with criminal background checks and then a couple of other things I just wanted to mention.

First, often times, agencies offer a product called the nationwide database, which is not up-to-date information. It's up-to-date as of the point that it's downloaded into the system that in general that's only updated every few months.

So always make sure with your vendor that you are getting up-to-date information but this is actually a specific requirements that individual needs to be told that decisions are not being based on up-to-date information.

Second and this is a big frustration for many individuals is that seven State laws limit the information that could be revive by consumer reporting agencies. Understanding the law criminal convictions can be reported in unlimited for an unlimited period of time and arrest can be reported in seven years.

Many State laws though limit criminal convictions for a period of time, they are (widely) reporting it on the less or less than ((inaudible)) so that always needs to be analysis of those issues. Also, one part important in disqualification (voting) on what Eric said there are three different types of ((inaudible)) with criminal background report that needs to be analyzed.

There are criminal convictions, arrest that's going to result in conviction and (begin) arrest and in a different analysis to each of the both and federal and state law as to whether or not they could be used for disqualification.

Moving on to the next type of check, employment qualifications, reference checks, in general, there are no significant issues posed by that. As I have mentioned earlier that if the entity is asking anything other than ((inaudible)) zero number the fact (inherited) into an investigative report.

Then there are educational qualifications going forward any information regarding someone's educational past and for both employment verification and educational verification, in general, if someone misrepresented the information that could be a basis for disqualification.

And in general, that could be addressed directly through the pre-adverse for action process but it's very hard for someone to get an explanation – to explain a little about conduct in that regard.

Moving on to the next slide, social security choices. Social security choices are very interesting issue but they are often by (varying) agencies. But what many agencies don't tell you is that they are not accessing the social security administration database because they don't have the reported access of the social security administration database. So there are real question as to whether or not, if you would see the negative trace what you can do with it

Is it an aggressive angle that you can issue a pre-adverse action notice based on it? Or at least have a conversation similar to what you would do under the credit no match regulation not the proposed ones that are on hold, but there's also a lot on the floor that says that in general, you can require someone to show your social security card until within 72 hours at least of work.

So how is someone ever going to be able to (refute) this information and that the employer maybe asking at its (peril) if it disqualifies this in one of these traces. So it's just up to be considered.

I do know that there are other ((inaudible)) these checks often times in which other locations where people lived, you could find that other information about addresses and work locations and that may help you expand the scale for your criminal background check and you may find some other issues at which you are unaware but I just wanted to mention the issue.

Similar to compensation checks, may (currently) modality in doing so it is questionable whether we need to be capital about finding information that could support discrimination claims. You could learn about people's protected classification, certain types of other protected conduct and you always need to be careful about such and I'm going to talk in a couple of minutes about what could compensation check and specific issues that come up with them.

In OFAC checks, in OFAC dated to the office of foreign asset and control and often times, these are called analyst watch list checks. However, there are numerous problems to this list that maintained by the government and oftentimes a lot of people list, Arab descent, Muslim or Muslim descent have ((inaudible)) there could be matches for example I think there was some jokes about Muhammad Ali being on the list.

So if it did comes up by ((inaudible)) there is no per se pro will be issued on disqualification. However, we always recommend that a mass situation rather than just going right to the pre-adverse action process similar to what we recommend with the criminal background disqualification unless the person write on their application that you first had a conversation with them so you could then say to yourself that we made an individualized decision that this is job related.

Few of the checks I want to mention, on the next slide, credit checks once again right now, under the state of Washington there is no per se limitation on credit checks. However, the credit checks is something that make us very nervous.

As I've mentioned, the state of Washington actually has imposed specific legislation limiting one of the (poorer) can do credit checks. Further we see a couple of national class actions alleging (disparity) impacts with credit checks.

So we strongly recommend that if you universally use your credit check that you ensure that its job related and that you always give someone an opportunity to explain it before you just do an automatic disqualification. Obviously if someone is in a high-financed division it's a much less slippery slope.

Sex offender checks, many states as well as in the federal sex offender database lists various individuals who will be convicted of sex crimes. In general, these databases will pull up the same information as pulled up by a criminal report. However, sometimes-criminal reports are limited to jurisdiction.

And what the database specifically says they cannot be used for employment purposes there is no per se disqualification restrictions. However, some of these databases, I believe, specifically California if I'm not mistaken imposed specific limitations on the use for employment purposes. So that's something that always needs to be taken into account.

