



# Background Screening and Drug Testing During the COVID-19 Pandemic

What Employers Need to Know  
and Consider

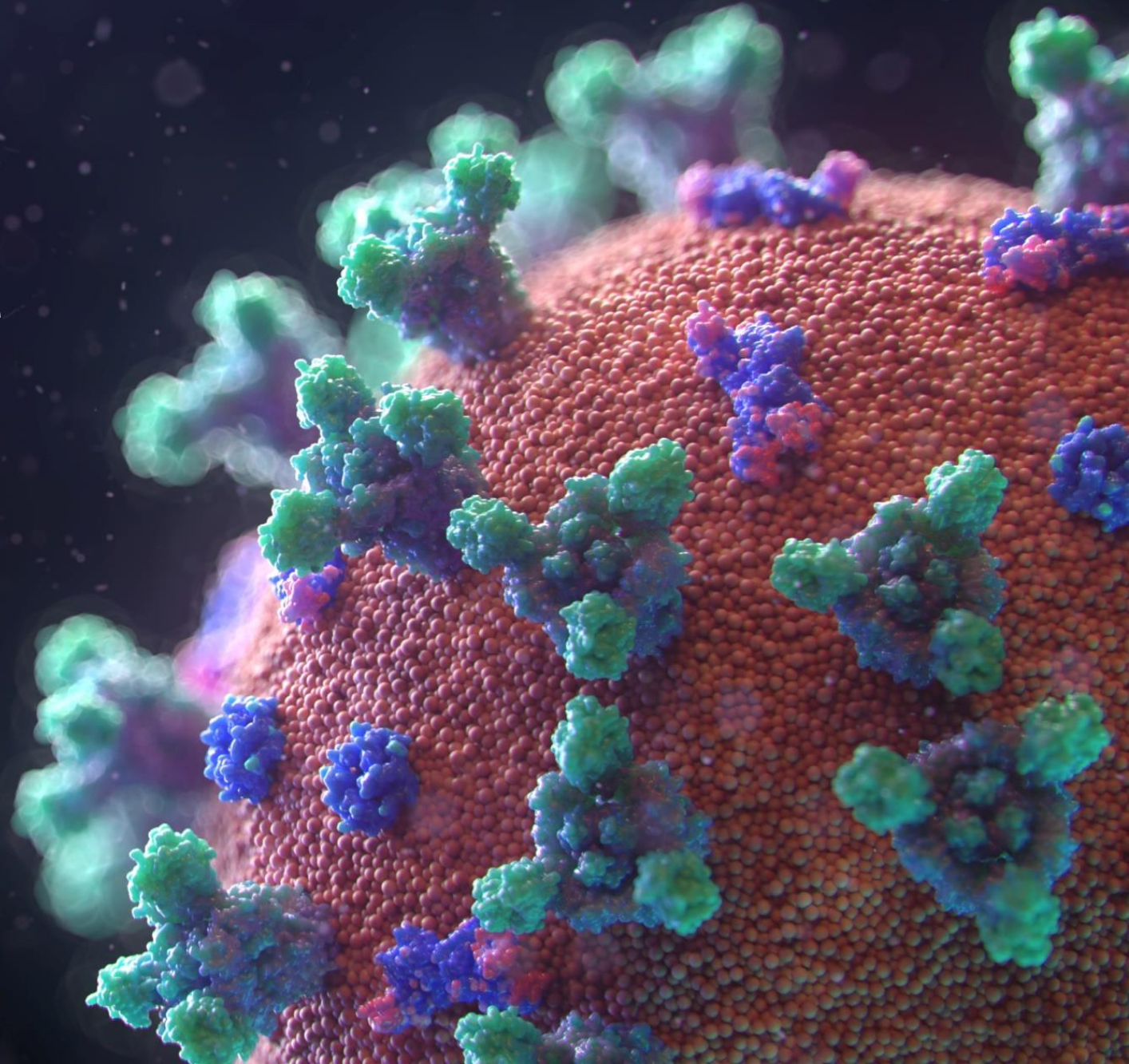
Pamela Q. Devata

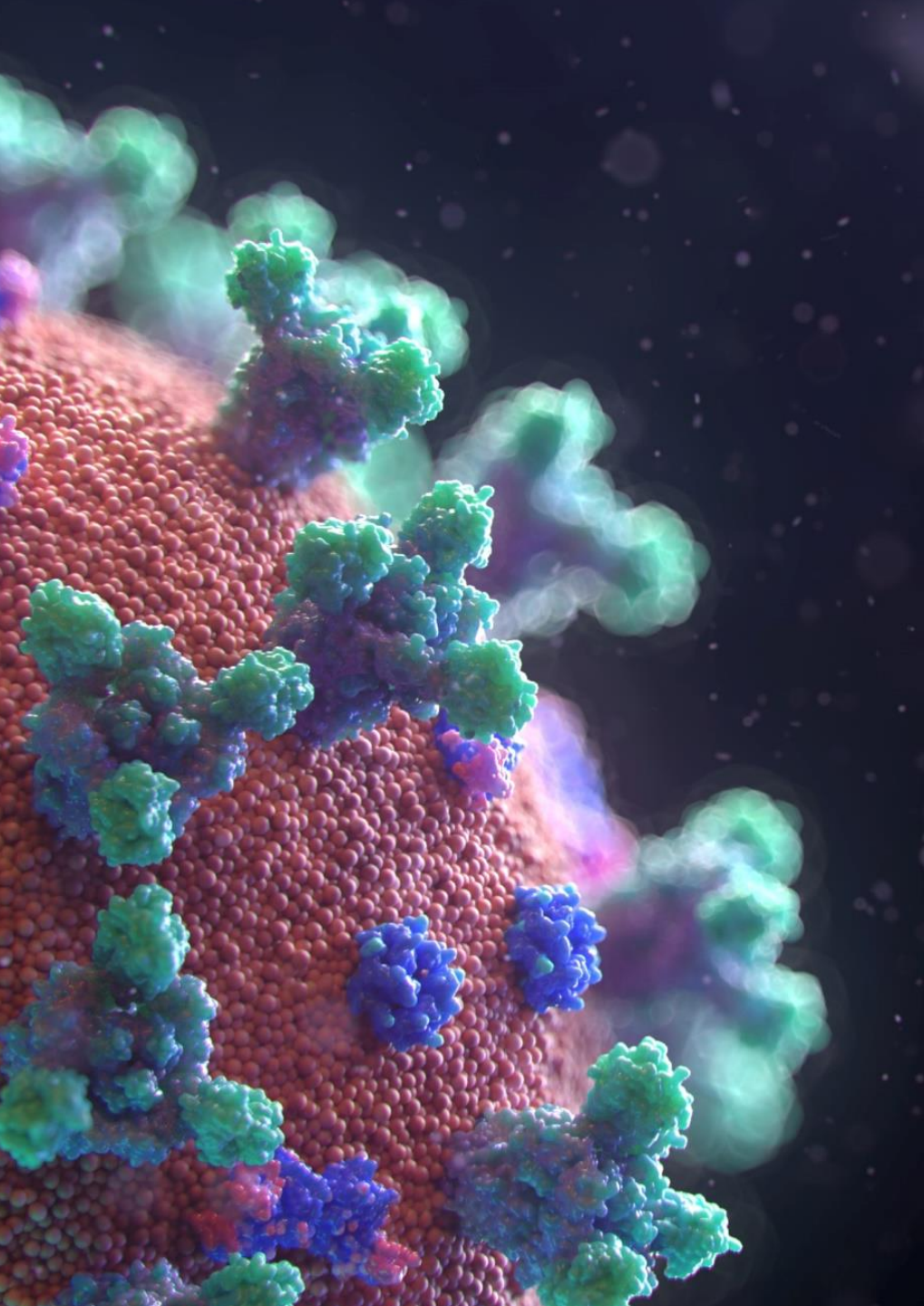
Jennifer L. Mora

April 10, 2020

**Seyfarth Shaw LLP**

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# Speaker Information



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# Agenda

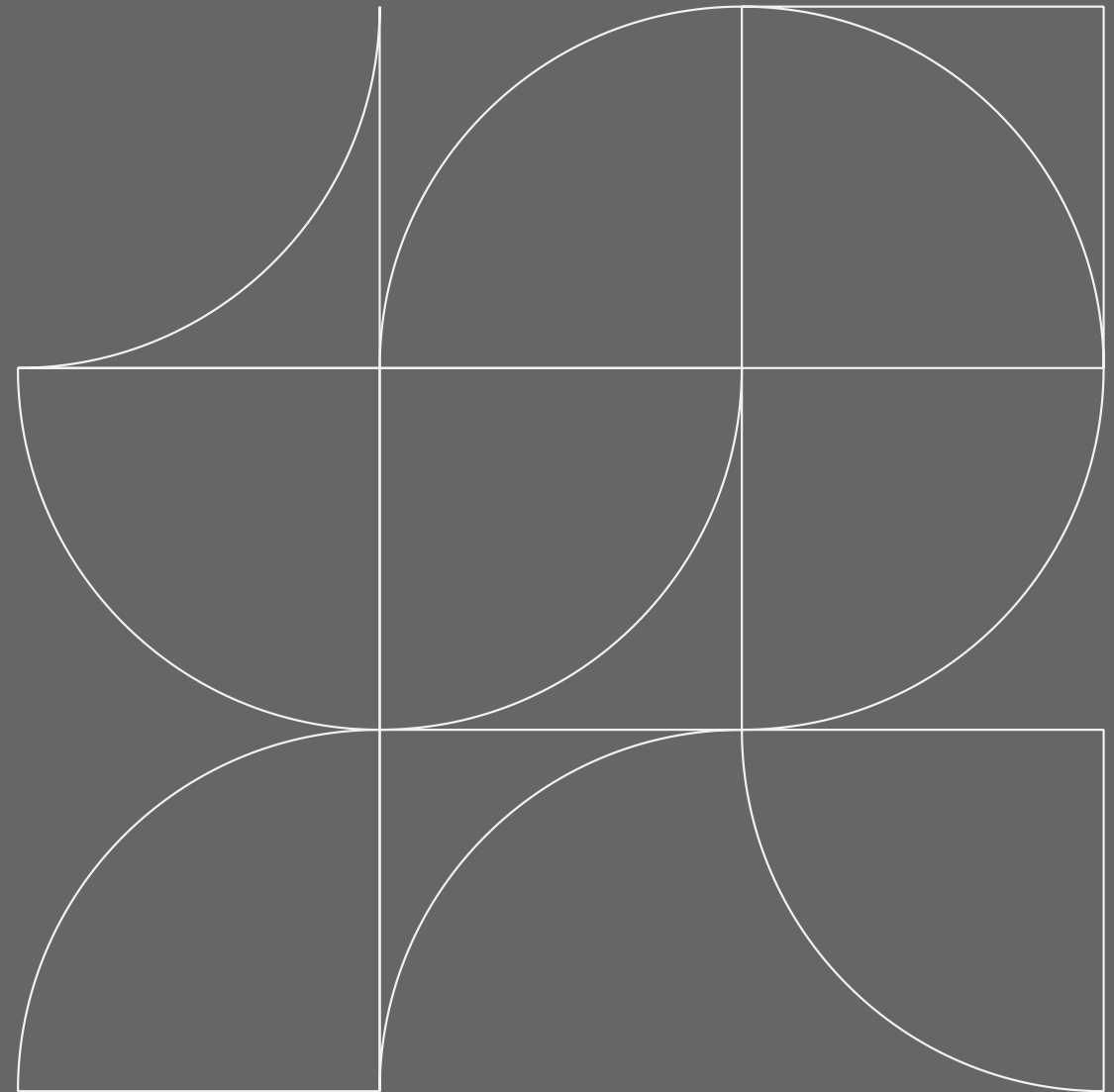
- Where We Are Now
- Employers Weighing Different Hiring Options
