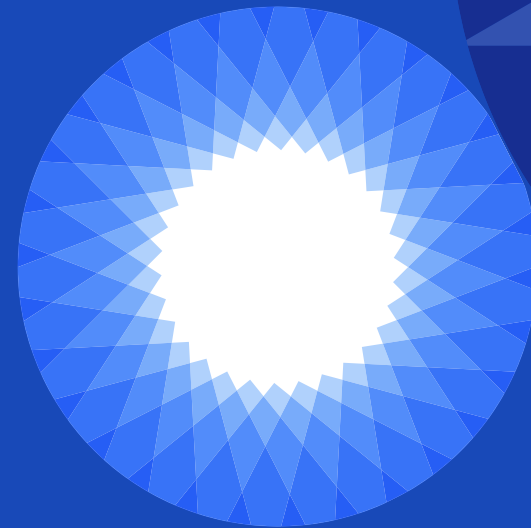


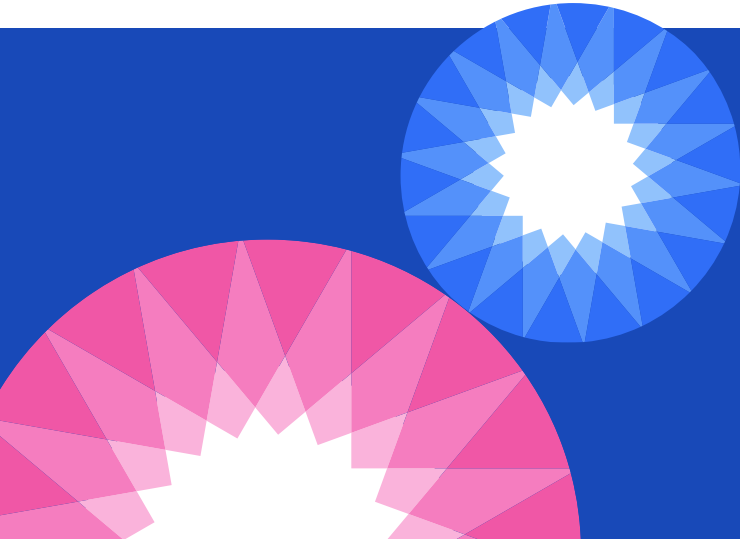
Background Checks During a Pandemic:
**5 Best Practices to
Mitigate Risk**



Introduction

▲ The novel coronavirus (COVID-19) has disrupted many aspects of our lives, up to and including how we run our businesses. One of the hardest-hit areas is the hiring of new employees and the corresponding processes, such as Form I-9 verifications and criminal and financial background checks.

With many government agencies partially closed or furloughed, including the local court systems, background checks are more complicated — and more important — than ever.



In this eBook, we will walk you through some essential things employers need to consider during the COVID-19 pandemic, including:

- What has changed
- What hasn't changed
- What options you have
- 5 best practices to mitigate risk

What has changed

Perhaps the most significant impact on the background check process has been the closure of courts, educational institutions and other public record repositories.

As a result of entire court systems closing and many public and private sector employees now working remotely, access to pertinent information can be limited and the background check process may take longer.

