

TOP TRENDS IN 2022

Background Screening and Employment Law

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As we enter 2022, it's important to reflect on the past year in order to understand where the future may take us next. It's likely safe to say that many thought 2021 was going to be a return to normal — as if there is a “normal” anymore! While there were plenty of positives in terms of moving forward from the pandemic, here we are facing down omicron and its many impacts on our society, family, friends and coworkers.

Despite what variant of the coronavirus is circulating, the world keeps spinning. Employers must keep moving forward to fill positions with the best talent possible while serving their customers successfully.

In reverse order, here are the top five trends we believe will impact employers in the new year (spoiler alert — COVID is not number one!).

TREND 5

Expanded Screening for Employees

In 2022, we're going to see employers relying not only on an initial background check pre-hire, but also on a check in with an employee's background throughout the employment relationship. Especially since many organizations have moved to a completely remote environment, employers may have employees that they never see in an office, never meet in person, may have trouble adequately supervising, etc.¹

Employers use differing names to describe these routine checkpoints such as continuous monitoring or routine monitoring, but the concepts are relatively the same. The employer wants to check in on an individual's background — most commonly criminal history — on a routine, periodic basis to identify if anything has changed with that individual that may potentially prevent them from remaining as an employee.

Why should employers consider conducting routine background checks? A large reason is safety. Safety of the workplace, colleagues, clients and consumers. The Professional Background Screening Association (PBSA) published its 5th annual survey, which again highlighted that the theme of safety, including protecting employees and customers, remains a leading reason for why employers conduct background checks. Other reasons include improving the quality of hires and protecting the company's reputation.²

A prime example of the safety concern is demonstrated by an indictment filed by the New Jersey Attorney General in March 2021. The press release that accompanied the indictment alleged egregious actions a school bus company committed that jeopardized the safety of those being transported. The allegations included the company knowingly hired individuals without a valid commercial driver's license and hired drivers with criminal histories (among other items). One of the examples cited was an incident in which an employee was allegedly under the influence of narcotics and crashed the bus. Another example was a former driver who drove children despite being a registered sex offender.³



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¹ As an aside, employers with remote environments need to ensure they are evaluating employee workspaces appropriately and may want to consider teleworking agreements that protect the employer as well as outline clear expectations for the employee.

² Professional Background Screening Association, Background Screening: Trends in the U.S. and Abroad. <https://pubs.thepbsa.org/pub.cfm?id=FB36B937-C9D5-A941-7720-4047386F38B0>.

³ Press release and indictment available at <https://www.njoag.gov/ag-grewal-announces-indictment-of-school-bus-company-its-owner-and-manager-charged-with-using-unsafe-buses-and-unqualified-drivers-with-criminal-records/>.

As time goes on, people may change. They may make mistakes or other circumstances may result in them no longer being an eligible employee. That's why these routine checkpoints with an employee's history can be so important for employers.

Further, it may help protect employers in the event of a negligent retention case. We often discuss negligent hiring lawsuits as a reason proper due diligence via comprehensive background checks pre-hire is so important. But a very real risk continues for employers that fail to take action against an employee that they knew, or should have known, posed a foreseeable risk to others. Appropriate action may vary depending on the situation and could include proper discipline measures, removing the employee from certain aspects of the position and/or terminating employment.

TREND 4

Marijuana — The Blunt Truth

2021 continued a notable shift in the attitudes of society towards not just medical marijuana but recreational marijuana, as well. While many employers still conduct pre-employment marijuana tests, others are taking steps to remove marijuana from their drug testing panel. The blunt truth? Marijuana laws are going to spread in 2022, providing increased protections for the individual.

