

TOP TRENDS IN 2023

Background Screening and
Hiring Impacts



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Employers are likely to remember 2022 as a never-ending roller coaster ride of trying to find candidates, get those candidates to actually show up for day one and then retain those candidates in a red-hot labor market. Heading into 2023, that roller coaster ride may be swapped out for the complete uncertainty of what economic fallout is in store.

While there are so many unknowns lurking around the corner, we believe there are some areas of predictability—particularly in the background screening space. With that in mind, we've focused on five key trends that we believe will impact employers in their background screening and hiring practices in 2023.

TREND 5

Economic Impacts—Recession, “Slowcession”, Business as Usual?

Perhaps the one of the most important trends is also the biggest unknown—the economy and its impact on hiring practices. According to the recent jobs report from the Bureau of Labor Statistics, December saw a jobs gain of 223,000 in December with a 3.5% unemployment rate, which has remained fairly stable since March.¹ With that said, we've already seen some major players in the tech industry proceed with large-scale layoffs, but it's unclear when, or if, that will bleed into other industries.

Indeed, even the experts don't seem to know exactly when and to what extent the U.S. economy will tip into a recession, or how long such a recession may last, although most agree that it will not arise to the levels of the Great Recession that took place in the late 2000s. Moody's Analytics recently came out with an analysis noting the U.S. economy will struggle in 2023 but will experience a “slowcession” and not a full-scale downturn.²

From an employment perspective, depending on how long the “slowcession” or recession may last, employers may hold off on mass layoffs to retain talent that remains hard to recruit in today's environment. Finding new employees to fill the void once the economy does recover may prove to be more expensive than finding a way to retain the talent that helps make a company successful. Rather than laying off employees, experts are predicting that employers may engage in a phenomenon called “quiet hiring,” which can involve transforming, even temporarily, a current employee's role and responsibilities to meet the more immediate business needs of the organization.

The job market may also see a slight shift in the power dynamic back to the employer's favor after 2022 saw employers struggle to catch up to employee demands—particularly on the pay and benefits front. Candidates may also be more serious about open opportunities if there is a lull in the job market, which hopefully will cut back on undesirable activities such as ghosting (either in the interview or on day one). Many employers are also considering a full-scale return to the office; this may be difficult to successfully achieve as individuals, who are used to the work from home environment, might balk at such a demand—or at least struggle to reacclimate to in-office work.

With all of the unknowns and flashy buzzwords being used to describe the current economic outlook, it's a confusing and stressful environment for many businesses. Employers would be wise to stay in tune with their employees, focusing on professional development opportunities and retention of strong contributors, while also preparing for whatever slowcession, recession, or downturn that may happen.



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¹ U.S. Bureau of Labor Statistics, Employment Situation Summary, <https://www.bls.gov/news.release/empsit.nr0.htm>, January 6, 2023.

² Moody's Analytics, “Slowcession”, <https://www.moodyanalytics.com/-/media/article/2022/slowcession.pdf>, January 2023.

TREND 4

Litigation, Litigation and More Litigation

A consistent trend year over year is all about litigation. We continue to see an increase in lawsuits under the Fair Credit Reporting Act (FCRA). According to one company's statistics, FCRA-related litigation saw a 4.1% increase from January-November 2022 over the same time period in 2021.³

Employers continue to face lawsuits over two key FCRA provisions—the disclosure form and adverse action process. Disclosure form-related issues, in particular, are plaguing employers. In one case filed in California state court, the complaint alleged that the inclusion of language related to other jurisdictions (such as DC, Connecticut and Hawaii) violated the “solely” provision of the FCRA. This lawsuit led to a \$600k settlement.⁴ Several other cases focused on the inclusion of language specific to investigative consumer reports on the disclosure form. One such case led to a nearly \$1.8 million settlement.⁵



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With respect to adverse action, a case filed against a nationwide home improvement store is worth a review as it brings in allegations related not just to the adverse action process but also the employer's adjudication terminology. In the complaint, the plaintiff alleges that the “Review in Progress” score applied to a report is a “pseudonym for ‘ineligible for employment.’” As further alleged in the complaint, when an employee sees this score, they do not conduct any further review of the report. Instead, the employer's CRA generates a pre-adverse action letter without the employer taking any action to review the report. The plaintiff also claimed he received a text message from an employee saying “unfortunately your background check did not pass” before even receiving a pre-adverse action notice.⁶

A key theme arising from recent complaints and court decisions is all about training. There seems to be an increased emphasis on how employers train their staff responsible for overseeing FCRA compliance, including how compliance with the law is monitored on an ongoing basis. We can see this trend emerge in the complaint described above, as the employee who allegedly texted the plaintiff to essentially rescind the offer should have been trained to avoid that type of contact—especially before the adverse action process was executed.

