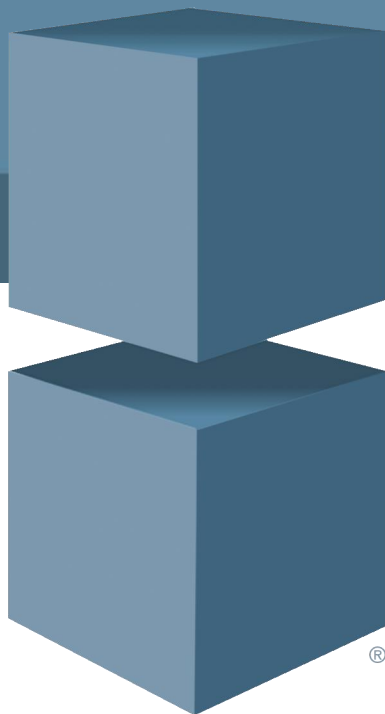




“Charting the Course for Success”

Volusia/Flagler SHRM

May 20, 2015



# Hot HR Legal Topics

## Criminal Background Checks

Presented by Greg Snell

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# Criminal Background Checks

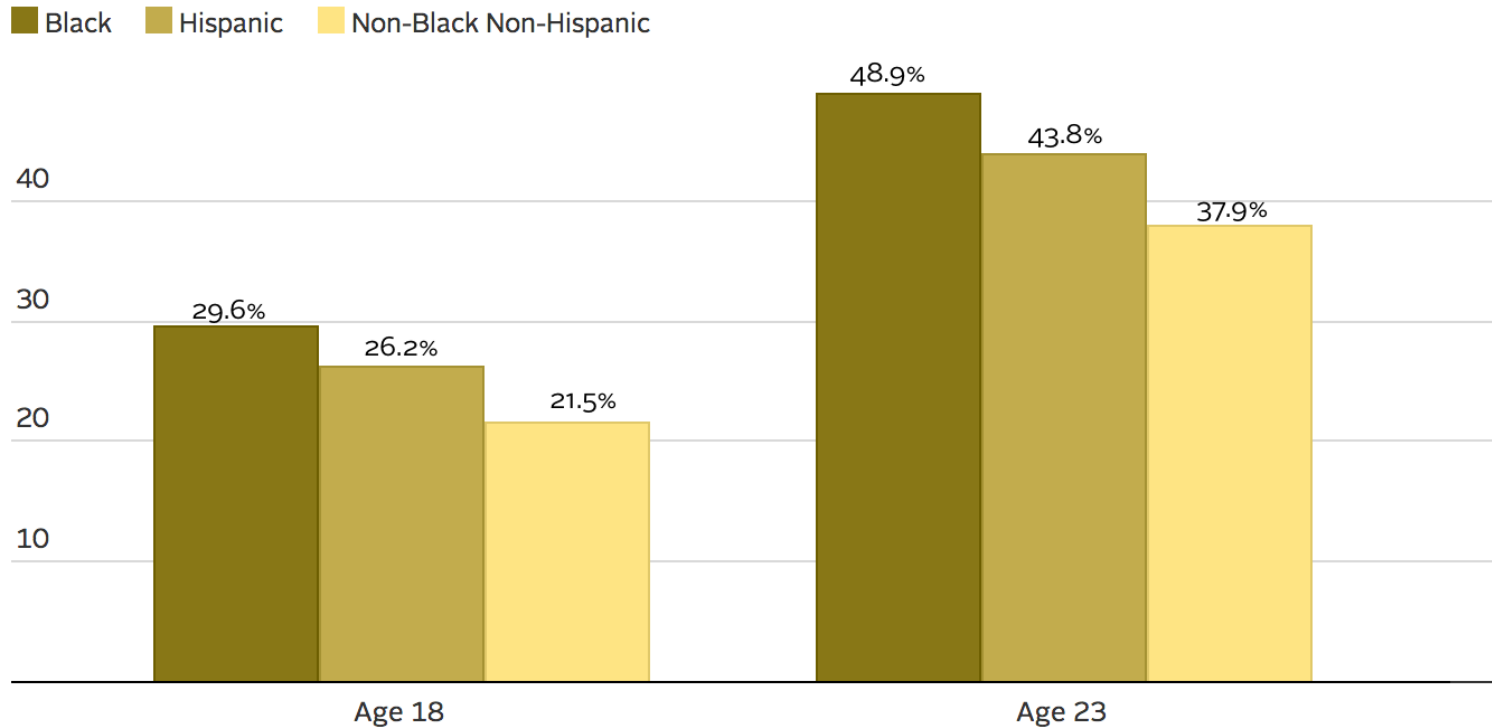
**CRIMINAL BACKGROUND CHECK**





# Arrests Men by Race and Age

## Percentage of men who have been arrested, by age and race



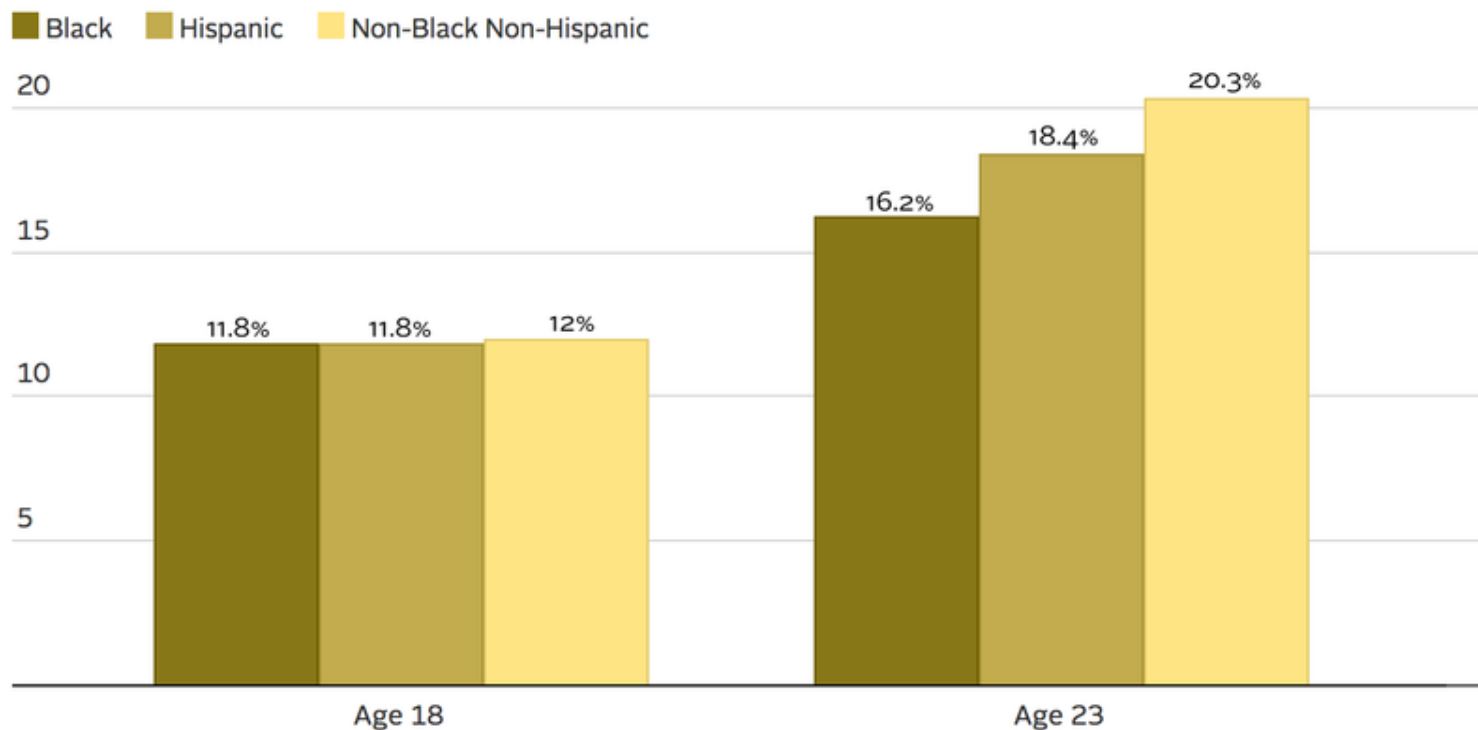
Source: Brame et al, 2014; NLSY97.





