

# LEGAL UPDATE

- Driver Application Do's And Don'ts
- Tips On Using Restrictive Covenants

Presented by:

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# Driver Application Do's and Don'ts

## ➤ Why Is This Important?

- ❖ Applies equally to employee drivers and ICs
- ❖ Quality drivers at a premium
- ❖ Liability Related to Application Programs
- ❖ Proactive measures to reduce future costs

# Overview

- Driver Application Do's and Don'ts
- Tips On Using Restrictive Covenants

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# Driver Application Do's and Don'ts

- General Requirements (49 C.F.R. Part 391)
- Fair Credit Reporting Act Compliance
- EEOC Guidance on Use of Arrest and Conviction Records
- Work Authorization Issues

# Fair Credit Reporting Act Compliance

- Driving records and background checks are consumer reports
- FCRA governs the use of consumer reports obtained from consumer reporting agencies.
- Primary Areas of Non-Compliance
  - ❖ Disclosure and authorization; and
  - ❖ Adverse action protocol

# FCRA Disclosure and Authorization

- Clear and conspicuous disclosure
  - ❖ Report will be obtained
  - ❖ Used for employment purposes
- In writing
- In a document that consists solely of the disclosure
- Applicant authorizes in writing
  - ❖ Motor Carrier Exception

# FCRA Disclosure and Authorization

## ➤ Motor Carrier Exception

**IF:**

- ❖ The applicant seeks a position as a driver, driver's helper, loader, or mechanic; and
- ❖ The only interaction between the applicant and the motor carrier has been by mail, telephone, computer, or similar means (a "Remote Applicant")



# FCRA Disclosure and Authorization

## ➤ Motor Carrier Exception (Cont'd)

### THEN:

- ❖ Motor carrier can provide oral, written, or electronic notice to the Remote Applicant that a background check will be obtained and a summary of the applicant's rights under the FCRA; and
- ❖ The Remote Applicant can provide oral, written, or electronic consent

# FCRA Adverse Action Protocol

**IF:**

- Based in whole or in part on report, decision to not hire/contract

**THEN: Prior to taking adverse action, must**

- Pre-adverse action notice
  - ❖ Provide copy of report to applicant
  - ❖ Provide copy of applicant's FCRA rights
  - ❖ Wait a reasonable period of time
- Send final adverse action notice

# FCRA Adverse Action Protocol

## ➤ Motor Carrier Exception

- ❖ For Remote Applicants (as with disclosure and authorization)
- ❖ “Only interaction between the applicant and the motor carrier has been by mail, telephone, computer, or similar means”

# FCRA Adverse Action Protocol

## ➤ Motor Carrier Exception (Cont'd)

- ❖ Motor carrier can send one notice to Remote Applicant (within 3 business days of adverse action) stating:
  - Adverse action taken based on consumer report
  - Contact information for consumer reporting agency
  - Consumer reporting agency did not make decision
  - Remote applicant can obtain a copy of the report

# FCRA Adverse Action Protocol

- Document the process
  - ❖ All letters and notices should be sent by certified mail, return receipt requested
  - ❖ Copies of all letters and notices, along with certified mail information, should be placed in applicant's file

# FCRA Adverse Action Protocol

- Liability Exposure for Non-Compliance
- Cases of Concern

## *Hall v. Vitran Express, Inc.* (N.D. Ohio)

- Class action
- Settled for \$2.6M (Aug. 2011)

## *Hunter et al. v. First Transit, Inc.* (N.D. Ill.)

- Class action
- Settled for \$5.9M (Sept. 2011)

## *Daniel et al. v. Swift Transp. Corp.* (D.C. Ariz.)

- Class action
- Filed August 2011, currently arguing class certification

# Use of Arrest and Conviction Records

- EEOC Enforcement Guidance, April 2012
- Implicates Title VII discrimination exposure
- EEOC continues stepped-up enforcement efforts

# Use of Arrest and Conviction Records

## FOCUS:

- Disproportionate impact on protected classes
- Blanket exclusions based on arrests/convictions “not related” to job or business necessity



# Use of Arrest and Conviction Records

## RESULT FOR EMPLOYERS

- Increased scrutiny on blanket exclusions of applicants based on arrest/conviction record.
- Increased exposure

# Use of Arrest and Conviction Records

## RECOMMENDATION

- Review/develop policy on use of arrest and conviction records to clearly define offenses the company considers potentially disqualifying.
  - ❖ Nature and gravity of the offense
  - ❖ Time elapsed since offense/completion of sentence
  - ❖ Nature of the job held or sought

**“TARGETED SCREEN”**

# Use of Arrest and Conviction Records

## RECOMMENDATION (CONT'D)

- Policy should provide for individualized assessment in all but most obvious cases

# Individualized Assessment

- Notice to applicant
- Opportunity for applicant to provide evidence the record is incorrect or exclusion should not apply
- Consideration of applicant's evidence

# Individualized Assessment

- Facts or circumstances surrounding offense or conduct
- Number of convictions
- Age at conviction or release from custody
- Same work post-conviction
- Employment history before and after conviction
- Rehabilitation efforts
- References

# Use of Arrest and Conviction Records

## RECOMMENDATION (CONT'D)

- Evaluate or develop policy on arrest and conviction record use
- Eliminate blanket exclusions
- Train managers and decision makers on Title VII's prohibition against discrimination
- Limit inquiries to applicant criminal records reasonably related to job in question

# Work Authorization Issues

- Whether the individuals you employ or contract with are authorized to work in the U.S.
- Increased scrutiny and heightened focus on investigations and penalties
- DHS focus on “critical infrastructure”
  - ❖ Airports, military installations, ports, etc.

