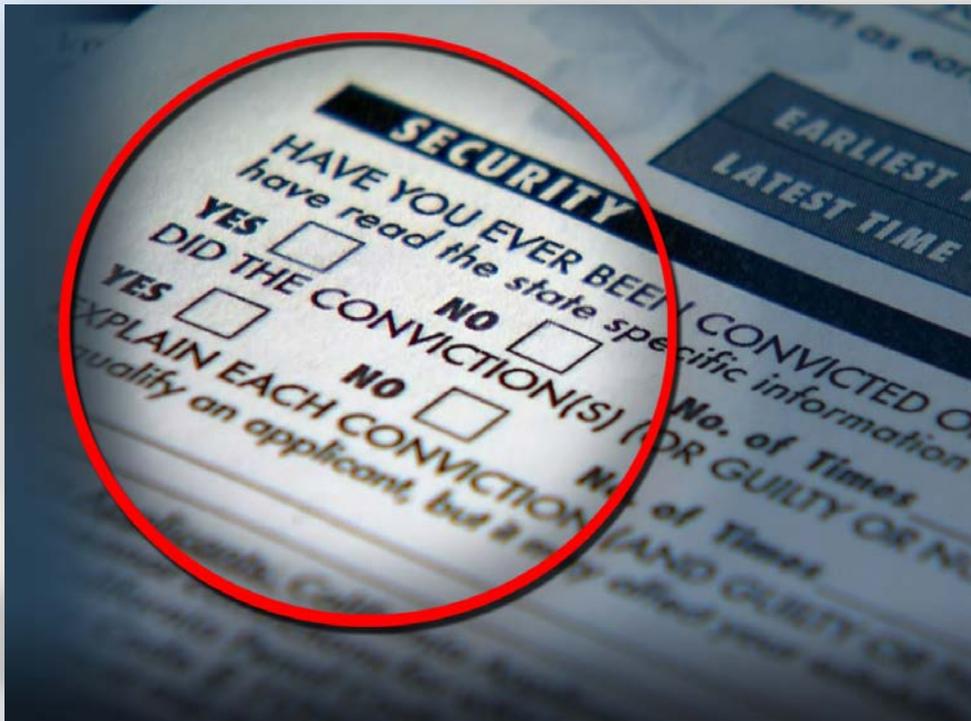


Criminal Background Checks, Credit Checks & Workplace Drug Testing



State Limitations on the Hiring Process



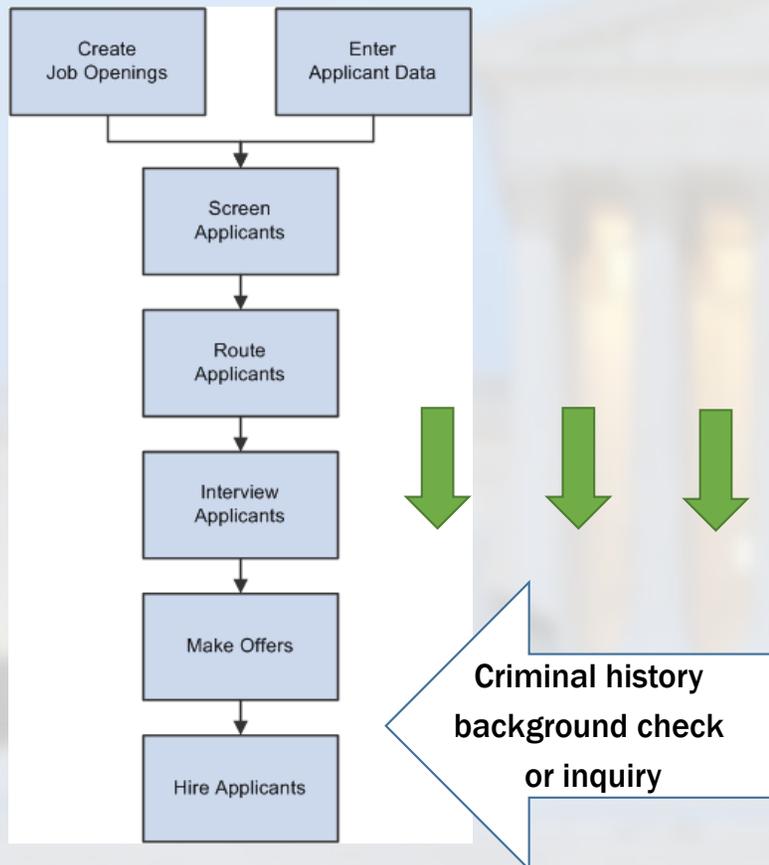
- ❖ Some states have shown interest in restricting employers from looking into an individual's credit, criminal, or salary history during pre-employment / job application process
 - MA and CA have adopted salary history restrictions, which have also appeared at local level (NYC, New Orleans, and Pittsburgh)
 - Coincides with rise of class actions filed under FCRA

Why Is “Ban the Box” a State/Local Initiative?