We have already seen the impact of this relaxed attitude toward marijuana in the workplace. One major employer issued a rather remarkable press release, announcing that not only was it moving to exclude marijuana from their pre-employment screening program (for unregulated positions), but it also reinstated employment eligibility of former employees and applicants who had adverse consequences due to a positive marijuana drug test.⁴ This press release came on the heels of a class action lawsuit filed in New York City, alleging the employer required candidates to submit to pre-employment marijuana drug tests in violation of the NYC Human Rights Law.⁵

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Employers face new bans on marijuana testing outside of NYC, including in Philadelphia, which banned pre-employment marijuana drug tests effective January 1, 2022.⁶ As another example, Kansas City, Missouri passed an ordinance banning pre-employment drug tests for marijuana for most government workers.⁷

Perhaps the biggest news in 2021 came from the New York Department of Labor via its guidance regarding New York's Marijuana Regulation and Taxation Act.⁸ As outlined in the guidance, “[e]mployers are prohibited from discriminating against employees based on the employee's use of cannabis outside of the workplace, outside of work hours, and without use of the employer's equipment or property.” Importantly, the guidance states that employers are not allowed to test for cannabis unless permitted to do so under the provisions of Labor Law Section 201-D(4-a) or other applicable laws. The FAQs note that employers can drug test an employee if federal or state law requires drug testing or makes it a mandatory requirement of the position (i.e., mandatory drug testing for drivers of commercial motor vehicles).

It's not just legislation worrying employers but litigation as well. The last two years saw a rise in lawsuits filed against employers for actions taken related to marijuana drug testing in both state and federal court. More often than not, employers are facing tough battles without successful litigation outcomes. One example is from the Pennsylvania Superior Court, which determined there is a private right of action for individuals under the Medical Marijuana Act (i.e., individuals can sue employers for things like wrong discharge).⁹



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⁴ Amazon press release: <https://www.aboutamazon.com/news/policy-news-views/amazon-is-supporting-the-effort-to-reform-the-nations-cannabis-policy>. Issued September 2021. Last updated November 24, 2021.

⁵ *Rivera v. Amazon.com, Inc.*, <https://storage.courtlistener.com/recap/gov.uscourts.nyed.461081/gov.uscourts.nyed.461081.12.0.pdf>. Remember, in NYC employers may not test candidates for marijuana unless an exemption is met.

⁶ Limited exceptions are provided including positions requiring a commercial driver's license. *Ordinance 200625*.

⁷ *Kansas City Code Sec. 2-1119.1* – Pre-employment testing prohibition.

⁸ Adult Use Cannabis and the Workplace, New York Labor Law 201-D. <https://dol.ny.gov/system/files/documents/2021/10/p420-cannabisfaq-10-08-21.pdf>.

⁹ *Scranton Quincy Clinic Company, LLC, et al. v. Pamela Palmiter*. <https://casetext.com/case/scranton-quincy-clinic-co-v-palmiter>.

However, it's not all bad news for employers on the litigation front. Limited "wins" have occurred in states like California and Minnesota. In a California case, the employer was successful in seeking summary judgment after the court determined there was no proof the individual (who unsuccessfully claimed he suffered from a disability) was fired for anything other than a legitimate, non-discriminatory reason — the failed drug screen.¹⁰

The Minnesota Supreme Court sided with an employer that argued the Controlled Substances Act preempts the requirement under Minnesota workers' compensation laws for an employer to pay for an injured employee's medical treatment when the treatment is medical cannabis.¹¹ This case conflicts with a decision from New Jersey, which determined there is no such conflict between state and federal law and thus required the employer to reimburse medical marijuana expenses.¹²

Expect to see more of the same in 2022, especially through legislation providing individuals more protections pertaining to marijuana use (medical or recreational) and regulating what actions employers can take based on off-duty legal consumption of marijuana. Given that testing still cannot determine a point in time of use, employers will need to solve how to evaluate reasonable suspicion and/or signs of impairment during working hours, which is further complicated in a remote working environment.



Employers should also be aware that a new litigation trend is on the rise and will continue to spread in 2022. This litigation trend is hyper-focused on how employers use criminal history information in their hiring and employment decisions.