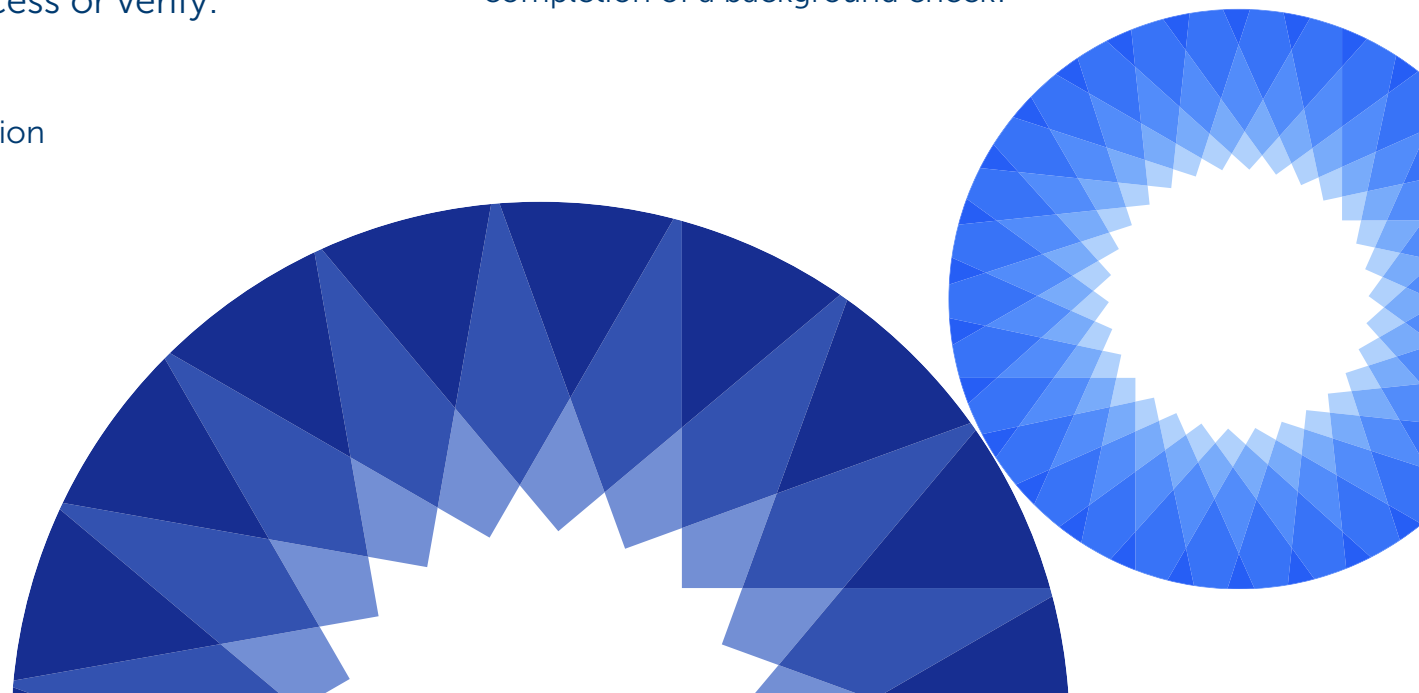
Employers may be unable to access or verify:

- Public records
- Previous employment information
- Education information

Due to these delays, background checks might not finish before a worker's anticipated start date or they may reveal potentially disqualifying information post-hire.

Consider what you, as an employer, will do to mitigate these risks:

- Are you going to change the type of background checks or screenings you conduct?
- Should you allow someone to start work prior to the completion of a background check?



What hasn't changed

Throughout this pandemic, things are moving fast and there's lots of misinformation. For the most part, all rules and regulations surrounding background checks remain in place, including "Ban the Box" laws, the Fair Credit Reporting Act (FCRA) and other equal employment opportunity laws. You must still comply with all laws and regulations surrounding background checks — we cannot stress this point enough.

According to the FCRA: "A person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer unless:

1. A clear and conspicuous disclosure has been made in writing to the consumer...in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and
2. The consumer has authorized in writing...the procurement of the report by that person."

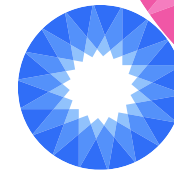
Disclosures and authorizations

Do not rush and do not change your policies and processes as they relate to your practice of getting proper documentation for disclosures authorizations.

While it's "technically" permissible under the FCRA to combine the disclosure and authorization, it's a best practice to keep these documents separate as most litigation in this space frequently surrounds forms on which the disclosure and authorization are combined.

Also, it's imperative to note that the FCRA applies equally to applicants and employees. If you run subsequent checks on current employees, you may need additional disclosures and authorization.

What hasn't changed



Pre-adverse and adverse action requirement

The laws and best practices around how employers administer pre-adverse and adverse actions also are unchanged during COVID-19.

Before taking pre-adverse action based in whole or in part on the results of a consumer report (e.g., background check), employers must:

- Provide the consumer a copy of the background report
- Provide the consumer a copy of the Consumer Financial Protection Bureau's Summary of Rights (and any additional notices mandated by state or local law)
- Provide the consumer a reasonable waiting time to consider the information in the report and advise of issues or inaccuracies (differs by jurisdiction)
- Identify the criminal history that is potentially disqualifying (if required by local jurisdiction)

If you decide to take adverse action on the candidate or employee based in whole or in part on the consumer report, you must provide notice:

- That adverse action has been taken based in whole or in part on a consumer report
- Of the name, address and toll-free number of the Consumer Reporting Agency (CRA) that furnished the report
- That the CRA did not make the adverse action decision and cannot provide specific reasons for the decision
- That the consumer has a right to obtain a free copy of the report
- That the consumer has the right to the dispute accuracy or completeness with the CRA

