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## How to Protect Tenants of **FORECLOSED** Homes

Federal Rights—Any Remedies?

Human Rights Frameworks, Strategies, and Tools

Human Rights Principles in Practice

Human Rights Driving Winning Campaigns

Social Work in Legal Aid Practice

Consumer Law and Criminal Record Barriers

Litigation to Challenge Systemic Problems

Advocacy Notes



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## Using Consumer Law to Combat Criminal Record Barriers to Employment and Housing Opportunity

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The use of criminal background checks has become omnipresent in our society and has increased the barriers that persons with criminal records face in obtaining two of the most basic necessities of life: employment and housing.<sup>1</sup> According to a 2004 survey by the Society for Human Resource Management, approximately 80 percent of employers conduct criminal background checks for all potential applicants.<sup>2</sup> The widespread use of criminal background checks has arisen as a direct result of computerization of federal and state criminal history databases, which offer a treasure trove of marketable information for the background-checking industry.

Although criminal background checks are often marketed as a public safety service, generating such reports has become a big business. Human resource behemoths such as First Advantage and HireRight have reportedly generated as much as \$4 billion in revenue.<sup>3</sup> In addition to the large national corporations, there are countless smaller local and regional companies supplying criminal record information to local employers and property managers.

The widespread and expedient dissemination of criminal record histories by the consumer reporting industry limits employment and housing opportunities for the tens of millions of people who have criminal records. We first summarize the consequences of the pervasive use of electronic data banks by consumer reporting agencies. Then, with examples from actual client stories, we focus on ways the Fair Credit Reporting Act may provide legal services advocates with a remedy to prevent the improper use of criminal records to deny individuals basic needs such as housing and employment. And, using New York law as an example, we demonstrate the interplay between federal and state laws to maximize remedies for clients.

<sup>1</sup>Sharon Dietrich, *Expanded Uses of Criminal Records and Its Impact on Reentry (Community Legal Services)*, REENTRY.NET/ NY (March 17, 2006), <http://bit.ly/hjVYve>.

<sup>2</sup>M.E. BURKE, 2004 REFERENCE AND BACKGROUND CHECKING SURVEY REPORT: A STUDY BY THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT (2006), cited in Alfred Blumstein & Kimori Nakamura, "Redemption" in an Era of Widespread Criminal Background Checks, NATIONAL INSTITUTE OF JUSTICE (June 1, 2010), <http://bit.ly/dVsT1r>.

<sup>3</sup>Chad Terhune, *The Trouble with Background Checks*, BLOOMBERG BUSINESSWEEK (May 29, 2008, 5:00 p.m. EST), <http://bit.ly/fhhQ48>.

## I. The Inequities of Criminal Background Checks

The use of criminal background checks disproportionately affects people of color. In 2008 the number of people incarcerated in the United States hit a historic high: one out of every one hundred American adults is behind bars. When race is factored in, the numbers take on an insidious slant.<sup>4</sup> While African Americans make up 12 percent of the general U.S. population, they make up 38 percent of the prison population. Statistics show that African Americans are about 6 times more likely to be imprisoned than Caucasians, and Latinos are 2.3 times more likely to be incarcerated than Caucasians.<sup>5</sup> Thus the racial effect of denying persons with criminal records housing and employment based solely on the existence of a criminal history becomes immediately apparent. The Equal Employment Opportunity Commission states that such denials have a disparate impact on African Americans and Latinos.<sup>6</sup>

The widespread use of criminal background checks also has a negative effect on rehabilitation. Routine use of criminal record checks affects the two major contributing factors for recidivism: lack of stable employment and lack of housing. Research shows that rampant discrimination against persons with criminal records is compounded by the increasing use of easily accessible criminal history records.<sup>7</sup> Research has consistently

demonstrated that lack of employment is a key factor in predicting recidivism.<sup>8</sup>

Criminal records are unreliable. Background checks do not necessarily give users the information they think they do. Users check criminal histories to evaluate the risk a person poses to employees, tenants, customers, vulnerable populations, and property. Employers and landlords also fear potential negligence claims based upon the rationale that past criminal records are predictive of future behavior and therefore give notice of potential risk.

Research demonstrates that a predictive effect is at its highest mark six months postarrest. After that point, the predictive effect subsides, and after seven to eight years the predictive effect of recidivism is the same as that of a person the same age who has never been arrested.<sup>9</sup> That the predictive value of criminal record information diminishes with time challenges the wisdom of making this information widely accessible, especially with research showing that recidivism increases when persons with criminal records are unable to obtain employment and housing.<sup>10</sup> While fear of negligent-hiring lawsuits is a reason that is often cited by employers for their reluctance to hire persons with criminal records, upon closer examination this threat appears to be more myth than reality. According to a National Hire Network study of negligent-hiring claims, only 10 percent of claims filed in 2003 involved the

<sup>4</sup>Adam Liptak, *1 in 100 U.S. Adults Behind Bars, New Study Says*, *NEW YORK TIMES* (Feb. 28, 2008), <http://nyti.ms/euyCuM>.

