Katie's Korner Q1 2021

January 1st, 2021

About Peopletrail

Peopletrail® is a leading US-based consumer reporting agency, providing advanced background checks and pre-employment screening solutions globally.

As a leading consumer reporting firm, we make ordering a background check more secure, accessible, and flexible for our clients. Our background screening products' depth serves a broad client base ranging in multiple industries and company sizes.

Marijuana and Elections

On November 3, 2020, five states had initiatives on the ballot to legalize the recreational and/or medical use of marijuana, and all five initiatives easily passed.

Mississippi voted to legalize medical marijuana, and Arizona, Montana, and New Jersey voted in favor of legalizing the possession and recreational use of marijuana for adults aged 21 years and older.

Lastly, history was made by South Dakota becoming the first state to legalize both medical and recreational marijuana at the same time.

Due to these recent changes, Employers may want to review these changes with competent legal counsel as well as watch for new developments.

Arizona

Arizona voters passed Proposition 207, the Smart and Safe Arizona Act, to legalize recreational marijuana. This allows for both medical and recreational marijuana to be legal within the state.

The passed legislation, Proposition 207, appears to retain employers' ability to maintain and enforce zero-tolerance drug-free workplace policies. This statue does not provide any obvious job protections for employees, but employers will still want to review their drug policies with legal counsel. With legal counsel, it will be vital to decide whether to continue to enforce zero-tolerance policies for marijuana and consider how policy decisions may affect the organization.

Mississippi

Mississippi voters had a citizen-driven ballot initiative called Initiative Measure No 65 to decide the fate of medical marijuana. Initiative Measure No. 65 will amend the Mississippi Constitution to create a state medical marijuana program. This program is similar to other traditional medical marijuana laws but listing over twenty qualifying conditions to obtain a medical marijuana cardholder status.

With the approval of Initiative Measure No. 65, voters rejected a more restrictive measure (Alternative Initiative Measure No. 65A) proposed by the Mississippi Legislature. The legislature's proposal would have limited medical marijuana access only to terminally ill patients and those with undefined "debilitating medical conditions."

Initiative Measure No. 65 does not contain any express protections for applicants or employees, and the legislation does not prohibit employers from testing for marijuana. These types of protections are often referred to as "antidiscrimination provisions." The goal of these protections is to prohibit discrimination against medical marijuana cardholders based on their status.

Although, Mississippi's new medical marijuana law does not contain an antidiscrimination provision, employers may want to be careful when handling medical marijuana issues to ensure that they are incompliance with disability discrimination laws. Employers may want to review these changes with competent legal counsel as well as watch for new developments

Montana

Statutory Initiative 190 (I-190) and Constitutional Initiative 118 (CI-118) were passed by Montana voters. These initiatives legalized the possession, purchase, and use of 1 ounce or less of marijuana or 8 grams or less of marijuana concentrate by persons over the age 21.

Neither initiative provides explicit protections for job applicants or employees, and it does not prohibit testing for marijuana. Statutory Initiative 190 (I-190) clearly allows for employers to

discipline, discharge, or refuse to hire an employee or job applicant for violating a workplace drug policy or being under the influence of marijuana while working.

The Montana Medical Marijuana Act is very similar to these two laws that were passed. The Montana Medical Marijuana Act does not provide employment protections for medical marijuana cardholders in Montana. The new laws on recreation are set to go into effect on January 1, 2021.

New Jersey

New Jersey voted in support of Public Question No. 1,.This question asked voter if they approved of amending the New Jersey Constitution to legalize the possession and recreational use of marijuana for adults aged 21 and older in New Jersey. Public Question No. 1 does not contain express protections for applicants or employees who use recreational marijuana, but we have seen a similar plot within the state, and it did not work in the employer's favor.

The New Jersey Compassionate Use Medical Marijuana Act expressly excluded employment protections. Specifically, the law stated that "nothing" in the act required "an employer to accommodate the medical use of marijuana in any workplace." N.J.S.A. 24:6I-14. This act was originally was enacted to decriminalize the use of medical marijuana and

However, a New Jersey appeals court concluded last year that New Jersey employers still may be obligated to provide reasonable accommodations under the New Jersey Law Against Discrimination (NJLAD).

In Wild v. Carriage Funeral Holdings, Inc., Docket No. A-3072-17T3 (N.J. App. Div. March 27, 2019), the appeals court held that an employee who was fired after testing positive for medical marijuana (which he used to treat pain caused by his cancer) could sue his former employer for disability discrimination under the NJLAD for failing to accommodate his medical marijuana use during "off-work hours."

We expect that this jurisdiction continues to give employers tough legal questions to discuss with their legal counsel.

South Dakota

South Dakota also became the first state to legalize cannabis for medical and recreational use on the same day. This was done by passing two separate legislations called Constitutional Amendment A and Initiate Measure 26.