(Eric Reicin): Can I ask you this question. Let's say your employers find a wider (carnage) on the sex offender list and because it was (military) trial or something else it was not – it was not listed perhaps in your regular background – criminal background that certainly is by jurisdiction as you've mentioned.

I guess the first part of it would be admit to in on the employment application but also you need to look at this database once you get to talk about that further.

Rich Greenberg: I think you made a couple of good issues. First, if someone wrote out in their employment, you always have – you don't have to engage in all of these balancing because the person misrepresented almost every employment application, it has a language at the back that said I affirm that everything here is sure and I have not deleted anything and if I did so I understand that is a ground for immediate disqualification.

Then one can say that you have here is that some of these databases specifically says that the information can't be used for employment purposes. So with that information that is provided if you are going to disqualify based on it and I'm not as concerned about it in a misrepresentation situation although technically it could be an issue.

One should always go back and either check this database and (sites) that is publicly available or check with their consumer reporting agency to make sure that there is nothing indicates on that database that it cannot be used for employment purposes.

Because in general, these databases weren't set up for employment purposes. They were set up for people to see whether or not in their neighborhood around their children there are already convicted sex criminals lack of a better term of which they should be aware.

The problem with motor vehicle checks. Oftentimes employers do these on everyone, our general recommendation once again while there is no per se standards is that we focus on job relatedness. And always disqualify someone based on a (DND) background if there are – if

the job requires driving or they're going to be driving a company car and the insurer won't insure them due to their driving history.

The final one on the other public sources seems like Google, LinkedIn, Friendster, Yahoo, et cetera and I'm just going to hold off all of those and touch those in a couple minutes when we go to the noble issues that I believe Eric also has some interesting points that he would like to make about that.

(Eric Reicin): Very interesting ((inaudible)).

Rich Greenberg: I'm just doing that. A question – now turning to – I also get a question from (Curt) OK. You talked about on these procedural issues earlier. What about if we run our own checks if we have our own risk prevention deployment that runs its own background checks that directly would see the criminal database as they paid by state.

Do we need to worry about any of these FCRA issues? The short answer is no. You would still need to worry about the disqualification FCRA issues that we talked about but you wouldn't have to worry about the FCRA issues, you wouldn't have to worry about the consent, the pre-adverse action and adverse action requirements at all.

Is it owing on to the issue as to whether or not the employee of those into one of these public databases like a nationwide database they purchase whether or not the FCRA is that implicated my thought is that it probably would be since the main purpose of the FCRA in this realm is to prevent employees from being subject to adverse action based on these "evil databases" that are being maintained that may not contain accurate information with them.

But most employers that do this directly don't have that issue. They went directly into publicly available sources and hiring such as that purchased databases but this issue doesn't really come up and if it does come up, it is something to consider.

Now let's turn to noble issues. The biggest one that comes up and not a week goes by when I don't get a question from our client that said, we did a Google search, we did a Yahoo search, we checked MySpace, we checked Friendster and we saw some things in there about this person that makes us not want to hire them.

Can we use that to hire them? The shorter answer is there is relatively no law in this area right now whatsoever and in general, if you feel you can pass the straight face test, that this is job related. That this goes to character. That this goes to somewhere who you believe to do the job, in general, you can disqualify the person based on those things.

(Eric Reicin): What about the serious states that have so-called (lifestyle) discrimination laws? Obviously, most of those are smokers' rights or so forth or marital rights – marital status discrimination. What about sort of – what (states) should we really be looking out for?

Rich Greenberg: That's a perfect segue to the exploit, Eric. Thank you.

As I mentioned, there are numerous states that have either legal activities laws or at the least smokers' rights laws. In those states and states that come to my mind with concerns with those states are New York, California, ((inaudible)), Colorado, North Dakota, and

Louisiana. And those are just based on the other broader laws as opposed with just the anti – the smokers’ rights laws. That I believe about 30 states, the last time I checked, have smokers rights laws. That information comes up there that we see, for example, we don’t like the fact that someone smokes but the state that has the smokers’ rights law, in general, we serve the ((inaudible)) based on the fact that, that person is smoking except that we do an analysis under the law and it’s a conflict of interest defense.