# Arrests Women by Race and Age

## Percentage of women who have been arrested, by age and race

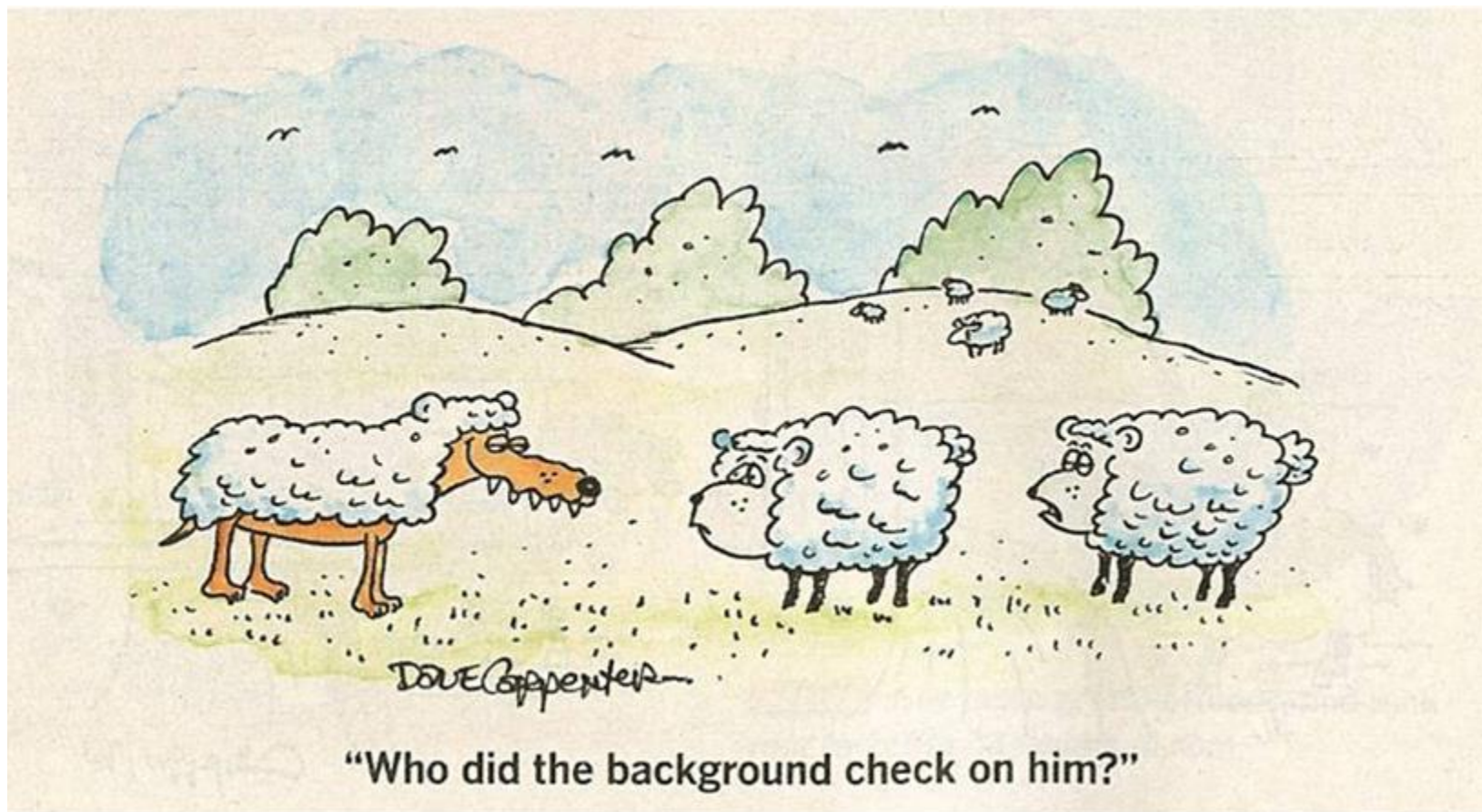


Source: Brame et al, 2014; NLSY97.





# Trying to Keep the Wolves Away





# Equal Employment Opportunity Commission Position

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- Seeking to eliminate hiring barriers.
- Policies and practices which exclude applicants based on criminal history which have a disparate impact on protected applicants will be closely scrutinized.
- Same standards apply to employees as applicants.



# EEOC Recommendations

- The EEOC recommends that employers relying on criminal history consider:
  1. The nature and gravity of the offense or conduct;
  2. The time that has passed since the offense, conduct and/or completion of the sentence; and
  3. The nature of the job held or sought.



# Cases Brought by EEOC

- Freeman – Event services company sued in 2009 for engaging in a pattern and practice of unlawful discrimination against:
  1. African American applicants by using poor credit history as a hiring criterion; and
  2. African American, Hispanic, and white male applicants by using criminal history as a hiring criterion.





