



Fair Hiring in Focus

Background Checks, AI, and Emerging Compliance Risks

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Seyfarth Shaw LLP

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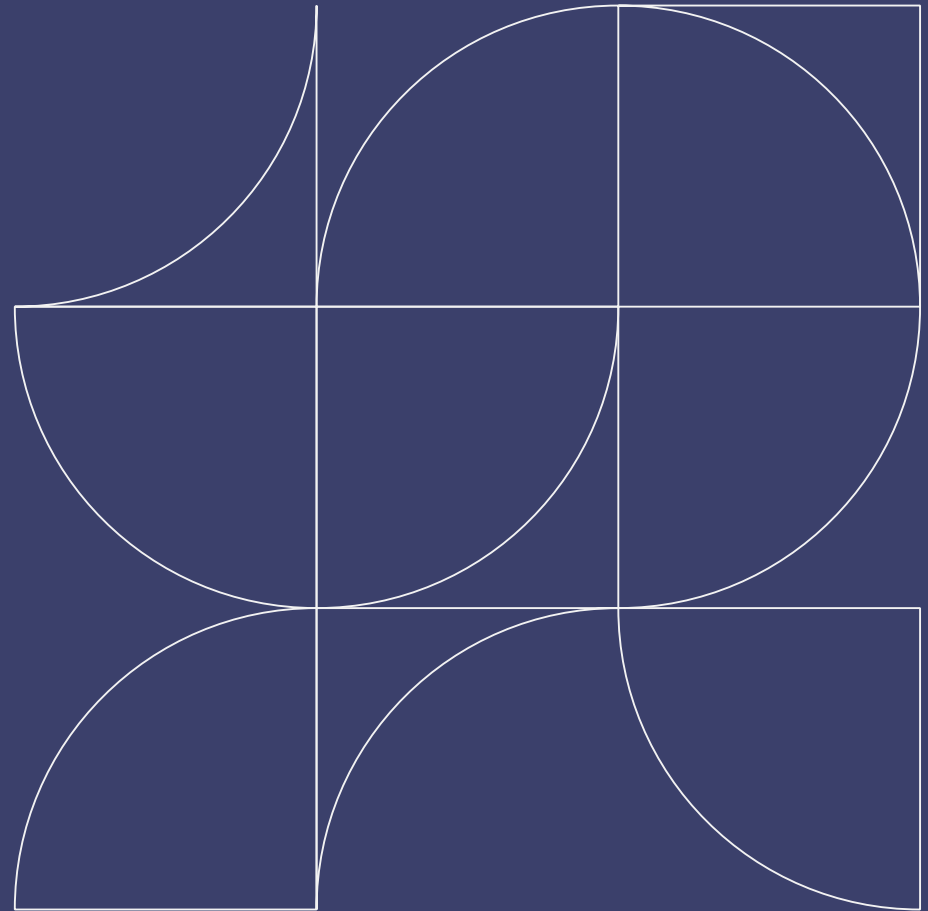
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Agenda

- 1 | FCRA Proposed Amendment
- 2 | AI in Hiring: Emerging Liabilities
- 3 | State and Local Developments
- 4 | Class Action and Enforcement Trends
- 5 | Practical Compliance Strategies

FCRA Proposed Amendment



FCRA Liability Harmonization Act, HR 5775

- Would cap statutory damages in class action lawsuits
 - April 16 Hearing at U.S. House Subcommittee on Financial Institutions of the House Financial Services Committee entitled Promoting Access to Credit for Everyday Americans.
 - Would limit attorneys' fees to 100k or 40% of actual damages for both negligent and willful violations
 - Eliminate punitive damages outright
 - For class actions-\$500k cap or 1% of company/person net worth
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AI and Background Screening



AI Overview and How It May Impact Background Screening

- Fragmented and evolving regulatory landscape
 - No comprehensive federal legislation governing AI in employment (near-term outlook)
 - Continued federal activity focused on voluntary standards and guidance
 - State and local jurisdictions are driving regulation
 - Increased activity in states such as California, Connecticut, Illinois, Colorado, and New York City
 - Growing momentum for state-led AI governance frameworks
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AI Overview and How It May Impact Background Screening