- ❖ There has been a dramatic increase in the number of states and localities that have adopted these laws over the past few years
- ❖ This area has come under scrutiny in recent years due to the disparate impact criminal background checks often have on African-American and Hispanic employees and job applicants

Background



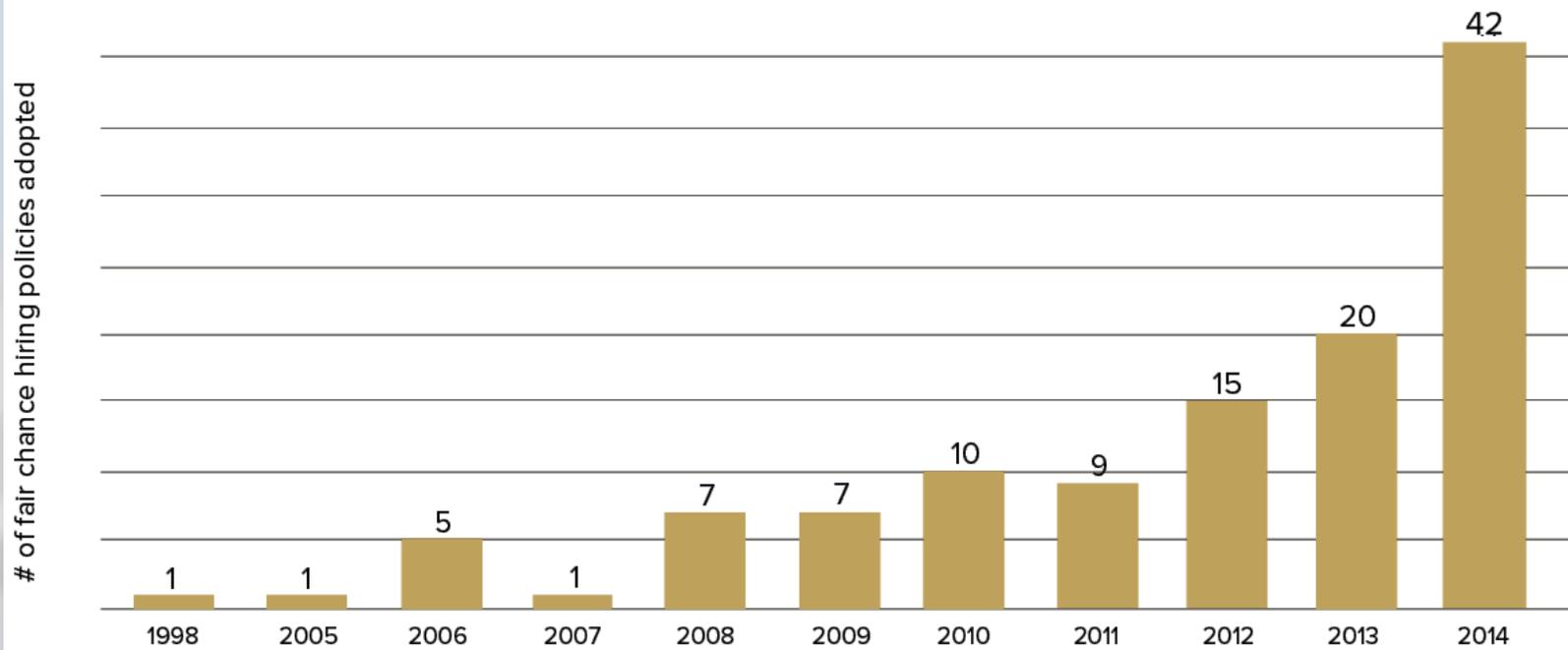
❖ **Box laws do not:**

- Preclude employers from ever inquiring about an applicant's criminal history
 - Usually postpones the inquiry until later in the hiring process, to promote hiring based on qualifications and not criminal histories
- Require employers to hire individuals with criminal records