What options you have

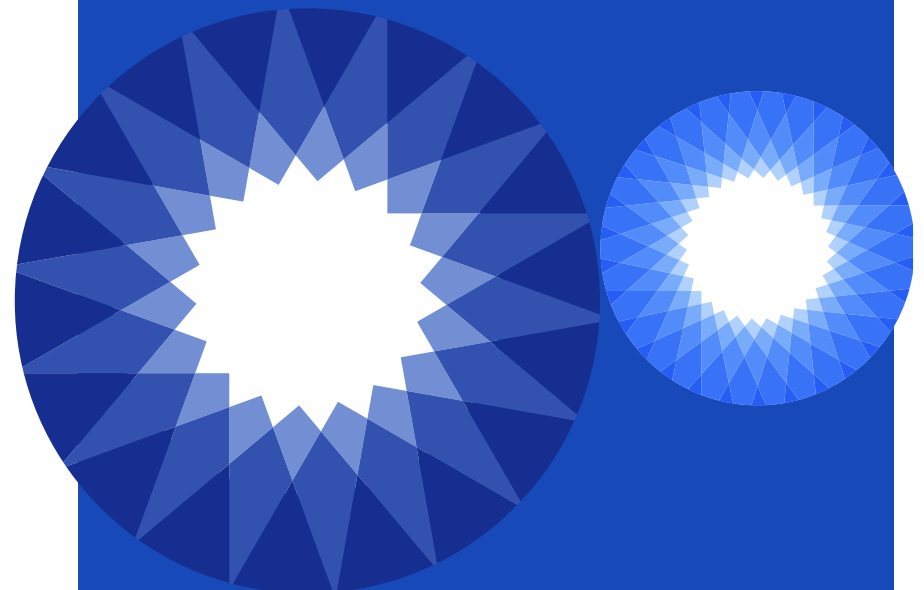
What does this all mean? In short, all pre-adverse and adverse action laws continue to apply, meaning you can't immediately reject a job applicant or terminate an employee based on information in a consumer report.

So, what are your options, especially for current employees? You should work with your counsel to select the approach that works best for you, but there are two possible options:

1. You can allow the employee to continue working while the pre-adverse and adverse action procedures are handled. There are risks associated with this.
2. You can put the employee on administrative leave while the pre-adverse and adverse action procedures are processed. If the leave is unpaid, this could be argued to be a violation of adverse action requirements.

What is a Ban-the-Box Law?

Ban-the-Box laws generally prohibit employers from requiring candidates to disclose their criminal history on job applications.



5 best practices for hiring during a pandemic

1 Review your offer letters

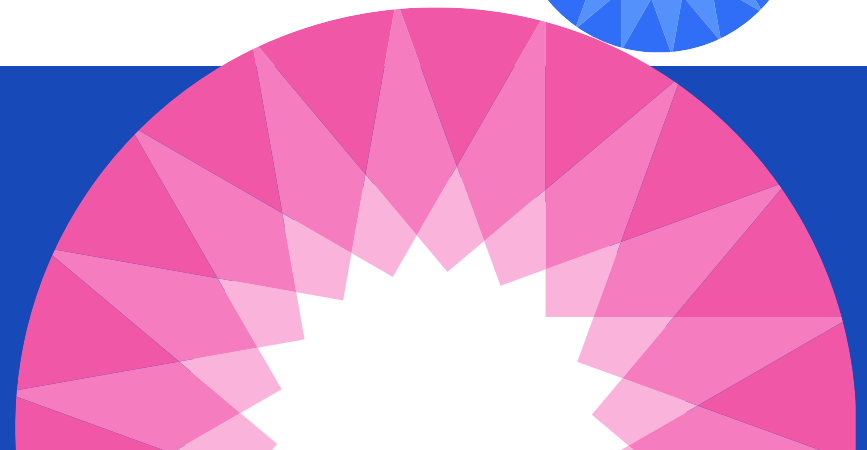
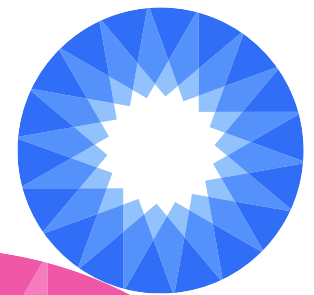
Most offer letters contain a clause stating that the offer is conditioned upon successful completion of a background check. Having the correct verbiage in your offer letter is more important now than ever. Make sure your offer letters are clear and unambiguous when it comes to advising applicants about employment screening that might not be completed until after they start work.