TREND 3

The Plague of Litigation & Enforcement Continues

Litigation under the Fair Credit Reporting Act (FCRA) and related state laws is still an ongoing threat to employers. According to one report, lawsuits under the FCRA have grown continuously year over year with 2021 seeing a 3.5% increase (as of November 2021).¹³ The good news remains that this litigation stays focused on the disclosure form content and the adverse action process. Employers could go a long way towards mitigating risk by investing in qualified legal counsel review of their forms and processes.

Here are a few examples from the past year that illustrate potential ways employers may misstep:

- **Disclosure forms:** A \$174,980 settlement over the inclusion of a waiver of liability in the employer's disclosure form. The plaintiff claimed he was "confused" and "did not understand that [the employer] would be requesting a consumer report." Based on this allegedly improper disclosure, the plaintiff claimed the employer also did not receive proper authorization.¹⁴
- **Adverse action:** The plaintiff alleged the employer violated the FCRA by not providing a copy of the report or the "A Summary of Your Rights Under the Fair Credit Reporting Act" document prior to taking adverse action against him. The employer filed a motion to dismiss claiming the plaintiff did not have standing to sue since he did not allege that anything in the report was inaccurate and therefore no injury occurred. The court ruled against the employer finding the adverse action process doesn't just apply if there is an inaccuracy on the background report.

Employers should also be aware that a new litigation trend is on the rise and will continue to spread in 2022. This litigation trend is hyper-focused on how employers use criminal history information in their hiring and employment decisions. Most commonly these cases are being filed in New York, particularly in NYC. These complaints are layering in arguments that employers violated Article 23-A and/or the NYC Fair Chance Act while also typically bringing in FCRA-related claims around adverse action.

This issue is certainly not isolated to New York. There was a class action complaint filed in New Jersey against a major nationwide retailer, alleging discrimination against Black and Latino individuals due to the employer's criminal history hiring practices. The complaint also alleged that the policy and practice of denying employment to individuals was too over-inclusive to meet standards of job-relatedness and consistent with business necessity and that the retailer did not consider evidence of rehabilitation or mitigation circumstances. An interesting part of the complaint also focused on the fact that the employer routinely allowed individuals to start working prior to completion of the criminal history check, which the law firm claimed illustrated the employer "does not view its criminal history screening process as necessary to protect the safety of its workforce or customers."¹⁵

¹⁰ *Espindola v. Wismettac Asian Foods, Inc.* Case 2:20-cv-03702 (C.D. Cal. Apr. 28, 2021).

¹¹ *Musta v. Mendota Heights Dental Center & Hartford Insurance Group*, <https://www.courthousenews.com/wp-content/uploads/2021/10/mn-musta-mendota.pdf>.

¹² *Hager v. M&K Construction*, https://www.njcourts.gov/attorneys/assets/opinions/webcast/a_64_19.pdf.

¹⁴ *Tafua v. Quantum Global Technologies*, https://www.govinfo.gov/content/pkg/USCOURTS-cand-5_18-cv-06602/pdf/USCOURTS-cand-5_18-cv-06602-2.pdf.

¹⁵ *Ramos v. Walmart, Inc.*

From a criminal history perspective, more ban the box or fair chance laws will be enacted in 2022. Several major changes occurred in 2021, including in Illinois and NYC, that significantly disrupted employer policies and practices. Increased enforcement of these laws will continue even outside of the usual hot spots like California and NYC. For example, at the end of September, the Acting Attorney General of New Jersey announced a ban the box “enforcement sweep,” which uncovered 15 companies that were acting in violation of the state’s Opportunity to Compete Act.¹⁶

The California Department of Fair Employment and Housing (DFEH) issued a press release notifying employers it is launching affirmative enforcement of the California Fair Chance Act by using technology to conduct mass searches of online job advertisements for statements that violate the law. In a one-day review, the DFEH found over 500 job advertisements with unlawful statements that the employer will not consider any job applicant with a criminal record. A new toolkit was issued that provides sample forms, suggested statement for the job advertisements and applications, an informational video explaining the act, and FAQs.¹⁷

What should employers focus on in 2022 when it comes to criminal history? Most employers have moved away from the traditional blanket disqualification, pass/fail policies of the past. However, that may no longer be enough. Employers should conduct a comprehensive review of their criminal history screening policies and practices. This includes items such as adjudication matrices, individualized assessment protocols and how information related to mitigation circumstances or rehabilitation efforts is considered.

