

Legal and Practical Background Check Considerations with Mike Coffey

- Ben: So everybody, thanks for coming back. It looks like we're keeping attendance up, and that is a wonderful thing right there. I know that five hours is a lot, but hey, this is wonderful information. It's stuff that we need to be kept in touch with. We need to make sure that we're doing things right, because hey, sometime success is just not making mistakes. I read that from Charlie Munger, who is Warren Buffet's partner and equally as successful as Warren buffet.
- Ben: And he says that one of the reasons that they got so successful is that they avoided mistakes, avoided the big mistakes, and that's what we're talking about here. And we're going to continue on that theme because we're going to be talking about background checks, we're going to be talking about making sure that you're working with people who are on the up and up. And our next guest is an entrepreneur, a human resource professional, a licensed private investigator, an HR consultant.
- Ben: He's also the president of Imperative, which is a background screening company, serving risk-averse employers. And each week he hosts the Good Morning, HR Podcast. Mike lives in Fort Worth, love, Fort Worth, with his very patient wife, where he practices yoga and maintains a keto diet about both of which he will gladly tell you way more than you want to know. So, I want to welcome to our Meet and Greet, Mike Coffey. How are you, Mike?
- Mike: I am well. Thanks for having me. I really appreciate it.
- Ben: Awesome. Well, thanks for being here. Hold on just a second, I'm going to make you the host. So now you have the power, so you should be able to share your... There you go.
- Mike: Great. Okay. Well, hello, Digital Bookkeepers Association, this is exciting. I'm glad to be here. I've built my business over the last 23 years basically by building relationships with trusted advisors. And so certainly, the folks that small and medium size businesses trust their books to are the kind of people that I want to have a relationship with. And so, I'm really excited about doing this. I'm a career HR guy, who 23 years ago had an HR consulting practice.
- Mike: And we got into the background check business to serve one client. It was a nationwide financial services company. They had some problems, they had hired some people that when the FBI got involved, showed them the FBI background check and said, "Why did you hire this guy?" And they brought me in to help him fix some of their employee selection processes. And the next thing you know, I got into the background check business with them.

Mike: So, we've been doing that for 23 years, and that as an HR guy, I bring a different approach to it than a lot of the other screening companies, primarily because I've dealt with the results of the bad background check both in my HR career and as a consultant. And certainly, as we've helped new clients dig their way out of problems that they created for themselves by putting the wrong people in the wrong seat.

Mike: But all that to say is that I don't want anyone to ever have the idea that we as an employer, as a background screening company are in the role or are looking for an opportunity to keep people from getting jobs. And you hear that a lot that, especially from advocates for former offenders, who are trying to reenter into society, employers won't give them a chance, will not be fair and reasonable in how they use their... how they evaluate somebody's criminal history, those kinds of things.

Mike: Well, I can tell you, I speak to two or three HR conferences a month. I spend a lot of time on the road doing the thing I love most, being in front of an audience. And I can tell you, I talk to these HR people, all our clients and across the country and other HR professionals, it is extremely rare that I find an HR professional who says, "Any criminal history at all, we're not going to consider you." But a lot of employers don't have really good tools in place to fairly evaluate that.

Mike: And whether we should even be concerned about this criminal history, whether it really is relevant to the position. So, we've put together tools and they're on our website and they're free for the whole world to help employers do a better job of confidently having conversation with candidates about their criminal history, and then legally and fairly evaluating that information to see if it's relevant to the job.

Mike: Now, when employers talk about their screening process, the first thing you talk about, well, screening, that means we're going to do the background checks. Well, my approach is very different from that because I think your entire employee selection process are opportunities for screening. And I think it starts way back at the job description, before you've ever met a candidate, I think your job description really ought to include considerations about the kind of role this is, what risks are inherent in that role.

Mike: And I've got an hour-long video on our website about how to go through the risk associated with the job. For instance, they've got access to vulnerable populations or company or customer accounts, which in your world is probably not uncommon. Where they've got access to easily removable assets, where they operate a motor vehicle, those kind of risks. Identifying what those risks are before we ever meet our candidate, and then defining what kind of past behavior would predict risk for those risks that we've identified for the job.

Mike: So, if you're hiring somebody to operate a forklift in your warehouse and they've got two DWIs in the last three years, there may be a significant risk there. There're some safety concerns, there's some compliance issues, things like that surrounding this person that may make you second guess that this person is the best candidate for the job. And then this is again, all before we've ever met our applicant, we're defining these things, and we're saying, "These are the risk factors and these are the kind of past behaviors that relate to those risk factors."

Mike: And then you have your employment application process, and I've got, again, another webinar that's recorded on the website that covers. It's the webinar version of my book, Seven Steps to Bulletproof Hiring Decisions and it covers that employment application. I think there this big rush from a lot of employers to improve the candidate experience by just, "Oh, we'll just accept a resume." Well, all resumes are polite lies and the resume... If all the resumes were honest and straightforward, there would be no such thing as a resume coach.

Mike: And just because a candidate has a beautiful resume, doesn't really tell you anything about that candidate, except that maybe they had 50 or \$100 to pay somebody to put it together for them. I'm a big believer that all your candidates for the job should follow the same process in coming in and introducing themselves to your organization. That means an employment application, but it's an employment application process that is relevant to the job. Because if you're looking for somebody, again, in your environment, a bookkeeping environment, I would guess you're looking for somebody who's got a high level of detail.