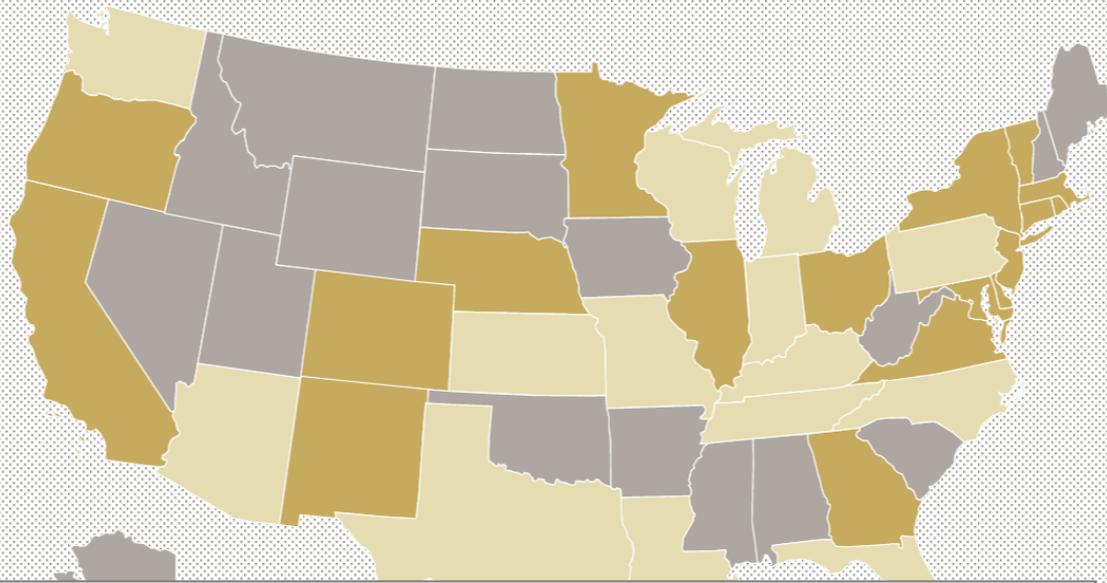
❖ However, 29 states have passed box laws as of July 2017, and more states and municipalities will likely pass such laws in the future

❖ Employers need to be ready to review and potentially revise their application process

Number of Jurisdictions Adopting Fair-Chance Reforms Is Growing Rapidly



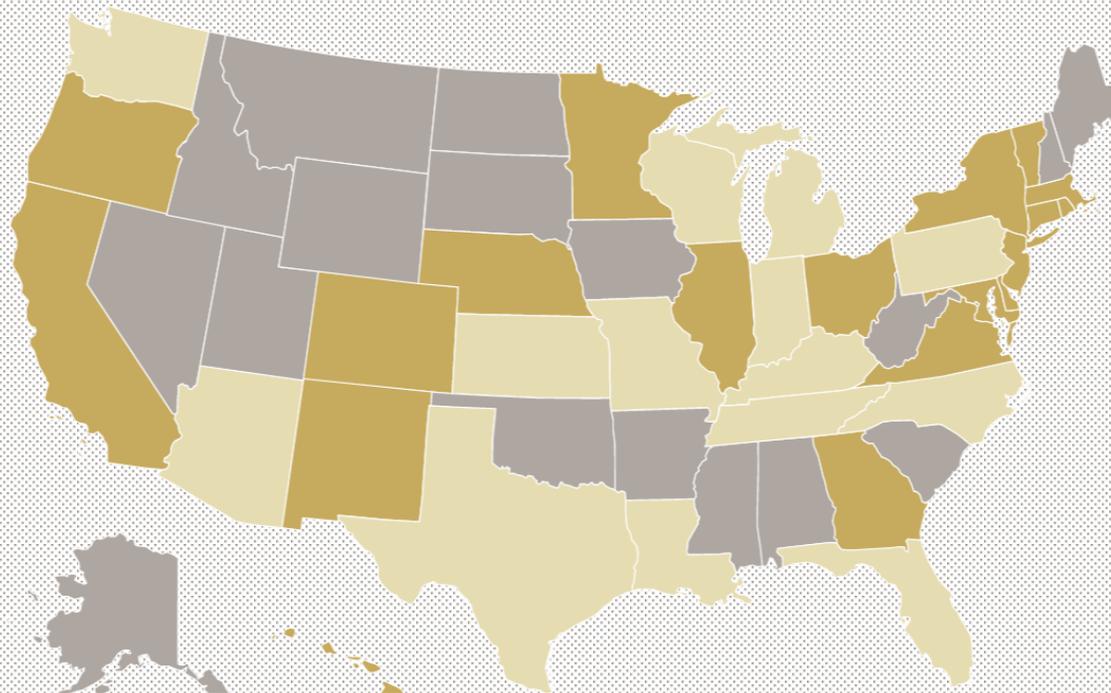
Where Are "Ban the Box" Laws Currently In Effect?



California, Colorado, Connecticut, Delaware, the District of Columbia, Georgia, Hawaii, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah, Vermont, Virginia, and Washington have passed box laws at the state level.

