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# The New Hire Checklist: What CLOs Need to Know When it Comes to Employment Screening

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# Road Map for Today's Discussion

- Ban the Box – timing and other restrictions
- Background Checks
- Personality & Skills Tests



# What is Ban the Box?

## **JOB APPLICATION**

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☐ Have you ever been convicted  
of a criminal offense?

**Ban the BOX**

## State and Locality Background Check Laws

# Which Laws Apply?



- If applicant/employee is a resident of the state/municipality

AND/OR

- If applicant/employee is applying to/working at a location in the state/municipality\*

*\*With certain exceptions—e.g., San Francisco*



# 12 States and 17 *Localities* currently Ban the Box

- |                           |                                |                      |
|---------------------------|--------------------------------|----------------------|
| 1. California             | 12. MD: Prince George's County | 21. Oregon           |
| 2. CA: Los Angeles        | 13. Massachusetts              | 22. OR: Portland     |
| 3. CA: San Francisco      | 14. Minnesota                  | 23. PA: Philadelphia |
| 4. Connecticut            | 15. MO: Columbia               | 24. Rhode Island     |
| 5. D.C.                   | 16. MO: Kansas City            | 25. TX: Austin       |
| 6. Hawaii                 | 17. New Jersey                 | 26. Vermont          |
| 7. Illinois               | 18. NY: Buffalo                | 27. Washington       |
| 8. IL: Chicago            | 19. NY: New York City          | 28. WA: Seattle      |
| 9. IL: Cook County        | 20. NY: Rochester              | 29. WA: Spokane      |
| 10. MD: Baltimore         |                                |                      |
| 11. MD: Montgomery County |                                |                      |

Note: Utah has restrictions on the use of certain types of PII (SSN, DOB, etc.); Madison, WI has restrictions on the consideration of certain criminal information. Neither is a true Ban the Box law.

# State Restrictions – Criminal Background Inquiries or Checks

## *After selection for interview*

- Illinois (selection and notification) + %
  - if no interview, after conditional offer
- Minnesota + %
  - if no interview, after conditional offer

## *After first interview*

- New Jersey + %
- Oregon + %
  - If no interview, after conditional offer

## *During or after first interview*

- Massachusetts +
- Rhode Island + %

## *After Applicant has been determined qualified for the position*

- Connecticut +
- Washington + %
- Vermont +
  - after applicant has been otherwise deemed qualified
  - for the position or during an interview

## *After conditional offer*

- California + %
- Hawaii + %
- D.C. + % #

Key:

+ Cannot inquire/ask about criminal history on application  
# Cannot require applicant/employee to complete background check forms  
% Cannot run background check

## Local Restrictions – Criminal Background Inquiries or Checks

### *After initial screening of applications to eliminate unqualified applicants*

- Seattle, WA + %
  - after screening to determine whether candidate is qualified

### *After selection*

- Chicago, IL & Cook County, IL + %
  - If no interview, after conditional offer

### *After first interview*

- San Francisco, CA + #
  - interview must be *live*
  - NOTE: will move to “after conditional offer” on 10/1/18
- Montgomery County, MD + %
- Prince George’s County, MD + %
- Rochester, NY + %
  - if no interview, must notify applicant if background check will be conducted before employment
- Kansas City, MO + %
  - after employer determines the individual is qualified AND interview
- Spokane, WA + %
  - after interview or conditional offer

### *During or after first interview*

- Buffalo, NY + %
  - if no interview, must notify applicant if background check will be conducted before employment

### *After conditional offer*

- Los Angeles, CA + %
- Baltimore, MD + %
- Columbia, MO + %
- New York City, NY + # %
- Philadelphia, PA + # %
- Portland, OR + %
- Austin, TX + %

+ Cannot inquire/ask about criminal history on application  
# Cannot have applicant/employee complete background check forms  
% Cannot run background check

# Compliance with Varied BTB Timing Requirements

## ■ One-size-fits-all approach

- Most stringent timing requirement
- Nothing pertaining to criminal history should be done until after a conditional offer of employment (oral or written).

## ■ Jurisdiction-by-jurisdiction approach

- Application/onboarding process that complies with the laws based on the application of (only) applicable laws.





# Background Checks



# What is a background check?

- Background checks are often requested by employers on job candidates for employment screening, and can be administered directly by employers or by a third-party company called a Consumer Reporting Agency.
- When background checks are administered directly by the employer, it can be administratively burdensome, and important details may inadvertently get missed – *e.g.*, an employer only does an employment verification and reference check, but doesn't check criminal history, and hires a person who may be a danger to the workplace or others.
- Most employers choose to have background checks administered by a third-party vendor called a Consumer Reporting Agency ("CRA"). When a CRA is contracted by an employer to conduct background checks, several laws must be complied with in order to use and obtain the background check information.
  - Federal Fair Credit Reporting Act ("FCRA")
  - California Investigative Consumer Reporting Agencies Act ("ICRAA")
  - Other applicable state and local laws



# Background Check Terminology

- Adjudication – scoring a background check report.
- Adverse Action – when a background check from a CRA influences an employer to reject a person from employment consideration.
- Ban the Box Laws – several states and cities have passed laws that affect whether employers can ask about criminal history on employment applications, and when in the new hire process a background check with criminal history can be conducted.
- Consumer Reporting Agency or “CRA” – the third-party vendor an employer contracts with to conduct its background checks.
- Consumer Report a/k/a Background Check Report – a written, oral, or other communication of any information bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is expected to be used, in whole or in part, in an employment-related decision.
  - Can include criminal history, credit history, driving history, education verification, employment verification, etc.
- Disclosure and Authorization forms (“D&A”) – federal and state required forms that must be presented to a person before a background check is initiated.