A case from California state court also highlights the importance of training as well as monitoring ongoing compliance. In this case, the plaintiff alleged the employer willfully violated the FCRA by including extraneous information on the disclosure form. Specifically, the disclosure form contained disclaimer language from the employer's CRA. The employer failed to remove the disclaimer language despite having numerous employees review the form including in a test environment within the CRA's system and the form was used over a two-year period. The court of appeals allowed the case to proceed, overturning the trial court's ruling that granted the employer's summary judgment motion, determining a jury could find the violation was willful. In so finding, the court cited that at least one employee knew of the extraneous information, the company may not have adequately trained employees on FCRA compliance and/or the company may not have monitored its disclosure form to ensure FCRA compliance.⁷

Employers must now also look beyond disclosure forms and adverse action issues as litigation over criminal history use is becoming increasingly popular, especially when New York and/or New York City is involved. For example, a class action lawsuit was filed against a real estate investment trust that owns and operates 16 hotels across NYC, in addition to the hotel management company that operates most of the hotels owned by the investment trust. The lawsuit alleged the companies violated the NYC Fair Chance Act, along with New York state law, by taking actions such as conducting a criminal background check pre-conditional offer and not following the proper adverse action process outlined in the Fair Chance Act.⁸

As another example, a global retailer is facing a lawsuit over its criminal history practices. As alleged in the complaint, the employer's hiring practices were discriminatory and were far too broad to meet the standards of job-relatedness and consistent

³ WebRecon, “Stats for Nov'22: Two Turtle Doves and a Lump of Coal”. <https://webrecon.com/webrecon-stats-for-nov-22-two-turtle-doves-and-a-lump-of-coal/>. Note: these statistics do not isolate lawsuits against employers for violations of the FCRA.

⁴ See *Oyero v. Pride Industries*, Case No. 20CV362399, in the California Superior Court for the County of Santa Clara.

⁵ See *Johnson V. G4s Secure Solutions (USA) Inc.*, Case No. 21-CA-005587 in the Circuit Court of the Thirteenth Judicial Circuit in and for Hillsborough County, Florida, Civil Division.

⁶ See *Herbert v. Barnes & Noble, Inc.*, <https://casetext.com/case/herbert-v-barnes-noble-inc-1>.

⁷ See *Hale v. Lowe's Companies, Inc.*, Case No.: 3:22-cv-00048, W.D.N.C., <https://www.classaction.org/media/hale-v-lowes-companies-inc.pdf>.

⁸ See *Sanchez v. Hersha Hospitality Trust*, Case 1:22-cv-01731, S.D.N.Y. <https://www.classaction.org/media/sanchez-v-hersha-hospitality-trust-et-al.pdf>.

with business necessity. The named plaintiff claimed she had successfully performed the work via an internship with a subsidiary of the employer doing the same entry-level work she would have performed in the role. The complaint also alleged the employer allowed individuals to begin working prior to the criminal background check completion, “illustrating that [the employer] itself does not view its criminal history screening process as necessary to protect the safety of its workforce or Customers.” In January 2023, the court ruled that the claims under Pennsylvania’s Criminal History Record Information Act would be subject to a six-year statute of limitations. That’s potentially an enormous class of individuals, which could lead to an incredibly costly outcome.⁹

Employers are encouraged to stay abreast of these litigation trends. We recommend engaging qualified legal counsel to conduct a review of hiring policies and background check practices on at least an annual basis. Given the steady influx of disclosure form and adverse action cases, it may even be worth having a review done of forms and practices on a semi-annual basis. The money spent on such a review could well pay dividends down the road in terms of risk mitigation.

