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New York AG Blasts Background Screening Process

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Last week a press release from the New York Attorney General's office raised some eyebrows about background screening practices—not an uncommon headline these days. According to the release "Four of the nation's largest background check agencies" entered into an agreement with New York A.G. Eric T. Schneiderman concerning compliance with New York laws designed to protect job applicants from discrimination.

The agreement prohibits the firms from engaging in the automatic disqualification of applicants who have criminal backgrounds—something that we can all agree is a bad practice. Based on the information contained in the press release, the named companies were called out for sending automatic rejection letters to candidates with criminal records.

Industry-Wide Practice?

In this case, the Attorney General's press release says it began investigating these companies after receiving information in 2013 that it was "industry-wide practice to use grading criteria and instructions provided by employers to automatically disqualify job applicants based on the information contained in a criminal background report."

Ok—I get it. Sending automatic rejection letters not only violates New York law, but also violates the EEOC's guidance on the use of criminal records in the hiring process. I don't agree that this practice is "industry-wide." But it happens.

Applicants should have the right to know why they are disqualified, and sometimes need and deserve an opportunity to provide additional information. But I found the settlements to be interesting for a couple of reasons.

Who Decides to Reject a Candidate?

First, right or wrong–the background screening companies ended up taking all of the heat for a law that is directed at employers. The New York State law requires that **employers** consider a number of mitigating factors in making hiring decisions based on criminal history. The decision to reject an applicant is a decision that is made by the**employer**—not the screening company.

In fairness to these employers, the background screening companies were acting on their behalf when the letters were sent. Here is where the screening companies were implicated: the law expressly prohibits third parties from aiding and abetting employers in violating the statute.

The AG's stated goal was to get employers' attention—especially those "who seek to ignore the law's requirements by having background check agencies carry out the unlawful conduct'" I don't know if he got those employers' attention—but he sure got the attention of background screening providers.

To be clear, the administrative service of sending notification letters on behalf of an employer is not illegal. But sending the letter without first building in a process giving the employer a chance to determine whether the person should be disqualified or given the opportunity to present additional information is illegal in New York, and other jurisdictions as well. The notice process needs to include time for an employer to apply their criteria and make a decision on the individual applicant.

Automation Partially to Blame

Another important observation here is the unintended consequences of automation. No one can really deny the efficiency of automation: speed, consistency, reduction in data entry and less human error are all brought by improved technology and automation. But by automating the notice, the employer and the screening company together created a flawed process.

In our rush to provide much wanted services to employers, services like adverse action notices, hiring matrices and adjudication services, background screening companies have been quick to design automated hiring tools to create a seamless and uninterrupted workflow. But sometimes the work flow needs to be interrupted. Employers don't always want to hear that, but it's true.

Pursuant to the agreements and the requirements of state law, the consumer reporting agencies in this case have revised their policies and agreed to cease issuing rejection letters triggered by an automatic disqualification. They will return all background reports to employers to make individualized hiring decisions about applicants with criminal convictions, and communicate these limitations on their roles to all current and prospective clients.

Three Questions for Employers

Employers, get it right the first time. Here are three questions to ask to avoid finding yourself, along with your screening provider, if you are conducting employment background checks in New York:

- Have a conversation with your screening provider about automatic notification, and ask: does your screener provide automatic notice to applicants, and under what circumstances?
- Look at your adjudication process. Whether it is done internally, or by your screening provider, do you give applicants who have criminal records a chance to provide additional information (an "individualized assessment"), or do you disqualify them automatically?
- Look at your adverse action process. Do you (or your screener) send automated letters of rejection after sending the pre-adverse action letter? If an applicant makes an attempt to contact you or your screener, do you stop the process and allow time for review and response?

Sometimes the best thing you can do is slow down long enough to ask a few questions. It's the best thing for your applicants, and your organization.