

## Special Instructions:

### What You Need to Know When Using the State Rules Register

The State Rules Register addresses the common issues employers face when using public records. Quite simply, the Register is designed for those needing an uncomplicated explanation in plain English of what is usable by the employer and what steps the employer must take to be in compliance with state laws. While a Consumer Reporting Agency (CRA) may be allowed to report certain information, there may be certain information that an employer is not allowed to use. Therefore, understanding how to properly use the State Rules Register is important.

Below are **six subjects** that **you must always keep in consideration** when using the State Rules Register.

#### 1. Equal Employment Opportunity Considerations regarding Criminal Records

The “new” Guidance in EEOC on criminal records was issued on April 25, 2012. See the Resource Tab about the EEOC Enforcement Guidelines. The EEOC wants employers to individually assess each applicant/employee who may be screened out because of a criminal record. This follows the process under the Americans with Disabilities Act (“ADA”). Generally, the EEOC wants to add a pre-adverse action process similar to that currently existing under the FCRA. Thus all employers will have this type of process, although not as formally set forth for information contained in consumer reports under the FCRA. The materials in the State Rules Register do not discuss the proper way an employer individually assess an individual for a particular job - that discussion is beyond the scope of this work. However, blanket disqualifications for anyone with a conviction is illegal. Beyond that, what is and is not discriminatory use of information is a topic that lawyers and even judges disagree over.

#### 2. Be Aware of Other Laws

When a state entry shows state restrictions on the use of consumer report information by users as “none beyond FCRA” that does not mean that the user is not subject to restrictions contained in an equal employment, equal housing law, etc. The term “none” refers to specific restrictions beyond these restrictions contained in FCRA and general antidiscrimination statutes. Rather than cluttering this work with redundant material this approach was taken. Hopefully the user will agree that this makes the materials easier to use.

#### 3. Know the FCRA Restrictions

The listing for each state does not include provisions that are functionally the same as the Fair Credit Reporting Act (“FCRA”). For example, some states early on required written consent for a report for employment purposes. Since the FCRA now requires this, such a state restriction is not discussed. In addition, several states have restrictions on consumer reports that are less restrictive than the FCRA. In those instances the FCRA controls and there is no reason to discuss the state restriction and the state lesser restriction is not listed because that does not impact the employer or the work the CRA must do.

A list of the existing FCRA restrictions is shown in the Resource Tab - **Mandatory Restrictions Per the FCRA** in the Register.

#### 4. Laws are Subject to Change or Interpretation

There are three factor that must be considered: 1) statutes can be interpreted by courts; 2) laws can change before such changes can be incorporated into this product (although every effort is made to be as current as possible); and 3) the facts in a single, isolated specific situation may lead to a different interpretation and result.

Keep in mind that the Register presents a collection of information on the subject of reportable/useable public record information. If you have specific questions beyond the content in the Register that affects the operation of your business, you should contact a counsel familiar with the laws of the particular state in question.

## 5. Use of Sealed or Expunged Records

Sealed or expunged records should not be available from a court or public records repository and the CRA an employer hires will not know that they ever existed. This state reports do not comprehensively list all state restrictions on reporting or using such records. Generally these records should not be used by employers. There are common exceptions to such use, such as positions in law enforcement, teaching, caretakers, and the like. Such groups are usually given special access to state records where they will receive sealed and expunged records. Normally an employer or CRA will not have access to such records. Pardons do not automatically seal or expunge a record; therefore, unless there is a specific statutory prohibition, a pardoned offense can be reported along with the pardoned to an employer. CRAs generally will inform their customers about what will and will not be included in their reports.

## 6. Reporting of Deferred Sentences or Adjudication Withheld

This is discussed because there are so many questions on this topic. The terms *Deferred Sentences & Adjudication Withheld* both refer to the same type of action by a criminal court. They simply go by different names in different states.

The process works as follows: Generally these arise due to a plea agreement. The defendant pleads guilty to some charge or charges. The court then either “defers sentencing” or “withholds adjudication” for the time period specified by the court. Usually this is a period of less than 5 years, but it can be longer. At the end of the period, which is like pre-sentencing probation, the defendant appears and shows to the court that he has met the terms set by the court. If the conditions have been met then the defendant is allowed to withdraw his plea of guilty and a plea of not guilty is entered and the case is dismissed.

So, will these be reported to employers? Unless the court revokes the deferred adjudication, this will not be a conviction. It is a non-conviction record and can be reported and used as such if allowed by the state law as discussed herein. What happens if the period goes by and there is nothing in the court file? The matter is still pending. Sometimes the defendant must file a motion to finish the process and if the motion is not filed then the case is not dismissed. However, be advised that these procedures are subject to local rules and practices. Generally, the CRA or its courthouse vendor are educated in these local rules and practices.