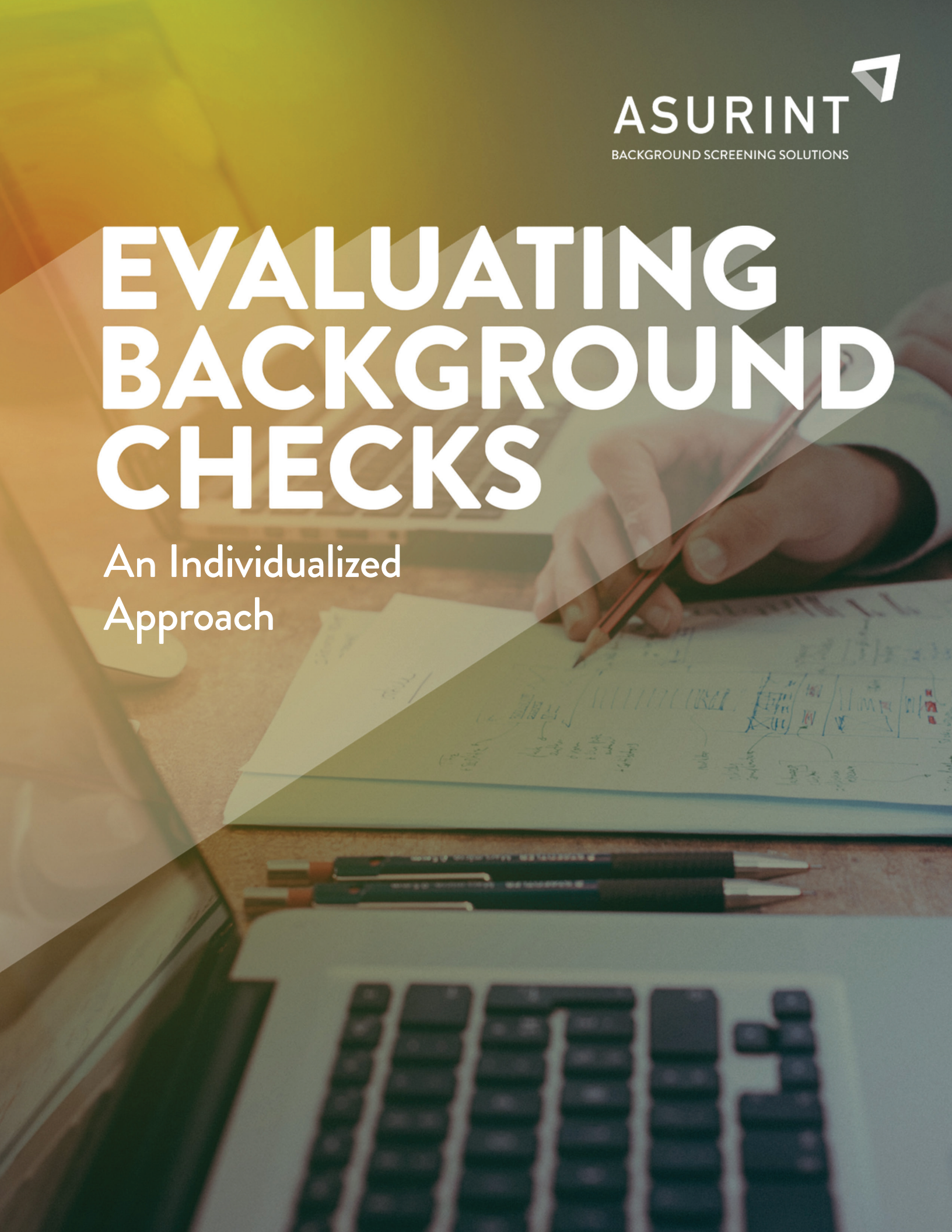
ASURINT
BACKGROUND SCREENING SOLUTIONS

# EVALUATING BACKGROUND CHECKS

## An Individualized Approach



# EVALUATING BACKGROUND CHECKS

Employers may ask a consumer reporting agency (CRA) to implement internal systems to evaluate background checks as part of the hiring process. An adjudication matrix (also known as a hiring matrix) is commonly used by employers to designate what types of crimes over certain time periods may make an individual ineligible for employment. An adjudication matrix will typically contain labels such as "clear" or "ineligible" that designate how the individual's background check results lined up with the matrix.

Prior to 2012, it was common for employers to have matrices coupled with bright-line disqualification rules. For example, if an applicant were convicted of a felony for drug possession within the last five years, he/she would be designated as a "fail" and not hired regardless of the circumstances. With the 2012 Equal Employment Opportunity Commission's 2012 Guidance on the use of criminal and arrest records in employment, employers are revisiting these practices in order to mitigate risk.[1]

## CONSIDERING THE RISKS

Asking a consumer reporting agency (CRA) to implement an adjudication matrix on behalf of the employer may, at face value, seem like an added convenience that allows for background checks to be evaluated fairly, uniformly and efficiently. Similarly, employers may develop their own hiring matrix to create a standard against which every applicant is measured. However, employers should proceed with caution when developing an adjudication matrix. Using any sort of policy or tool to automatically disqualify individuals based on information in their background check poses legal risks to both the employer and CRA.