-  Has a state policy or law (may also have city and county fair-chance policies)
-  Has at least one city or county fair-chance policy

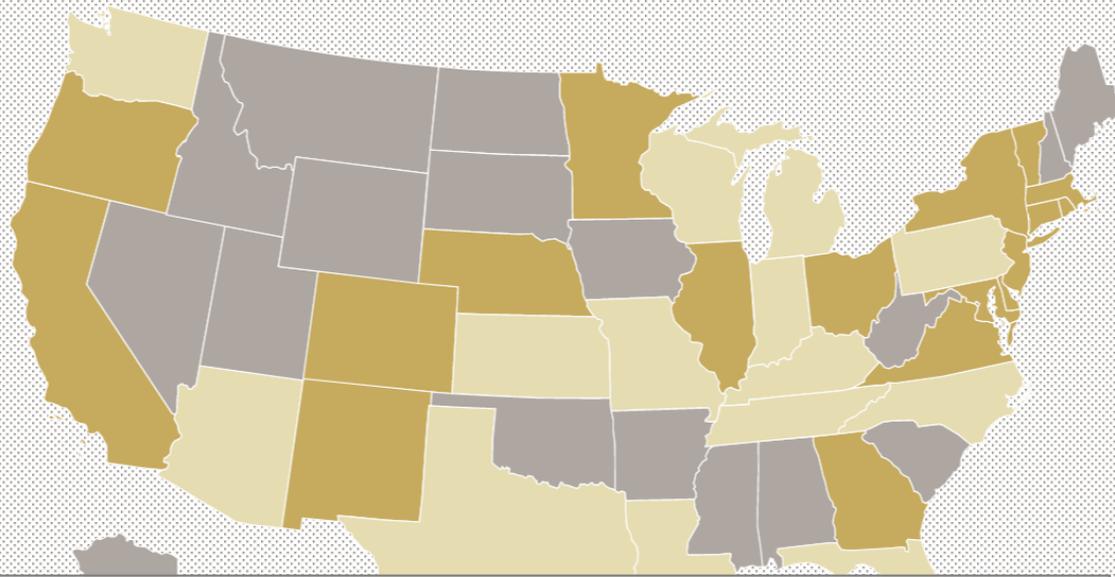
Where Are "Ban the Box" Laws Currently In Effect?



-  Has a state policy or law (may also have city and county fair-chance policies)
-  Has at least one city or county fair-chance policy

Connecticut, the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Rhode Island, and Vermont, as well as 29 cities and counties, have passed box laws that apply to both public and private employers.

Where Are "Ban the Box" Laws Currently In Effect?



More than 100 localities across the United States have some form of box law. Of these, more than ten cities and counties (New York City, Baltimore, Buffalo, Chicago, Columbia (MO), Montgomery County (MD), Newark, Philadelphia, Prince George's County (MD), Rochester, and San Francisco) have box laws that apply to private employers.

-  Has a state policy or law (may also have city and county fair-chance policies)
-  Has at least one city or county fair-chance policy

Executive Order Extends "Ban the Box" Protection to Applicants for Federal Employment



- ❖ In 2012, the Equal Employment Opportunity Commission (EEOC) released a Guidance on the use of arrest and conviction records in employment decisions. The Guidance embraced targeted hiring strategies
- ❖ In 2015, President Obama instructed the Office of Personnel Management (OPM) to remove inquiries about criminal records from federal employment applications
- ❖ The President also announced grants to aid communities in providing resources to the ex-incarcerated, including job training and child care resources
- ❖ In addition, the President asked congress to pass reforms that would not only "ban the box" but also eliminate mandatory minimum sentences for nonviolent offenders

“Does your company perform individualized assessments for candidates with convictions so they can explain the circumstances?”



Nearly three-quarters (72%) of respondents are performing individualized assessments—up from 64% in last year’s survey. This is a fairly strong indication that the EEOC’s guidance continues to have a growing impact on employers’ hiring practices.

Employee Screen IQ: Applicants Get a Chance to Explain 2015 Employment Screening Survey



Self-Disclosure Persists on Applications

More than half (53%) of respondents indicated that their companies continue to ask candidates to self-disclose criminal histories on employment applications despite EEOC guidance that recommends its removal as well as a number of state and municipal laws that “ban the box.”

EEOC v. BMW, No. 7:13-cv-01583 D.S.C.

Consent decree (Sept. 8, 2015):

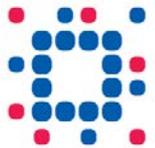
- ❖ **Ordered BMW to pay \$1.6 million and provide job opportunities to alleged victims of race discrimination as part of the resolution of a lawsuit filed by the EEOC alleging BMW excluded African-American logistics applicants from employment at a disproportionate rate under the company's criminal conviction records guidelines.**
- ❖ **BMW will offer employment opportunities to the discharged workers in the suit and up to 90 African-Americans who the company refused to hire based on its previous guidelines. BMW also will provide training on using criminal history screening in a manner consistent with Title VII.**



The Fair Credit Reporting Act


TransUnion[®]

EQUIFAX[®]