- What Hasn't Changed
- Best Practices to Mitigate Risk

## Where we are now -- after COVID-19?

- COVID-19 has caused courts, other public records repositories and laboratories to either close or be difficult to access.
- Information is less available based on closures and remote working:
  - public records
  - previous employment information
  - education information
- Applicants reluctant to visit labs.
- Depending on industry (e.g., retail, health care, etc.), employers may be hiring at an accelerated pace for temporary or permanent work.
- Background checks or drug tests may not be able to be completed before a worker's start date (e.g., open items) or a background check reveals potentially disqualifying information post-hire.

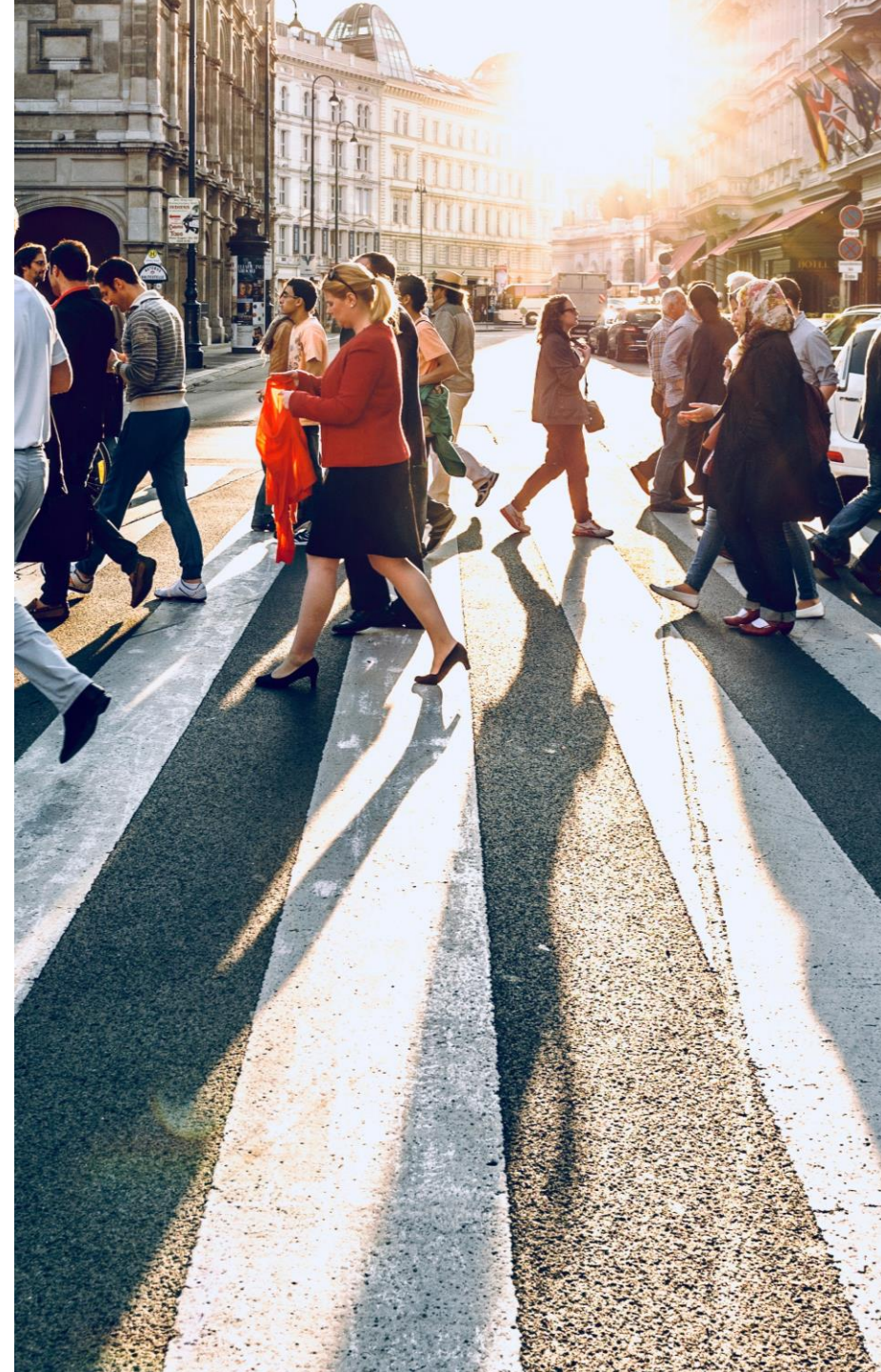
A red rectangular sign with the words "FOR HIRE" in white, bold, sans-serif capital letters. The sign is mounted on a black metal post with a wooden ball finial at the top. The background is dark and out of focus.