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**Risk to the Employer**

Based on the ever-evolving litigation and legislative landscape, the Professional Background Screening association (PBSA) recommends that screening programs are reviewed on a periodic basis to evaluate policies and procedures. In conducting a periodic review, employers must be cognizant of potential litigation risks from the EEOC based on its Guidance and lawsuits under the Fair Credit Reporting Act. Additionally, there are potential state and local laws that require employers to individually evaluate criminal background checks as part of the hiring process. The remainder of this white paper outlines these potential risks to employers.

**Risk to the Consumer Reporting Agency**

Asurint does not act as an adjudicator (decision maker) and believes that employers are in the best position to make a hiring or other employment determination. Asurint also does not automatically trigger the pre-adverse action letter based on the results of the background check. It is always the individual employer's responsibility to determine eligibility for employment, make the hiring decision and initiate the pre-adverse action letter if needed.

One of the driving factors behind Asurint's decision is to create a clear separation between us as a CRA and the employer. We do not have any involvement in the employment decision and are not best suited to instruct employers if and how an individual's criminal history can/should be considered. There are far too many variances including industry, type of position being filed, risk tolerance of the business, etc. Additionally, there may be legal risk to Asurint such as in New York. Both Article 23-A and the Human Rights Law in New York provide protections of individuals with a criminal history. Employers must consider seven specific factors when determining if there is a direct relationship between the conviction and position sought, and if employing the individual would involve an unreasonable risk to property or the safety and welfare of others. There is a provision in the law that allows an agent of the employer to be held liable for "aiding and abetting" employers' violations. Thus, we have instituted the above procedures to protect Asurint as well as protect employers.

[1] EEOC Enforcement Guidance: "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. *https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm*.



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## EEOC GUIDANCE & CONSIDERATIONS

As mentioned, the issuance of the 2012 Guidance on the use of criminal and arrest records caused many employers to review their hiring protocols.[2] In this Guidance, the EEOC focused on disparate impact discrimination which occurs when an employer has a facially neutral hiring policy, but the policy disproportionately screens out protected class individuals without showing it is job-related and consistent with business necessity.

> Essentially, the EEOC believes that because individuals in certain protected classes are more likely to be arrested and convicted, an employer policy that excludes individuals with prior criminal histories across the board will inevitably commit discrimination.

The Guidance does not prohibit employers from using criminal records, but it does outlines best practices that the EEOC advises employers follow. These include, among other best practices, considering the "Green Factors" and conducting an individualized assessment.

**Green Factors[3]**

There are three specific factors the EEOC recommends employers consider when evaluating an individual with a criminal past for employment. Commonly referred to as the "Green factors" these considerations are also part of several local and state ban the box or fair chance laws.

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence;
- The nature of the job held or sought.

**Individualized Assessment**

In conjunction with the Green factors, the EEOC recommends that employers conduct an individualized assessment for each applicant.

According to the EEOC guidance, employers should consider the following factors while conducting an individualized assessment:

- Additional facts or circumstances surrounding the offense
- Evidence that the individual worked in a similar capacity post-conviction with no known incidents of criminal conduct
- Efforts towards rehabilitation
- Employment history before and after the offense occurred.

> An individualized assessment counteracts previous "bright-line" disqualification policies that failed to consider the candidate's individual circumstances in making an employment decision based on criminal history.

**EEOC Enforcement**

The EEOC has successfully enforced the Guidance against employers—even though the Guidance is not technically law. For example, in 2013 the EEOC sued BMW alleging its use of a bright-line disqualification policy resulted in racial discrimination. Particularly, the policy screened out many contractors with criminal histories (several of whom had already been working in BMW facilities for several years) without consideration of individual circumstances. In September 2015, BMW entered into a consent decree which required them to pay $1.6 million to impacted individuals, change their hiring policies, re-train employees, and offer the claimants employment through a labor contractor. The EEOC has several pending cases against other employers for this very topic as well.[4]

## LITIGATION RISKS

Employers are also facing class action claims alleging violations of the Fair Credit Reporting Act (FCRA). In particular, plaintiffs' attorneys have focused on employers' use of words like "fail", "ineligible", "does not meet criteria", etc., before sending out a pre-adverse action letter. The allegations claim the use of this terminology demonstrates the employer made a final adverse employment decision before engaging in the adverse action process—regardless of if an employer sent a pre-adverse action letter or not.

The FCRA litigation landscape is tough to navigate, but one recent example—Moore v. Rite Aid—provides a modicum of relief for employers. In December 2017, the Eastern District of Pennsylvania dismissed claims against Rite Aid finding the plaintiff did not sufficiently demonstrate that she suffered any harm. At issue was Rite Aid's use of the term "noncompetitive" (or ineligible for hire) based on the background check results which triggered the preadverse action letter to be sent. Rite Aid also sent the final adverse action letter five days after sending the pre-adverse action letter.