 **Experian**SM

- ❖ Requires employers to provide applicants with notice of any adverse action taken based on information in their files. However, it does not do much more to protect applicants
- ❖ FCRA does not:
 - Prevent employers from not hiring someone because he or she has a criminal record
 - Apply to consumer reports not prepared by consumer reporting agencies
 - Govern how employers should consider criminal history information
- ❖ As a result, many states' Ban the Box laws address one or more of these topics and include supplemental FCRA provisions

Ramirez v. TransUnion LLC

- ❖ Plaintiff brought a class action lawsuit alleging that TransUnion violated the FCRA when it conflated a class of consumers with similarly named terrorists and criminals from a government watch list, harming their credit and credibility.
- ❖ A California federal jury hit TransUnion with the highest verdict in FCRA litigation history: \$60 million (\$8 million in statutory damages and \$52 million in punitive damages). The company plans to appeal.



Carter v. Shalhoub Management Co.

- ❖ **Shalhoub Management Co., which owns McDonald's restaurants, agreed to pay \$950,000 to settle a class action lawsuit alleging violations of the FCRA.**
- ❖ **The Plaintiff claimed the company did not provide a “clear and conspicuous disclosure” on a separate sheet of paper that a consumer report may be obtained for employment purposes.**
- ❖ **The company has also agreed to cease obtaining background reports on employment applicants.**



Fernandez v. Home Depot USA Inc.

- ❖ Home Depot paid \$1.8 million to settle a class action alleging that the company had job applicants sign two background check authorization forms that, in violation of the FCRA, provided for more than just background check information.
- ❖ The lawsuit claimed Home Depot “violated the FCRA by including releases of liability in their preauthorization background and/or credit check disclosure forms.”



Speer v. Whole Food Market Group, Inc.

- ❖ Whole Foods agreed to pay \$803,000 to settle a class action lawsuit alleging violations of the FCRA for not providing “clear and conspicuous disclosure” to job applicants that they would undergo background checks as part of the application process.
- ❖ Background checks are subject to strict disclosure and authorization requirements under the FCRA. The Court found fault with Whole Foods’ Disclosure Statement and Consent form not being in a “single document” format, and for including a liability waiver in its FCRA disclosure.



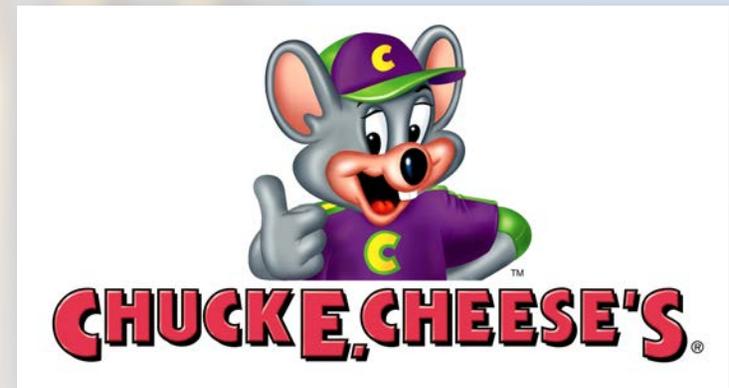
Brown v. Delhaize American, LLC



- ❖ Food Lion, LLC and its parent company Delhaize America, LLC reached a \$3 million settlement in a class action lawsuit filed by a group of job applicants over background checks that allegedly the FCRA.
- ❖ The lawsuit claimed the company violated FCRA's requirement for "a clear and conspicuous disclosure" or "stand-alone disclosure" when a background check report is "obtained for employment purposes."
- ❖ Plaintiff also alleged that she never received a copy of the report or a summary of her rights as required by the FCRA.

Ford v. CEC Entertainment, Inc.

- ❖ CEC Entertainment Inc., owner of Chuck E. Cheese restaurants, paid \$2.5 million to settle a class action lawsuit that claimed the restaurants failed to provide job applicants with proper background check disclosures.
- ❖ The FCRA explicitly states that employers cannot perform a background check on a job applicant without the individual's permission on a separate preauthorization form.
- ❖ As part of the settlement, the company agreed to revise its job applications to better comply with FCRA requirements governing the use of background check disclosure forms.



Pitt v. K-Mart Corp.