Mike: Who's very patient and would not mind an employment application that was a little bit more tedious. Because when we're hiring somebody to be an analyst for our background screening company, I'm looking for people who are very detailed-oriented and don't get frustrated by a lot of data fields and a lot of detail. So, we have designed all our employment application process for analysts to be really tedious. And we get about a 60% drop-off rate.

Mike: As soon as somebody starts our application process, they drop off at the fourth or fifth, sixth question, and we celebrate that. We think that's great because they just self-identified to us as someone who's not going to have the patience to do the job, we're asking them to do. They're not fit for it mentally. I would be horrible at it. I'm great at talking. I've got new ideas; shiny objects are my favorite thing. I'm always trying to reinvent the wheel. I'd be a horrible analyst in our organization, which is very procedural and step-by-step.

Mike: Then you've also got to talk about the criminal history inquiry. When are we going to ask it? When can we ask it? What question do we ask? And then our interview process gets deeper into those. A lot of people get nervous about asking about criminal history and talking about... Or not even just a criminal

history, talking about why did you leave that last employer? "Well, it was mutually agreed." Well, that didn't tell you anything as an employer, right? I don't understand that. Tell me what happened. Give me the details.

Mike: And employers, we get... Hiring managers get just liver quiver. They don't like to have that conversation, but I insist that's important that you understand the applicant's side of the story about why they left, especially, because I'm going to want you to go back and talk to the extent that you can previous employers and understand their side of it. And then evaluate who's credible and who gave you the better story.

Mike: And then we get to the verification process, and that's where the background check comes in. Verifying the information that this candidate has, has given you to determine if in fact they're honest about it. So, if you follow that process, you have a really thorough application process, good thorough criminal history question. We ask about employment history and education and all the details related to those. All the background check is a lie detector test.

Mike: And so, the background check, if your candidates are honest, should never cost you a job, cost you a new employee. The only time a background check should cause that is when the employee's lying. And I'm grateful, I guess, that we wouldn't exist if all your candidates were honest, right? My kids' college and orthodontia would've been paid for some other way and not background checks if all your candidates were honest. And we do see a lot of people in lying, in fact, we see more people lying about their education and their certifications and their employment history than we see lying about their criminal history.

Mike: So, when we're talking about the background check, what gets included in there, what are we talking about? Well, first identity, is this person who they say they are? We see, and I'm sure many of you who are processing payroll have seen it as well. What happens is, you hire a new employee and get down the road and process their payroll, everything seems fine. Your direct depositing their checks, everything's good. But then you get a letter from the Social Security Administration saying, "Hey, we don't have this person, this isn't the valid... This name, date of birth and social don't match our records."

Mike: And you don't want to get that far down the employment road before you find that out. So, the first thing we do when we're starting a background check is corroborate the identity information that the person's given us. And so, what that means is looking at consumer reference files, big data about people. We've heard about how big data's collected on all of us and these companies are all trading in it. And I think it's a little alarmist when you really get into what's really being traded.

Mike: But this is the information that we're accessing is from credit bureaus and a whole bunch of other transactions that most American consumers deal with, and they shoehorn all this data into a big database. And so, what we do is we take the social security number your candidate gave us, and we bounce it against that information. Now, some screening companies will call it identity verification or something like that. Well, we call it identity research because it's not a verification that the government's records match what this person has given us.

Mike: It's not a verification from the Social Security Administration that this name, date of birth and social really match their records. It's just corroboration, this person's engaged in all these transactions out here that use this information consistently. And it's really reliable. It's like the Wikipedia approach to data, enough people have contributed to this database, enough merchants and banks and creditors that that name, date of birth social look pretty good together.

Mike: The other thing this tells us though is other names that are associated with this person. My wife and what she still, after 25 years calls the good old days was Christie Gable before she became Christie Coffey. And so, all the bad stuff she did before she was Christie Coffey would be indexing the criminal record files under Christie Gable. And if I go search criminal records, looking for records for Christie Coffey, I'm not going to find those Christie Gable records.

Mike: And so, we need to know all those names that are associated with that person, and who knows what your real name is better than the people who you owe money to, and they report it to the credit bureaus. It also gives us a good a history of addresses, addresses with which you've been associated with over time. Generally, our minimum is to look back 10 years of addresses, but it's a pretty robust list of places where we should go conduct research based on your address history.

Mike: So, identity research is the first step. And then if for some reason Jane Smith is your candidate and you get in there and you start the identity research and everything comes back Bob Jones and Jane Smith is nowhere to be found. What we're going to do is stop that process and reach out to our client or sometimes the candidate directly and say, "Hey, did you transpose some numbers and the social security number," or something like that. And often that's all it is, is they just gave us the wrong social somehow.

Mike: But sometimes it turns out, well, what they really did was they didn't give us a good social on purpose because, and I'm sure as bookkeepers, you see this when you're doing payroll again. There are people out there who have government leans against them for child support or taxes and their wages are going to get attached at some point. And so, they don't want their income being reported to

the IRS under their appropriate social security number. They're avoiding child support or whatever.