TREND 2

COVID’s Job Market Impact

Here we are in 2022 still focused on COVID. It truly impacts daily life and employers certainly have not been immune from its effects. 2021 brought immense challenges from a labor market perspective with the introduction of the “great resignation” or the “big quit” (or any number of other names). Millions of people have quit their jobs and there are millions of job postings out there unfilled. This

problem will continue to plague employers throughout at least the beginning of the new year.

There are plenty of theories as to why this phenomenon has occurred. Regardless of which theory — or blend of theories — is accurate, employers must evaluate how to make their open positions and their organization an attractive place for talent to land.

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From a hiring and onboarding perspective, the candidate experience is perhaps more important than it has ever been. Employers who haven’t optimized their paperwork process to be digital and mobile-friendly are arguably behind the curve (understanding that not every job seeker may have technology or the skills to complete information online, of course).

A further focus must be on the background screening process. Candidates and employers can’t afford to wait weeks for their background checks to return. This means a reputable, trustworthy background screening provider is essential. According to PBSA’s 5th Annual Survey, the top two most important qualities employers consider when evaluating a background screening provider are quality/accuracy and speed. Those factors are not mutually exclusive. Receiving a background report quickly may not be helpful if the information is not accurate so employers should consider turnaround time in conjunction with accuracy rates.

Employers should also consider expanding how they find talented individuals. Throughout 2021, there were numerous articles covering individuals who are still struggling to find a job given their criminal history even when there are these countless open positions employers are struggling to fill. Individuals with a prior criminal history face a number of barriers including training, relevant job experience and bias.



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¹⁶ Press Release: <https://www.njoag.gov/acting-ag-bruck-commissioner-asaro-angelo-announce-agreements-with-15-employers-in-ban-the-box-enforcement-sweep/>.

¹⁷ Press Release: <https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2021/10/DFEH-Fair-Chance-Act-Press-Release-2021-10-20.pdf>; Fair Chance Act toolkit and resources: <https://www.dfeh.ca.gov/fair-chance-act/>.

What can employers do? One potential solution is to go back through the talent pool that applied to positions previously to determine if any individuals may be worth another look especially if they had a criminal conviction that disqualified them originally. Maybe their record has since been expunged, or maybe the individual has accrued more relevant work experience that provides a greater sense of comfort in their ability to perform the position. Perhaps the candidate acquired a certificate of good conduct or rehabilitation that affords the employer greater liability protections against negligent hiring suits.

Another potential solution is to evaluate hiring criteria as it relates to criminal convictions. As discussed in Trend 3, many employers are moving away from traditional pass/fail models into the individualized assessment model where each candidate with criminal history is considered on a case-by-case basis. As part of this assessment, employers can review a variety of factors including those outlined by the Equal Employment Opportunity Commission (EEOC) in their 2012 guidance on the use of criminal and arrest records.¹⁸ In that guidance, the EEOC recommended employers review evidence such as the facts or circumstances surrounding the offense or conduct, the number of offenses, evidence individual has performed similar work following the criminal conviction with no issues, and rehabilitation efforts.

With that said, while there may be a job for every person, not every job is right for every person. As discussed in Trend 5, the primary driver behind background screening remains safety. It's important for employers to still perform their appropriate due diligence to ensure an individual is not being placed in a role where they could do harm.