- ❖ **K-Mart agreed to pay \$3 million to settle a class action lawsuit alleging that the company willfully violated the FCRA prior to obtaining consumer reports and taking adverse actions against job applicants.**
- ❖ **Specifically, Plaintiff claimed that a contracted background-checking company ruled him “unhireable”—based on a 2002 misdemeanor charge—before K-Mart gave him a chance to see the report.**



Singleton v. Domino's Pizza LLC



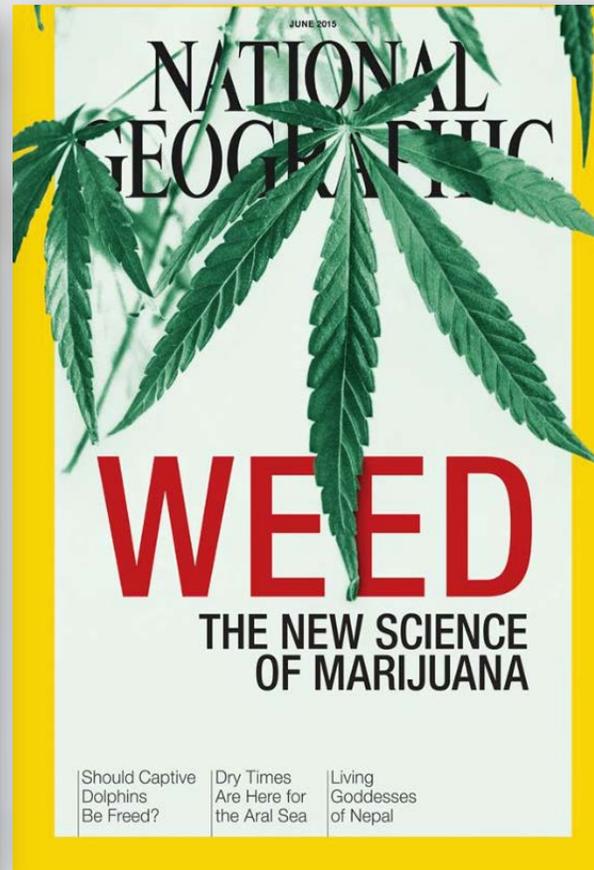
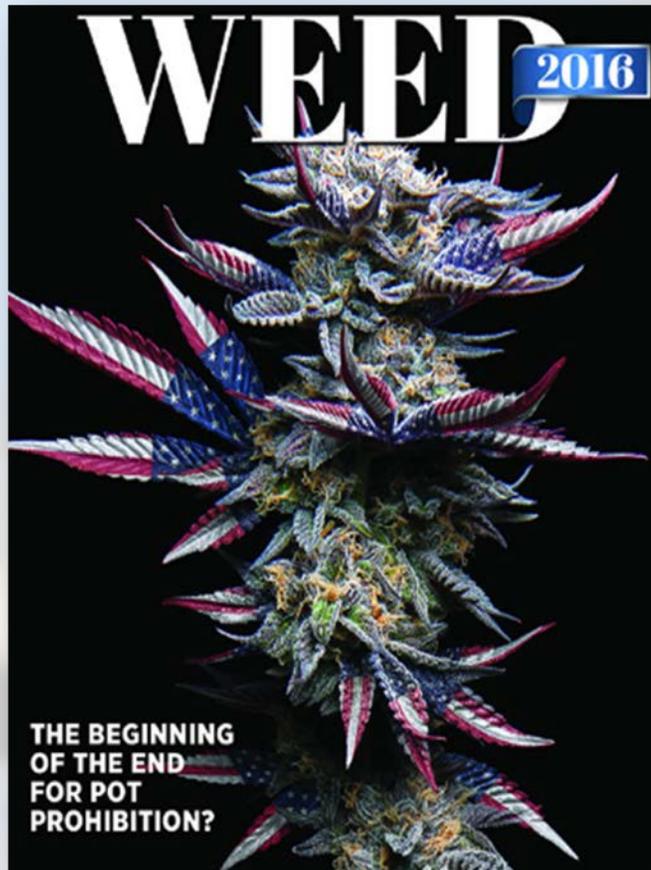
- ❖ Domino's agreed to pay to \$2.5 million to settle a class action lawsuit (from which plaintiffs' counsel's 25% fee award would be taken)
- ❖ Plaintiffs alleged that the consent form Domino's used for procuring a consumer report violated the FCRA, and that it took adverse actions against applicants without providing them with notice and a copy of the report in advance.