Constitutional Amendment A legalizes the possession, use, transport, and distribution of marijuana and marijuana paraphernalia by people age 21 and older.

Initiated Measure 26 establishes a medical marijuana program for individuals with a “debilitating medical condition” which includes those with “a chronic or debilitating disease or medical condition…that includes severe, debilitating pain; severe nausea; seizures; or severe and persistent muscle spasms, including those characteristic of multiple sclerosis.”

Battery & Assault Difference

Battery

Battery is a criminal offense involving unlawful physical contact, distinct from assault which is the act of creating apprehension of such contact.

Assault

Assault is sometimes defined as any intentional act that causes another person to fear that they are about to suffer physical harm. This classification recognizes that placing another person in fear of imminent bodily harm is itself an act deserving of punishment, even if the victim of the assault is not physically harmed. This definition allows police officers to intervene and make an arrest without waiting for the assaulter to actually strike the victim.

Assault and Battery

Respectively, "assault" and "battery" are separate offenses. However, they often occur together, and that occurrence is referred to as "assault and battery.

Historically, battery and assault were considered separate crimes, with battery requiring that the aggressor physically strike or offensively touch the victim. In that way, a battery was a “completed” assault.

Many modern statutes don't bother to distinguish between the two crimes, as evidenced by the fact that the phrase "assault and battery" has become as common as "salt and pepper." These days, statutes often refer to crimes of actual physical violence as assaults.

Assault Statute Example: Utah

In Utah, there is no distinction between an assault charge and a battery charge. An assault can be defined as an attempt to do bodily injury to another with unlawful force or violence, an act committed with unlawful force or violence that causes bodily injury to another, or as an act that creates substantial risk of

bodily injury to another. It can be the use of unlawful force or the attempted use of unlawful force that creates a substantial risk of bodily injury to another.

Utah Assault Statute

76-5-102 Assault -- Penalties.

(1) Assault is:

(a) an attempt, with unlawful force or violence, to do bodily injury to another; or

(b) an act, committed with unlawful force or violence, that causes bodily injury to another or creates a substantial risk of bodily injury to another.

(2) Assault is a class B misdemeanor.

(3) Assault is a class A misdemeanor if:

(a) the person causes substantial bodily injury to another; or

(b) the victim is pregnant and the person has knowledge of the pregnancy.

(4) It is not a defense against assault, that the accused caused serious bodily injury to another.

Amended by Chapter 430, 2015 General Session Effective 5/12/2015

COVID-19 and Court Closures

COVID-19 has affected all avenues of business. There has not been an industry unaffected by COVID's wrath, and this includes the background industry as well. Unfortunately, the sources of information that typically appear in background checks are now quite hard to access, and this can make our clients left in the dark when it comes to making employment decisions.

Many employers, schools, and courts are either closed or limiting access to information. This has created a challenge to obtain public records and verify educational credentials and prior employment. It is vital to remember even during a pandemic, the Fair Credit Reporting Act (FCRA) is in effect. The FCRA requires us to have up to date information, and we do this by going directly to the source such as a court, employer, or school.

Due to these challenges of many of these institutions being delayed or closed, reports may show orders as "pending," much longer than Peopletrail's typical standards to have our backgrounds completed for our clients within 48-72 hours timeframe.

The following are some the sample questions that we have received from clients like you:

How is Peopletrail keeping track of court delays or closures?

Peopletrail's compliance department is reviewing daily court closures through internal sources and documentation, and then publishing the data throughout the organization.

Should the employer change the types of information it orders from a background check provider because of COVID?

Most likely not. This really depends on what standards your backgrounds are based on. Some of our clients work with children or other at-risk populations, and they have very specific requirements that they must complete due to Federal, State, and/or local laws. In these cases, our clients are locked into what they must get in a background check to remain compliant.

In theory, more lacking employers could change their background packages because they may not have the compliance restrictions. It is vital to know that this most likely is unnecessary. We are seeing courts go through cycles of being open to being closed. It really depends on the current outbreak in the area, but clerks have been excellent about making sure that, when they are available, we are getting the much-needed information. Sometimes there is a back order for the clerks, but we have your request in a "line" waiting to get your results.

It is vital to remember even during a pandemic, the Fair Credit Reporting Act (FCRA) is in effect. The FCRA requires us to have up to date information, and we do this by going directly to the source such as a court, employer, or school. If you are concerned about a specific timeline, please reach out to either client success or your dedicated account manager.

If the "pending" item relates to criminal history, are there ways to expedite this search?

If there is a criminal history search pending longer than 72 hours, it is likely that it is a state or court that may be delayed.

On the front page of our homepage, the compliance department post once a week of the latest delays and more information about it. Please review that page to see if the search in question is subject to their jurisdiction, and if you are unsure, feel free to reach out to your dedicated account manager.