## Background Check Terminology, cont'd.

- Employment purposes – this can mean employee, independent contractor, volunteer, intern, board member, or any other role that a person may serve for the company. This is different than the general meaning of “employee” which gives a broader reach of applicable background check laws.
- Federal Fair Credit Reporting Act (“FCRA”) – federal law that governs the obtainment and use of background checks.
- Individualized Assessment – When employers consider additional information provided by a person who may otherwise have been deemed ineligible for employment based on background check results.
- Pre-Adverse Action Letter – Notification to an applicant/employee that an employer is contemplating an adverse employment decision based, in whole or in part, on the results of a background check.
- Reasonable Wait Time – The amount of time between the pre-adverse action letter and final adverse action letter (no less than 5 business days).



## Why are compliant forms and processes important?

### **FCRA Damages are expensive!**

- Actual damages sustained by applicant or employee or Statutory damages – **\$100 to \$1,000 per violation** (e.g., per background check conducted), if willful
- Punitive damages, if willful
- Attorneys' fees, if willful



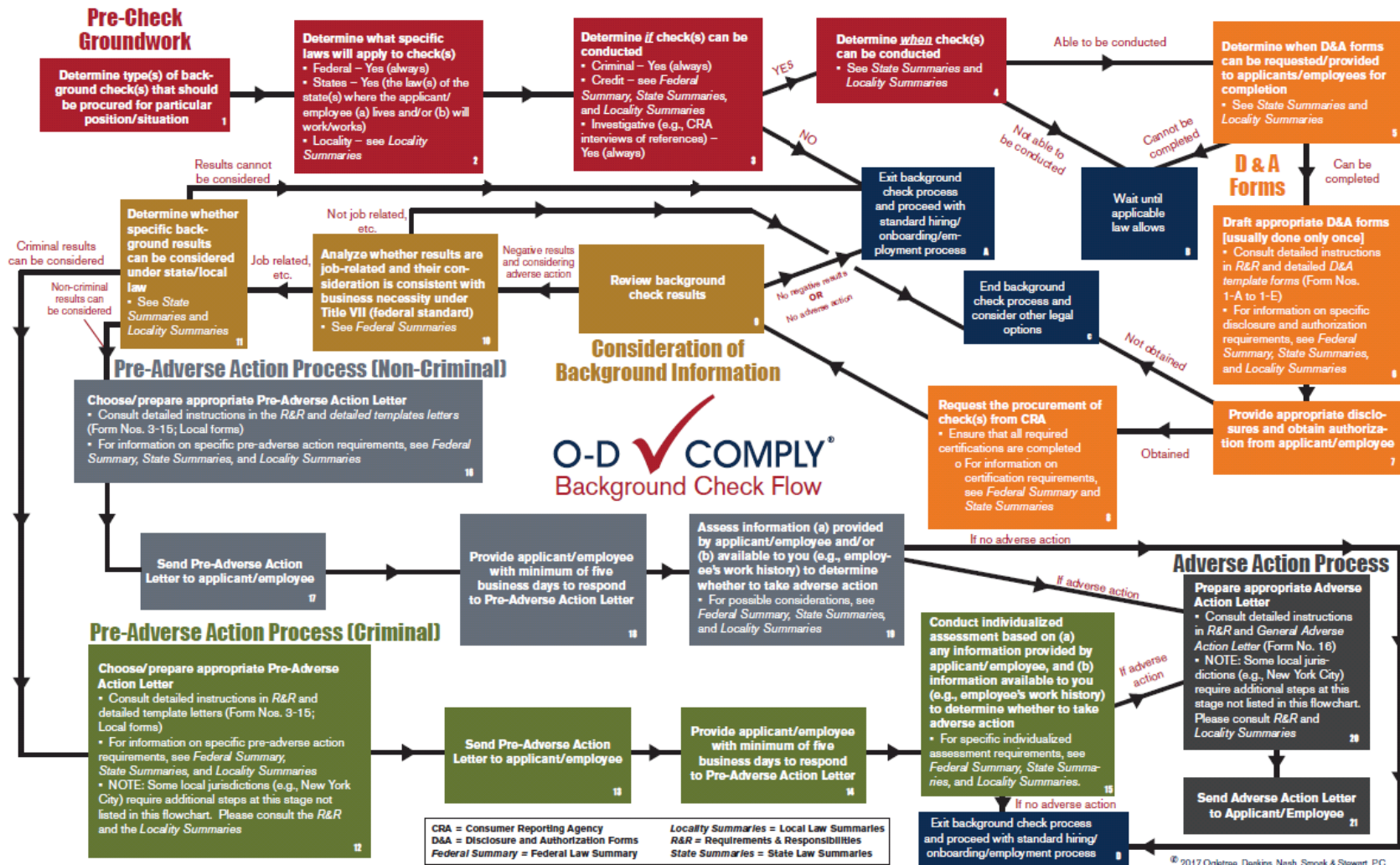
# Background Checks – Best Practices



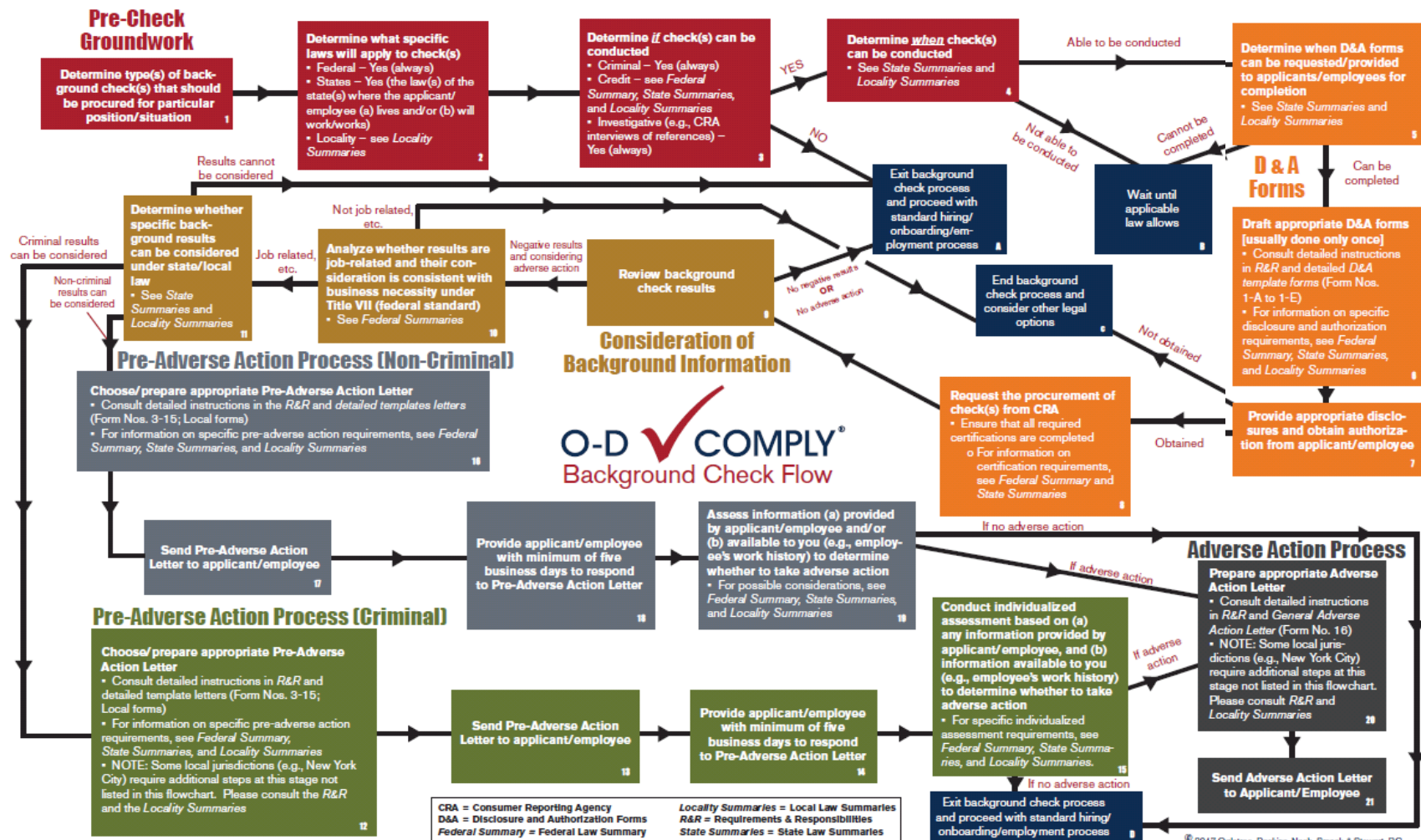
# Background Check Process Overview

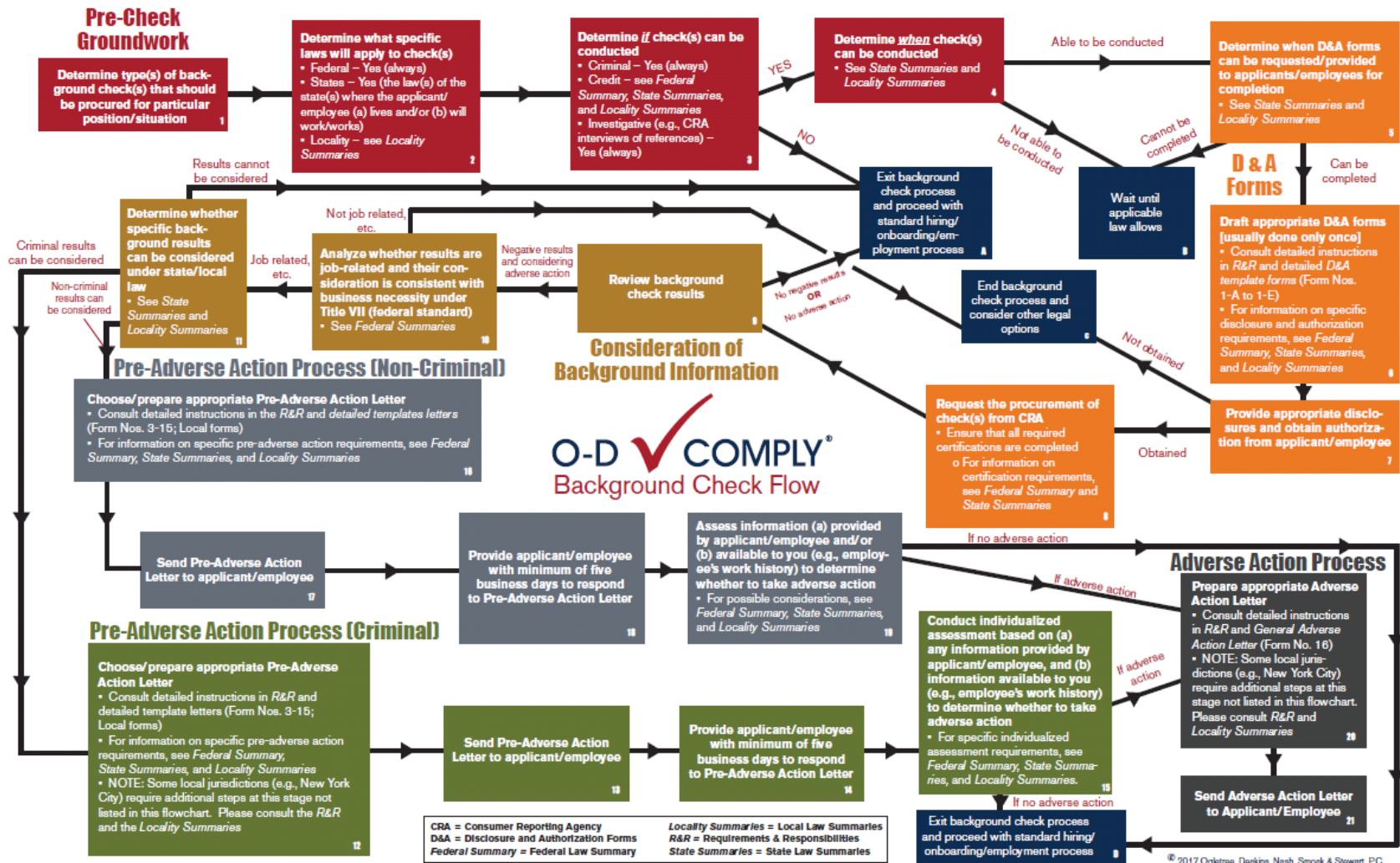
1. Applicant Applies for Job
2. Applicant Interviews
3. Conditional Offer Extended
4. Pre-Check Ground Work
5. Disclosure & Authorization/Consent Forms Completed
6. Background Check is Requested
  - As a best practice, you should wait until the background check is complete to view and/or consider the information.
7. Consideration of Information/Preliminary Determination
8. Pre-Adverse Action Letter
9. Reasonable Waiting Period
10. Individualized Assessment/Dispute
11. Final Adjudication
12. Adverse Action Letter











# Consideration of Information/Adjudication

This is the phase in the background check process where employers provide a preliminary “score” to the background check, indicating whether the individual in question requires additional