# Cases Brought by EEOC

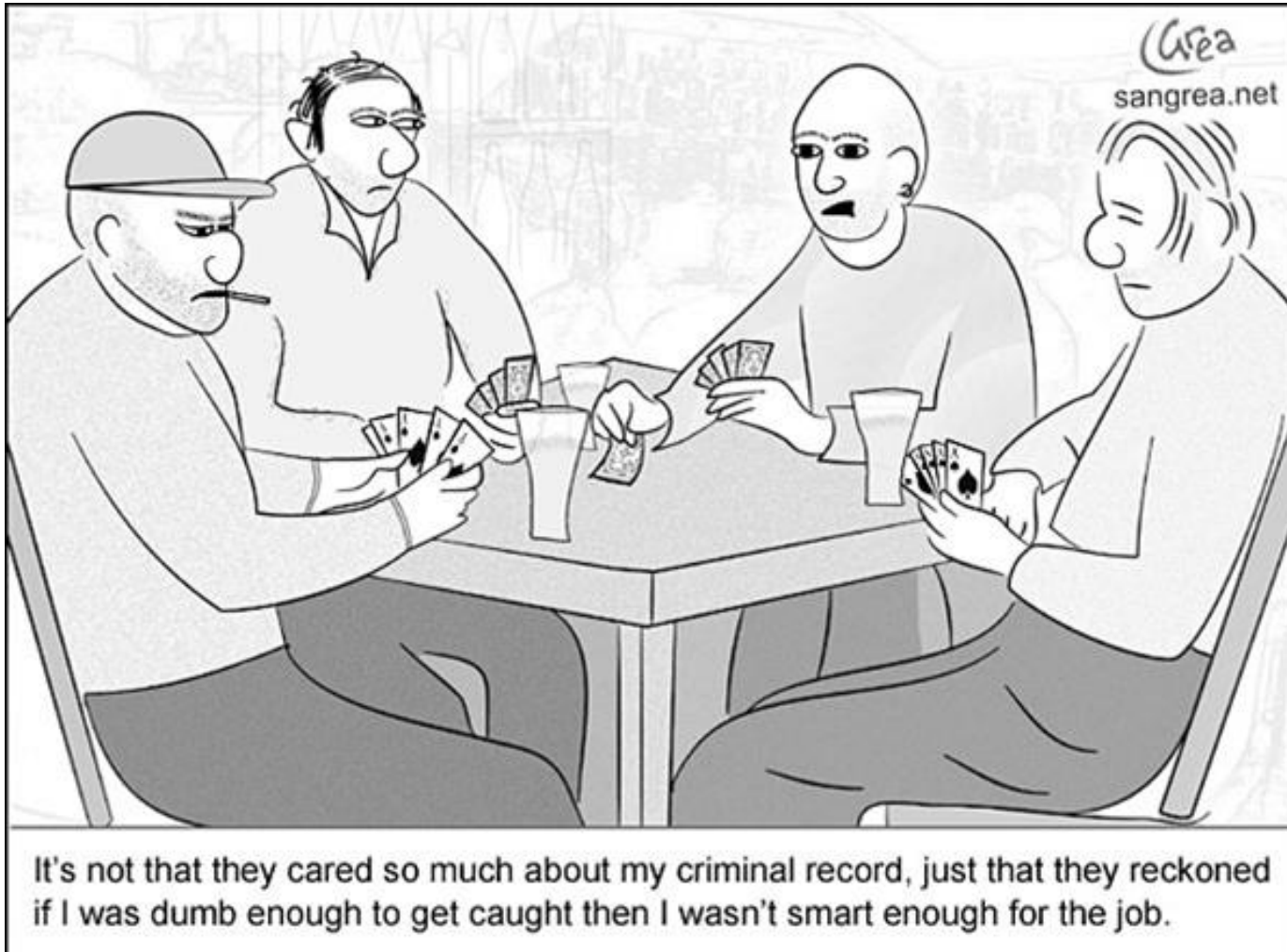
- BMW – Automobile manufacturer sued in 2013 for disproportionately screening out African American applicants with criminal convictions. Employees worked for prior BMW contractor at BMW facility and were screened when new contractor hired. EEOC contends should have been individualized assessment of employees and consideration given to their prior work history at facility.



# Cases Brought by EEOC

- Dollar General – Retailer sued same day in 2013 as BMW for disproportionately impacting African American applicants and conditional hires based on criminal history. Conditional offer was withdrawn due to six year old felony conviction for possession of controlled substance. Second employee terminated based on erroneous report. As in BMW case EEOC contends assessments should have been individualized.