For example, New York has a broad legal activities law. That covers political activities, recreational activities, including smoking, but as a conflict of interest defense. So, for example, the American ((inaudible)) Association and therefore certain amount of smoke in the environment and they have an unequivocal policy that they won’t hire smokers. They could probably pass muster onto that conflict of interest defense.

That building, of what Eric said, the biggest concern with this type of (track) in terms of liability is making sure two things. Number one, in terms of per se issues, that you’re not disqualifying based on something that’s protected activity under a state law; and then number two, that once again you’re passing the straight face test, especially those with protected classifications because even though we may not be able to bring a direct claim, you had to bring it to (styro) treatment claim based on race discrimination, age discrimination or something like that. And that the only defense that we could have for a 45-year-old is that there is a picture of him drinking underage when he was in a fraternity when he was age 20. That may be very difficult to overcome at least at the agency level.

(Eric Reicin): I think there’s some interesting issues. I think you’re right. You know, my understanding is the there are about 100 million individuals that have personal webpages and if you don’t think your HR directors are doing Google searches or Friendsters or Linksters or whatever may be you’re Linked in, you’re just missing the boat. Then, ((inaudible)) who told me that most people are doing this to verify work histories with, you know, some were upwards close to half of all applicants light somewhere on their resumes. We’re worried about their attitude if it was an organization but also issues related to ((inaudible)) hiring and whether or not maybe we should have known that they are unfit or unsafe. And signing applicants with published negative information about the company.

Now, you got to worry about the National Relations Act if it’s sort of organizing activity as opposed to just merely saying nasty things about your company but I think which makes a very good point is what you do when you go on someone’s MySpace page and let’s take the different scenario. Let’s say, they’re not, you know, when they were 20 years old, in a fraternity somewhere; hypothetically, you know, getting blasted on their, on a webpage – it’s you know, it was last week and it was they’re out of control drunk and it could be the financial officer of your company. But what about the scenario of whether or not, illegal drugs were involved then.

I think we have some interesting issues that are less legal depending on the state and then more along the lines of whether this person is as good fit for the company and the culture of the organization. And there has to be a very serious conversation between the in-house lawyer and the HR director or among the hiring person as well as to how you want to handle that.

(Chris), if you want to add to that at all.

Chris McVey: Well, it's interesting. I just had this issue today. We had an applicant who had a pretty extensive criminal background check but most of the convictions occurred before 1995 and a recent disorderly conduct and open container arrest and the HR director didn't want to hire him because of basically the length of the record and I've cautioned them not to disqualify this person because most of the convictions were so old. And he's just going to be a production employee, not in a financial or a position that has to do share of responsibility to the company. So I'd do exactly what Rich says which is to advocate an individual analysis for each of those situations.

(Eric Reicin): Yes. I think some of the HR professionals out there are getting creative. For example, I'm aware of one circumstance where people sign up for dating services. If you will go on the dating service, and you find people that are on their, their dating service. You can find out all sorts of information about the individuals likes or dislikes, whether they're often as with other customers, like walks in the beach and pina coladas or they like something else.

And honestly, you know, depending on the information you find, ((inaudible)) as possibly but you also you finding out information that may be relevant for the job. And its, you know, that I'd like to say the ((inaudible)) get one second ((inaudible)), the question is how do you manage it legally and how do you deal with those sorts of issues. But I think this is for in house counsels especially employment law area where we're going to see more laws soon. It may not be this year, it may be in the next year but it's going to be – I think there's going to be more law out there dealing with these issues. Primarily, at the state level. Although I would notice that on December 3rd, the EOC put out a faxed sheet, primarily an employment test as selection procedures. But I know that they're looking at this issue.

There was again this hearing back on May 16th, 2007, that was employment test and selection procedures but I know that this is an issue for a number of commissioners right now. So, let's see how where that goes as we go forward.

Rich Greenberg: Thanks, Eric. I'm moving into Chris' ((inaudible)). I'm just going to quickly go to my last couple of slides that I think that we touched on most of the issues. ((inaudible)) major litigation is concern as I see are apply minimum credit standards to all due to the concern about job-related ((inaudible)) due to Washington state law which could be a harbinger of future legislation and due to the disparity impact concerns. Also, a disqualification standards especially in regard to criminal and credit, the importance of speaking with an individual of something negative comes up especially regarding criminal or credit and there wasn't a lie in the application so we pass the straight face test in terms of saying that we did an individualized analysis. And that we clearly had a legitimate non-discriminatory basis for our decision and this will go one of the most frustrating things I see is employment applications.