evaluation and may be potentially disqualified from employment because of information in the background check. Some employers utilize a matrix to provide preliminary “scores.”



# Adjudication, cont'd.

- Best practice is to consider background check information on a case-by-case basis (this is the most compliant with EEOC requirements).
- When adjudicating information in the background check, employers must consider whether the criminal history information is **job-related and consistent with business necessity**.
  - *i.e.*, criminal conviction must directly relate to job duties and/or the work environment
  - EEOC 2012 Guidance provides the employer roadmap on consideration of criminal history information [https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)



## Consideration and Use of Criminal History Information – Expanded Requirements\*

### States

- California;
- D.C.;
- Hawaii;
- Kansas;
- New York;
- Pennsylvania;
- Washington;
- Wisconsin.

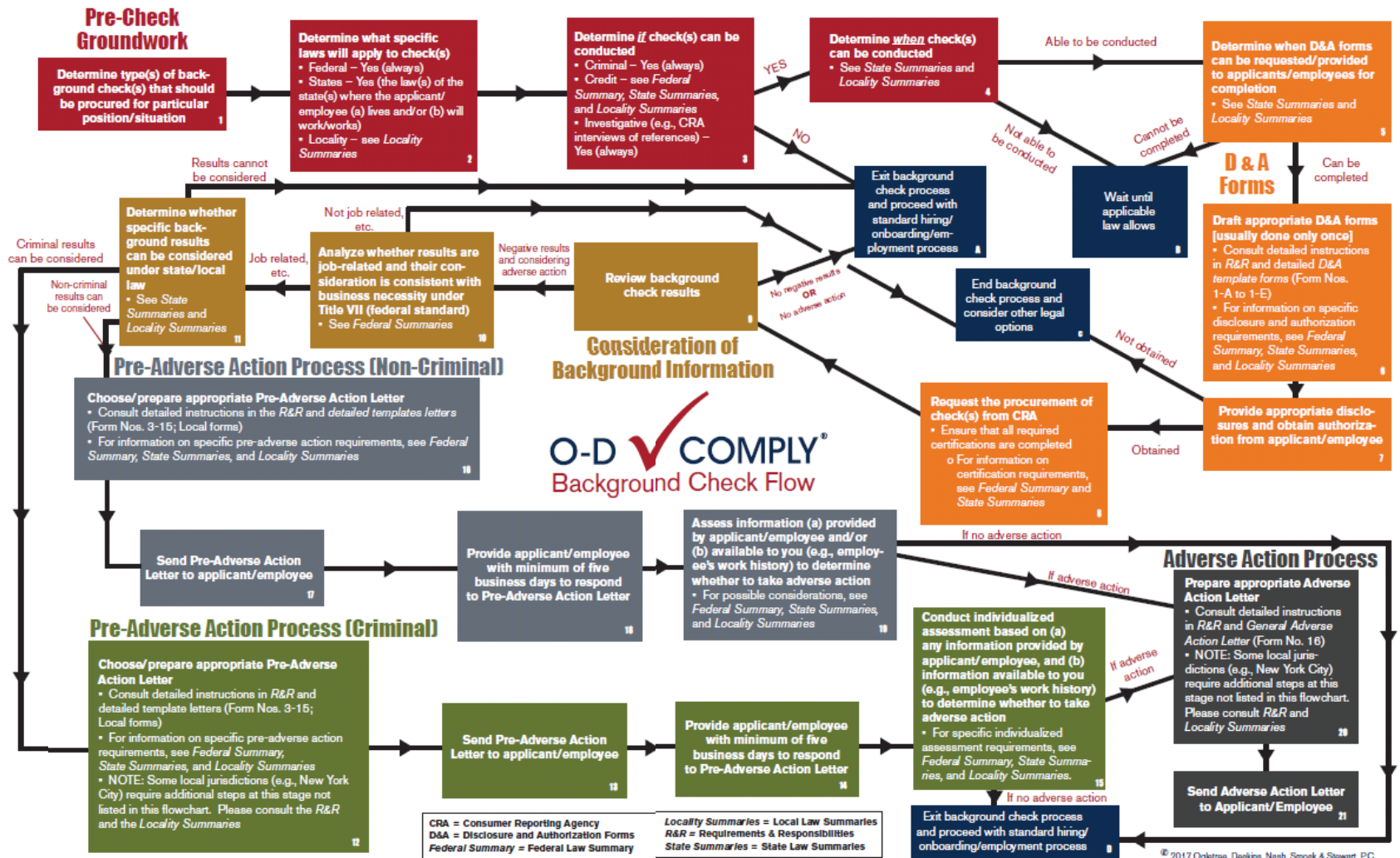
*\* Does not include state and locality requirements the same/substantially the same as EEOC 3-factor test.*