<sup>5</sup>*Id.*

<sup>6</sup>See *Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (1982)*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Sept. 7, 1990), <http://bit.ly/dIALRC>; *Conviction Records: EEOC Policy Statement on the Issue of Conviction Records Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. (1982)*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Feb. 4, 1987), <http://bit.ly/f0gLce>; see also *Employment Tests and Selection Procedures*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (Sept. 23, 2010), <http://bit.ly/eVrwnV>.

<sup>7</sup>Keith Finlay, *Effect of Employer Access to Criminal History Data on the Labor Market Outcomes of Ex-Offenders and Non-Offenders* (National Bureau of Economic Research, Working Paper No. 13935, revised Sept. 8, 2008), <http://bit.ly/gQ0Uio>.

<sup>8</sup>Christopher Uggen & Jeremy Staff, *Work as a Turning Point for Criminal Offenders*, 5 *CORRECTIONS MANAGEMENT QUARTERLY* 1 (2001); cf. Christopher Uggen, *Work as a Turning Point in the Life Course of Criminals: A Duration Model of Age, Employment, and Recidivism*, 65 *AMERICAN SOCIOLOGICAL REVIEW* 529, 541 (2000) (employment significantly reduced recidivism in offenders over age 26); Vera Kachnowski, *Returning Home Illinois Policy Brief: Employment and Prisoner Reentry*, *URBAN INSTITUTE* (Aug. 30, 2005), <http://bit.ly/fHlpUb>.

<sup>9</sup>Blumstein & Nakamura, *supra* note 2, at 10.

<sup>10</sup>Finlay, *supra* note 7.

hiring of persons with criminal histories and only 50 percent of those plaintiffs received favorable decisions.<sup>11</sup>

Criminal background checks often produce records that contain incorrect information or sealed information. The U.S. attorney general reported in 2006 that only half of the records in the Interstate Identification Index system, which contains the records from all states and territories, have a final disposition.<sup>12</sup> This means that countless individuals who were ultimately acquitted or obtained dismissals of criminal charges, and whose cases were sealed, could be reported as having pending criminal cases into perpetuity. The state repository systems are only nominally better. A 2008 study of multiple state criminal record repositories reported that 40 percent of records still did not have a final disposition five years after the date of arrest.<sup>13</sup>

With state-maintained databases, a positive identification system is utilized to match a person to a record through fingerprints, thereby significantly reducing the chances of incorrectly connecting someone to another person's criminal record. But, because the databases used by private criminal history background check companies are typically based upon nonpositive identification matches such as names and dates of birth, the risk of someone being inaccurately identified is much greater.

Legal tools are available to challenge the use of inaccurate or unauthorized information obtained through criminal background checks. The use and dissemination of criminal history records is regulated by the federal Fair Credit Reporting Act and state Fair Credit Reporting Acts as discussed below.<sup>14</sup> Some states, such as New York, have specific

laws regulating the use of criminal record information in relation to employment determinations.<sup>15</sup>

## II. Applying the Fair Credit Reporting Act to Criminal Background Screening

Although the Fair Credit Reporting Act is generally thought to apply to traditional credit history reports, the provisions of the Act also apply to the use and dissemination of criminal history records. Originally enacted in 1970, the Act aims to protect consumers' privacy and ensure that information is as accurate as possible. The Act's regulatory structure attempts to achieve those goals by imposing duties and requirements on the entities that gather and report information (the consumer reporting agencies), those that give information to consumer reporting agencies (the furnishers), and those who obtain these reports and use them (the users).

Fair Credit Reporting Act cases involving criminal background checks typically present differently from traditional credit cases. Although third-party criminal background checks are well established as being regulated by the Act, many users and even some consumer reporting agencies fail to recognize the connection between criminal background reports and the Act. Because these groups fail to recognize their responsibilities under the Act, they fail to meet even the most basic notice requirements. Thus people never know that their rights were violated and the source of the criminal background report is unknown. Because of this dynamic, our analysis under the Act begins with the users. We follow the typical progression of the cases we see, considering, first, the users of the reports; second, the

<sup>11</sup>April L. Frazier, *Negligent Hiring: A Myth or a Reality for Employers?*, NATIONAL HIRE NETWORK (n.d.), <http://bit.ly/gw610U>.

<sup>12</sup>OFFICE OF THE ATTORNEY GENERAL, U.S. DEPARTMENT OF JUSTICE, *THE ATTORNEY GENERAL'S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS* (June 2006), <http://bit.ly/f7Y9TU>.

<sup>13</sup>BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, *SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2008: A CRIMINAL JUSTICE INFORMATION POLICY REPORT* (Oct. 2009), <http://bit.ly/gdQ5eE>.