Nothing drives me crazier than employment applications, and just asks someone to reveal phonies. Well, just ((inaudible)) within the last five years. Because while some states imposed some limitations, in general, the ((inaudible)) allow you to ask of you, other than convicted of a crime that has not been sealed. And the ((inaudible)) to that question is the more that you can, the more likely it is that if someone misrepresents that you're going to be

able to get them on that misrepresentation and not need to engage in such an individualized analysis.

Further, we're touching on a couple of other things that I've seen. I've mentioned before the concerns with civil litigation checks, specifically worker's compensation checks. You know, often times client run worker's compensation to third party agencies but by doing so, they learned that people may have disabilities and then they've opened the door to a potential disability discrimination claims that they don't hire that person. And that's a major concern.

Second, one thing that we see often now in the financial industry, in the tech industry, that the more people are allowed to go on site to certain entities that, that entity wants to either run a background check or at least see the background check that was running that person. I swore we recommend that background check results not be disclosed so that ((inaudible)) can be disclosed that there was no issues but the background check results not be disclosed unless there is a clear authorization from the employee. Well, ((inaudible)) going back to the confidentiality identity theft issues.

You know, most of the time, these reports contain social security number, full name and an address. And almost any hacker in the world can get credit cards with that information, often can get into bank accounts. And that there be very, very strong measures maintained to maintain the confidentiality of all of these acquired information. I thank you all for your time.

And now, I'm going to – will ((inaudible)) to questions to the end. And now I'm going to turn it to Chris some (I-9) issues.

Chris McVey: Thank you, Rich. I appreciate it. I'm going to go quickly so that we have allow some time at the end of our presentation for your questions.

Obviously, one of the issues when analyzing an applicant for employment is whether or not they meet the I-9 requirements of the United States government. Most of you know that the I-9 is a document that individuals are required to complete and it verifies that the individual who is applying for the job is who they say they are. That's the identity piece and that they are eligible to work in the United States, the employment authorization piece.

Obviously, you must fully complete the form within 72 hours of the start of the employee's employment. Certain parts of the I-9 had to be completed the very first day that the employee shows up. And if you, and I'm going to talk about e-verifying a little bit but if you participated in e-verify program, the entire verification process has to be completed on the first day. I-9 documents must be presented to the employer within 72 hours and employers must look at the document that applicants present and at least visually verify that they look authentic. There's no requirement that an employer verify that they are authentic but they have on their face at least look authentic.

You'll see here on the screen that there is a note that there are two schools of thought as to whether or not employers should copy and retain back up documents. The main issue there is that there is no requirement that employers keep those documents but if you want to have some kind of proof down the road that those documents that you reviewed looked authentic, it certainly helps to have copies of them available for review by your inspector.

Employers can request to see social security cards on the first day of employment for payroll purposes. It's also worthwhile to note that you must maintain copies of I-9 for three years or one-year pass termination date, whichever is longer.

Moving on to the next slide, most states know that the U.S. Citizenship and Immigration Service issued a new I-9 form. The date on that form is June 5th, 2007. It wasn't actually released until December 26th of 2007, but all employers must be using that new form now. So, if you're using an old form that you have photocopies a thousand times and haven't updated lately. If the federal government audits you, you will be subject to penalties if you are not using the new form.

The major differences on the new form is that they have removed all eligible documents from list A which is the list that verifies identity and eligibility to work and they have also added one to that list. The USCIS has also issued a new handbook for employers that includes instructions for completing the form I-9. And for those of you who are interested. It is available on the web and it contains examples of completed I-9 forms and up to date color copies of various acceptable documents.

The note – this is a change from the old form. If the employer participates in the e-verify program, the employee does not have to provide a social security number in section one of form I-9. Practically speaking, I don't know how often that will happen. I don't know how many employees and/or applicants are going to know whether the employer participates in that program but if you are a participant and somebody refuses to provide their social security number for I-9 purposes, you cannot require them to do so. If you are re-verifying an employee, you have to use the new I-9 form with its updated list of acceptable documents.

None of the previous versions of the form are valid anymore, either whether in English or in Spanish. The new form is available in English and in Spanish but only employers in Puerto Rico may require their employees to complete the Spanish version for their records.