# Background Checks



# Employers Weighing Different Hiring Options

- Three main considerations:
  - Should an employer even order a background check?
  - Will the type of background checks you run change?
  - Should the timing of when you run the background checks change?





# What Background Checks Should Be Conducted?



## Changes to the type of background checks to be conducted?

- Options for background checks
  - stop running checks altogether (don't recommend)
  - maintain the status quo
    - background checks
  - only criminal history searches (i.e., eliminate employment/education/drug)
  - only order what can be completed quickly
- Ask about criminal history from candidate (or continue if you are asking) (e.g., “Have you been convicted of a crime?”)
  - Post-conditional offer
  - Ban-the-box laws still apply

# Timing of Background Checks

- Option 1: Don't run any checks
  - Problem: Safety/security employees-- negligent hiring
  - Problem: Job related/business necessity
- Option 2: Status quo for many: allow an employee to start only after the background check is complete.
  - Problem: uncertainty as to when courts and other information sources will be available.
  - Problem: Could be weeks/months and might have the same issue with other applicants.
  - Regulated entities.
- Option 3: Onboard before the background check is completed.
  - Problem: uncertainty as to whether the worker poses a risk to the employer and its property, information, and employees (e.g., negligent hiring).
  - Problem: Fair Credit Reporting Act (FCRA) and state laws still apply (more to come).
  - Will you “finalize” checks later (i.e., when courts open)?

## What Hasn't Changed?



### FCRA disclosure and authorizations are still required.

- “A person **may not procure a consumer report**, or cause a consumer report to be procured, for employment purposes with respect to any consumer **unless** –
- (i) a **clear and conspicuous disclosure** has been made in writing to the consumer...in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
- (ii) the consumer has **authorized in writing** (which authorization may be on the [disclosure] the procurement of the report by that person.”

# Disclosure and Authorization FAQs

- Much class action litigation under the FCRA.
- Do not rush the process!
  - What is a “**document that consists solely of the disclosure**”?
  - Can I **combine** the disclosure and authorization?
  - Can I put the disclosure in my **employment application**?
  - Do I need a disclosure and authorization **every time** I run a background check?
  - What else do I need to provide with the disclosure and authorization?
    - State and local notices (e.g., Los Angeles, San Francisco, New York).

## What Hasn't Changed?



- The FCRA's disclosure and adverse action notice requirements are **not** limited to job applicants: **they apply to current employees!**
  - If you run subsequent checks, you may need additional disclosures (i.e., California).
  - What do your offer letters say about contingencies or conditions of passing a background check?
  - What do you need to do in the case of a job-related disqualifying record? (more to come)

# What hasn't changed?

- Pre-adverse action notice
  - “...**before taking adverse action** based in whole or in part on the **report**, the person intending to take such adverse action shall provide to the consumer...
    - (i) a **copy** of the report
    - (ii) a description in writing of the rights of the consumer...”
  - Reasonable **waiting time**
    - FTC has opined that **5 business days** is reasonable.
    - Other state and local jurisdictions may require a longer period (e.g., 7 days, etc.).