Mike: But we're going to stop research until we can really corroborate that identity is right. And sometimes we can't, especially with 18, 19, 20-year-old kids, who've always lived at home and their parents have paid all their bills and they've never had established their own credit. Then what we can do is go to the social security administration and it's extra paperwork that your candidate has to complete, but in little fee, not significant.

Mike: But we can go to the social security administration directly and verify that name, date of birth and social. It's just extra paper, and 95% of the time it's not necessary. But identity research is always necessary to tell us who to research and where to do the research at.

Mike: So, when we're talking about criminal background checks, that's what most people, when they say background checks, they're thinking about criminal history. And so, there are roughly between, depending on how you define criminal record between one in four and one in six Americans have some sort of criminal history. Now, it could be a stupid misdemeanor from 15 years ago for public intoxication or something like that that's not relevant in almost any setting for employment, or it could be a sexual assault from two years ago.

Mike: So, the numbers depend and the depends on who you ask and where the numbers come from. But employers, in order to make a well-informed decision about the people they involve in their business, they need that information. They need to understand what this person's past behavior may predict about their future behavior.

Mike: Now, there are concerns about using criminal history, and so you want to make sure that here in compliance with the EEOCs guidance. It's from 2012 and it's pretty much a good... It's a about a 52-page document, I think, and it's a pretty good guidance on how to fairly evaluate criminal history. Especially if you like me are an HR nerd who's really into understanding the history of Title VII of the Civil Rights Act in 1964. It's a great document because it covers a lot of that history.

Mike: But they do make a few assumptions about employers that I think are unfair and their expectations of employers in some places aren't really reasonable in my opinion. And this is just a guidance, doesn't have enforceability. But it tells you if you're given the EEOC complaint for your use of criminal history, then this is what the investigators from the EEOC are going to be looking at.

Mike: Now, why is being a former criminal offender, does that put you in a protected class? Not really. That doesn't make you... There're no federal protections for

private employers considering criminal history, except that the sad truth is in the United States, people of color minorities are arrested, prosecuted and convicted at a higher rate than the white population.

Mike: So, if your criminal history policy is overly broad and excludes people and you don't have a really good business reason for that exclusion, then you may find yourself or your clients may find themselves in violation of Title VII and end up with a lawsuit. So, you really need to understand that, and I've got a whole webinar on that recorded on our website that you can go look at for free.

Mike: Other stuff that people include in background checks are verifications. Verifying education, verifying employment, and verifying certifications, all those kinds of things. All the claims that your candidate made on their application or during the interview process that suggests that, hey, this is the person I want to hire because they've got this experience, they've got this, they've got this. That is what you need to verify. Because again, if all your candidates were honest, I'd be out of work and I'm not.

Mike: So, you really want to make sure you have a process in place, whether you do it or your background screening company does it, where you're verifying as much information from the previous employers as you can get. Now, some employers will just give you title, dates of hire. Maybe they'll give you eligibility for rehire. Some will confirm in writing salary or termination reason. And then other employers, about 30 to 40% of the employers we talk to on behalf of our clients will actually give you some actual quality information beyond that.

Mike: They'll verify that the kind of employee is, the kind of responsibilities he's had in his role. What risk, performance assessments like. You'd be amazed how often when you bothered to ask, you'll get that information. But you always want to ask, you always want to have documentation that you ask. So, let's say worst case scenario, you do a background check, you call a previous employer and you just say, "He said he was a bookkeeper level one and he worked there from 2017 till 2021."

Mike: And they say, "Yes," and you hang up. Okay, he told us the truth. But let's say, this employee absconds with some of your client's funds. They get hold of a bank account or something like that and just cause you a misery. Now, maybe you're on the other end of a lawsuit from that client. And your employment law attorney, your defense attorney is going to want you to be able to say, "Hey, we did everything we can reasonably do to know this person's history and everything checked out."

Mike: But then you're understand, and I've been an expert in quite a few employment law cases, you understand and the plaintiff's council says, "Well, did you ask the

previous employer if there was ever any reason to question his honesty or integrity?" And you say, "Well, no, because employers don't share that information." "So, you didn't even bother to ask?" So, I suggest you always ask. We've got a standard list of questions we ask on behalf of our clients.

Mike: Even when we know the employer won't respond, we're going to have documented that we asked those questions and that the employer refuse to respond. And that may help worst case scenario, our client mitigates any future liability if this person jumps the rails. And so, we always ask, "Was there ever a reason to question his integrity or honesty? Did he ever act in a threatening a course of manner?" And we've got a whole series of questions like that make a lot of sense to ask and have documented that you did ask.

Mike: And then there's driving history. And certainly, if the person's driving, you want to check their driving history and see if they operate motor vehicles safely on public roads. But beyond that, driving history does a few other things for you. First of all, you'll remember my talk about identity research earlier said, this isn't a verification, that name, social, and date of birth go together. But if you verify somebody's driving history, what you also do is verify their driving license number.

Mike: And so, what you're getting is a name, a date of birth and an address. So, we're actually able to verify those three pieces of information and ensure that they really belong to the right person. And you're seeing their driving history. I would argue that if somebody has a really bad driving history, your only concern isn't about their operating motor vehicle in the course of business. You may be also if they're operating any kind of heavy equipment or dangerous equipment, even industrial equipment where they're standing in front of a piece of machinery operating it like a slicer or anything like that.

