

TRENDS

Latest Background Screening Trends and the Impact to Employers

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Each year, Employment Screening Resources (ESR) releases our highly anticipated “ESR Top Ten Background Check Trends.” These important trends directly affect organizations background screening programs, especially as it relates to legal obligations and litigation. Existing and ever growing legislation along with increase in background screening litigation underscores the importance of aligning with a screening firm that can and will take an active interest in their clients’ compliance requirements.

1. Local Ban the Box Laws Will be Challenged as Less Effective than Statewide BTB Laws

As of January 2018, a total 30 states and more than 150 cities and counties in America have passed “Ban the Box” legislation that removes questions about the criminal history of job applicants from applications and generally delay such inquiries until later in the hiring process.

Due to the growth of “Ban the Box” employers will have to deal with a myriad of overlapping local and statewide Ban the Box laws that can be confusing to say the least.

Originally, Ban the Box laws were concerned with the initial the application process. However, many have now morphed into “Fair Chance” laws that also impose processes for how criminal information is utilized, such as delaying criminal history questions until a conditional job offer.

In other words, Ban the Box laws are often no longer limited to just the application process, so a consistent statewide Ban the Box policy where employers are given some sort of immunity if they hire an ex-offender is likely the most effective means of giving people a second chance.

2. Salary History Questions by Employers Will be Restricted as Pay Equity Movement Spreads

Several states and cities in the U.S. have passed legislation prohibiting employers from seeking salary history information from job applicants as part of a “pay equity” movement to narrow the gender wage gap between women and men. This growing restriction on questions about the salary history of applicants by employers is a trend that we expect will continue to spread.

3. Waiting for FCRA Lawsuits to Slow Down? We don’t think so.

In May 2016, the U.S. Supreme Court ruled in *Spokeo, Inc. v. Robins* that plaintiffs must prove “concrete injury” in class action lawsuits for alleged “bare” violations of a federal statute such as the Fair Credit Reporting Act (FCRA) for standing under Article III of the U.S. Constitution.

The case involved a man named Robins who filed a lawsuit claiming that Spokeo – an online “people search engine” that sells publicly available data about individuals – violated the FCRA by providing inaccurate information about him. But the Supreme Court stated in its opinion:

“Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.”

However – even after the Supreme Court ruled Article III standing requires an injury that is “concrete” and “actual” – employers are still being targeted in lawsuits for alleged technical violations of the FCRA, a federal law that regulates employment background checks.

Many of these lawsuits are related to basic and or procedural violations of FCRA by the employer.

- Failure to use FCRA required forms and notices.
- Failure to use “Standalone” documents.
- Using disallowed “Release” language.
- Failure to provide Adverse Action notices.

Why? Because in no way did the Supreme Court decision in Spokeo mean employers could relax obligations for FCRA compliance. Employers will always need to ensure that they comply with their FCRA obligations and work with background check providers that understand the FCRA and have compliance built into their processes.

4. Global Data Protection Regulation (GDPR) Goes Into Effect May 2018

On May 25, 2018, the General Data Protection Regulation (GDPR) will take effect as the primary law regulating how companies protect the personal data of citizens in the European Union (EU). U.S. companies will need to comply with GDPR rules when international screening in the EU.

The GDPR has been called “the most important data privacy regulation in 20 years.” Some key requirements include requiring the consent of subjects for data processing, anonymizing collected data, providing data breach notifications, and safely handling the transfer of data.

The GDPR will replace the Data Protection Directive 95/46/ec established in 1995 and is designed to harmonize data privacy laws across Europe, to protect and empower all EU citizens data privacy, and to reshape the way organizations approach data privacy.

U.S. companies need to be up to speed with the GDPR requirements before the end of May 2018. However, research and advisory company Gartner predicts more than 50 percent of companies affected by the GDPR will not be in full compliance by the end of 2018.

5. Millennials Drive Technology Changes in Hiring Process

“Millennials” – people aged 20 to 35 in 2016 – are expected to overtake “Baby Boomers” aged 52 to 70 in 2016 in total population size in 2019, according to the Pew Research Center, which projects the Millennials to swell to 73 million while baby Boomers decline to 72 million in 2019.

With Millennials on the cusp of surpassing Baby Boomers as the nation’s largest living adult generation, employers need to be sensitive to the special issues in hiring and working with Millennials now that they will soon overtake Boomers as the dominant group in the workforce.

“Applicant Friendly” is a term used to describe a hiring and background check process leaves a good first impression for job candidates about their potential employers. Built in automation with a “humanizing” approach to hiring help attract more Millennials to job openings.

Along with a transparent and intuitive screening process, Millennials also need to know that the privacy, security, and confidentiality of their personal information will be protected by the background check provider after growing up reading about data breaches and identity theft.

Employers will have to adjust workplaces and hiring processes to suit the mobile technology and social media-oriented behavior of the Millennial generation. The most critical issue employers find with Millennials is that they are the most “wired” generation so far in history.

Get the Complete List of Trends

The topics mentioned above are only half of the “ESR Top Ten Background Check Trends” for 2018. For the full-length summary of all screening trends for this and prior years, please visit:

<http://www.esrcheck.com/Tools-Resources/ESR-Top-Ten-Background-Check-Trends/>.



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