Now, e-verify is a program sponsored by the federal government with the intention of assisting employers in ensuring that their new hires are lawfully eligible to work in the United States. As you see on the screen, the participation in the program is not mandatory generally although the Bush administration has announced intention to require a participation for all federal contractors doing business with the government. There is some concern at this point over how well that system will work when they add up to six million employers. If all employers are required to participate in the program.

The basic pilot that ran had about 13,000 employers in it and I think they had some issues with the quality of the information, the database. Participation through e-verify can be done directly or through a third party and companies that sign up to use this process have to sign a memorandum of understanding and attest that they will comply with certain procedures. Now, the e-verify program, the federal government is looking at expanding it to include a photo component, in which they will compare photos of applicants that have been submitted for other purposes for example, visas and passports. The government would like to coordinate their database with state driver's license databases and their intention is to go to the states and request access to those database so they can compare those pictures.

One issue that we are watching closely is how the federal government's requirements on immigration coordinate with state laws. Many states across the country have passed legislation that directly addresses employers within their jurisdiction to verify eligibility, separated apart from what the federal government requires.

One of the first cases that came out was in Pennsylvania where the state issued a law regarding certain verification requirements that, excuse me – the city of Hazleton issued the regulation and it was eventually enjoined by a federal court there, saying that it had been pre-empted by the immigration and immigration and control act. That issue is still up in the air.

If you read the news today, the Supreme Court refused to hear a case yesterday that that was *Van Elk versus Reyes*. This was an appeal from the California Court of Appeals decision where the plaintiffs there claimed that the defendant, an employer in the state of California, had failed to pay them prevailing wages but the plaintiffs were illegal immigrants. And the U.S. Supreme Court refused to hear the case. So, we have not gotten any additional guidance on the (book) preemption issue.

Just to highlight one state in particular, Arizona passed last summer the Legal Arizona Workers' Act that requires all Arizona employers within their boundaries to participate in the e-verify program. There are several lawsuits that were filed, challenging the legality of law but a federal judge dismissed those. Right now, that law is still in effect. And any employer within the state of Arizona who transacts business there has a business license issued by an agency within Arizona and employs one or more individuals who perform work in that state must participate in the e-verify program.

Another example, to be aware of, in July of 2006, Colorado enacted a law that tightened up the requirement for employers on verifying the identity and eligibility of new hire employees. In Colorado, employers have to complete and affirm a form of legal work status, a specific form that the Colorado Department of Labor has issued. They have to examine the work status of any newly hired employee. This is one of the states that requires that you retain a copy of federal form I-9 identity document that is in addition to what the federal government requires but this form is one where the employer basically attests that the forms have not been altered or falsified. And that they the employer have not knowingly hired an unauthorized alien.

Now, the form has to be maintained in either written or electronic copy in the employee's federal form I-9. With documents and employers who fail to comply with this requirement or subject to monetary penalties that you see listed there. Another example very quickly, Illinois on the other hand, went to the other extreme and said employers, you cannot participate on e-verify because the Social Security Administration and the Department of Homeland Security have to make a final determination on their non-confirmation notices.

The Bush administration stepped in and said you're interfering with our ability to manage immigration issues so they sued the state of Illinois. The state of Illinois backed down and right now, Illinois employers are still eligible to participate in the e-verify program without fear that the state is going to perceive it as an enforcement action against them.

So, in light of the new I-9 forms, in light of the Bush administration's stated intention to increase enforcement in this area, this is a time where employers should be taking an opportunity to audit your existing I-9's, make sure that you using the new I-9 forms and that you don't have old copies of the old I-9 forms still circulating at being used. Consider using the e-verify program and with the issue of contractors, you want to make sure that your contractors are taking steps to verify the identity and eligibility, employment eligibility of their employers.

And as Rich said earlier, we don't advocate that you, you know, require review of all these documents for co-employment purposes but we do require certification from contractors that they have completed those checks and have taken all the necessary steps to verify eligibility and identity, authenticity check.

(Eric Reicin): Thank you, Chris. We are going to take some questions now. If you want to ask a question, use the box in your left hand side and we have a number of questions already out there. So, I think we'll go quickly. Others will be a little bit longer and I'm sure Rich would be happy to talk to talk you individually if your question is not answered here at Jackson Lewis up in New York.