## What Hasn't Changed?



- Adverse action notice
  - If a person **takes adverse action based in whole or in part on the background check report**, then the person must provide to the consumer notice of the following:
    - (I) **that adverse action has been taken** based in whole or in part on a consumer report received from a consumer reporting agency;
    - (II) the name, address, and toll-free telephone number of the **consumer reporting agency**;
    - (III) the **consumer reporting agency did not make the decision** to take adverse action and is unable to provide specific reasons; and
    - (IV) the consumer has a **right to a free copy of the report** and **may dispute** accuracy or completeness with the consumer reporting agency.



## What does this mean?

Employer cannot immediately terminate if background check report reveals disqualifying information.

- Still must follow pre-adverse and adverse action notice process.

Still must provide a “reasonable” waiting period (i.e., 5 business days)

- Options:
  - Allow the employee to continue working.
  - Put the employee on administrative leave.
    - Paid or unpaid?
    - Unpaid could be seen as “adverse action.”



# Adverse Action FAQs

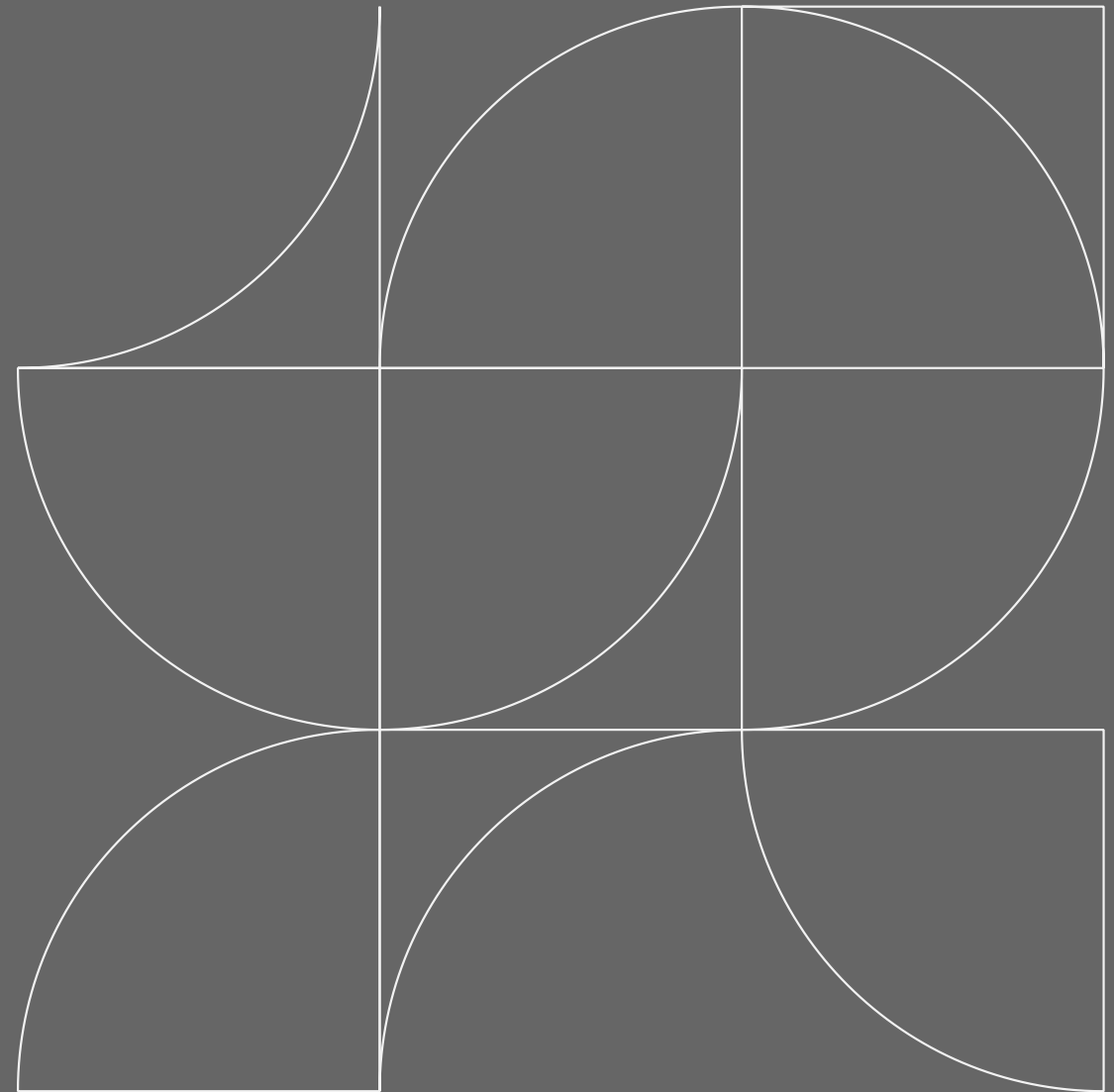


- Did the person self-disclose?
- This crime is a **close call**, and possibly job related.
  - Should I send pre-adverse action notice?
- **What** do I need to send with the pre-adverse action notice?
- Do I need to provide a way for the applicant or employee to **contact our company** in the notice?
- **How long do I need to wait** before I send the adverse action notice?
- Can a **background check company** send **these notices for me**?