### Localities

- CA: Los Angeles;
- CA: San Francisco;
- MD: PGC;
- MO: Columbia;
- MO: Kansas City;
- NY: Buffalo;
- NY: NYC;
- NY: Rochester;
- PA: Philadelphia;
- WA: Seattle;
- WI: Madison.

# Decision-making Roadmap

- What does the report say?
- What job is the person applying for?
- What does the matrix say, if you have one?
- What state is the applicant/job in?
  - Are there any restrictions in the state for the use/consideration of the information?



# Pre-Adverse Action Letter (PAAL) Requirements

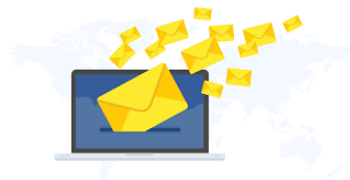
- Growing number of states/localities now require state/locality PAALs.
- 3 basic types:
  - Specificity on disqualifying criminal offense;
  - Additional Disclosures; or
  - Unique Process.

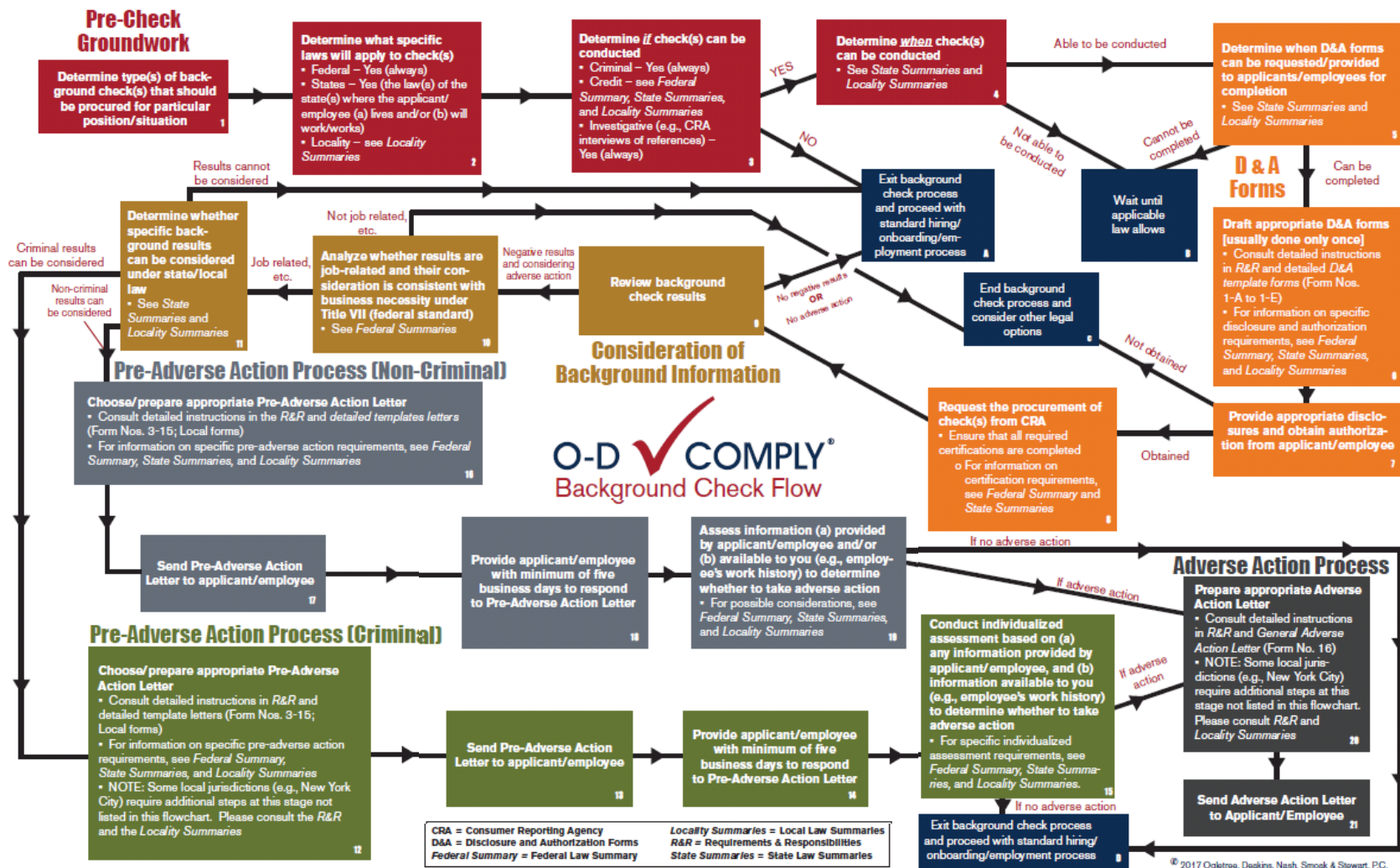




# PAAL Requirements

- Arkansas (Additional Disclosures)
- Colorado (Additional Disclosures)
- Delaware (Additional Disclosures)
- Maryland (Additional Disclosures)
- New Jersey (Additional Disclosures)