TREND 1

Criminal History Record Access

In 2021, two states in particular sparked a huge issue for background screening providers and employers — California and Michigan. Expect these issues to continue especially in California throughout 2022. The concern is that this type of problem could occur in other parts of the country. As the background screening industry focuses on protocols regarding how information is reported, certain courts are restricting what information they make accessible, namely key identifiers that are needed in the screening process.

Earlier this year, Michigan issued a rulemaking that required redaction of date of birth (DOB) from public records effective July 1, 2021. This would have impacted searches at the county court level (not the statewide iChat search). At the 11th hour, the rulemaking was delayed until January 1, 2022. However, several counties in Michigan continued to redact DOB information from county court records. Without access to DOB, it's highly unlikely Asurint, or any other background screening provider, would be able to report criminal records from a county court search. Proposed legislation was introduced — Michigan House Bill 5368 — that would require court records contain DOB. That legislation was paused when a court rule was adopted on December 6th that would help ease access to DOB information (effective April 1, 2022).



As the background screening industry focuses on protocols regarding how information is reported, certain courts are restricting what information they make accessible, namely key identifiers that are needed in the screening process.



Proposed legislation was introduced — Michigan House Bill 5368 — that would require court records contain DOB. That legislation was paused when a court rule was adopted on December 6th that would help ease access to DOB information (effective April 1, 2022).

¹⁸ Equal Employment Opportunity Commission, Enforcement Guidance on the Consideration of Arrest and Conviction Records in employment Decisions under Title VII of the Civil Rights Act. Issued 4/25/2012. <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#VB9>.

While Michigan's problems may be on the mend, California's issues continue to worsen. The issues stem from a California court ruling that found the Riverside Superior Court is prohibited from allowing the electronic criminal record repository to be searched by using an individual's date of birth or driver's license number. Following this court ruling, several courts in other counties have pulled the ability to electronically search court records using DOB from their online systems. However, orders may still be fulfilled in these impacted counties by sending someone into the courthouse (as an example). The Professional Background Screening Association (PBSA) is evaluating a variety of strategies including a pursuit of appropriate legislation. However, these efforts may not have any impact before late 2022 at the earliest.¹⁹

Often employers ask the "why" behind these changes. Why are courts removing access to DOB? Why are courts making it more difficult to gain access to important information? There is no one simple, straightforward answer unfortunately. Commonly, courts cite concerns that making information such as DOB available may

lead to increased identity theft issues. However, that simply is not the case. PBSA is focused on providing education to courts across the country to help correct this misperception.

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We've also continued to see impacts from COVID on court record access. As omicron sweeps through the nation at an alarmingly high rate, courts are not immune to closures or staffing issues due to the pandemic. When courts close or clerks are otherwise not available, criminal record requests can get delayed. Employers should look to their background screening provider for routine, proactive updates when these issues happen.

CLOSING

With the introduction of COVID, each year (each month, each day even) becomes harder to predict. Asurint believes the trends outlined above will be among the most impactful to employers in this new year. Background checks are certainly not going away; instead they are being leveraged at an increased rate to evaluate new talent while also checking in on existing employees. While employers may be overwhelmed with the ever-changing landscape related to background screening, they should build in time and resources to thoroughly evaluate their screening practices and policies. Investing in this review can truly pay dividends in return based on the legislative and litigation trends that will undoubtedly continue.

The preceding is offered as general educational information only and does not constitute legal advice. Consultation with qualified legal counsel is recommended.

¹⁹ For more information on these issues from the PBSA, visit <https://thepbsa.org/government-relations/california-dob-redaction-information1/>.

Asurint is leading the background screening industry forward. Our powerful, customizable technology—backed by expert answers and personalized assistance—helps employers hire the right candidates every time, and faster than ever before.

Our clients leverage better background checks to reduce manual workloads, minimize compliance risk, promote a safer workplace, and drive insights to boost hiring and recruitment success.



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