Mike: You may still care about what driving history says about their safety awareness, their compliance with operating procedures and things like that. That may give you some insight. Somebody with a really bad driving history, suspended driver's license, things like that, that may be a red flag that maybe this isn't your best candidate for certain kinds of roles.

Mike: And then the thing everybody asks about is credit, and in your environment, I think credit is going to be more relevant than from... I spend most of my time talking employers out of running credit, because quite honestly it doesn't tell the story in most cases that employers think it tells. Because what employers say is, "Well, I want to know their credit because I want to know how honest they are." Well, the reality is that credit doesn't really predict honesty.

Mike: The very few ladies that are out there suggest that there's no correlation between honesty or bad behavior at work and a negative credit history. What credit could tell you though is first of all, do they manage... How well do they manage business? So, in your environment, especially where somebody has got access to and responsibility for managing other people's finances, I would be interested in understanding their credit.

Mike: But you understand, just looking at the credit is not the same as understanding it. So, you somebody's got a number of negative accounts on their credit report and some things are in collections and all. That's not to the point of understanding yet. What you've got there is just the information, but why do their credit go bad? And I can tell you, we see very often people have good credit for a long time. Then about three years ago, maybe four years ago, something went wrong because all of a sudden, they start slow paying accounts, things start going into collections.

Mike: And often they get a really negative credit history, but their previous three years, three or four years was great. And so, what happened there? Well, sometimes you can tell because you look and you see, well there are several medical collection accounts on this report. So, somebody got sick in the family, and maybe it was your applicant, maybe it was a kid, maybe it was a spouse.

Mike: And in order to finance those medical expenses, other things had to go. And that's not something necessarily that I, as an employer really care about. As long as they're doing what they can to take care of business, but I'm going to have a conversation with them, and that is an icky conversation to have.

Mike: But other times you see somebody who has bad credit ongoing for years, certain things go into collections and then they go up in new accounts and those go into collections. And they just are living well beyond their means and just making a mess. I would be very concerned about that person in any kind of fiduciary role or role where they're managing accounts or making financial decisions on behalf of customers or clients. The other thing you need to know about credit is in the employment context, you don't get a credit score.

Mike: In fact, if you're credit right now and you're getting a credit score, somebody's doing something wrong and in violation of their agreement with the credit bureaus. Because the credit bureaus will not sell an employment, permissible credit report with a credit score. And you can't buy a credit report with a score for employment purposes. And so, if you're seeing credit score on your current credit reports, you need to talk to wherever you're getting them from and get that corrected because that is a violation of the agreement with the credit bureaus.

Mike: So, while we're talking about credit, let's talk about the Fair Credit Reporting Act, and I'm going to follow along in chat. Follow the chat and make sure there's nothing that I need to respond to. So, if you have questions, feel free to drop them in there.

Ben: Hey, Mike, I'll monitor that and let you know. So, you focus on your presentation. Thank you.

Mike: I appreciate it. The federal law is the Fair Credit Reporting Act. Okay. Ignore the word credit in that law because the first thing people think is, okay, it has to do with credit reports. And as long as I don't order a credit report on my background check, it doesn't apply. Well, it ought to be called the Fair Consumer Reporting Act. But when they passed the law back in 1971, the Fair Credit Reporting Act, credit bureaus were the only people really providing background checks to employers and they were credit reports. That's what they were getting.

Mike: And there wasn't an industry like we've built over the last 30 years of individuals who are walking physically into courthouses and doing criminal research and doing all those things to make sure they do a good... the employers have a better-informed hiring decision. But the law governs not just credit, but anytime you as an employer are buying information from a third party about your candidates or your employees. So certainly, a background check that you're paying for is one.

Mike: But even if you're doing your own background checks in-house and you verify employment and you call the employer up and they send you to the work number, which is owned by Equifax now. And to verify employment, because a lot of employers won't do that directly anymore. They use a third party, that makes it a consumer report, now all the FCRA applies. Or if you go to verify education and they send you to the National Student Clearing House, which a lot of registrars use to verify education, so they don't have to be on the phone with employers all day.

Mike: The National Student Clearing House is a consumer reporting agency and everything you do because you're paying for information about your applicant or your employee makes it a consumer report. And the plaintiff lawyers have discovered the FCRA. Over the last 15 years, every year, there are multiple multimillion dollar settlements, and they're almost all settlements.

Mike: Because this is a law that's really pretty easy to follow, but many employers don't understand it or they get sometimes just bad information from their own employment law attorneys and they end up on the wrong side of it. And just

having the wrong words on a form is enough to violate the FFCRA. And so, we keep seeing more and more of these multimillion-dollar lawsuits.

Mike: As I said earlier, the FCRA covers consumer reports that are pulled for employment purposes. So, an employment purpose is hiring or information you're going to use to retain an employee, or maybe you're considering promoting an employee or even a lateral... Some employers have a policy, if we're going to transfer someone to another part of the organization, we're going to run a background check, whatever it is. Or if it's just your annual background checks.

Mike: Many employers run some sort of smaller background check just to primarily get an updated criminal history on their candidates, on their employees every year. Those are all employment purposes. If you're paying for information from a third party about your employees or your potential employees, it's an employment purpose.

Mike: Now, what's not an employment purpose under the FCRA and isn't considered a consumer report is when you're getting the information directly from the source. So, if you pick up the phone yourself as the potential employer and you call the previous employer and they tell you about the potential employee, tell you how amazing she was. Then that's not a consumer report because you're not paying anybody for that information, you're getting it directly from the source.

