



## XpertHR Podcast

February 3, 2017

# Why Background Checks Pose Catch-22 for Employers

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David Weisenfeld: I'm David Weisenfeld for XpertHR.com, published by Reed Business Information and proudly partnered with LexisNexis.

On this podcast our focus turns to criminal background checks, one of the most meddlesome issues facing employers today. Employers can be in a bit of a Catch-22 when it comes to conducting background checks, and that's becoming even more true as a growing number of states have taken steps to ban criminal history questions on job applications.

But no company wants to be on the evening news either for a workplace violence incident that could have been avoided. So what's a well-meaning employer to do?

For some answers, my guest will be Ogletree Deakins management-side employment attorney, Steven Luckner, who joins me on location at the firm's Morristown, New Jersey office. Steve has been a frequent guest of ours over the years, and we're glad to have him back. Steve, welcome.

Steven Luckner: Thank you for having me, Dave.

David Weisenfeld: Well Steve, studies show that 90% of employers are conducting at least some sort of background check on job applicants, but you've said that employers are essentially damned if they do, damned if they don't with these criminal history checks. Why is that? [0:01:28.1]

Steven Luckner: Well I'd like to start with the 'damned if they don't.' You could find yourself on the end of a negligent hiring or negligent supervision claim where you find out that the person you hired has a propensity or proclivity for certain inappropriate activity. So to the extent that those kind of activities can be discovered through a criminal background check, employers would be damned if they don't do the background check.

And obviously the flip side, the 'damned if they do,' is now you've got this maze of various local and state and federal laws that you need to comply with in order to properly conduct a background check, and it's not as easy as you would think it should be. So it's a tightrope that

employers walk. It's something that they have to do but sometimes easier said than done.

David Weisenfeld: That's certainly true. Now Steve, talk a little bit about this term 'ban-the-box' that comes up so often. Where does that term come from? [0:02:35.5]

Steven Luckner: Well the 'ban-the-box' term comes from the traditional employment applications which for decades have had a little checkbox on them which asks applicants to check the box if they have ever been convicted of a criminal offence. And what they would like to do is prevent employers from unnecessarily excluding otherwise eligible applicants because of maybe an indiscretion that they had had a number of years before. So this movement started to ban this box and essentially it's become a little bit of a moving target as the future has gone down, as to when you can use the box, and it's not necessarily just a box on a piece of paper anymore. It has now become a bit of a measuring stick as to where in the process with a candidate you can actually ask these questions.

David Weisenfeld: So sometimes it could be later in the hiring process or even at the conditional employment offer stage? [0:03:38.3]

Steven Luckner: Absolutely. There are laws that specifically provide for that, and I think that's troubling for some employers. There's a lot of time and energy spent in the recruiting process and to only find out at the end of the recruiting process that the candidate has something in their background that would preclude them from getting an offer for the position can be a significant waste of time and resources for an employer.

David Weisenfeld: Steve, speaking of the end of the recruitment process, four of the nation's five biggest cities, including New York, Los Angeles and Chicago, have broad ban-the-box laws applying to private employers and, as noted at the top, several states of course have laws on the books as well. So is the safest course for a multistate employer simply not to ask criminal history questions until after a conditional job offer has been made? [0:04:29.5]

Steven Luckner: If you want to categorically put it as the safest course, then of course that would be the safest course. I think that it is still possible to keep up with the various municipalities and state laws, and if you've got good HR people and decent-sized workforces in these areas where you have these ban-the-box laws, then you can generally still know when in the process that you're entitled to ask these questions.

If you don't feel that you've got the infrastructure and the proper HR support in those areas, and maybe you don't hire enough in those areas to really know what the local laws and ordinances are, then the safest bet is always to wait at least until the conditional offer of employment before conducting that background check.

David Weisenfeld: Now these laws are designed to give qualified rehabilitated job applicants a chance to get a foot in the door and there have been a few articles recently questioning, though, whether that's what's actually happening in practice. So Steve, with that said, what are your thoughts on these laws' effectiveness? [0:05:37.3]

Steven Luckner: Generally speaking, from my own anecdotal evidence, I find them to be somewhat effective. I can certainly tell you that I have had clients who have had background checks come back of applicants where they ordinarily would have maybe ceased the process at that point in time or may have never gotten to the background check had they run that check earlier in the process, and have found qualified candidates.

And even beyond just the ban-the-box, with the EEOC guidance that's also in place and using that guidance to determine whether or not you should really be considering somebody's background and criminal history in the decision, I think that they've probably been surprised by how it has turned out. It's not perfect and obviously sometimes people don't work out, but you could say that about any employee, but to the extent that it is giving people a foot in the door whereas otherwise before they would never have had an opportunity.

David Weisenfeld: So when you say they've been surprised, the surprise has more often than not been in a good way, it sounds like? [0:06:59.5]

Steven Lockner: Yeah, I think that to the extent that they have found candidates and they said, "You know what? I probably would not have met with this person before these laws took place, but having met with this person and having heard their story, I found it compelling. And having run a criminal background check on them prior to this, I might not have ever heard that compelling story." So I think that they are somewhat pleasantly surprised. It may not happen all the time, but I think it does happen.