# If it was only this easy!





# Status of EEOC Cases

- Freeman case was lost by EEOC at trial and appellate levels because opinions of expert hired by EEOC to prove disparate impact through use of statistics were excluded. Appellate decision rendered in February. Courts were very critical of EEOC. Never got to merits of EEOC claims. Attorney fee claim by Freeman against EEOC for 1.7M pending.



# Status of EEOC Cases

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- BMW case still pending. Has been intense battle between BMW and EEOC over BMW obtaining information on hiring practices of EEOC. BMW wishes to demonstrate that EEOC has same faults in practices for which they attempt to hold others accountable. BMW has prevailed in obtaining information on the practices but it has not been decided whether the information will be admitted at any trial as evidence.



# Status of EEOC Cases

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- Dollar General case still pending.



# Fair Credit Reporting Act Requirements

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- Employers using background checks, including criminal background checks, performed by a credit reporting agency, during the hiring process, or with employees, must give advance notice that they intend to use a “consumer report” and obtain written authorization on a stand-alone document.
- If the employer plans on taking adverse action based on the report the employer must give written notice, the report, information on the credit reporting agency, and a summary of rights.
- After a reasonable time the employer must inform the applicant or employee orally, in writing or electronically, that the adverse action was based on the report, that he or she can dispute its accuracy or completeness, that the credit reporting agency did not make the decision and cannot explain it; and they are entitled to another free report within 60 days.



# FCRA Cases

- Class action suits against employers alleging a violation of the FCRA more than tripled from 2013 to 2014.
- Approximately half of 2014 class actions filed in California *but* Florida, Georgia and Missouri also saw more than one.
- Some settlements in 2014 ranged between \$2 million and \$7 million.






# FCRA Cases


- FCRA background check cases almost always allege:
  1. Applicant authorization was not obtained on a stand-alone document but, instead, was combined with other extraneous material, e.g., a waiver.
  2. The applicant or employee did not have a reasonable time to dispute the report from when he or she received the **contemplated** adverse action notice to receipt of the adverse action notice.

# Can she do that?


## I Was Framed



Your background shows you are using a Fake ID and have a Felony Fraud Case.



I'm Withdrawing my Authorization to do my background check NOW!"



OK... Which ID are you using for that?

Real Stories Behind the Scenes at Cluso

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# Ban the Box

- “Ban the Box” is a policy not to have the question of whether an applicant has been convicted of a felony on the employment application. The EEOC endorses this policy. The idea is to focus on qualifications initially and not consider criminal history until later in the process.



# Ban the Box Acceptance\*

- 17 states have adopted “ban the box” by legislation or executive order. 11 of these states have done so by executive order so it only applies to government agencies and not private employers.
- Over 100 cities and counties have banned the box.
- Wal-Mart Stores, Inc., Home Depot, Inc. and Bed Bath & Beyond, Inc. have banned the box.
- 200 civil rights and social justice groups sent a letter to President Obama on March 25 urging an executive order to ban the box for federal employers.

\*All information on this slide per The National Employment Law Project.



# Advice

- This is an area of law in transition so stay on top of any pertinent developments and be sure all with a need to know in your organization are also informed and prepared to perform within the law.
- Consider how essential it is to obtain criminal history, particularly felony convictions, at the initial application stage. If it is not essential you may wish to voluntarily “ban the box”. There are a variety of potential benefits to this including reduction in the size of any prospective class which might bring suit.
- If possible individualize assessment of any criminal history prior to making an adverse decision taking into account the factors which the EEOC recommends be taken into account. Also, if a criminal history is going to be disqualifying identify soundly how that is “job related and consistent with business necessity”. All of this should be well documented so that the position can be defended.



# Advice

- Be sure the background check authorization form is stand-alone i.e. in compliance with the FCRA. If post-hire background checks are to be done be sure that is mentioned in the authorization. If a criminal history is not automatically disqualifying then this should also be made clear. If the background check is not going to be done at the application stage, or until a decision is made on qualifications aside from whatever bearing a criminal history may have, then make that clear as well.
- Similarly, comply with the FCRA requirements on the contemplated adverse notice and the adverse notice. Five days between notices to allow an opportunity for explanation is a reasonable amount of time.



# Advice

- Per the FCRA if the adverse decision is based on something other than the report then the FCRA does not apply. Therefore, be sure to document the non-background related basis.
- The statute of limitations under the FCRA is two years from the discovery of the violation, or five years from the violation, so records should be retained for five years.

# A day in the life in HR



Poor finish to a long-winded explanation.





# Questions

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