

## **Compliance Alert: Individualized Assessments**

We recently announced that we updated our automated adverse action process in our system to include the individualized assessments, special disclosures and candidate feedback loops that are required in numerous Ban-the-Box jurisdictions and strongly encouraged by the EEOC.

When you initiate Pre-Adverse Action, a popup window will appear, prompting you to type the specific reason for initiating Pre-Adverse Action and including a brief explanation for why this reason would potentially disqualify the applicant.

If your applicant lives in New York City or Los Angeles, the popup will be an Individualized Assessment form that is required in those cities.

When entering the information in the popup window, you must provide a certain amount of detail. The information you enter starts the “individualized assessment” process that is required when implementing a compliant Adverse Action protocol.

For example, if an applicant has a criminal record on a county criminal search, do not just type into the space provided “county criminal record” or “felony record, XYZ County.”

A better, more compliant approach would be to describe the specific crime listed under that category with a brief explanation of why the crime would potentially disqualify the applicant.

But keep in mind that the Pre-Adverse notice gives the applicant an opportunity to dispute the accuracy of the information and / or provide an explanation with supporting facts and documents related to the crime, their rehabilitation efforts, work history, etc.

So a Pre-Adverse notice is not the final word.

If the candidate provides an explanation in response to the Pre-Adverse notice, their explanation must be considered as part of the individualized assessment.

You might ultimately conclude, after performing the individualized assessment, that the offense still disqualifies the applicant. If so, you would

send a Final Adverse notice. Ten business days after you initiate Pre-Adverse, we will send you an email with a link that would trigger the Final Adverse notice being sent to the candidate. However, if the candidate provides an explanation during the initial 10 business days, then the clock on the 10 business days will start over before we send you this email.

When performing an individualized assessment, please keep in mind that the Equal Employment Opportunity Commission (EEOC), as part of their guidance on the use of arrest and conviction records in employment decisions has provided employers advice on how to approach these situations.

In their guidance, the EEOC references the 'Green Factors', which stem from a court case in which a railroad used a blanket exclusion policy that prohibited employment for anyone with a criminal history that included anything worse than a minor traffic offense.

For candidates with a criminal history, the employer must consider several factors.

The 'Green Factors' include:

- The nature and gravity of the offense or conduct
- The time that has passed since the offense, conduct and / or completion of the sentence
- The nature of the job held or sought

The **nature and gravity of the offense** includes factors like the seriousness of the offense and the pattern and persistency of convictions. The **time that has passed since the offense and / or completion of the sentence** makes the distinction between a single conviction from many years ago to a recent conviction.

Employers are asked to look at the pattern in context. The **nature of the job held or sought** factor asks if a job creates an opportunity for a specific kind of crime.

In addition to the 'Green Factors', an individualized assessment can consider many other factors:

- Detailed facts surrounding crime
- Applicant's age at the time of the offense
- Number of offenses committed
- Evidence of rehabilitation
- Work history

It's essential that employers have a written policy in place that set guidelines on how to proceed with candidates that have a criminal history.

Considering 'Green Factors' as part of an individualized assessment is one part of the process.

Hiring procedures and forms should be reviewed on a regular basis to help ensure legal compliance and consulting with a legal professional is recommended.

Please email any questions to [info@expressbackgroundchecks.com](mailto:info@expressbackgroundchecks.com).