## What Hasn't Changed?

- Best practice/requirement to conduct an individualized assessment
  - Nature and gravity of the offense; nature of the job; and time elapsed since the conviction or completion of sentence.
  - Mitigates Title VII risk.
  - Required in some jurisdictions (e.g., California, New York, among others).
  - Consider ban-the-box notice requirements.
    - Los Angeles and New York City assessment forms.
    - Identify the potentially disqualifying criminal history in some pre-adverse or adverse action notices (jurisdictions vary).
    - Waiting periods (e.g., 7 days in San Francisco; 3 days from receipt of pre-adverse action notice in NYC).

# Drug Tests



# What's an employer to do?

- Three main considerations:
  - Should an employer even order a drug test?
    - Applicant reluctance.
  - Will the way in which you order a drug test change?
    - Mobile or oral fluids.
  - Should the timing of when you order the tests change?
    - Once the haze clears?



# State Considerations



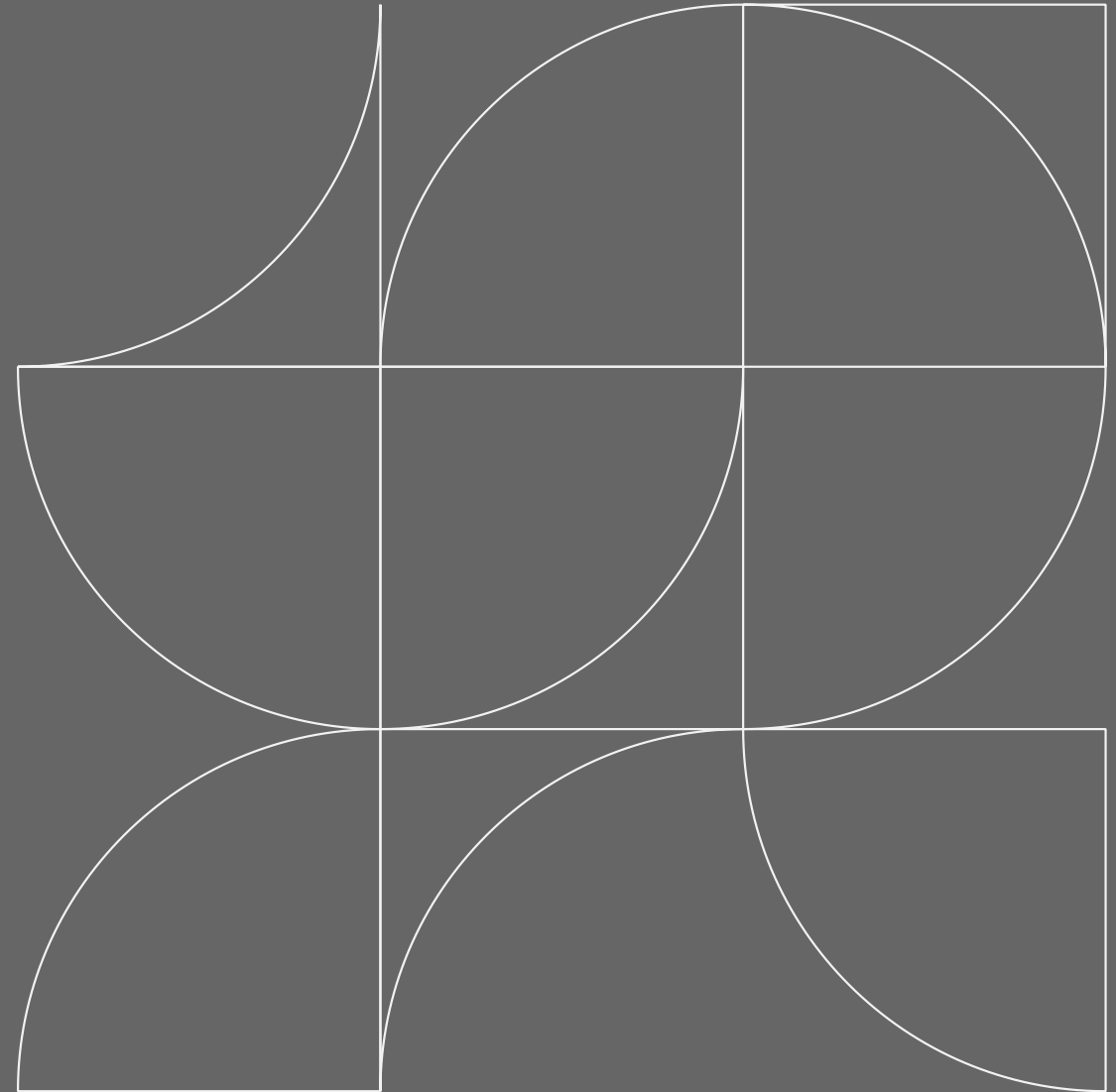
## State laws still apply.