- North Carolina (Additional Disclosures)
- North Dakota (Additional Disclosures)
- Oklahoma (Additional Disclosures)
- Rhode Island (Additional Disclosures)
- Washington (Additional Disclosures)
- West Virginia (Additional Disclosures)
- California (Specificity)
- *MD: Montgomery Cty. (Specificity)*
- *MD: Prince George's Cty. (Specificity)*
- Massachusetts (Specificity; also, source of CORI)
- *PA: Philadelphia (Specificity)*
- *WA: Seattle (Specificity)*
- *CA: Los Angeles (Unique Process)*
- *NY: New York City (Unique Process)*

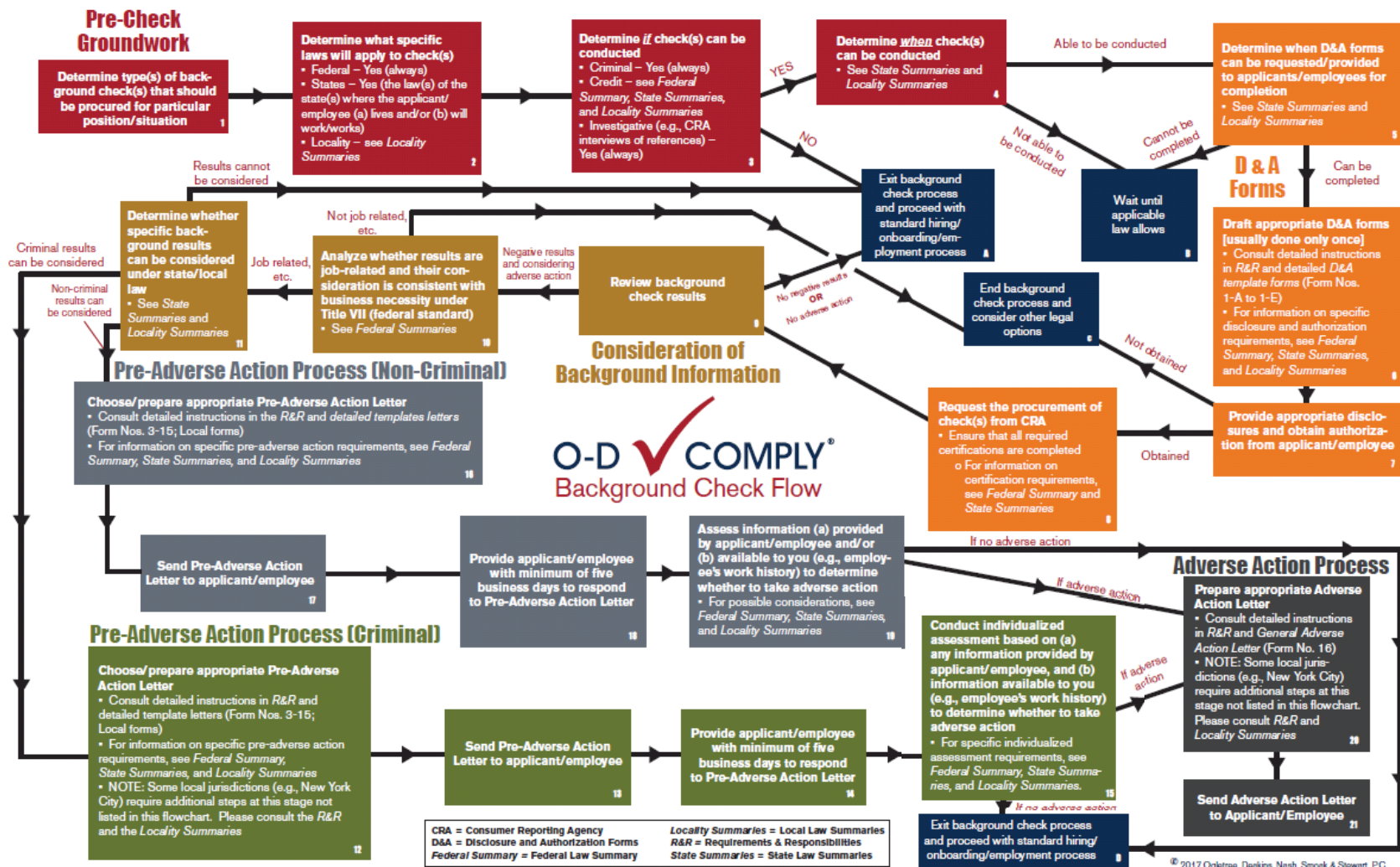




# Reasonable Waiting Period

- Allows applicant or employee time to dispute report results (federal law (FCRA) requirement) directly with the CRA
- **Individualized Assessment** (under the EEOC's 2012 Guidance)
- Must wait “reasonable” time (under the FCRA)
- No statutory definition of what is “reasonable”
  - 5 business days = typical, unless there is a local law requirement