<sup>14</sup>See Fair Credit Reporting Act, 15 U.S.C. §§ 1681 *et seq.* (2010) (effective May 29, 1968); see New York Fair Credit Reporting Act, N.Y. GEN. BUS. LAW § 380 (McKinney 2010).

<sup>15</sup>N.Y. CORRECT. LAW art. 23-A, §§ 750–755 (McKinney 2010); New York Human Rights Law, N.Y. EXEC. LAW art. 15, § 296(15)–(16) (McKinney 2010).

background screeners or consumer reporting agencies; and, third, the original source of the criminal background information—the public records.<sup>16</sup>

### A. Identifying the Users of Criminal Records

In a case where an individual's application for employment has been wrongly denied because of criminal background information, any legal recourse begins with the user. Most often, the users of criminal background information are potential employers and landlords or property managers. Under the federal Fair Credit Reporting Act, users of criminal background information must follow very specific legal requirements.

Landlords, employers, and most other users must obtain written authorization to check a prospective applicant's background through a consumer reporting agency.<sup>17</sup> If the user takes any adverse action, as defined by the Fair Credit Reporting Act, on the application based upon that report, the user must notify the applicant. Notice must include the name and contact information of the consumer reporting agency that supplied the report and must inform the applicant that the applicant is entitled to dispute the accuracy of the report to the agency.<sup>18</sup> Employers have additional duties when using a consumer report.<sup>19</sup> In addition to the Act's general notice requirements, the employer, before taking an "adverse action," must give the individual a preadverse action notice. The preadverse action notice must include a copy of the individual report and notice of the applicant's rights under the Act.<sup>20</sup>

A user's failure to comply with the Fair Credit Reporting Act's notice requirements creates a Catch-22 for those who are subject to the criminal background

check. The purpose of the notice under the Act is to ensure that the individuals who are the subject of the background check have the opportunity to learn why they were denied (or adversely affected), have the opportunity to correct any errors, and have knowledge of their rights. When a user fails to comply, those seeking employment or housing have no way of knowing that their rights have been violated and so they may never seek to enforce those rights.

When people do seek legal assistance, the reason is that they have been told that they were denied housing or employment based upon a criminal background check (fulfilling some of the notice requirements), but they have not been given information on how to contact the reporting agencies or actual copies of their reports. Typically those who seek legal assistance come to us either because they believe they do not have criminal records or because they believe that their records should have been sealed. Lindsay's case is typical of cases such as these.

**Lindsay.** Addicted to heroin at 16, Lindsay was arrested on two separate occasions for possession of a controlled substance. After successful completion of drug treatment court, Lindsay was adjudicated a youthful offender. As a result of her youthful offender adjudication, Lindsay's conviction was vacated, and her records were sealed. The judge told Lindsay that she was getting a fresh start and that she could truthfully answer that she had never been convicted of a crime.

Approximately six months after her criminal record was sealed, Lindsay submitted an employment application to a retail store and was given a conditional offer of employment contingent upon the results of a background check. The store manager later told her that the

<sup>16</sup>The Fair Credit Reporting Act is an intricate and complex set of statutes. Our intent here is to give legal services providers a basic understanding of how the Act applies to criminal background checks (for a more thorough analysis of how to use the Fair Credit Reporting Act, see NATIONAL CONSUMER LAW CENTER, FAIR CREDIT REPORTING MANUAL (6th ed. 2006) (2009 Supplement)).

<sup>17</sup>See 15 U.S.C. §§ 1681b(b)–(c).

<sup>18</sup>*Id.* § 1681m.

<sup>19</sup>*Id.* § 1681b(b).

<sup>20</sup>*Id.* § 1681b(b)(3).

conditional offer had been rescinded because Lindsay lied on her application by not disclosing her drug charge.

Lindsay attempted to inform the employer that she had no criminal convictions. She also requested that the employer give her the source of the incorrect report that she had been convicted of a crime. The employer ignored her request. As a result of that experience, Lindsay feared applying for other jobs because she was sure that everyone would know about her drug charge and refuse to hire her. Lindsay then retained Legal Assistance of Western New York, or LawNY, to help her learn the source of the criminal background information.

Cases such as Lindsay's present several challenges. The first challenge involves deciding whether the Fair Credit Reporting Act applies to the case. The second challenge is devising a strategy that balances the client's goals of redressing the wrong committed by the user and ascertaining the source of the report in order to correct any errors that may cause problems in the future.

