

## Ready, Set, Hire.

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Every day, while we typically hear of companies instituting hiring freezes, furloughs, and layoffs, certain *essential* businesses – cleaning companies, healthcare facilities, some retailers like supermarkets, and delivery services – appear to be hiring at a record pace to meet the needs of the COVID-19 pandemic. Their hiring methods, however, are different for several reasons. First, given social distancing and state and local orders to stay at home, many companies are choosing to interview by phone or video. Second, quickly onboarding individuals can be a challenge, particularly when background checks may take longer than usual due *in part* to court closures and delayed verifications, *e.g.*, an employer may not be available for a reference.

This may get even more complicated for companies, where permissible, traditionally conducted credit checks on certain positions. On March 23, 2020, California Congressman Brad Sherman (D-Sherman Oaks) presented a bill to amend the Fair Credit Report Act (FCRA) in response to the COVID-19 crisis, entitled “The Disaster Protection for Workers’ Credit Act.” According to Sherman, “**The Disaster Protection for Workers’ Credit Act** will put in place an immediate moratorium on all negative credit reporting, which will stay in place for four months. Individuals who face continued financial hardship as a result of the outbreak will also be covered by additional longer-lasting protections ... In addition, this bill will specifically prevent any negative information associated with medical debt incurred for treatment of COVID-19 from impacting credit reports and credit scores. All these protections will go into effect for the current crisis as well as other future major disasters.” See <https://sherman.house.gov/media-center/press-releases/sherman-introduces-the-disaster-protection-for-workers-credit-act>. A bill under the same name was introduced before the U.S. Senate on March 17, 2020, by Senators Sherrod Brown (D-Ohio) and Brian Schatz (D-Hawaii). As for the purpose of the bill, Senator Schatz says, “As some families struggle with job losses or reduced incomes, they may fall behind in paying their bills. These late payments could hurt their ... applying for a job ... long after the crisis is over.”

Neither of these proposed bills have been made public yet, so it is difficult to say what impact these amendments – if they even pass – will have on the hiring process. We will provide updates when more information becomes available, but in the meantime, employers would be well advised to review application and hiring protocols. Here are some key points to keep in mind:

- Be consistent. The same rules should apply to everyone, so that what you do for one, do for the rest of the individuals in the same job group.
- Be careful in your job advertisements and review for problematic language. For example, it is never a good idea to state in an ad, “You cannot have any misdemeanor or felony convictions” (unless there is a government law or regulation that applies to a particular posted job).
- Begin with ensuring your organization has an up-to-date *completed* (lawful) employment application for completion by the candidate. This is an important part of your screening process.
- If your organization is prepared to offer an individual employment, make sure the offer letter is clear about employment being contingent on the successful completion of the background check, which may now be completed *after* employment begins. If the individual is a union employee or operates under an employment agreement, the process should be reviewed consistent with any applicable collective bargaining agreement or contract.
- If you are using a third-party background check agency to assist in conducting background checks, you need to carefully review those forms. Don’t assume that because you are using a “professional” background check company, the forms are compliant.

On a related note, on March 21, 2020, the EEOC updated its [Pandemic Preparedness in the Workplace and the Americans with Disabilities Act Guidance](#), which addresses post-conditional medical exams of candidates. Significantly, it provided:

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- An employer may screen applicants for COVID-19 *after* making a conditional offer, as long as it does so for all candidates in the same job.
- Medical exams, such as taking a temperature, is permitted after an employee receives a conditional offer of employment (though not all individuals with COVID-19 will have a fever).
- An employer may withdraw a job offer if the applicant was to in a role that was supposed to start immediately, but the applicant has COVID-19 or symptoms of it.
- Employers may delay the start date of individuals with COVID-19 or symptoms associated therewith, but the EEOC noted that employers should follow updated guidance by the CDC and public health authorities as the pandemic evolves, as well as special guidance for particular workplaces (*i.e.*, healthcare).

FCRA is a technical compliance statute, a true trap for the unwary, and the Amended EEOC Pandemic Preparedness Guidance is, of course, a guidance document only. At the very least, an employer must review applicable federal, state and local guidelines before making any adverse decision. Individual assessments are critical, and when in doubt, consult employment counsel.

Jackson Lewis has a dedicated team tracking and responding to the developing issues facing employers in this difficult time. If you need guidance in handling the complicated issues pertaining to COVID-19 and related business closures, please contact a Jackson Lewis attorney to discuss.

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