# Work Authorization Issues

## ➤ Employee versus Independent Contractor

### ❖ Employees

- Must take affirmative steps to determine authorization
- Form I-9 (Rev. 8/7/09)



# Work Authorization Issues

## ➤ Independent Contractor

- ❖ No affirmative steps required (No I-9)
- ❖ Your obligation: the Immigration Reform and Control Act makes it unlawful for an entity to contract with an individual if you have knowledge that the individual is not authorized to work in the U.S.
- ❖ No liability without knowledge or constructive knowledge

# Work Authorization Issues

## ➤ E-Verify

- ❖ Still voluntary for most employers
- ❖ State-by-state
  - Indiana
    - State contracts
    - No tax deductions if knowingly hiring illegal immigrant
    - DWD civil suit to recoup UI benefits
    - Penalties for knowing concealment
- ❖ H.R. 2885 – Legal Workforce Act
  - E-Verify mandatory
  - Eliminate I-9 system

# Overview

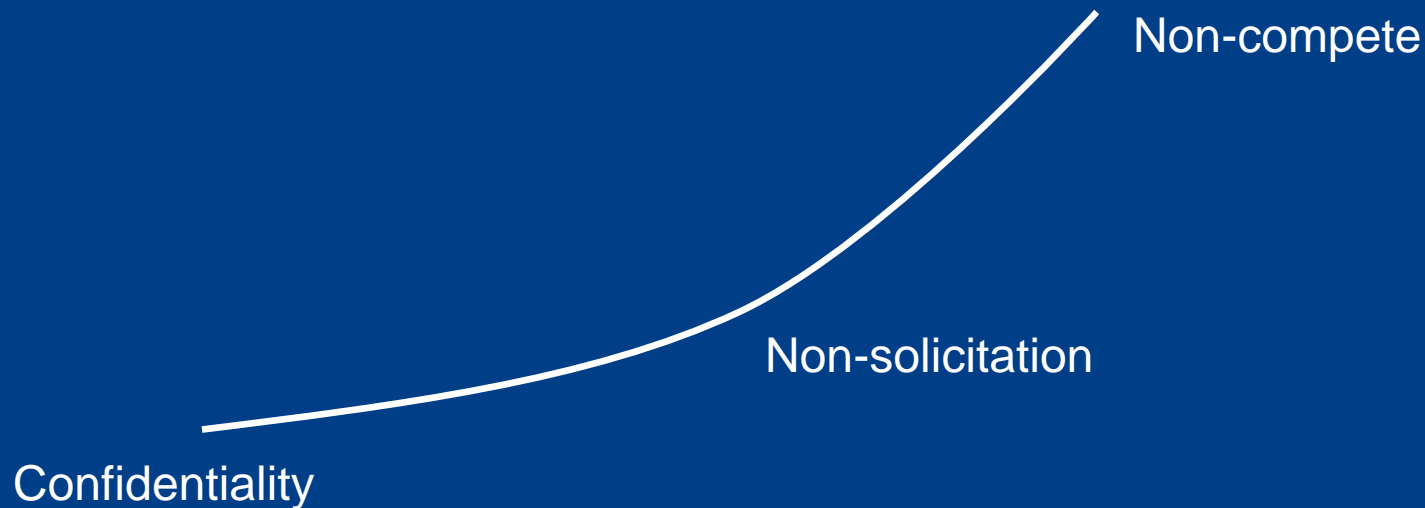
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# Tips On Using Restrictive Covenants

- State specific
- Judicial construction issues
- Be selective in application
  - ❖ Office/sales/management
  - ❖ Extent of restriction

# Restrictive Covenants

- Range of agreements
- Varying levels of enforcement difficulty



# State-Specific Agreements

- **Governed by state laws**
  - ❖ **One-size-fits-all approach is common mistake**
    - Balancing administrative burden with effectiveness
    - Which states are more or less strict
      - Louisiana, California, Colorado, South Dakota, Georgia
  - ❖ **Not necessarily an agreement for each state, but consider categories**

# Judicial Construction Issues

- Depending on the state, court may strike or modify unenforceable provisions
- Stated policy will be “reasonableness”
  - ❖ But results may be unexpected

**GOAL: Keep the court out of it**

# Beware of Overbroad Restrictions

- **Tailor your agreements**
  - ❖ Range of conduct
  - ❖ Time restriction
  - ❖ Geographic area
- **Overreach can result in non-enforcement**
  - ❖ Working for a competitor in any capacity
  - ❖ Soliciting prospective customers
  - ❖ Rule of thumb on time restrictions



# ID Confidential Information and Protect It

- Define what you consider confidential information before it becomes an issue
- Courts more likely to enforce if restrictions consistent with employee access
- Are there sufficient safeguards in place on your confidential information?

# Apply The Correct Type of Agreement

## ➤ Confidentiality

- ❖ Employees with access to sensitive information

## ➤ Non-solicitation

- ❖ Sales

## ➤ Non-compete

- ❖ High-level, wide access to confidential information

# Conclusion

## ➤ Driver Application Do's and Don'ts

### ❖ Periodically review your practices

- FCRA
- Arrest and conviction records
- Work authorization

## ➤ Tips On Using Restrictive Covenants

### ❖ Tailor your agreements

### ❖ Protect your confidential information

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## Questions?

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