Sample background screening clause: “This offer and your employment are contingent and conditioned upon the successful completion of

a background check, which may occur prior to or after your start date.”

It might be beneficial to add specific language surrounding COVID-19. For example, state in the offer letter that background checks may be delayed due to COVID-19 and that work may begin prior to the completion of the background check.

If you do allow workers to start before the background check is complete, make sure to create a process for following up on background checks and completing open searches, such as a file tagging system.



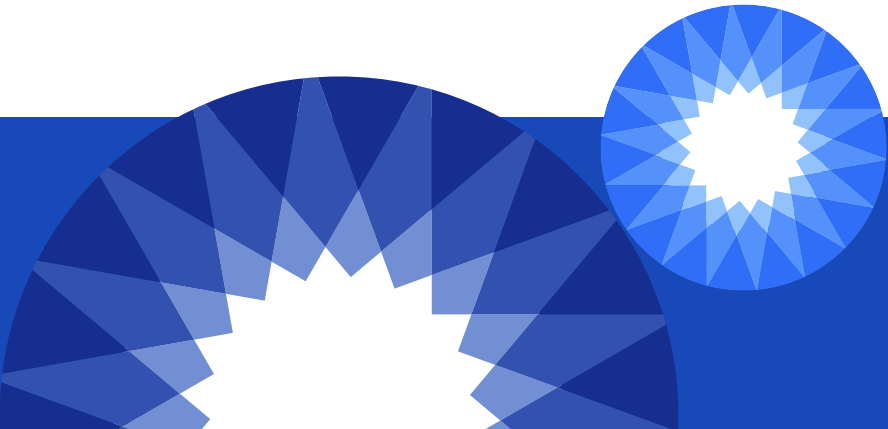
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2 Consider types of background checks you will perform

Amid the COVID-19 pandemic, people might be performing different jobs for which they were originally hired, working remotely or are furloughed. This means that employers might want to re-evaluate the types of background checks they perform. For example, you may not have needed to run department of motor vehicle (DMV) checks in the past, but that might change if you are now offering delivery services and employees are driving on behalf of your company. Or, you might decide that credit or criminal history searches should be given greater priority than employment or education verification checks.

You can always keep a background screen open and revisit once things are up and running again.

Another option to consider is to ask applicants to self-disclose their criminal history. This has been a touchy subject since the Equal Employment Opportunity Commission (EEOC) issued its criminal history guidance in 2012. While many jurisdictions ban asking about criminal history during the application process, most allow employers to ask once a conditional offer of employment has been made. But it's always important to verify with your counsel.



If you have screened workers with drug test and criminal history, you can't suddenly remove those tests from your background screening policy for that role.

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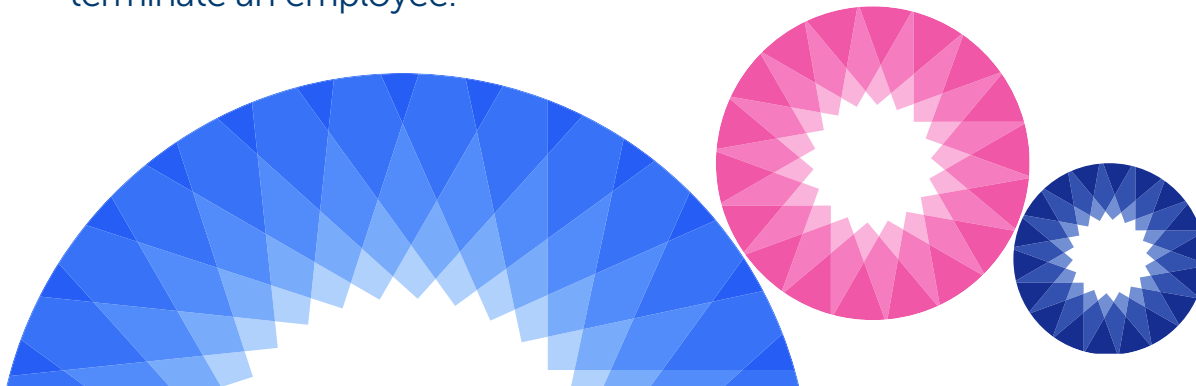
3 Consider timing of background checks

Prior to COVID-19, in general, it was considered a best practice to never let an employee start work prior to the completion of the background check. Given the nature of the pandemic and the shutdowns that have resulted, many employers are looking at alternative options.