- Expanding legal scrutiny of hiring decisions
- Laws targeting how employers use AI in sourcing, screening, and selection
 - Broad interpretations

Core requirements emerging:

- Notice and transparency
 - Audits and validation
 - Disparate impact and bias analysis
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AI Overview and How It May Impact Background Screening

- Broader liability across the hiring ecosystem
 - Laws increasingly apply to vendors and others in the hiring “chain”
 - Heightened focus on employer responsibility for vendor tools
 - Emerging claims and litigation risks
 - New claims tied to the use of AI in hiring workflows
 - FCRA-based claims against AI vendors on a class-wide basis
 - Downstream exposure for employers relying on those tools
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AI Overview and How It May Impact Background Screening

- Expanding applicant rights and legal activity
 - Opt-out and disclosure rights (e.g., NYC, Colorado, California proposals)
 - Active legislative pipeline in Texas, Illinois, New York, and California
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- Use of public AI tools (data input risks)
 - Risk of litigation alleging data breaches
 - Trade secret information
 - Breach of contract/confidentiality
- Risk of waiving privilege
 - Attorney-client and other protections
- IP and contract/licensing violations
 - Don't know where the output is being pulled from

Old Laws—New Use Cases

Employers are using AI throughout the applicant/employee lifecycle

- Note-taking/recording
 - Privacy and wiretap consent issues
- Training/onboarding content
 - Copyright, trademark, and ownership risks

Old Laws—New Use Cases

AI Use in Recruiting/Hiring and Workforce Decisions

- FCRA exposure and emerging class actions
 - *Kistler v. Eightfold.ai*
- AI vendors alleged to be consumer reporting agencies
 - third party assembling and evaluating data
- Employers as end-users face parallel liability
 - Permissible purpose; disclosure/authorization; adverse action, etc.
- Discrimination risks
 - Algorithmic bias (e.g., video interviews, resume screening tools)

Old Laws—New Use Cases

A close-up photograph of a vintage car's door handle. A red rectangular sign with the words "FOR HIRE" in white, bold, sans-serif capital letters is attached to the handle. The handle is black metal with a brass-colored knob at the top and a circular brass-colored detail at the bottom. The background is dark and out of focus, showing parts of the car's interior and exterior.

FOR HIRE

Fair Chance Update

Philadelphia Amends Its Fair Chance Ordinance: Key Changes

Original Ordinance

- Criminal history inquiry only after conditional offer
- 7-year lookback on convictions (excluding periods of incarceration)
- Individualized assessment required
- Post-decision requirements:
 - Notice of decision
 - Copy of report
 - 10-day period to respond (timing less clear)

Coverage expanded (2021)

- Covers gig workers
 - Allows employers to consider pending charges
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Philadelphia Amends Its Fair Chance Ordinance: Key Changes

2025 Amendments

- Narrowed lookback periods
 - Felonies: 7 years
 - Misdemeanors: 4 years
 - Summary offenses excluded entirely
 - Sealed/expunged records must be disregarded
 - Enhanced notice requirements
 - Rights summary
 - Clarified timing
 - 10-days is now after the pre-adverse
 - Model forms anticipated
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Washington's New Fair Chance Act

- Effective July 1, 2026
 - Closely aligned with California's framework
 - Moves from "otherwise qualified" → criminal history only after conditional offer
 - No arrests/pending charges as a basis for action (limited exception if actively pending in certain circumstances)
 - No automatic exclusions based on criminal history
 - "Legitimate business reason" required for conviction-based decisions
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Washington's New Fair Chance Act

- Enhanced individualized assessment
 - Required
 - Must be documented
 - Pre- and post-adverse action notices required
 - First notice must include:
 - Specific disqualifying record
 - Opportunity to respond (≥ 2 business days; 5 if tied to FCRA)
 - Final notice must include:
 - Detailed reasoning and a copy of your written assessment
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Washington's New Fair Chance Act

New Disclosure Requirement (Unique)