Mike: And the same goes, if you walked into the local courthouse and searched the criminal records in that county for records related to that person, that wouldn't be a consumer report. It's just when you pay a third party like me to do the background check that this really gets involved.

Mike: And then there is an exclusion when you hire a third party like me to do an investigation on your behalf. A violation of law or a violation of company policies, things like that. Those third-party investigations are generally excluded from the definition of a consumer report under the federal law. But and I do... As I said earlier, I'm a licensed private investigator, and for some of our clients, we do internal investigations. I'm doing one now for a large employer where an allegation was made inside of HR from one person against another person in HR and they went at a third party from outside to come in and do the investigation.

Mike: And so, I'm doing those. So, there are times where you may want somebody out on the outside to come in. But you do have some responsibilities in those cases, and I won't dig real deep into them. But just know that when you hire an outside party to do an employment related investigation, you do have some responsibilities.

Mike: And then interviews. There's a special kind of consumer report called an Investigative Consumer Report. And that's when your consumer reporting agency, your background check company hires someone to interview other people about them. And it's all over the place, but the most common interview is when I pick up the phone and we call a previous employer, and we're talking to that manager who supervised this person at one time. And we started asking questions about, did they ever act in a threatening a course of manner?

Mike: Was there ever any reason to question their integrity or honesty? Things like that. We start going through those question and that makes it an interview. If I'm just saying, "he said his title was bookkeeper. His date of employment was 2017. His termination was 2021." That's not an issue. That's not an interview. But as soon as I start getting into qualitative information, maybe subjective information, and asking details, that's when it becomes an interview.

Mike: And that Investigative Consumer Report is only relevant because of the paperwork that's required when you're disclosing to the individual. And we'll talk about that in a minute, that you're going to procure a consumer report on them.

Mike: So, having said all that, let's dig into what I can tell you. What can we include in the background check? Well, as you probably know, everything negative drops off your credit report after seven years. That's because of the Fair Credit Reporting Act. And in the employment context, for all other kinds of things, almost everything drops off your consumer report. Things can't be told to you, negative information can't be shared with the employer after seven years, with some notable exceptions.

Mike: First of all, criminal cases. Criminal cases can be reported forever under federal law. Now, some states do limit that, and we'll talk about that in a minute, but under federal law, under the Fair Credit Reporting Act, and in most states, criminal convictions where the person was actually found guilty are reportable forever. So that's easy. But everything else that's negative, non-conviction, criminal cases, so somebody got deferred adjudication.

Mike: They plead guilty to the case, to the offense and agreed to serve probation, it's deferred adjudication. They serve probation and case is dismissed. If that case was filed more than seven years ago, I can't tell my employers about it unless the person's going to make more than \$75,000. If he's going to make more than \$75,000, all bets are off the table. We can tell everything.

Mike: So, anything negative, a non-conviction case or a straight dismissal case, civil cases where they've been sued, or they were the plaintiff or the defendant, liens and judgements, negative employment. Somebody was terminated involuntarily seven years and one day ago. And even if they tell me he was terminated for

embezzlement, I can't legally tell my employer, client that if the person's going to make less than \$75,000 a year.

Mike: Now, if they're going to make \$75,001, then by golly, I can tell them and I will. But that's what you need to understand. There are times where you can ask, where the employer can ask the question and you consider the information, but the background check company can't tell the employer the same stuff. So, every now and then, we'll get a call from an employer who they'll say, "Hi, we gotcha. You missed one." And I'll say, "Okay, tell me what happened." And he says, "This guy had a DWI case that he served deferred adjudication on and it was dismissed eight years ago. And you missed it."

Mike: Well, no, we didn't miss it because even if we saw it, we couldn't tell you about it. Because the law, if he's making less than \$75,000, it was more than 7 years ago. So, this is an important thing. Now, some states do have their own limit limitations on what employers can consider, notably, California and New York being among the most severe. But even cities have their own rules. San Francisco, Los Angeles, Seattle, New York city, they have their rules on top of the state's rules about what employers can consider as far as criminal history goes.

Mike: Madison, Wisconsin, most criminal records can't be shared with an employer in Madison, Wisconsin, if they're older than three years old. And so that's a problem, right? But if... Sometimes when I've got a training program for former offenders, to help former offenders find meaningful work with a record. And I train them how to have a conversation with employers about their history and how to be prepared for that conversation, all that stuff.

Mike: How to answer the criminal history question on the application, all of that. And sometimes somebody's got a hairy history in their distant past, but it's something that would stop many employers from progressing with that candidate. And I suggest, "Okay, well, maybe you want to, how do you feel about really cold winters? Because Madison, Wisconsin maybe the place for you to go look for your next job."

Mike: When you sign up with your CRA, Consumer Reporting Agency and your background check company, they should be requiring under the law that you certify that you're not going to use the information for any purposes that are in violation of civil rights laws or any other law really that's a consumer privacy law or some sort of civil rights protection. And that you're going to use this information for employment permissible purposes, and not for some other reason. There may be a legitimate reason, but you need to certify upfront what your purpose is.