TREND 3

Consumer Financial Protection Bureau Crackdown

The Consumer Financial Protection Bureau (CFPB) has the primary rulemaking and enforcement authority over background screening companies (formally called consumer reporting agencies). In 2022, the CFPB issued a number of publications aiming to crackdown on background screening in a number of industries, including employment and tenant.

In one opinion, the CFPB emphasized the need for consumer reporting agencies (CRAs) to ensure there is a permissible purpose prior to providing a consumer report to an end user, in order to protect consumer privacy.¹⁰ In a separate interpretive rule, the CFPB noted that states can essentially issue whatever rules or regulations they choose in order to govern CRAs.¹¹

Another publication honed in on the obligation for CRAs to conduct reinvestigations citing the “shoddy investigation practices” of some companies. The CFPB noted that CRAs cannot impose any obstacles to deter disputes, such as mandating a specific form be completed or requiring the consumer to provide documentation. However, if the consumer provides documentation, the CRA must



While this activity by the CFPB primarily focuses on requirements imposed on CRAs, employers should continue to monitor these developments, as there may be a downstream impact on background check fulfillment.

ensure any furnisher used to complete the report is provided that information during the reinvestigation stage.¹²

These publications come on the heels of the CFPB’s advisory opinion on accuracy in November 2021. In that document, the CFPB stated that name-match only practices will never meet a CRA’s requirement to maintain reasonable procedures to assure maximum possible accuracy.¹³

While this activity by the CFPB primarily focuses on requirements imposed on CRAs, employers should continue to monitor these developments, as there may be a downstream impact on background check fulfillment. For example, there have been several consent decrees over the years between the CFPB or the Federal Trade Commission with CRAs in the tenant screening and employment space focused primarily on matching practices. The FCRA is technically silent on what exactly constitutes “reasonable procedures” but primarily what CRAs use to meet this requirement is stringent matching criteria. This means that, at a minimum, CRAs will require at least two full identifiers match between the consumer’s information and the record with even more pieces of identification necessary for common names. Employers may start to see instances where there is a perceived “missed hit” where perhaps a record could have been reported but the CRA had insufficient identifying information to include it on the report, especially as courts move towards restricting access to identifiers.

Additionally, CRAs should have practices in place such as credentialing new clients prior to providing their services. This may take different forms, but employers should expect to complete

⁹ See *Ramos v. Walmart, Inc.*, Case 2:21-cv-13827, D.N.J. https://fingfx.thomsonreuters.com/gfx/legal/docs/lgvdwmmgnpo/EMPLOYMENT_WALMART_BACKGROUNDCHECKS_complaint.pdf.

¹⁰ Bureau of Consumer Protection, “Fair Credit Reporting; Permissible Purposes for Furnishing, Using, and Obtaining Consumer Reports” Advisory Opinion, https://files.consumerfinance.gov/f/documents/cfpb_fair-credit-reporting_advisory-opinion_2022-07.pdf.

¹¹ Bureau of Consumer Protection, “Authority of States to Enforce the Consumer Financial Protection Act of 2010” Interpretive Rule, https://files.consumerfinance.gov/f/documents/cfpb_section-1042_interpretive-rule_2022-05.pdf.

¹² Consumer Financial Protection Circular 2022-07, “Reasonable investigation of consumer reporting disputes”, <https://www.consumerfinance.gov/compliance/circulars/consumer-financial-protection-circular-2022-07-reasonable-investigation-of-consumer-reporting-disputes/>.

¹³ Bureau of Consumer Protection, “Fair Credit Reporting; Name-Only Matching Procedures” Advisory Opinion, https://files.consumerfinance.gov/f/documents/cfpb_name-only-matching_advisory-opinion_2021-11.pdf.

some sort of information or application form and provide business documentation to prove they are a legitimate business that has a viable permissible purpose to order and receive background reports.

TREND 2

Employers Lost in the Marijuana Haze

Without a doubt, one of the most impactful areas of change is with marijuana. The rapid evolution of societal viewpoints, coupled with fast moving legislation, has created a whirlwind environment for employers to navigate.