One easy question or one simple question that was asked, not to denigrate that question whatsoever, but it's a question a lot of people do ask this question. HR folks, especially in particular, people who aren't law employment specialists. If the employee lives in Connecticut and the employers in New York or some other state, which state law applies, Rich?

Rich Greenberg: I think that there's a two (side) analysis to that question. First in terms of the procedure requirements in terms of the Consumer Report Act Laws, the consent forms in general, I would always recommend applying the most protective law because a lot of the times these laws are drafted, to say that we want to protect our citizens. In terms of a disqualification laws, I feel pretty comfortable that the disqualification laws are focused on where the person is working. And that you could focus on just the disqualification laws that would be applicable in the work location.

However, I do know that this is an area where there ((inaudible)) law so you could be asking a bit of your old ((inaudible)) but that's the advice I've been given for about 10, 12 years now, and not having any clients having specific negative experiences in that regard.

(Eric Reicin): OK. Another question from the field is – you may be mistaken in there, which it was presented but the question was asked. Can you always ask whether the applicant has ever been convicted of crime? I think one of the factors that you need to make sure is when in that particular state, there is a prohibition for that. So, you watch out in Massachusetts. This is watched out in California. You need to watch out for juvenile records, for sealed records. Those sort of things, whichever you want ...

Rich Greenberg: ((inaudible)) answer the question. I apologize because maybe I was speaking too fast in the end. What I said is unless the state law imposes a specific requirement, there is only about 10 states, mainly the ones that I have mentioned that imposed such a requirement. There is no indication on a broad question, have you ever been convicted of a crime that has not been sealed or expunged. But as Eric mentioned, there are certain states,

California, Massachusetts, and Illinois. We got this ((inaudible)) specific language about expunged and sealed juvenile conviction. There is a limitation that there are many national employers that I worked with that just nationally say, just tell us about phonies, just tell us about things have been in the last five years, which I think is very limiting to them.

(Eric Reicin): There's another question of, going back to slide 12, that just move for the group on ((inaudible)). What are examples of the databases that ((inaudible)) may apply if the employers run their own check.

Rich Greenberg: the biggest one that comes to mind would be if an employer on its own purchase one of these national databases. With the national databases is sort of a download, of criminal information provided to you by a third party that allegedly acquired it as an ex-date from the – you know allegedly from the specific state databases that maintains for example by correctional department. And because of the logic of the (FCOA) that all these databases out there, they may not be accurate. Someone should have the opportunity to contest the accuracy of the information, there could be an argument there that, that database creates and SCRA issue. I have not seen any case law on it but since you know, we have high-level professionals on the phone, I just wanted to raise the issue.

(Eric Reicin): There's another question about physical screening that's pre-employment qualifications for capable performed job specific activities and in answering that question, you have to be mindful of the Americans with Disabilities Act and the state (FEPs), which there is a whole series of guidance on the ((inaudible)) with respect to that. But basically for physical screening, you cannot do medical tests prior to the pre-offer stage under the ADA. Once the offer is made, then you can do the physical screening that may be necessary for.

Operator: All participants have been muted but you may out-mute your line by pressing the star six.

(Eric Reicin): Sorry about that interruption, ladies and gentlemen. I'm not familiar with that technical difficulties.

Our next ((inaudible)) state FEPs with respect to that and I think we have time for, may be one more question based on the technical item;

And that question would be – there's a question about a ((inaudible)) states smokers' rights law and lifestyle laws and I assumed (Jackson Lewis) has put together something on lifestyle laws and smokers' rights laws. Is there any place or any website that we can look for that, Rich?

Rich Greenberg: I'm not sure we have it publicly posted but it's something that I can put together and have issued here. And we could put on any response that we're putting out.

(Eric Reicin): OK. Well, we're very close to the end of our time. Let's virtually thanking and give a virtual applause to Rich and Chris. Thank you for – Jackson Lewis for putting the PowerPoint and Rich and Chris for putting together a wonderful program.

Again, our next webcast for the ACC Employment and Labor Committee will be in early March based upon the ((inaudible)) announcement of the Department of Labor, new (FMOA) proposed regulations which changes the underlying FMOA but also provides

information on the new military law that was recently signed into law by President Bush.  
And this concludes our webcasts discussions this afternoon.

Thank you for joining.

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