# Individualized Assessment



## ■ 2012 EEOC Guidance – 9 Individualized Factors

[https://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

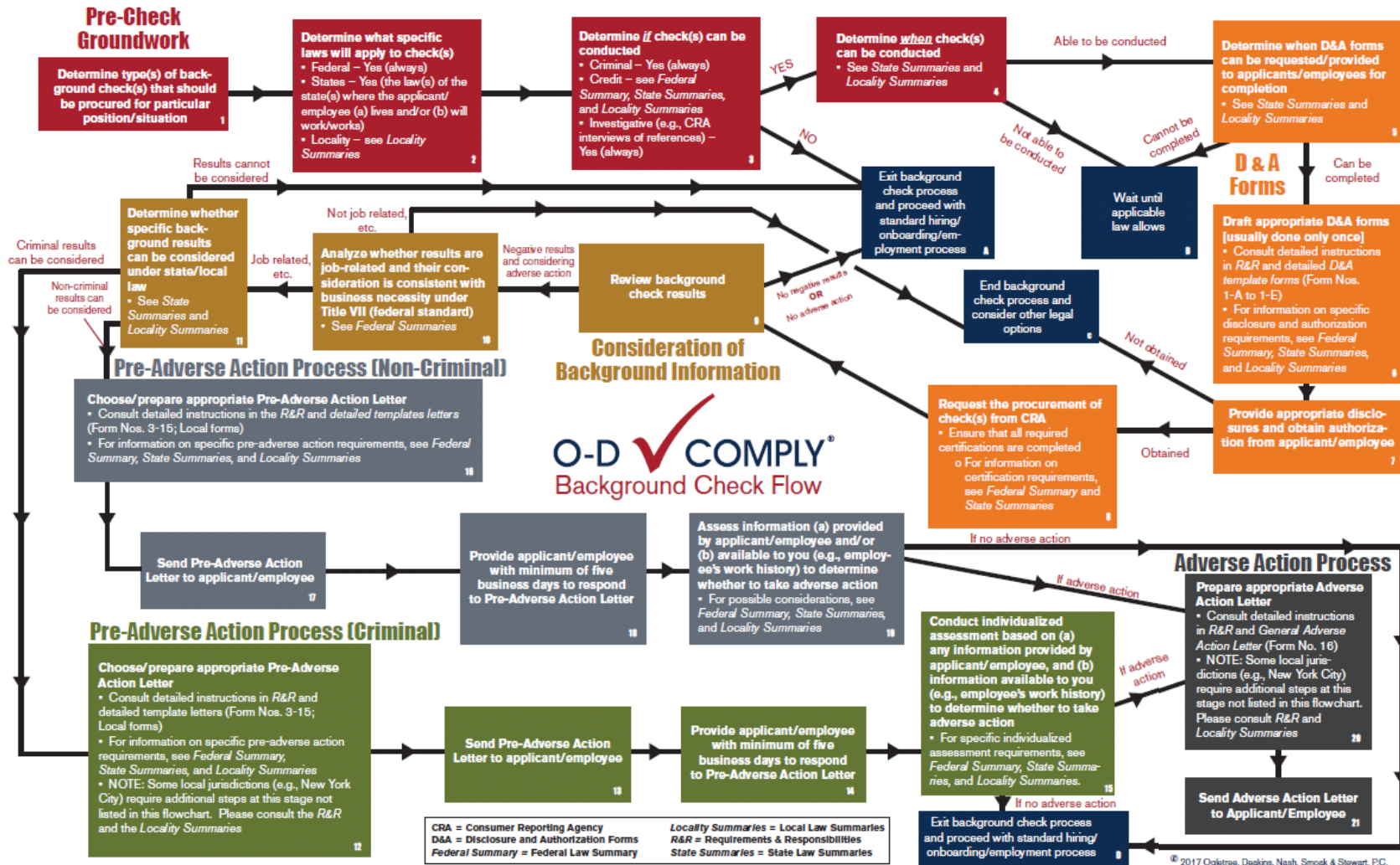
1. The facts or circumstances surrounding the offense or conduct;
2. Whether there is any inaccuracies in the information reported;
3. The number of offenses for which the individual was convicted;
4. Older age at the time of conviction, or release from prison;
5. Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
6. The length and consistency of employment history before and after the offense or conduct;
7. Rehabilitation efforts, *e.g.*, education/training;
8. Employment or character references and any other information regarding fitness for the particular position; and
9. Whether the individual is bonded under a federal, state, or local bonding program.