- When employer advises the position is contingent on a criminal history background check or the applicant voluntarily discloses criminal history:
 - Must immediately provide written summary of rights + AG guidance
 - Current AG document reflects old law

Baseline Requirements (CA Fair Chance Act)

- Post-offer criminal history inquiry only
- “Initial” individualized assessment
- Preliminary notice (identify record + provide certain rights + waiting period)
 - Waiting periods are complicated
- Consider all responsive information
- Final notice with required details

California Civil Rights Department Investigations on the Rise



The CRD's Focus

- Very detailed information requests
 - Job postings (screening for unlawful language)
 - Applications
 - Offer letters and job descriptions
 - Notices and process compliance
- Preliminary and final determination letters heavily scrutinized
 - Even minor technical deficiencies → settlement + required remediation

California Civil Rights Department Investigations on the Rise



The CRD's Focus (continued)

- **Individualized assessment (in practice)**
 - Not expressly required to document—but CRD expects proof
 - Lack of documentation creates significant risk in investigations
- **Lookback enforcement (key risk area)**
 - Strong resistance to considering records older than 7 years
 - CRD bulletins state older records may not be considered
 - If older records are considered:
 - CRD expects a clear, well-documented, job-related justification

California Civil Rights Department Investigations on the Rise



- **Risk for Employers**

- Exposure not limited to individual complaints—
focus on company-wide practices
- Significant document production and data
burdens
- Potential for class or systemic enforcement
actions

- **Why It Matters**

- California is leading a broader shift toward
proactive regulator enforcement
- Employers should ensure AI tools, screening
processes, and policies are defensible and
documented



California Civil Rights Department Investigations on the Rise

**California
Proposal Signals
Further
Tightening of
Fair Chance
Rules (AB 2095)**



Proposed Expansion of Fair Chance Requirements

- Extends Fair Chance Act framework to align with LA unincorporated county rules
 - May require written individualized assessments to be shared with applicants
 - Prohibits applicants from paying for background checks
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California Proposal Signals Further Tightening of Fair Chance Rules (AB 2095)



- Enhanced offer letter requirements
- Additional disclosures, including job duties requiring screening
- Limits on applicant disclosures
- Would restrict voluntary self-disclosure of criminal history