Employers are increasingly evaluating not only their drug workplace policies, but also their drug testing habits including whether to even continue testing for marijuana.

One of the most watched pieces of legislation came from California. AB2188 goes into effect January 1, 2024, extending new protections to marijuana users.¹⁴ Employers will need to closely evaluate how they can test for marijuana once this law goes into effect as the law only allows for adverse employment related actions based on “scientifically valid preemployment drug screening conducted through methods that do not screen for nonpsychoactive cannabis metabolites.”

The White House also stepped into the hazy fray with President Biden’s proclamation granting pardons for all federal offenses of simple possession of marijuana.¹⁵ In his accompanying statement, President Biden stated, “no one should be in jail just for using or possessing marijuana” and commented that “[c]riminal records for marijuana possession have also imposed needless barriers to employment, housing, and educational opportunities.” President Biden also urged state governors to take similar action.¹⁶

Following that proclamation, Oregon’s (now former) Governor Kate Brown announced pardons for all electronically available Oregon convictions for possession of one ounce or less of marijuana, in pre-2016 cases in which the person was 21 years of age or older, this was the only charge, and there were no victims.¹⁷ This action resulted in a total of 47,144 convictions being pardoned.

In the “legislation to watch” category, New Jersey is at it again this time with recently introduced bill S3189.¹⁸ As currently drafted, this legislation would prohibit employers from conducting a pre-employment marijuana drug test. S3189 would also prohibit employers from taking any action that prohibits an employee from using cannabis items during non-work hours.

As covered in the past, New Jersey is already a hotbed for marijuana-related litigation with employers suffering numerous losses given how expansive the state’s legislation already is in terms of protections offered to individuals who use marijuana medically or even recreationally. However, litigation on this topic is not isolated to New Jersey. Several cases have been filed in states such as Pennsylvania, where the state’s Medical Marijuana Act is increasingly being leveraged against employers who have terminated employees, or revoked job offers, based on positive marijuana drug tests.

Conversely, court rulings in other states have gone the direction of the employer. For example, the Nevada Supreme Court found the state’s “lawful use” statute did not extend to adult recreational use given marijuana remains illegal under federal law. The court further found that Nevada’s law regulating pre-employment marijuana drug tests would be moot if the lawful use statute did in fact protect marijuana use.

What does this all mean for employers? Employers are increasingly evaluating not only their drug workplace policies, but also their drug testing habits including whether to even continue testing for marijuana. This is illustrated in a recent survey where five percent (5%) of respondents noted they already dropped marijuana from their drug testing panel, with another five percent (5%) considering doing so in the next 12 months. There were several driving reasons such as an inability to find candidates, along concerns around lawsuits or legal liability if they continue testing for the substance.¹⁹

¹⁴ California Assembly Bill No. 2188, https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2188.

¹⁵ The White House, “A Proclamation on Granting Pardon for the Offense of Simple Possession of Marijuana”, <https://www.whitehouse.gov/briefing-room/presidential-actions/2022/10/06/granting-pardon-for-the-offense-of-simple-possession-of-marijuana/>, October 6, 2022.

¹⁶ Statement from President Biden on Marijuana Reform, <https://www.whitehouse.gov/briefing-room/statements-releases/2022/10/06/statement-from-president-biden-on-marijuana-reform/>, October 6, 2022.

¹⁷ Governor Kate Brown Grants Pardon for Oregon Marijuana Offenses, <https://www.oregon.gov/newsroom/pages/newsdetail.aspx?newsid=76442>, November 21, 2022.

¹⁸ <https://www.njleg.state.nj.us/bill-search/2022/S3189>.

¹⁹ Current Consulting Group, “2022 Employer Drug Testing Survey”, <https://www.currentconsultinggroup.com/wp-content/uploads/2022/11/2022-Employer-Drug-Testing-Survey-Slick.pdf>, November 2022.

Dropping marijuana from the panel may not be the right solution for every employer, every position or every industry so employers should work to conduct an individualized review of the pros and cons of such a decision looking at factors such as regulatory requirements and the responsibilities of each position.