Finally, if they are on the list, it may be harder to expedite, because some of the courts are closed. However, if you call, we will try to reach out to our vendors to see what is possible.

Can employers allow candidates to start work before completion of their background check?

It depends, but employers might be reluctant to do so because they know nothing about the candidates' backgrounds and cannot assess whether the candidates will pose a risk to property, employees, or customers.

Overall, it is vital for employers to perform employment background checks for multiple reasons. It is said that about 40% or more potential employees misrepresent themselves on their resumes, applications, and their previous criminal activities. One thing a background check does is point out discrepancies between what your applicants are telling employers and what is true. Companies lose about five percent of their revenue a year due to company fraud. Roughly 30% of employees admit to stealing from their place of employment, with about 41% of managers, 39% of employees, and 19% of executives or owners, have admitted to stealing. It is estimated that small businesses or organizations can lose around $140,000; while larger companies or organizations can lose about $1 million a year, due to company fraud.

Sadly, white collar crimes have not slowed down during the pandemic, and it is vital to protect your organization from any risk. Please talk to competent legal counsel about your situation, and what is best for your organization.

How can employers dismiss employees because of their background check?

The FCRA requires a two-step notice process (Pre-Adverse & Adverse) for a denial of employment or any other action that negatively affects the employee that is based in whole or in part on information revealed in the background check report. This requirement is still in effect during the pandemic, and you cannot

immediately take negative actions towards an employee based on the background check without completing the Pre-Adverse and Adverse Process.

There may be additional state and local requirements for the Pre-Adverse and Adverse Process, with the FCRA. Please talk to competent legal counsel about your situation, and what best for your organization.

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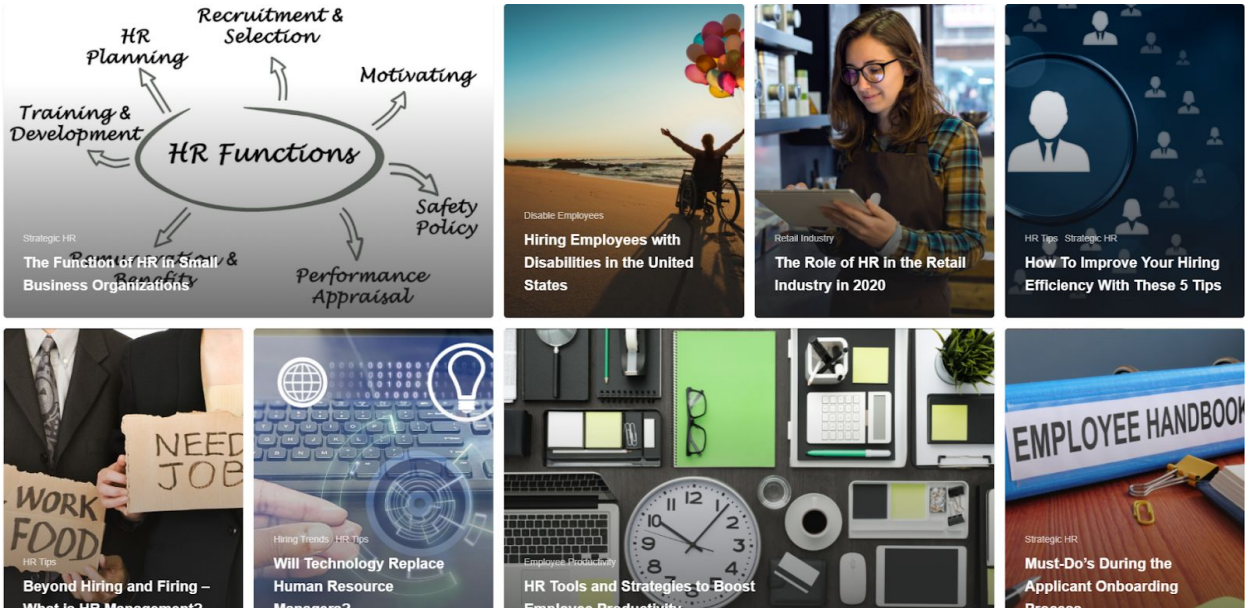

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Case Study of the Quarter

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Sorenson Communications

Employment Screening For High Volume, Multi-State Hiring Needs

With more than 5,200 employees and roughly 500 new hires each year, Sorenson Communications is a $25M+ company that needed an employment screening provider with expertise in compliance laws across several states to accommodate 109 locations operating in 39 states. In addition, they required a highly configurable and scalable solution to accommodate their diverse hiring needs that would also improve their time to hire. Through Peopletrail's Actionable Insight Screening® technology, Sorenson streamlined and simplified its hiring processes, reduced time-to-hire, and easily customized hiring packages to meet organizational needs based on our suggested best practices.

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