With many courts closed — possibly staying closed for weeks or months — and several aspects of the background check process unavailable, it may be acceptable to onboard new workers before the background check is complete. This is a decision many employers struggle with since it's a lot easier to rescind an offer of employment than it is to terminate an employee.

If you decide to allow candidates to start work before the completion of the background check, there are a few things to consider:

- Have you updated your offer letter to explain the situation?
- Will you ask the applicant to self-disclose their criminal history?
- Will you do further screening at a later date?
- Have you evaluated the potential risk to your business, data and information systems, intellectual property and employees (i.e., negligent hiring) if you hire a worker with a background check pending?



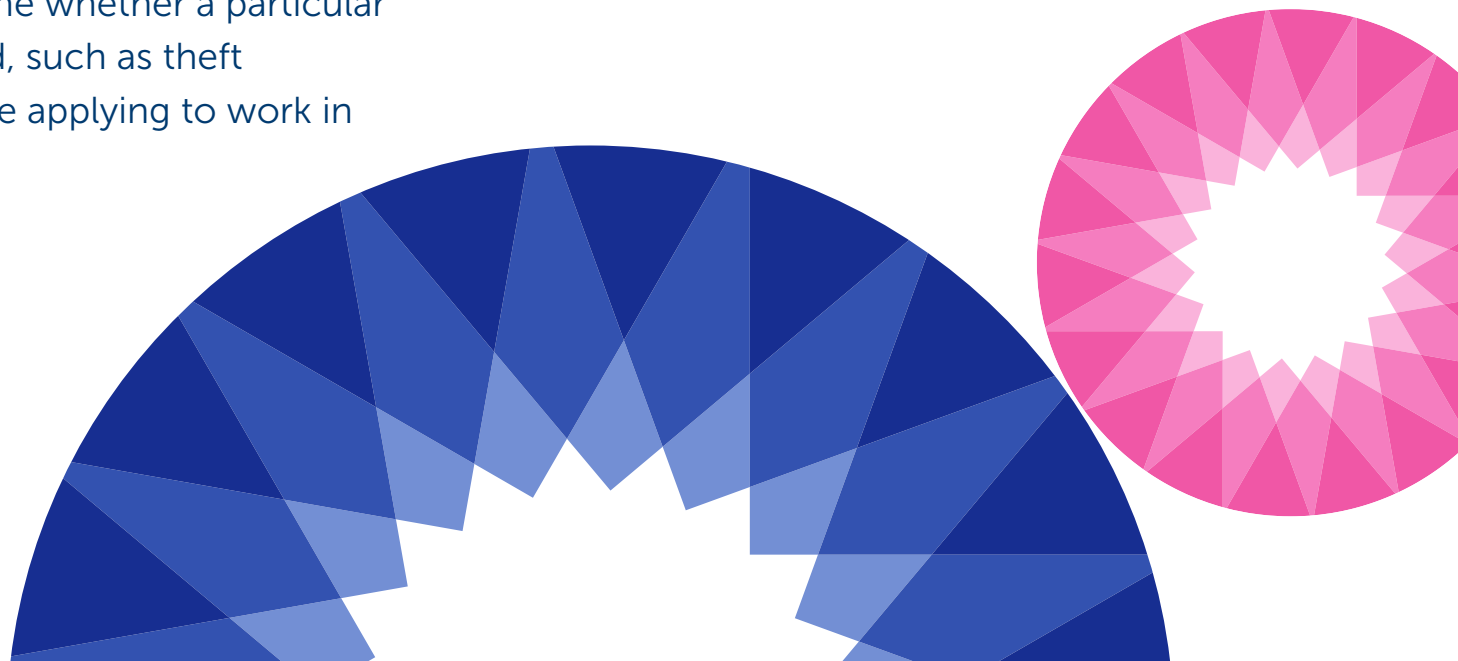
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4 Continue to conduct individualized assessments

Employers have flexibility when it comes to how they will respond to the results of a background check. While the EEOC provides guidance, it's just that: guidance.

Even though several lawsuits have been litigated and some hefty settlements levied (See EEOC vs. BMW and EEOC vs. Dollar General), you want to be sure you're still conducting individualized assessments to determine whether a particular conviction is job-related, such as theft convictions for someone applying to work in retail or a bank.