Mike: And now here's where employers really start to get in trouble. Before you ever order the background check, you've got to make a valid disclosure to the candidate that you're going to order the background check. This disclosure is outlined in the Fair Credit Reporting Act. It's real simple to comply with, but this is where I see the most employers getting in trouble. Because they simply have the wrong language in their disclosure document. Because the problem is your disclosure document cannot contain any additional information.

Mike: So, it's going to be a document used exclusively for the purpose of making the disclosure that you're going to order a consumer report. And you can also get their authorization for the consumer report on the same form. But that's it, so anytime you see extraneous information like I release anybody from liability. That document, if it's where it is, if it's on the disclosure document, that is a violation of a CRA. This disclosure document, this disclosure language can't be part of your employment application. It's got to be a separate document.

Mike: I see disclosure documents from employment law attorneys still, and this law has been in place since '97, this part of the law has been there. I still see documents from employment law attorneys that say, "I understand that my employment will be at will," or, "I release the employer from any liability," or, "I release everybody who shares information with the employer or with the background screening company from liability." So, it's one of those things where you've got to... It's a real simple rule to comply with, but a lot of employers tend to screw it up.

Mike: So, go back and look at your documents. We've got sample documents on our website, but just go look at your documents and make sure that the document where you're disclosing to the candidate that you're going to order consumer report has nothing else in it, except, "So we're going to order a background check on you related to employment, and you're going to authorize it right here." That's all you really need on that document.

Mike: Then at the time that you order the background check, you should also receive a prompt from your screening company to certify again, that you've got a permissible purpose for doing this and you're going to follow the law in how you process the information you receive. And that you have already received that applicant's authorization and made the necessary disclosures to them.

Mike: So, the background check comes back to you, right? And we're unexpectedly receiving information that we didn't think was going to show up and it surprises us. And maybe criminal history, maybe it's a negative employment reference or whatever, but there's information on the background check that makes us think, "Well, we may not proceed with this candidate because of this. Or we may go talk to other candidates first." Anything that from the point of view of the

candidate would be an adverse or a negative action kicks in some requirements for you.

Mike: And before you take that adverse action, you have to give the candidate a copy of their report and a copy of their rights under the Fair Credit Reporting Act. It's really simple, you print the report out. Most of your screening companies have automated systems now where you just push a button and it'll email to the candidate a secure link where they can look at their report and receive their summary of rights, and then records electronically that they receive those. And it gives them a time and date stamp in your system so you know when they looked at it.

Mike: The other thing you can add to that is in the cover letter of that pre adverse action information, say, "I encourage our clients to put this note in." "Hey, if there's any additional information that would help us put in context the information in the report and help us better understand it, please contact us immediately. Give us that additional information." And then whatever they tell you, go verify, because I hear a lot of crazy stories from candidates sometimes, and we go try to verify them and they're not accurate.

Mike: But go ahead and include that right in there right up front. Because what you don't want to do is because of a misunderstanding or because of the context of something. And especially if you didn't ask the right questions in the interview, give that candidate an opportunity to tell their side of the story. Because you don't want to lose a good candidate just because you didn't ask the right question or because there's information out there and you're just going to assume that it's automatically negative.

Mike: Sometimes they tell their side of the story, rarely though, to be honest, that in my experience... If an employer is not going to hire somebody or is going to reevaluate hiring somebody because a criminal history, rarely is there much that the applicant's going to add to it in those of conversations. But this is a good way to have documentation that you've given them an opportunity to look at that information.

Mike: And when I'm talking to former offenders about it, I encourage them to tell employers before you ever run the background check about their history. Even if employer hasn't asked the criminal history question, hasn't posed any questions to them. I tell them, "What you don't want is your criminal history coming back to the employer in black and white on my report without any context."

Mike: So you can explain, and I'm encouraging former offenders to be more focused on explaining why these passed critical errors in judgment are not reflective of who they are today. So that's the story they really need to tell is, "Yes, I did something

stupid four years ago, seven years ago, 10 years ago. Here's what I learned from that process." Whether they went to jail or paid fines or probation or whatever they did, "Here's what I learned from that process.

Mike: Here's the things I've done to better myself since then. And here's the things I can put forward as evidence that I'm not the person who made that bad decision any longer." Those are important stories, and I think it's helpful for employers to hear the context. Now, though, on the other side of that coin, if you're using our system and if you go to our website, you can download our system and download the information related to our criminal history questions and things like that.

Mike: If you're using a good system and you've asked a really thorough criminal history question. If you've asked for a reason for termination and were really explicit and they lied to you or they fail to answer the question honestly, the gospel, according to the Coffey is, if they lied to you coming in the door, you can't... It's just not reasonable to believe that their behavior is going to change later. Okay.

Mike: So, if they lied to you coming in the door, your criminal history question is really thorough and there's no wiggle room. And if they've got something they should have told you, and then the background check comes back with negative information. They just lied to you, you caught them in a lie, and my argument is always, if they lie to, you move on to your next candidate. But before you do that, you have to give them a copy of their report and the summary of their rights under the law.

Mike: And then breathe. Give the candidate an opportunity to review the information. And if there is any reason to think the information's incorrect, they can dispute it back to the background check company. And if you see this very often, a lot of disputes coming in from candidates about the background check and then the background check gets corrected after they bring it up. That's a red flag that you're working with a pretty fly by night background screening company.