# CA, Los Angeles, CA, and New York City, NY

- California
- Los Angeles, CA
  - Employers must follow the Fair Chance Ordinance Requirements
- NYC, NY
  - Employers must follow the Fair Chance Act Requirements



## Pre-Check Groundwork



# Adverse Action Letter (AAL)

- Sent after the reasonable wait time has passed
- Elements of the letter must include:
  - Name, address, telephone number of CRA
  - “May obtain a free copy of the consumer report from the CRA within 60 days of the adverse action”
  - CRA disclaims role in or knowledge of decision-making
  - “Individual may dispute with the CRA the accuracy or completeness of any information in a consumer report.”
- Some states and localities have their own AALs



# Discrepancies between Applicants' Disclosures and Background Checks



- What if criminal background check doesn't confirm what applicant previously disclosed?
  - If worse than disclosed, did applicant lie on application or during the application process?
  - If better than disclosed, would what the applicant disclosed disqualify him/her from position?
- Should we even conduct a criminal background check if applicant discloses disqualifying information?

# Background Check Takeaways



- Review your Disclosure and Authorization Forms
- Review Adjudication Matrices
  - Ensure there are not blanket exclusions
- Review PAAL/AAL letters
- Review the Individualized Assessment Process
- Know your CRA – processes, procedures
  - If you are using their materials, be aware they will not stand behind the compliance of those materials

# Personality & Skills Tests

# Testing for Specific Jobs

Designed to measure attitudes, beliefs, and traits relevant to successful performance in particular jobs or fields.

Examples:

## Sales

- Self-Motivation
- Assertiveness
- Extraversion
- Self-Confidence

## Customer Service

- Relaxed, cooperative attitude
- Patience
- Desire to help others

## Retail, Home Health Care, Security

- Conscientiousness
- Integrity/Honesty
- Rule following



# General Assessments for Culture Fit

- Promoted as measuring traits and behaviors for cultural “fit” and successful performance in a wide range of jobs
- Usually anchored on “key” personality traits:
  - Extraversion
  - Agreeableness
  - Conscientiousness
  - Cooperation
  - Stress Tolerance
  - Patience
  - Formality
  - Openness



# Legal Issues

Target paid **\$2.8 million** to settle EEOC claim that its assessments screened out applicants for exempt-level positions based on race/sex

Rent-A-Center's use of the Minnesota Multiphasic Personality Inventory (MMPI) violated the ADA; **\$1.2 million** settlement

Burns Security paid **\$2.1 million** for a test that asked if applicants thought companies make too much profit or if marijuana should be legalized



## Legal Challenges:

- **Title VII of the Civil Rights Act of 1964 and Equivalent State Laws**
  - Disparate Impact
  - Job Related and Consistent with Business Necessity
- **Americans With Disabilities Act (ADA)**
  - Medical Examinations
  - Accommodation
- **Privacy Laws**
  - Political Belief Questions

## Sample Questions

**Most people lie a little on employment applications.**

- A. True
- B. False



**When I am at work, I am always careful to avoid making a mistake.**

- A. True
- B. False



*Any issues with these questions?*

# Sample Questions

**A customer contacts you about an outdated process that you do not have any experience with or know about. You decide to:**



- a. Explain that you do not know the answer, but will return the call by a specific date.
- b. Transfer the call to a coworker whom you believe has more knowledge of the process.
- c. Place the customer on hold while you track down the answer using other internal resources.
- d. Respond to the customer with the most likely answer based on your knowledge of similar processes.



# Sample Questions

*Please choose one statement that best describes you and one that least describes you:*

I get along with people I come in contact with.	___ Most	___ Least
I have an analytical mind.	___ Most	___ Least
I am good at organizing others.	___ Most	___ Least

If somebody uses an illegal drug, it is nobody's business but his or her own.

- A. True
- B. False



# Test Reliability and Validity

## Validity

- Evidence of the skill or behavioral characteristic that a test measures and how well it measures
- The means by which you demonstrate that the characteristic(s) being assessed relate to job duties/qualifications
- Proof that a test or assessment is “...job related and consistent with business necessity”

# Test Validation

## What is it ? How do you do it?

### Primary methods:

- **Content:** Demonstration that the test content represents key activities/behaviors required for the job
- **Criterion-Related:** Demonstration of a statistical correlation between test results and job performance (Validity Coefficient)
- **Validity Transportability:** Reliance on evidence collected by using a test for various jobs at different companies

*(Uniform Guidelines on Employee Selection Procedures)*

# ADA Issues

- Medical examination prior to employment offer
- Duty to accommodate (knowledge, notice)
- Job relatedness of “culture” fit criteria
- Perceived disability



# Prohibited Medical Exams

- Results interpreted by Psychiatrists/Psychologists
- Questions that may elicit indication of a disability

## Agree/Disagree:

- I am an anxious person when I am at work
- It is easy to get depressed when things go wrong at work
- When I am at work, I am always careful to avoid making a mistake
- It is easy to take it personally when things go wrong at work

# Accommodation



- In the test taking process itself
- Disabilities related to demonstrating the characteristics being measured
  - Psychiatric disabilities
  - Spectrum disorders
  - Job analysis
- Perceived disability



# Best Practices

- Validate Per Uniform Guidelines
- Thorough Job Analysis - on site
- Local Criterion Validation
- Monitor Adverse Impact
- Consider Alternatives
- Accommodate Disabilities



# Takeaways

- Watch for new forms of tests: apps, games
- Beware of off-the-shelf, inexpensive assessments with broad assurances of “validation”
- Be wary of validity generalization – particularly without a job analysis and technical report
- Question Vendors
  - Ask to see validation evidence
  - Ask about adverse impact
  - Ask about EEOC/OFCCP charges/audits, litigation
  - Ask how ROI will be measured
  - Ask about litigation/audit expert support