Not all criminal background checks are subject to the Fair Credit Reporting Act. Whether a criminal background check is subject to the Act depends on three factors: (1) the nature of the information contained in the report, (2) the way that the report is used, and (3) the source of the report. The Act defines a consumer report, in pertinent part, as "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living...."<sup>21</sup>

Because criminal background checks contain information related to the person's "character, general reputation, personal characteristics, and mode of living," they

can be a type of consumer report. The report must also be used to determine eligibility for credit, employment, or any other purpose authorized under the Fair Credit Reporting Act.<sup>22</sup> While the most common uses of criminal background checks are for rental housing or for employment, they can also be obtained by anyone who has a "legitimate business need" for the information.<sup>23</sup>

A criminal background check is considered a consumer report only if it is obtained from a consumer reporting agency (described below).<sup>24</sup> A potential employer or landlord who obtains a person's criminal records directly from law enforcement or court records, for example, is not subject to the requirements in the Fair Credit Reporting Act. Most important, when criminal background information is obtained other than through a consumer reporting agency, the user has no duty to give any notice or information to the consumer unless otherwise required to do so by state law. California's Investigative Consumer Reporting Agencies Act does require notice regardless of how the background information is obtained.<sup>25</sup>

Lindsay's lawyer at LawNY wrote the employer a letter demanding a copy of the report it used as well as contact information for the source of the report. After initially agreeing to rectify its unlawful conduct, the employer stopped communicating with LawNY and ignored a second demand letter. Without the employer's cooperation, we had to determine whether the store was likely to have used a consumer reporting agency. Because state records confirmed that Lindsay's records were sealed, and because the store was a part of a large retail chain, we decided that the store probably had not obtained Lindsay's records directly from law enforcement or court files. We concluded that the most likely scenario was

<sup>21</sup>*Id.* § 1681a(d)(1).

<sup>22</sup>*Id.*

<sup>23</sup>*Id.* § 1681b(a)(3)(F).

<sup>24</sup>*Id.* § 1681a(d)(1).

<sup>25</sup>CAL. CIV. CODE §§ 1786.2(c), 1786.16(a)-(b) (Deering 2010).

that the employer used a consumer reporting agency to obtain the report, the agency had obtained its information before the court record was sealed, and the agency had subsequently failed to update its database.

LawNY teamed with the consumer unit at the Empire Justice Center and sued the employer in federal court; they alleged violations of the Fair Credit Reporting Act and wrongful discrimination. The company and Lindsay settled the matter for monetary damages, attorney fees for both legal services organizations, and a copy of the consumer report so that Lindsay could press the issue with the consumer reporting agency. The report confirmed that the agency was a large, national, human resources management company.

## **B. The Criminal Background Screening Companies Regulated by the Fair Credit Reporting Act**

The Fair Credit Reporting Act places the primary obligation to ensure the accuracy and relevancy of a consumer report on the consumer reporting agency that generates it. A consumer reporting agency is defined as “any person ... [who] regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties...”<sup>26</sup> Background-screening companies are a subset of consumer reporting agencies.

### **1. Background-Screening Companies**

Background screeners come in all shapes and sizes. The Fair Credit Reporting Act’s definition applies to all types of organizations, from major national employment-screening companies, to nonprofit entities that run background checks for their members, to individuals who buy bulk court records and sell them to landlords. Large, national human resources management companies such as ChoicePoint and HireRight supply criminal background checks to employers; others are smaller

organizations or individuals looking for profit.

While the criminal background check market is dominated by a handful of behemoths, a multitude of smaller local and regional consumer reporting agencies have cropped up to serve specific industries and localities. These much smaller agencies are often able to undercut the much larger agencies’ prices by omitting costly protections required by federal and state fair credit reporting laws. Small agencies may neglect to update continuously the information they have gathered on individuals. The cases of LawNY clients Chris and Joe illustrate the illegal cost-cutting techniques that smaller agencies frequently apply.

**Chris.** Once charged with a felony, Chris was eventually acquitted. A landlord rejected Chris for housing based upon information about Chris’s arrest. Unlike in Lindsay’s case, when Chris asked his potential landlord where the landlord obtained the information about his arrest history, the landlord gave Chris the contact information of the consumer reporting agency that supplied the report.

LawNY investigated Chris’s case and discovered that the consumer reporting agency had compiled a database with hundreds of thousands of names from the arraignment dockets published daily by the New York court system. While arraignment information and pending charges are public information, arrest information that ultimately results in a noncriminal disposition and a sealing of the record may not be reported by consumer reporting agencies in New York.<sup>27</sup> The agency that reported Chris’s arrest did not update its database to reflect final dispositions in any of the arraignments, nor did it have a dispute mechanism by which individuals could challenge the information that the agency supplied to potential landlords.

LawNY negotiated with the consumer reporting agency prior to filing an action and reached a settlement. The agency agreed to abide by its obligations under the Fair Credit Reporting Act and ex-

<sup>26</sup>See 15 U.S.C. § 1681a(f).

<sup>27</sup>N.Y. GEN. BUS. LAW § 380-j(a)(1) (McKinney 2010).

punge all records of arrest charges that did not result in criminal convictions from its database.