Mike: Because they're not doing very much to be accurate and they're going to get you sued eventually. But sometimes the applicants, it's true or what happens at or where we change reports. We maybe change two reports a year, two or three at most. And what we see is the, we call the previous employer and they tell us the person is ineligible for hire or rehire, or that they were voluntarily or involuntarily terminated. And so, we put that in our reports, the client says, "Oh, that's a red flag for me. That's not what they explained in the interview process or on the application."

Mike: And so, they send a candidate a copy of the report and the summary of their rights. And then the candidate picks up the phone and calls the previous

employer and starts yelling at him. And when they do that, the previous employer says, "Oh, okay, well, yeah, we'll change our story on that." And so, the candidate then calls us and disputes the accuracy information, you said, "XYZ company said I was not eligible for rehire. That's wrong." So we say, "Okay, we call XYZ company up, and XYZ company says, "Oh, well, by policy, we don't make that determination. Or we don't share that information. That's not..."

Mike: Since we talked to them last, they've changed their position. Okay, we'll take that off the report because our report has to reflect the current information from the source. And so sometimes that happens. Sometimes though there are legitimate reasons for the can to be concerned, because identity theft is a real thing, even in criminal records. And this is a story from a number of years ago from our files, but it gives you an idea what can happen. And we see one or two cases like this a year, and we do thousands of background checks, so I don't think this is common.

Mike: But I think it's fair to say that you're better off giving your candidate the benefit of the doubt. So, here's what happened. A large social services organization here in Texas is one of our clients. And they were hiring a guy to be a senior leader with a social... He had social work background. So, we're going to do the background check, his employment history went back 20 plus years and was confirmed 100%. He had never had five minutes of unemployment. He had moved steadily from one role to the other, always here in Texas.

Mike: But when we start doing the criminal background research, we find that he has criminal records in Berkeley, South Carolina, and then Navarro County, Texas. So, my analyst brought that into my office and said, "Hey, we've got an issue here." It was a really unique name too. It was like, imagine Uriah Ezekiel Bojangles Smith Johnson. Just the most unique name. There's not going to be somebody else out there with that same name and its same date of birth.

Mike: It's just highly, highly unlikely for that, for something that unique. Now, Betty Smith, or even Mike Coffey with the same date of birth wouldn't be a surprise, but this one was really unique. And they said, "Well, we found this criminal history and the name, date of birth match." And so, what do we do because his employment checked out and he couldn't have been in jail in South Carolina or Navarro County, Texas, and working for these other companies?

Mike: And so, we ordered the copies of the criminal files from the local courts and the booking photos from the jails there. And this is what's funny. Look, these are the same guy. That was between '96 and 2001, this guy had some hard miles, but there you go. We identified as the same guy, 66 inches, so he's not real tall, but... I've got a photo, we also looked inside those criminal files and both of them

happened to have social security numbers, which is often not the case, but neither one of them were good.

Mike: One belonged to a woman that we determined belonged to a woman and another one that had never been issued at all. So, I know we've got something going on here. So, I called my client up, the big social services agency and said, "Okay, so tell me about Mr. Ezekiel Isaiah Uriah Smith." And he says, "Well, he's an amazing social worker. He's been on the board of United Way; he's got all this history." And I said, "Well, describe him to me physically.

Mike: "Well, he is about 6'2" black guy." And I'm like, "Bingo, that's all I needed to know. Thanks." So, this was not our guy, because clearly this is not a 6'2" black guy." But the name and date of birth were so unique. And we did other research, there was nobody else there. There didn't appear to be anybody else out there with the same name and date of birth. And so, I called the candidate up directly and said, "Hey, Mr. Smith, here's who I am. Here's what I do.

Mike: And I just want you to know we came across these records. We're not including them in a report, but are you aware there's somebody else out there with the same criminal history?" And he said, "No, I didn't know that, but it explains a lot because whenever I've gone to other places to get a background check, sometimes it takes a long time to get the background check back, or when I get stopped by the police, often I'm sitting in my car for a long time. It seemed always to take too long."

Mike: And I said, "Well, have you ever have been the victim of identity theft?" And he said, "That only happened back when I was in the military in the '90s, someone stole my identity, opened up a bank account, using my information and created a whole bunch of mess for me to clean up." Well, this is the guy probably who did that back in the '90s. He took this guy's I information, created a fake ID with his own face on it. And the first time he got arrested, he used that information.

Mike: And now this guy's fingerprints are associated with this other guy's name and date of birth. And so, every time this guy gets fingerprinted that other identity information from the original jail records comes up and he just keeps getting prosecuted. I imagine if I went back and looked deeper now, since it's been a number of years since we had this case, we'd found more criminal records for him. But this guy, at least now our candidate at least knows that happened and that he probably needs to and is watching for it.

Mike: And in fact, he worked with the local Sheriff's department. Most of your law enforcement agencies have somebody who help people resolve problems with identity theft. I've got a friend in Dallas, who's a former police officer and his daughter arrested down at Texas A&M. She ran a stop sign and the college

station police pulled her over and she had warrants for her arrest out of Dallas County, where she grew up for prostitution and drug charges.

Mike: And this is a little bowhead sorority girl or whatever and she calls her daddy crying. And he goes down to Dallas County to figure out what's going on. And there's all these cases with his daughter's name and date of birth. Even her address was on some of them, their home address. And he does some research, he pulls the mugshots there and it's the little girl she grew up with. It was her best friend growing up who got into drugs in high school. And the first time she was arrested, she didn't give them her name, she gave them somebody else's name.