This is especially true since assessments are required in some jurisdictions. These assessments should be based on a variety of factors, including the nature and gravity of the offense, nature of the job, time elapsed since the conviction or completion of sentence, and any other factor that applicable law requires be considered.



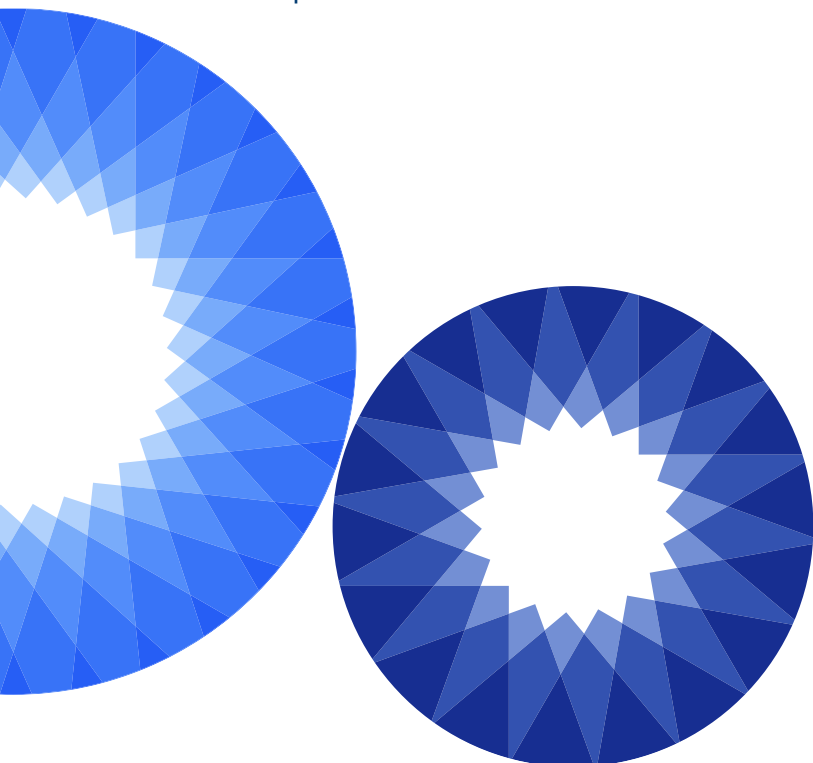
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5 Mitigate risk

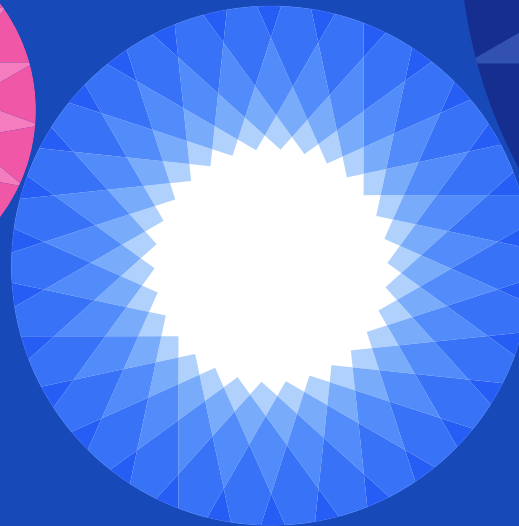
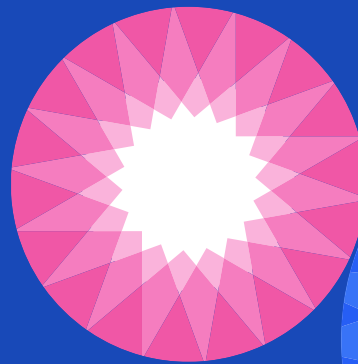
Finally, mitigating risk is the ultimate goal here. Because the world and its processes have changed, an uptick in litigation is almost a given. Make sure to document as much of the hiring and background screening process as possible.

Here are a few steps businesses can take to mitigate risk:

- Audit and revise, if necessary, your FCRA disclosure and authorization forms.
- Revise pre-adverse and adverse action letters to cover incumbent employees.
- Provide hiring managers and HR personnel with talking points regarding the company's background screening and hiring procedures during COVID-19.
- Train hiring managers and HR personnel on the adverse action process.
- Revise offer letters to explain to applicants that background checks might remain pending after their employment begins.
- Continue to pay employees during the pre-adverse action waiting period.



**We hope these best practices help you
with your hiring and background checks
during the COVID-19 pandemic.**



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