David Weisenfeld: Again our guest on this podcast is Ogletree Deakins employment attorney Steven Luckner, who joins me at the firm's Morristown, New Jersey office. Steve, the EEOC has said that employers shouldn't ask about arrests because they tend to disproportionately affect minority applicants and without more, they're not evidence of any wrongdoing. What are your thoughts about that? [0:07:55.9]

Steven Luckner: I think that asking about arrests is probably a dangerous game at this point. And that's not quite as new as ban-the-box. So I would have clients shy away certainly from asking about arrest records, even if they felt that in their jurisdiction they could do such, I think that sticking with convictions is certainly a far more discerning way to go.

David Weisenfeld: With that said, are there any other big issues you're seeing generally with background checks that you can share? [0:08:32.0]

Steven Luckner: Well I think that the background check process is becoming more complicated. I think that plaintiffs' lawyers have grasped upon the complexity of the background check issue and very similar to the wage and hour issue, I would say, it's very easy to find yourself in a technical violation of the background check laws, whether it's the Fair Credit Reporting Act, or the state Fair Credit Acts, or even the smaller municipal laws. So in that regard it's become a little bit of a cottage industry now, the background check litigation. It's ripe for technical violations. Whether or not any actual discrimination was intended I think is a completely different story.

David Weisenfeld: Well for HR professionals and employers who are listening, what misconceptions have you seen or heard about in this area?  
[0:09:33.6]

Steven Luckner: I think that the problem is that people still don't fully understand what they can and can't do in the background check process. And it's complicated and even for HR professionals you've got your pre-adverse actions letters, your adverse action letters, when you have to send these, what order you have to send them in.

You have disclosures and authorizations that you have to provide prior to doing a background check – when do you have to get those signed? What do those authorizations and disclosures have to say? They have to say different things in different states. There's not necessarily a one-size-fits-all authorization and disclosure. In certain states they need to be on separate pages. In certain states you can have an authorization and disclosure on one page. And this is really part of a lot of the technical violations that can occur.

And I think that probably one of the biggest misconceptions that HR professionals have is their reliance on their credit reporting agencies to the extent that their credit reporting agencies give them forms, whether it's authorizations and disclosures, and they simply use those forms without having anybody in legal look at them. And often what happens is that they all contain disclosures saying that the credit reporting agency is not going to be liable for anything, and it comes back to the employer and the Fair Credit Reporting Act brings it back to the employer if those forms aren't legally compliant.

So to the extent that HR professionals are relying upon the credit reporting agencies and think that, "Well I got it from my credit reporting agency so it must be accurate and compliant," they might be in for a rude awakening.

David Weisenfeld: And of course our focus has been on criminal background checks, but a hot issue of late in terms of employers asking questions about an applicant's background in the recruitment process has involved these questions about salary history. Do you have any thoughts about those and whether that's an area that employers should shy away from?  
[0:11:48.9]

Steven Luckner: Well I think that it's a burgeoning area now. I think that you're seeing it more and more, and once again this is starting in a somewhat grassroots municipal, state, city kind of level, where people are pushing this concept of not being able to ask for somebody's salary history, that it's got some kind of discriminatory relevance to it. And the feedback that I've been getting from HR professionals is that, "Oh, this is ridiculous. What do you mean I can't ask what they were making previously?"

So my advice would simply be to get legal advice. If that's part of your onboarding or recruiting process is to determine what somebody was previously making and you're going to be asking that question, then I think that you need to reach out to your legal counsel, whether it's in-house or outside, and find out if you can do it in your jurisdiction or what's out there coming down the pike.

David Weisenfeld: OK, well in our final minutes, Steve, I just wanted to ask you if you have a final takeaway lesson about background checks generally that you'd like to share with the audience? [0:13:08.0]

Steven Luckner: There's a gotcha moment here for plaintiff's counsel with regard to background checks, and the problem is that it really lends itself to class action. It's something that you do over and over and over again. You give out these employment applications to – depending on the size of your organization – tens, hundreds, thousands of people, and those people are all going to meet the requirements, whether it be numerosity or similarity to be able to form a class, and that's what plaintiff's attorneys are looking for. They're looking for numbers. And an employment application is a really good place to find numbers.

And it's very easy for them to go ahead and start these suits and then collect all the applications that you've issued, and if you've got some kind of violation in it then every single one of those is going to be a party to that class. So I think that it could be a large-scale problem. So it's not a one-off kind of situation.

David Weisenfeld: OK, well we'll let that be the last word. New Jersey employment attorney Steve Luckner of Ogletree Deakins has been our guest, and if you'd like to hear more from Steve, check out his February 2017 XpertHR webinar on employer background checks. And, he's presented for us on issues involving the Family and Medical Leave Act as well. Well Steve, always a pleasure.

Steven Luckner: Thank you, Dave. I really appreciated talking to you.

David Weisenfeld: Same here. I'm David Weisenfeld. We hope you've enjoyed this XpertHR.com podcast. Thanks again for listening. Continue checking our website regularly for more podcasts on key employment-related topics, including Truth and Consequences – What the 2016 Election Means for HR.

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