- Consider applicable state laws.
  - Drug tests of current employees allowed only if the position is safety-sensitive.
  - During employment drug tests otherwise limited per statute.
- Be mindful of medical marijuana laws.
  - Litigation on the rise.
  - New employee-friendly laws passed annually.
  - Consider disability discrimination laws.

# Department of Transportation

- Recently issued guidance specific to COVID-19.
  - DOT-regulated employers still must follow Part 40.
  - Make reasonable efforts to locate necessary resources.
    - Mobile collection services (but not POC or instant tests).
  - Document why tests aren't completed.
  - Cannot allow a worker to perform regulated duties without a negative test result.
  - Be sensitive to worker concerns, but also evaluate whether the refusal to test is reasonable.
    - Talk to the clinic or lab.

# Final Thoughts

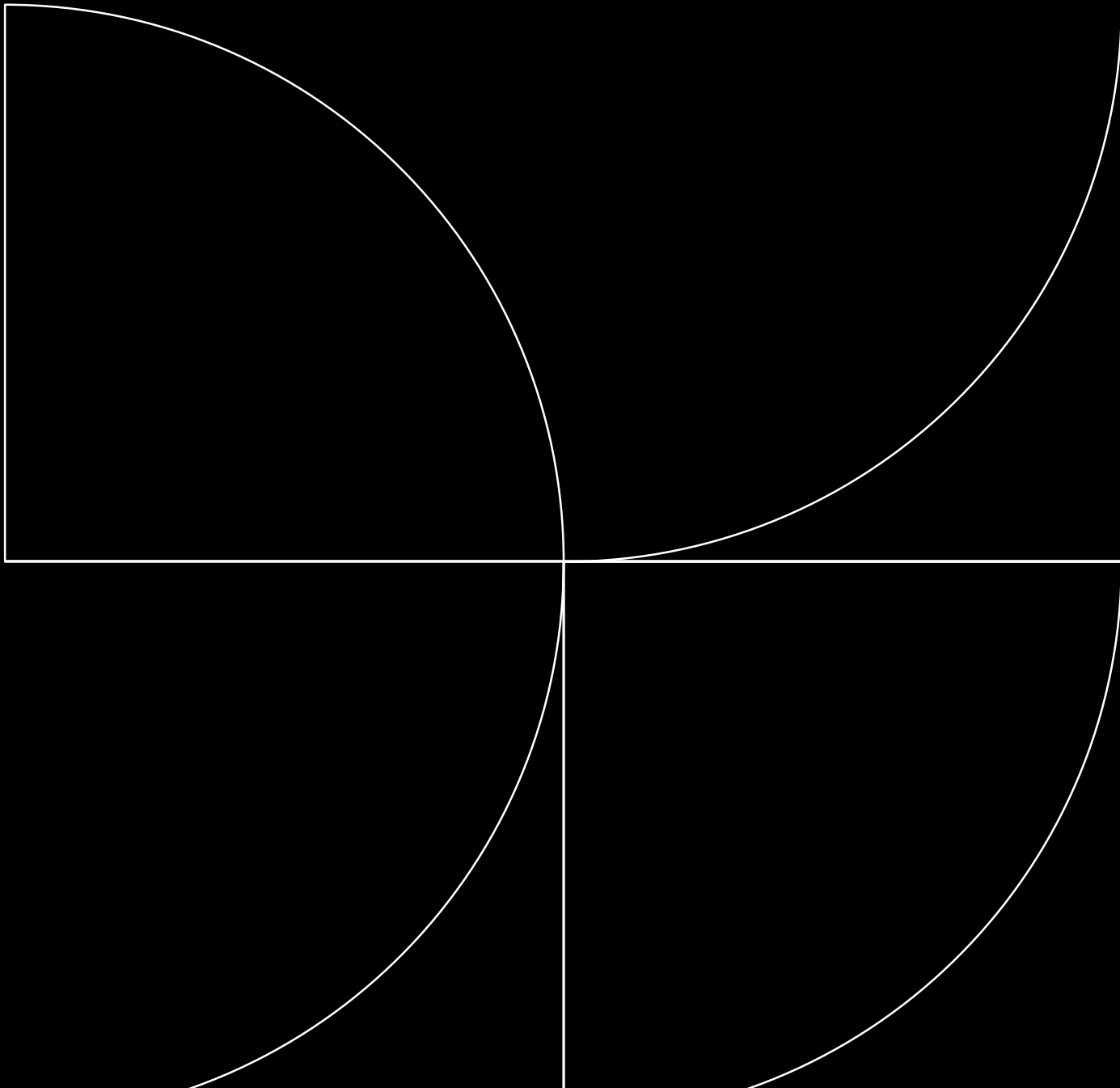