The plaintiff claimed Rite Aid made a final employment decision before this five-day period had expired. The court focused on Rite Aid's hiring policies which allowed for the "non-competitive" designation to be overridden if the applicant contacted the hiring manager with mitigating facts to consider in the final hiring decision.

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[2] "When Background Screens Turn up Criminal Records" *https://www.shrm.org/resourcesandtools/hr-topics/risk-management/pages/ background-screens-criminal-records.aspx*.

[3] The Green factors were born from the case Green v. Missouri Pacific Railroad. In this case, Missouri Pacific Railroad refused to hire individuals with criminal convictions (except minor traffic offenses). Green sued claiming the policy violates Title VII of the Civil Rights Act because Black individuals are disqualified at a higher rate than White individuals. The Court found the employer's policy was discriminatory and identified the three factors it believed were relevant in determining whether criminal convictions were job-related and consistent with business necessity.

[4] BMW to Pay $1.6 Million and Offer Jobs to Settle Federal Race Discrimination Lawsuit. *https://www.eeoc.gov/eeoc/newsroom/release/9-8-15.cfm*.



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In this case, the plaintiff did contact the hiring manager within the five-day period to explain the situation. Ultimately Rite Aid proceeded with the final adverse action letter. Since the plaintiff received the notice and contacted the employer, the court determined she did not suffer sufficient harm to warrant the claims and dismissed the case. Despite Rite Aide's ultimate success, it's important to note that the complaint was originally filed in 2013. That means the employer incurred four long years of legal expenses and business impact.

Additionally, the case of Reid v. The Kroger Co. offers another example where the court ultimately sided with the defendant and dismissed the plaintiff's claim that preliminary grading of reports is considered adverse action. Plaintiff Deloris Reid, when applying for a job with Kroger, originally disclosed a misdemeanor assault conviction from the year prior. Several days after interviewing for the position, Reid was extended a conditional offer of employment contingent on passing a background check. The background check returned a felony assault conviction that resulted in an initial grade of "Pending/Not Clear to Hire." This grade was based on a predetermined matrix applied by Kroger's vendor and triggered the pre-adverse action letter to be sent to Reid.

Reid filed a dispute with the consumer reporting agency after a Kroger representative told her she was unable to assist in the dispute process. The report was ultimately updated to reflect the reduced misdemeanor assault charge (not the originally reported felony), and an updated copy of the report was provided to Kroger. Although the report was updated in Reid's favor post-dispute, she was still determined to be ineligible for hire because "of the temporal proximity of her crime (approximately on year) to her application."

Reid argued that Kroger violated the FCRA because it failed to provide her a copy of her background check prior to taking adverse action, which, according to her, occurred when the report was initially scored as "Pending/Not Clear to Hire." The court, however, rejected this argument because it determined that the initial score was "preliminary and subject to change" and did not constitute as adverse action. Reid further argued that Kroger did not hold the position open during the dispute process; however, she remained under consideration for employment pending the resolution of her dispute and the final adverse action notice was sent based on the post-dispute report.

What was important in this case was the employer's ability to demonstrate that the dispute process played a crucial role in evaluating the background check and was not merely an arbitrary process that had no bearing on the employment decision. Kroger held the position open during the dispute process and issued final adverse action only after the report had been updated postdispute. Employers should take heed and review their dispute process and evaluate the impact it has on the hiring decision.

## JURISDICTIONS TO CONSIDER

Several jurisdictions have made individualized assessments a legal requirement through ban the box and fair chance laws. Los Angeles and New York City take the requirement a step further and require a specific assessment form (or a substantially similar one) be completed by employers and provided to the impacted applicant with the pre-adverse action letter.[5]

## FINAL POINTS TO CONSIDER

Employers should engage qualified legal counsel to review their hiring programs, including the use of adjudication or hiring matrices. For example, it may make sense to develop a job-specific matrix that takes into account each position's responsibilities that can also be combined with an individualized assessment. However, that approach may not always be feasible especially for larger organizations that have numerous positions. In that case, it may be appropriate to leave the adjudication matrix as-is, but then implement an individualized assessment protocol. Review of hiring practices should also include whether use of terminology such as "fail" or "ineligible" should be retired and replaced with terminology such as "review" or "under consideration." This softer terminology represents that the information is under review, but that a final decision has not been made which may lessen the risk of a lawsuit under the Fair Credit Reporting Act.

**For more information on these requirements, download our Ban the Box and Fair Chance Law white paper >**


The preceding is offered as general educational information only and does not constitute legal advice. Consultation with qualified legal counsel is recommended.

[5] Los Angeles Fair Chance Initiative for Hiring Assessment form: *https://bca.lacity.org/Uploads/fciho/FCIHO%20Individual%20Assessment%20and%20Reassessment%20Form.pdf*.
NYC Fair Chance Act Notice: *https://www1.nyc.gov/assets/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf*.



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Asurint is leading the background screening industry forward. Our powerful, customizable technology—backed by expert answers and personalized assistance—helps employers hire the right candidates every time, and faster than ever before.

Our clients leverage better background checks to reduce manual workloads, minimize compliance risk, promote a safer workplace, and drive insights to boost hiring and recruitment success.

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