**Joe.** A 52-year-old veteran and licensed practical nurse, Joe encountered a different kind of screening agency when he applied for a job at a nursing home. The New York State Department of Health requires certain nursing home employees and home health care aides to undergo fingerprint background checks through state and federal criminal record repositories. Because the state-mandated background checks are cumbersome and costly and can take lengthy periods to complete, a local trade association in Joe's area set up its own private pre-screening service. When an applicant applied for a position at a nursing home, the trade association would contact the county sheriff's office to get that applicant's records.

Like Lindsay, Joe had never been convicted of a crime, but when Joe was denied employment he, too, knew his denial was based upon the criminal background check. Joe had pleaded guilty to noncriminal violations, but he believed that the records had been sealed. The longtime nursing home worker never before had trouble passing state-run background checks. With our legal representation, Joe is now involved in federal litigation against both the nursing home for violating Fair Credit Reporting Act notice requirements and the private background-checking agency for reporting information prohibited by the Act.

## 2. Consumer Reporting Agency Duties Under the Fair Credit Reporting Act

The purpose of the Fair Credit Reporting Act is to ensure accuracy, privacy, and

relevance of consumer reports. Because consumer reporting agencies are in the best position to ensure that those elements are met, they have the greatest duties under the Act. To attempt to achieve those goals, the Act prohibits certain information from appearing on consumer reports, requires consumer reporting agencies to have reasonable procedures to ensure the accuracy of their reports, and provides a mechanism for consumers to dispute inaccuracies.

Generally, with one significant exception, the Fair Credit Reporting Act prohibits the use of adverse information that is more than seven years old on consumers' reports.<sup>28</sup> The exception to this rule is that criminal convictions may be reported indefinitely.<sup>29</sup> Arrests, however, are not reportable past seven years, provided that the consumer report is not used in connection with a credit transaction involving \$150,000 or more, the underwriting of a life insurance policy with a face amount of \$150,000 or more, or a position of employment where the salary is reasonably expected to be \$75,000 or more.<sup>30</sup> The Act does not impose strict liability for reporting inaccurate information. Rather, the Act requires consumer reporting agencies to follow "reasonable procedures" to ensure the accuracy of information reported about consumers.<sup>31</sup> This standard can make it difficult legally to challenge the accuracy of reports from agencies that obtain records from law enforcement contemporaneously with applications for employment, such as the trade association in Joe's case.

However, where the consumer reporting agency's procedures are unknown, courts have not always required direct proof of an agency's failure to follow reason-

<sup>28</sup>15 U.S.C. § 1681c(a).

<sup>29</sup>*Id.* § 1681c(a)(5). Other exceptions to the seven-year rule are bankruptcies, which are reportable for up to ten years, and civil judgments, which are reportable for seven years or until the governing statute of limitations has expired, whichever period is longer (see *id.* § 1681c(a)(1)–(2)).

<sup>30</sup>See *id.* § 1681c(a)(2), (b)(3); see also *Serrano v. Sterling Testing Systems*, 557 F. Supp. 2d 688, 689, 692–93 (E.D. Pa. 2008) (disclosure of existence of arrest records constitutes dissemination of adverse information under subsection (a)(5)).

<sup>31</sup>See 15 U.S.C. § 1681e(b); see also *Philbin v. Trans Union Corporation*, 101 F.3d 957, 963 (3d Cir. 1996) (defining "reasonable procedures" as those that reasonably prudent person would undertake under the circumstances) (quotation and citation omitted).

able procedures. Although this standard varies among the circuits, “[i]n certain instances, inaccurate credit reports by themselves can fairly be read as evidencing unreasonable procedures.”<sup>32</sup> Except in the Seventh Circuit, facial inconsistencies or contradictions in a consumer report may be sufficient to prove a failure to follow reasonable procedures.<sup>33</sup> The Ninth and Eleventh Circuits held that if a plaintiff made out a prima facie case under the Fair Credit Reporting Act by showing that an agency prepared a report using inaccurate information, to escape liability the agency must prove that it did, in fact, follow reasonable procedures.<sup>34</sup>

Examples of failures to follow reasonable procedures could be shown by a failure to do a positive match on the consumer (i.e., if the social security number or the date of birth does not match). A gray area is where records on a report are partially accurate, incomplete, or technically accurate but misleading. The District of Montana held that a conviction under the federal Youth Corrections Act that had been set aside could be reported because “[t]hat the conviction was set aside does not alter the fact of the theft nor the admission of it.”<sup>35</sup> However, in other cases where information was technically accurate but misleading, courts held that determining whether the information was accurate was up to a jury.<sup>36</sup> In New York the attorney general’s position is that reporting convictions of violations,

youthful offender convictions, or arrests that do not lead to a conviction (all of which are presumptively sealed by statute) violates the reasonable-procedures requirement because a consumer reporting agency should know that those records were likely sealed.<sup>37</sup>

Consumer reporting agencies do have additional duties when background checks are used in employment screening, however. First, reporting agencies have a duty to use reasonable measures to ensure that users are using the consumer reports for legitimate purposes.<sup>38</sup> Specifically, when using a report for employment purposes, the user must certify to the agency that, when using the report, it will abide by all applicable federal and state equal employment laws.<sup>39</sup>