Rise of Pay Equity Laws



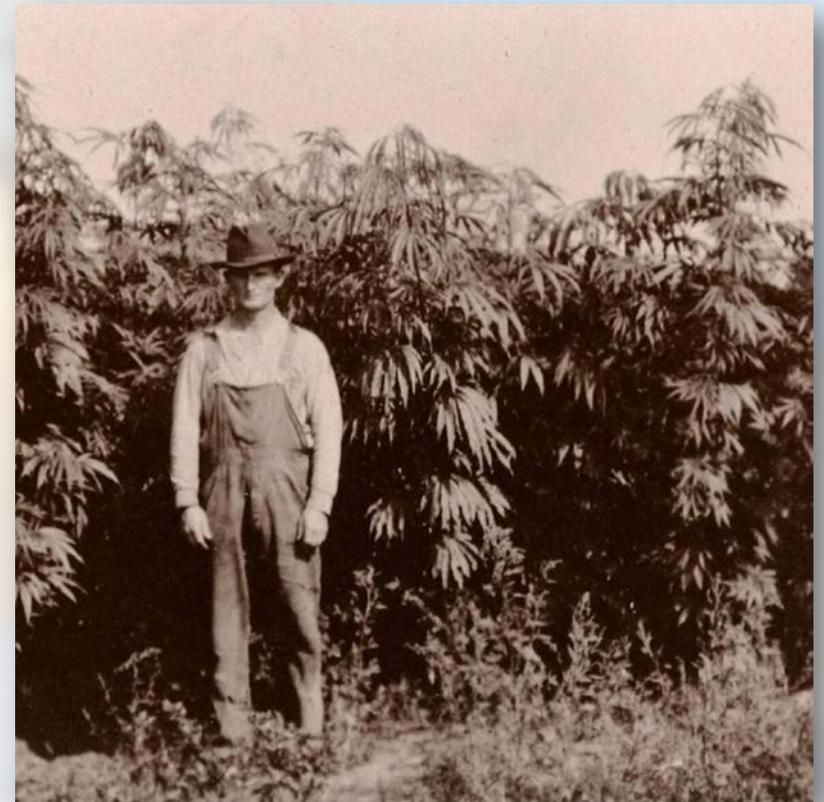
- ❖ EEOC's equal pay data rule faces hostility from Trump administration and acting chair Victoria Lipnic
- ❖ However, increasing popularity at state level: in 2016, pay equity laws took effect in CA, MD, and NY, and another was passed in MA
- ❖ These laws are intended to address the pay gap between men and women, making it more difficult to discriminate against workers based on sex

Attitudes Toward Marijuana Have Changed



The History of U.S. Marijuana Policy

- ❖ **Marijuana Tax Act of 1937**
 - **Backed by Special Interests**
 - **Opposed by the American Medical Association**
- ❖ **1960's**
 - **Drugs & Free Love = Hippies = Bad**
- ❖ **1970 Controlled Substance Act ("CSA")**
 - **Schedule 1 Drugs: Have no accepted medical use, a lack of accepted safety for use under medical supervision, and a high potential for abuse.**
 - **Examples: Heroin, LSD, Ecstasy and Marijuana**



Legalization of Recreational Marijuana

- ❖ In 1995, California Passes Proposition 215
 - Became the first state to legalize marijuana for medical purposes
- ❖ A number of states follow suit and legalize the use of medicinal marijuana



Legalization of Medical Marijuana

To date, 29 States and Washington D.C., Guam, and Puerto Rico
Have Legalized Medicinal Marijuana

Alaska	Guam	Montana	Oregon
Arizona	Hawaii	Nevada	Pennsylvania
Arkansas	Illinois	New Hampshire	Puerto Rico
California	Maine	New Jersey	Rhode Island
Colorado	Maryland	New Mexico	Vermont
Connecticut	Massachusetts	New York	Washington
Delaware	Michigan	North Dakota	Washington D.C.
Florida	Minnesota	Ohio	West Virginia

Legalization of Recreational Marijuana

**Eight States and Washington D.C.
Have Legalized Recreational
Marijuana, Including Four in the
2016 Election**

Alaska

California

Colorado

Oregon

Maine

Massachusetts

Nevada

Washington

Washington D.C.

Vermont (vetoed)



Where Do We Stand Today?

What does this mean in terms of ENFORCEMENT and PENALTIES?



Federal Law

Marijuana is still
considered a
Schedule I drug

States

Generally, passing laws
that legalize medicinal
and recreational use of
marijuana

- ❖ In 2009, the DOJ “Ogden Memo” urges federal prosecutors to stop prosecutions of medical marijuana distributors that are otherwise lawful under state laws
 - <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>

- ❖ U.S. Attorneys should not “focus federal resources in [their] States on individuals whose actions are in clear and unambiguous compliance with existing state laws providing for the medical use of marijuana.”

- ❖ Ogden went on to say that patients and caregivers in particular should not be targeted, though “commercial enterprises” were still an enforcement priority

- ❖ The “Cole Memos,” issued by Deputy AG James Cole in June 2011 and August 2013
- ❖ June 2011 memo: backpedaled some and warned that “the Ogden Memorandum was never intended to shield such activities from federal enforcement action and prosecution, even where those activities purport to comply with state law.”
 - <http://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf>
- ❖ August 2013 memo: outlined DOJ’s eight enforcement priorities and stated that “the existence of a strong and effective state regulatory system, and an operation’s compliance with such a system, may allay the threat [to federal enforcement priorities].”
 - <http://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf>

- ❖ **December 2014 – “Wilkenson Memo” – extends Cole memo to marijuana activities on tribal lands.**
 - <http://www.justice.gov/sites/default/files/tribal/pages/attachments/2014/12/11/policystatementregardingmarijuanaissuesinindiancountry2.pdf>
- ❖ **December 2014 – Congress defunds DEA’s budget to carry out raids on medicinal marijuana businesses operating legally under state laws.**
- ❖ **December 2015 – DEA recommends to FDA that they reclassify marijuana from schedule 1 to schedule 2 drug under Controlled Substances Act.**
- ❖ **November 2016 – Election Day**

What Will Trump Do?