# Can An Employer Mitigate Risk?

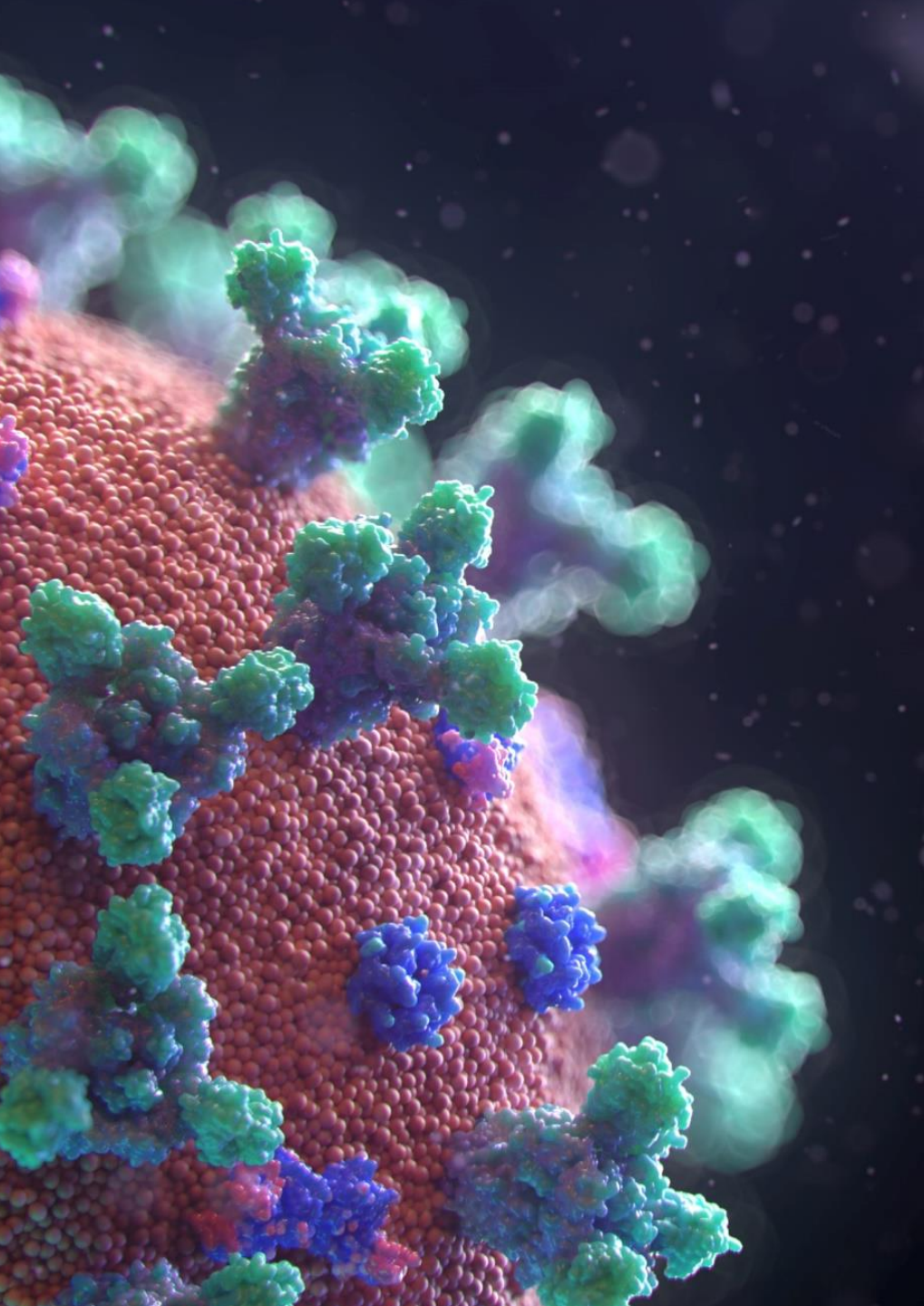


- Ensure that offer letters are clear and unambiguous about the status of a background check.
- Ask applicants to self-disclose their criminal history after a conditional offer but before they are on-boarded.
  - “Have you ever been convicted of a crime?”
  - Notice requirements might still be required in ban-the-box jurisdictions.
- Develop a process to follow up with background check provider to clear any open searches.
  - Tagged reports or searches or ability to sort.
- Consider providing a new disclosure form and obtain additional authorization in California.
- Revise pre-adverse and adverse action letters to cover incumbent employees.
- Provide managers with talking points.
- Follow adverse action:
  - Pay employees during the waiting period to minimize claims.
  - Keep employed during time frame.





**Questions?**



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