Where a consumer reporting agency has reason to believe that its report will be used for employment purposes and the report has public information (criminal or civil) that is likely to have an adverse effect on the job applicant, the agency must either notify the applicant contemporaneously that the record is being reported and to whom it is being reported or maintain strict procedures to ensure the accuracy of the report.<sup>40</sup> Most employment-screening companies choose the option of sending a contemporaneous notice to the applicant, thereby avoiding the use of strict procedures.<sup>41</sup>

<sup>32</sup>See, e.g., *Stewart v. Credit Bureau Incorporated*, 734 F.2d 47, 51–52 (D.C. Cir.1984); *Wilson v. CARCO Group*, 518 F.3d 40, 42–43 (D.C. Cir. 2008).

<sup>33</sup>See, e.g., *Dalton v. Capital Associated Industries Incorporated*, 257 F.3d 409, 416 (4th Cir. 2001); *Phillbin*, 101 F.3d at 965; *Stewart*, 734 F.2d at 52; but see *Sarver v. Experian Information Solutions Incorporated*, 390 F.3d 969, 972–73 (7th Cir. 2004).

<sup>34</sup>*Guimond v. Trans Union Credit Information Company*, 45 F.3d 1329, 1333 (9th Cir.1995); *Sampson v. Equifax Information Services*, 2005 U.S. Dist. LEXIS 19240, at \*6 (S.D. Ga. Aug. 29, 2005).

<sup>35</sup>See *Fite v. Retail Credit Company*, 386 F. Supp. 1045, 1047 (D. Mont. 1975).

<sup>36</sup>See, e.g., *Andrews v. Trans Union Corporation*, 7 F. Supp. 2d 1056, 1073–76 (C.D. Cal. 1998); *Cotto v. Jenney*, 721 F. Supp. 5, 10–13 (D. Mass 1989); *Koropoulos v. Credit Bureau Incorporated*, 734 F.2d 37, 39–42 (D.C. Cir. 1984).

<sup>37</sup>See *In re ChoicePoint Work Place Solutions*, Assurance of Discontinuance No. 09-165 (Civil Rights Bureau, N.Y. Office of the Att’y Gen., 2009).

<sup>38</sup>See 15 U.S.C. § 1681e(a).

<sup>39</sup>*Id.* § 1681b(b)(1)(A)(ii).

<sup>40</sup>*Id.* § 1681k.

<sup>41</sup>NATIONAL CONSUMER LAW CENTER, *supra* note 16, § 8.2.20

The Fair Credit Reporting Act gives consumers the right to dispute information contained in their reports.<sup>42</sup> When a consumer disputes the accuracy of an item on the consumer's report, the reporting agency is required to perform a "reasonable reinvestigation" into the dispute within thirty days.<sup>43</sup> Typically, in a reasonable reinvestigation, agencies simply verify the accuracy of information with the original furnishers of the information. If the agency determines that the disputed information is inaccurate or can no longer be verified, the agency must promptly delete such information.<sup>44</sup>

While the right to dispute the accuracy of information and have a reasonable reinvestigation performed applies to criminal background checks, enforcing the right in this situation can be nearly impossible since by the time a consumer discovers the existence of inaccurate information the damage has already been done. For this reason, consumer reporting agencies' disclosure requirements are especially important in this context.

Consumer reporting agencies are required to give consumers, upon request, one free copy of any information the agency has in that consumer's file each year.<sup>45</sup> As mentioned, this right rarely benefits consumers who are subject to criminal background checks because they do not know who has their records until the records have been used adversely.

**Denise.** A domestic-violence survivor seeking safer housing for herself and her daughter, Denise applied for an apartment at a privately owned federally subsidized housing complex. Denise's case illustrates the problems that incomplete

or dated information can cause applicants for employment or housing. Denise's only brush with the law had been an arrest for shoplifting more than a year earlier; this resulted in an adjournment in contemplation of dismissal. In New York State an adjournment in contemplation of dismissal is a noncriminal disposition whereby charges are dismissed and the record sealed after six months if there have been no new criminal charges during that time.

Notwithstanding that consumer reporting agencies are required to ensure that the information reported is current, some agencies take a snapshot in time of information and subsequently report it though no longer accurate. Denise's case had been sealed for over a year at the time of her rental application, but the agency continued to report the sealed arrest information as if it were an open and pending case.

Like many other users, the housing provider refused to comply with Denise's demand for information regarding the consumer reporting agency. That refusal prompted LawNY to file federal and state Fair Credit Reporting Act claims against the housing provider in federal court.<sup>46</sup> The case resulted in a consent order that furnished Denise with an apartment and significant monetary damages. The order also required the provider to adopt written criminal record admission policies and procedures consistent with federal regulatory requirements for subsidized housing and the Fair Credit Reporting Act.