Trump and Marijuana Legalization

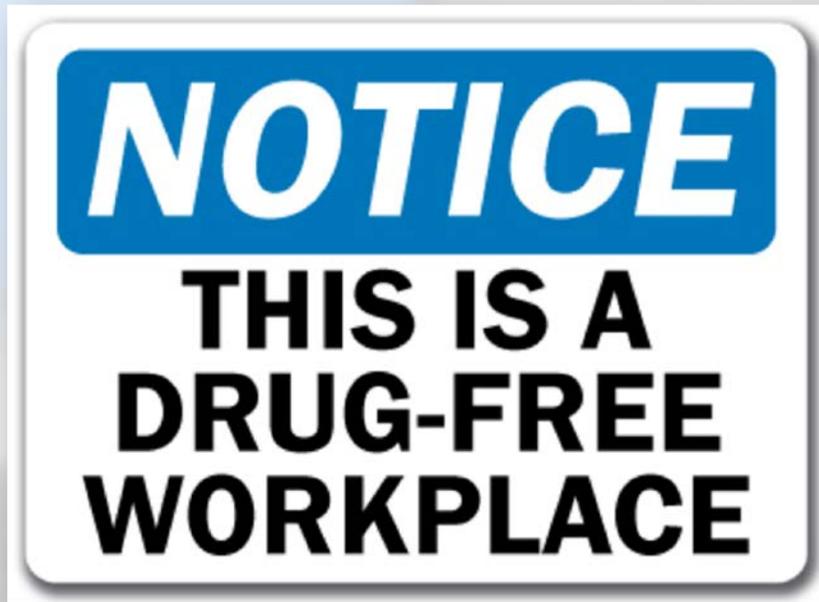
- ❖ According to President Trump, legalizing marijuana for anything other than medicinal use is a “bad” experiment, and he called Colorado’s legal marijuana industry “a real problem.”
- ❖ White House Press Secretary Sean Spicer emphasized that “[t]here are two distinct issues here: medical marijuana and recreational marijuana.”
- ❖ Regardless, Spicer said DOJ will consider “greater enforcement” of federal marijuana laws, even in states that have legalized the drug.

Attorney General Jeff Sessions



- ❖ As AG, oversees the DEA and other federal law enforcement operations
- ❖ Sessions has historically opposed marijuana legalization
- ❖ In May 2017, Sessions issued a memo rescinding DOJ's more lenient sentencing guidelines under Holder. Instead, he has directed federal prosecutors to seek mandatory minimum sentences
- ❖ He also has asked Congress to eliminate the Rohrabacher-Farr Amendment to the appropriations rider

What Do Employers Need to Know?



- ❖ General Rule – employers in all 50 states and the District of Columbia can regulate an employee’s use of marijuana by:
 - Prohibiting marijuana possession and use in the workplace
 - Prohibiting employees from reporting to work impaired or under the influence of marijuana

But...

- ❖ Marijuana is a nearly \$5 billion dollar industry, and growing
- ❖ There are **1.8 million LEGAL** marijuana users in the U.S.
- ❖ Shifting norms and perceptions towards the use of marijuana for recreational and/or therapeutic reasons
 - Recent polls have public support for medical marijuana at over 80%



See also *Callaghan v. Darlington Fabrics Corp.*

- ❖ A Rhode Island Superior Court has found that an employer cannot deny employment to a job applicant who is legally entitled to possess and consume medical marijuana solely because the applicant would fail a mandatory pre-employment drug test.
- ❖ The Court recognized an implied private right of action for qualified cardholders to sue employers for discrimination with respect to their status as medical marijuana patients. The Court also found no preemption issue with federal law.
- ❖ Depending on how the appeal proceeds, a positive drug test, specifically for marijuana, may no longer be automatic grounds for Rhode Island employers to deny a job application or require a current employee to seek rehabilitation.

Best Practices for Employers

- ❖ **Treat marijuana use like alcohol, and provide information to employees regarding what the approach to drug and alcohol testing will be.**
- ❖ **Prohibit employees from reporting to work or working while "under the influence of alcohol and/or other drugs that adversely affect the employee's ability to safely perform his or her job duties."**





Thank you!