TREND 1

All About Criminal History— Access Issues & Reform

Criminal records access in California is currently disrupting the background screening process at an increasingly high rate. The problems began in May 2021, following a court ruling that determined Riverside Superior Court is prohibited from allowing the electronic criminal record repository to be searched by using an individual's date of birth (DOB) or driver's license number.²⁰

Following this court ruling, more and more courts have removed access to DOB information on their online portals and even in the public access terminals in the courthouses. We're also seeing courts implement various measures such as: (i) restricting the number of files that can be pulled each day (i.e., how many searches can be done); (ii) limiting how many personnel a company can send into the court each day; (iii) refusing to respond to criminal record search requests and (iv) limiting the amount of PII they will include when a record is found.²¹

Why is this impacting background check fulfillment? The most common two pieces of identifiers used when conducting a criminal background check are full name and DOB (as Social Security Numbers are rarely readily available or associated with criminal record information). When dealing with a common name, generally consumer reporting agencies will require even more identifiers to match. Courts removing access to this crucial piece of information electronically inevitably slows the process as more searches are being processed in-person with increasing limitations imposed by the courts as outlined above. The industry was hopeful for relief with the passage of SB 1262; however, Governor Newsom vetoed the bill at the 11th hour citing various concerns including those related to data privacy.²² Relief on background check delays in California is highly unlikely throughout 2023 and into 2024, so impacted employers should start to account for this issue in their hiring practices including setting reasonable expectations for candidates who may see their start dates pushed back.

In addition to the personal identifier access issue in California, states and cities across the country are considering various pieces of legislation within the realm of criminal justice reform. As an example, Missouri has filed legislation, House Bill 352, that would expand the state's expungement law to allow for automatic expungements for various misdemeanor offenses after three years and felony offenses after five years. Certain types of convictions would be excluded from expungement eligibility. The proposed legislation would also prohibit "credit bureaus" from reporting arrests, pending cases and convictions beyond a 7-year period, and prohibit reporting any criminal information if a full pardon or expungement has been granted. It's important to note that this legislation is still in the initial stages of consideration and may or may not pass at all, much less as currently drafted.²³



We expect to see continued legislation at the state and city level throughout 2023 and also expect to see revisions to some pre-existing laws and regulations with notable revisions already proposed to California's existing criminal background check regulations.

Ohio provides another example of comprehensive criminal justice reform via Senate Bill 288 which was signed by Ohio's Governor on January 3, 2023. This wide sweeping legislation covers a variety of topics including eligibility for individuals to seek either sealing or expungement of their criminal records. Certain drug-related convictions, including those related to marijuana, will also be eligible for expungements.²⁴

While 2022 did not see a vast explosion of ban the box or fair chance laws, Gainesville, Florida did slip in passage of its Fair Chance Ordinance on December 15th which immediately went into effect. Under the ordinance, covered employers cannot consider or solicit criminal record information until after extending a conditional offer of employment. Further, employers can only

²⁰See *All of Us or None – Riverside Chapter v. W. Samuel Hamrick, Jr.*, as Clerk, Super. Ct. No. 37-2017-00003005-CU-MC-NC, Court of Appeal, Fourth Appellate District, Division One, State of California (May 26, 2021), <https://law.justia.com/cases/california/court-of-appeal/2021/d076524.html>.

²¹Additional information and updates regarding the date of birth access issues in California may be found on the Professional Background Screening Association's website: <https://thepbsa.org/government-relations/california-dob-redaction-information/>.

²²Office of the Governor Press Release announcing veto of SB 1262: <https://www.gov.ca.gov/wp-content/uploads/2022/09/SB-1262-VETO.pdf?emrc=d9bc20>, September 29, 2022.

²³Missouri HB 352, <https://house.mo.gov/Bill.aspx?bill=HB352&year=2023&code=R>.

²⁴Ohio Senate Bill 288, <https://www.legislature.ohio.gov/legislation/134/sb288>.

consider pending cases or convictions (with limited exceptions) and may only take adverse action against an individual due to criminal history information if the employer has determined the individual is unsuitable for the job based on an individualized assessment.²⁵

Finally, Atlanta passed an ordinance that made “criminal history status” a protected class meaning it’s an unlawful employment practice for an employer to fail or refuse to hire or to discharge an individual or otherwise discriminate against them based on various protected classes including now criminal history status. Employers can still use criminal history in employment decisions when it’s based on how the criminal history is related to the position’s responsibilities considering: (1) whether the applicant committed the offense, (2) the nature and gravity of the offense, (3) time since the offense and (4) the nature of the job for which the applicant has applied.