### C. Furnisher Responsibility

Consumer reporting agencies obtain their information in a variety of ways. Though

<sup>42</sup>See 15 U.S.C. § 1681i.

<sup>43</sup>*Id.* § 1681i(a)(1)(A).

<sup>44</sup>See *Henson v. CSC Credit Services*, 29 F.3d 280, 286 (7th Cir. 1994).

<sup>45</sup>See 15 U.S.C. § 1681g.

<sup>46</sup>Private rights of action for failure to give Fair Credit Reporting Act notices are covered by a patchwork of statutes—for employment cases, by *id.* § 1681b(b)(3); for credit cases, by the Equal Credit Opportunity Act, *id.* § 1691, 12 C.F.R. § 202.9(a) (2010). Neither statute applies to applications for rental housing. Whether a private right of action exists for a failure to give a notice required by 15 U.S.C. § 1681m is ambiguous. The Seventh Circuit held in *Perry v. First National Bank*, 459 F.3d 816, 823 (7th Cir. 2006), that no private right of action existed under 15 U.S.C. § 1681m. However, in *Barnette v. Brook Road Incorporated*, the District Court for the Eastern District of Virginia explained that the section limiting private enforcement was meant to apply only to new requirements created by the Fair and Accurate Credit Transactions Act of 2003, not to previously existing requirements such as the notice-of-adverse-action requirement (429 F. Supp. 2d 741, 747–48 (E.D. Va. 2006); see NATIONAL CONSUMER LAW CENTER, *supra* note 16, for more information on this topic).

not specifically defined, a person who supplies information to a consumer reporting agency is considered a furnisher.<sup>47</sup> In a traditional credit history report, information is regularly supplied to credit bureaus by entities that are themselves the prime users of credit reports. This is not the case in criminal background checks where the information contained in the consumer report is largely based upon public information.

In criminal background checks, the consumer reporting agencies initiate the furnishing of information. Background-checking businesses are thriving because the federal and state governments are increasingly making information concerning persons with criminal records more available for employment and housing background checks. In 2008 the U.S. Bureau of Justice Statistics reported that state criminal history repositories contained approximately 103 million individual records with 92 million maintained in digitally automated systems.<sup>48</sup> Approximately 14 million arrest records were added in 2007.<sup>49</sup> According to the Bureau of Justice Statistics, nearly all states make their criminal history repository records available directly through the Internet or offer bulk data to commercial third parties for redissemination.<sup>50</sup>

As mentioned above, consumer reporting agencies retrieve public record information in a variety of methods. In some cases agencies purchase batches of court records and store the information until someone requests it. In other cases agencies seek out the information contemporaneously with the request for

a background check. Therefore an error in a background check could be the result of an error in an agency's storage and retrieval method, or the error could be a result of an inaccuracy at the source of the furnisher.

Notwithstanding that furnishers of information have a duty under the Fair Credit Reporting Act to ensure the accuracy of the information they give, there is no private right of action to enforce this duty.<sup>51</sup> As stated above, when a consumer reporting agency learns that information in a report is being disputed, the agency must relay the dispute to the furnisher, who has a duty to do its own reinvestigation at that time. This duty is not exempt from a private right of action.<sup>52</sup> However, the benefit of maintaining a private right of action must be balanced with the need to correct expeditiously any incorrect criminal records.

### III. State Fair Credit Reporting Acts

Many states have enacted their own Fair Credit Reporting Acts that often provide greater protections than the federal Act.<sup>53</sup> For example, the New York Fair Credit Reporting Act prohibits the reporting of all arrest information and noncriminal convictions unless the charges are still pending.<sup>54</sup> The New York Act prohibits reporting of conviction information seven years after the date of conviction, release, or parole.<sup>55</sup> Under the New York Act, if a user of a criminal background check for employment purposes intends to take an adverse action based upon the report, the employer must give the applicant a copy of New York Corrections

<sup>47</sup>See 15 U.S.C. § 1681s-2(a); see also NATIONAL CONSUMER LAW CENTER, *supra* note 16, § 6.2.1.

<sup>48</sup>BUREAU OF JUSTICE STATISTICS, *supra* note 13.

<sup>49</sup>FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 2007 (Sept. 2008), <http://bit.ly/eg16wx>.

<sup>50</sup>BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAMS, U.S. DEPARTMENT OF JUSTICE, SURVEY OF STATE CRIMINAL HISTORY SYSTEMS, 2006 (Oct. 2008), <http://bit.ly/eFnUH0>.

<sup>51</sup>See 15 U.S.C. §§ 1681s-2(a)-(c).

<sup>52</sup>*Id.* § 1681s-2(b).

<sup>53</sup>While many state Fair Credit Reporting Act statutes face serious preemption issues, any state statute that provided such protections prior to September 30, 1996, remains in effect (see 15 U.S.C. § 1681t(b)(1)(B)).