Mike: And if your fingerprints aren't on file, that's what happens. All of that to tell you that, give your candidate the benefit of the doubt. If they say, "This isn't me," or they say, "This information's incorrect, take a breath and let the background screening," and tell them, "Hey, you need to contact the background screening company and dispute the accuracy of the information." We're going to ask them to give it to us in writing. Sometimes they don't and we just have to take it down and reinvestigate it to the best of our ability.

Mike: But just give them benefit of the doubt you because what you don't want to lose is a good candidate just because of some faulty information.

Mike: Finally, after all that, you've given them a copy of the report and summary of their rights under the law, given them a minute to acknowledge that the information's theirs and it's accurate, then you can make that hiring decision, "Okay, we're going to offer them a different job." Maybe he's a great salesperson, but he's got three DWIs and I can't put him behind a wheel. So, I'm going to make him an inside sales, give him an inside sales job until I know him better and have an idea that he's not going to pose any risk to us. That's an adverse action, so we're going to put that note in there.

Mike: Or maybe you're going to offer him less money. We see this sometimes, employers based on the experience level someone has, they will offer them X dollars as a salary. But then when we go verify the details of their employment, we find out, well, they were only actually the full charge bookkeeper for this company for two years. And before that they worked in human resource. They didn't even come into accounting, so they don't really have 10 years of accounting experience, which is what we thought we were paying for.

Mike: But we're still going to hire them, but we're not going to pay them for 10 years of experience. We're going to pay them for two years of experience, and so we're going to make that adjustment. So, it's not always just not hiring somebody, but again, if it's adverse action, if from the point of view of the applicant or the

candidate or the current employee, it's a negative action. It's something that they're not going to be thrilled about. Treat it like an adverse action.

Mike: And you have to give them another notice once you finally take that action saying, "Hey, this is the action we're taking based in whole apart on the background check. This is imperative information groups. If you want to punch somebody in the nose, here's how you reach Mike Coffey and other information that's just required in the law." It's a standard letter, your background check company will give it to you, but make sure you do it every single time.

Mike: And that is the high level 10,000-foot view of background checks and your general federal requirements for employers. Now, again, like I said earlier, state by state, there are a variety of... And even city by city, there are a variety of laws and regulations that you have to follow and your background screening company should be able to help you make sure you comply with those as well.

Mike: Now, I have a podcast, Good Morning, HR. Good Morning, HR. I'm Mike Coffey and this is the podcast where I talk to leaders about bringing people together to create value for shareholders, customers, and the community. So basically, it's an HR podcast, but I've got a lot of small business owners and people who just manage employees who join it, who listen as well. And we drop a new episode every Thursday morning. It's on Apple Podcasts, Spotify, Stitcher, and on YouTube, or at goodmorninghr.com.

Mike: And finally, imperativeinfo.com/7 will get you my book, Seven Steps to Making Bulletproof Hiring Decisions. So, if there are questions, if we've got any time, I'd be glad to answer them.

Ben: Oh, thank you so much. This is great information, Mike. And again, we're getting scared into a lot of different things here today, so it's nice to be scared for of an HR person too. One question that I do have, number one, you mentioned several resources. Is that on imperativeinfo.com or is it on the other side?
imperativeinfo.com-

Mike: imperativeinfo.com. That's our company website. And if you go to imperativeinfo.com/7, it'll point you to you the eBook, you can download it. And inside the book are links to almost everything I've talked about.

Ben: Okay, great. Second thing, what about engaging a contractor? We have some people here that have a business and they engage a contractor to help them. So, what are our dos and don'ts when it comes to background checks on a contractor, or can we even do that?

Mike: You can, and probably should. Now, the real question is, are they contractors like they have their own corporate entity set up and you just want to do your due diligence on that entity and them before engaging in business with that entity? We call that due diligence, and we do a ton of that. Or, but if it's just going to be a 1099 contractor, somebody who doesn't have their own corporate entity and you're going to be paying them 1099 piece mail, or however you pay them, but it's going to be a 1099 at the end of the year, not going to be a regular employee.

Mike: Then what you need to do is treat them like an employee, because under the Fair Credit Reporting Act, employment is defined very broadly. And so, if you're paying them directly, you're writing a check in their name or their DBA, then consider it employment. And we've worked for some of our clients who got squishy about the employment language on all the forms, because they don't want to... You never want to make a 1099 employee feel like you're engaging in an employment agreement with them.

Mike: And so, we've altered some of the employment language to the extent that we came into the law, so it's not we're saying, "Instead of in connection with your perspective employment with our company," you're saying, "In connection with your perspective provision of services to our company," something like that so that it's not so doesn't sound so employment-ish. Now, when you read the document from the Federal Trade Commission though, it's got employment all over it and there's no way around that because that's a document you have to give them and their summary of rights.

Ben: Okay. All right. Well, Hey, it has been wonderful having you here, Mike. We appreciate your knowledge and sharing all this information with us today and hope to have you back.

Mike: Oh thanks. And if I can help anybody, you can reach out to me at imperativeinfo.com.

Ben: Awesome. Thank you so much, Mike.

Mike: Thanks a lot. Have a good one.