These various examples demonstrate that criminal history reform and the second chance movement are stronger initiatives than ever before growing into a bipartisan area of agreement in many parts of the country. We expect to see continued legislation at the state and city level throughout 2023 and also expect to see revisions to some pre-existing laws and regulations with notable revisions already proposed to California’s existing criminal background check regulations.²⁶

BONUS TREND ALERT!

AI, Algorithms, Regulation

Although somewhat limited from a legislative perspective at this exact moment in time, there is the potential for an increased focus by cities, states, and regulators on the use of AI and algorithms in the hiring process. The White House and the Equal Employment Opportunity Commission (EEOC) are also both sharply focused on this issue. In October 2022, the White House published a “Blueprint for an AI Bill of Rights” that focuses on how the use of AI can lead to discriminatory practices and impact data privacy.²⁷ Meanwhile the EEOC will hold a public hearing January 31 to discuss employment discrimination in AI and automated systems, following its joint roundtable on the topic with the Department of Labor in September 2022.²⁸



Employers may want to take a step back and evaluate how these types of tools are utilized in hiring and employment practices in the event this type of legislation continues to advance at the local, state and/or federal level.

In perhaps unsurprising news, New York City arrived early to this trend passing the first bill in the country to address the use of automated employment decision tools requiring employers to conduct bias audits and provide candidate and employee notice if such tools are used.²⁹ California’s Civil Rights Department published draft modifications to its employment regulations regarding automated-decision systems.³⁰

Employers may want to take a step back and evaluate how these types of tools are utilized in hiring and employment practices in the event this type of legislation continues to advance at the local, state and/or federal level. Certainly employers based in New York City should keep an eye on the developing rules situation in advance of the law’s April 15, 2023 effective date.

CLOSING

There is no doubt background checks will continue to play an important role in keeping workplaces and consumers safe in 2023. As we’ve seen year-over-year, the legislative and litigation landscape only grows more complex for employers. Topped by an unknown economic outlook, employers likely feel overwhelmed heading into the new year. However, a sharp focus on conducting a review of background screening and hiring practices may prove to be a worthwhile investment that could even save money and time in the future (particularly from a litigation or enforcement perspective).

²⁵ Ordinance No. 2022-617 has now been published in the City of Gainesville’s Code of Ordinances, available here: <https://mcclibraryfunctions.azurewebsites.us/api/ordinanceDownload/10819/1190179/pdf>.


²⁶ Civil Rights Council, “Modifications to Employment Regulations Regarding Criminal History”, <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/12/Modified-Text-of-Proposed-Modifications-to-Employment-Regulations-Regarding-Criminal-History.pdf>.

²⁷ The White House, “Blueprint for an AI Bill of Rights: Making Automated Systems Work for the American People”, <https://www.whitehouse.gov/ostp/ai-bill-of-rights/>.

²⁸ In May 2022, the EEOC published a technical assistance document titled, “The Americans with Disabilities Act and the Use of Software, Algorithms, and Artificial Intelligence to Assess Job Applicants and Employees” providing a Q&A to explain how “employers’ use of software that relies on algorithmic decision-making may violate” the Americans with Disabilities Act. <https://www.eeoc.gov/laws/guidance/americans-disabilities-act-and-use-software-algorithms-and-artificial-intelligence>.

²⁹ While Int 1894-2020 was slated to take effect January 1, 2023, the effective date has been postponed until April 15, 2023 as the Department of Consumer and Worker Protection is still working on rules for the law. <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=4344524&GUID=B051915D-A9AC-451E-81F8-6596032FA3F9>.

³⁰ Civil Rights Council Proposed Modifications to Employment Regulations Regarding Automated-Decision Systems, <https://calcivilrights.ca.gov/wp-content/uploads/sites/32/2022/07/Attachment-G-Proposed-Modifications-to-Employment-Regulations-Regarding-Automated-Decision-Systems.pdf>.



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