<sup>54</sup>See N.Y. GEN. BUS. LAW § 380-j (McKinney 2010).

<sup>55</sup>*Id.*

Law Article 23-A, which prohibits employment discrimination based solely on criminal record.

State Fair Credit Reporting Acts can also fill gaps in the federal Act. Although users of consumer reports are required to give notice of adverse action, no private right of action under the Fair Credit Reporting Act enforces the right to be notified of an adverse action.<sup>56</sup> There is a private right of action for failure to give an adverse action notice in credit applications under the Equal Credit Opportunity Act, and there is a private right of action under the Fair Credit Reporting Act for an employer failing to give the “preadverse notice.”<sup>57</sup> However, no private right of action exists for failure to give adverse action notice in residential rental or lease cases under the federal Act. By contrast, the New York Act does expressly require “users” of reports for “residential rental or lease” to inform applicants that an “adverse action” is based upon the report, to give applicants the name and address of the consumer reporting agency, and to notify applicants of their right to inspect and receive a free copy of the report from the agency.<sup>58</sup>

#### IV. State Antidiscrimination Laws: The New York Example

Some states have enacted laws that provide employment protections to people with criminal records as well as fair credit reporting laws. For example, New York has one of the most stringent laws protecting applicants’ or employees’ rights. State or private employers’ denial of employment or licensure or both based solely on the existence of a conviction record is, under New York Corrections Law Article 23-A, unlawful discrimination, with two exceptions.<sup>59</sup> Article 23-A provides that employment or licensure may be denied to persons with criminal convictions (1) when there is a direct re-

lationship between the criminal offense and the specific license or employment sought or (2) when granting the license or employment sought would create an unreasonable risk to persons or property. Furthermore, the New York Human Rights Law makes it an unlawful discriminatory practice to inquire into sealed arrests or convictions.<sup>60</sup> These provisions dovetail perfectly with the New York Fair Credit Reporting Act and prohibit consumer reporting agencies from reporting sealed arrests and sealed violations and prohibit employers from inquiring into and acting upon the same prohibited information.

State antidiscrimination laws have also prompted organization and coalition building around the legal obstacles facing people reentering society after incarceration or living with criminal records. LawNY established its Reentry Project four years ago to focus on enforcement of the New York Corrections Law and the New York Human Rights Law. As well as providing direct legal assistance to people with criminal records who encounter employment discrimination, the Reentry Project partners with community organizations and agencies to conduct training sessions on state and federal laws, including Fair Credit Reporting Act rights, that protect people with criminal records. The Reentry Project also trains lawyers and judges and works with a local community organization to help people obtain their criminal records and ensure the accuracy of those records.

In states that have strong antidiscrimination laws, consumer reporting agencies that report prohibited information could face aiding and abetting liability. State-law protections can, and should whenever possible, be joined with state and federal Fair Credit Reporting Act claims to achieve the fullest relief possible for individual clients and to cor-

<sup>56</sup>See 15 U.S.C. § 1681m.

<sup>57</sup>Equal Credit Opportunity Act, 15 U.S.C. §§ 1691 *et seq.*; 15 U.S.C. §§ 1681b(b)(3), 1681n, 1681m.

<sup>58</sup>See N.Y. GEN. BUS. LAW § 380-i(a)(1)–(3).

<sup>59</sup>See N.Y. CORRECT. LAW §§ 752–753.

<sup>60</sup>See N.Y. EXEC. LAW § 296(16); see, e.g., N.Y. CRIM. PROC. LAW §§ 160.50, 160.55 (McKinney 2010).

rect unlawful employment or housing admissions policies that affect persons with criminal records generally. The Sentencing Project, a national organization promoting sentencing reform and alternatives to incarceration, maintains a catalogue of state-by-state criminal record antidiscrimination laws.<sup>61</sup>



In our experience the Fair Credit Reporting Act is an adaptable and useful tool for overcoming the criminal record barriers affecting many of our clients, especially when used in conjunction with available state-law protections. Because the Act also provides attorney fees and even punitive damages for willful violations,

it is a powerful tool for keeping consumer reporting agencies accountable even in cases with small provable damages.<sup>62</sup> As demonstrated by the cases of Lindsay, Chris, Joe, and Denise, the Act can be used to remedy unlawful systemic practices that exclude many persons who would otherwise qualify for employment or housing. Even in those jurisdictions that do not have strong state-law protections against unreasonable and unfair use of criminal records, compliance with the Act would mean that records would be more accurate and, with proper notice, that the subjects of background checks would have the information they need to challenge incorrect hiring and housing admission decisions.

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<sup>61</sup>Margaret Colgate Love, *Relief from the Collateral Consequences of a Criminal Conviction: A State-by-State Resource Guide*, THE SENTENCING PROJECT (June 2008), <http://bit.ly/hOg6Ah>.

<sup>62</sup>15 U.S.C. §§ 1681n, 1681o.



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