Why It Matters

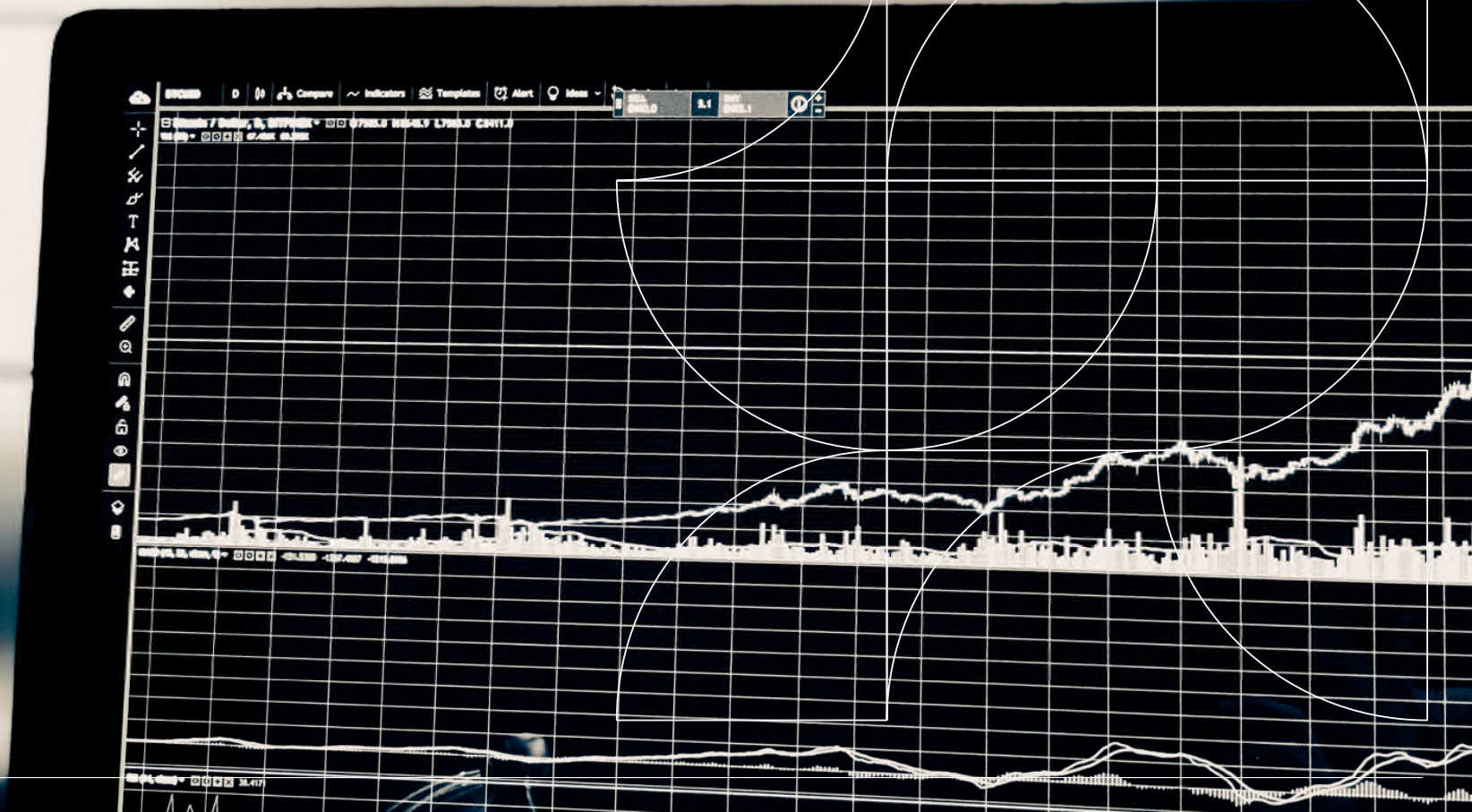
- Signals continued movement toward more prescriptive and applicant-protective rules
 - Would further increase process, documentation, and notice obligations
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California Proposal to Make "Criminal History" a Protected Class (AB 2064)



- Proposal to add criminal history as a protected category-similar to race, disability gender, etc.
- Still in committee
- Discrimination exposure if cannot justify job-relatedness and consistent with business necessity—not just FCA claims
- Overlay of FCA-still no inquiry before conditional offer, IA; pre-adverse and adverse
- Must show direct adverse relationship to job duties
 - No longer just procedural but must defend decisions on the merits

Credit Checks



Current Landscape

- California
 - Colorado
 - Connecticut
 - District of Columbia
 - Hawaii
 - Illinois
 - Maryland
 - Nevada
 - New York City
 - Oregon
 - Philadelphia (PA)
 - Puerto Rico
 - Vermont
 - Washington
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New York

New York State Ban on Employment Credit Checks (Effective April 18, 2026)

- Employers in NYC—already likely complying
 - Employers may not request or use consumer credit history for hiring, compensation, or other employment decisions
 - Applies to both applicants and current employees
 - Background screening agencies prohibited from providing and employers prohibited from using credit history (absent exemption)
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New York

What Counts as “Consumer Credit History”

- Credit reports and scores
- Payment history, accounts, collections, bankruptcies, liens, etc.

Limited, Narrow Exemptions (only where role or law justifies use)

- Roles requiring legal/regulatory credit checks
 - Law enforcement, security clearance, or high public trust roles
 - Positions with fiduciary authority or control over significant funds (\$10K+)
 - Access to trade secrets, national security info, or cybersecurity systems
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Recommendations for Credit Checks Generally

- Employers must eliminate credit checks except in narrow cases
 - Update policies, screening protocols, and vendor instructions
 - New York employers should ensure alignment with both state and NYC requirements (whichever is stricter)
 - Consider whether credit is important to you
 - Hard to evaluate
 - No score
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Questions?



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