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IMPORTANT LEGAL NOTICE

This presentation is to provide general information and updates regarding rights and obligations. These materials are not intended to provide legal advice.


Individuals should consult with in-house counsel or with an experienced employment law attorney for legal advice regarding specific facts and circumstances.

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TOPICS

1. Industrial-Organizational Psychology and Criminal History Screening
2. Primer on Criminal Background Checks
3. Legal Landscape
4. Framework for Evaluating Employers' Use of Criminal Records
5. Ensuring the Job-Relatedness of Criminal Conduct Screens
6. Establishing Job-Related Crimes
7. Challenging Criminal Conduct Screens
8. Using Recidivism Research to Ensure Job-Relatedness
9. Conclusion/Q&A

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Industrial-Organizational (I-O) Psychology

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WHAT IS INDUSTRIAL-ORGANIZATIONAL (I-O) PSYCHOLOGY?

- Field that studies and addresses workplace issues at the individual and organizational level
- I-Os conduct and apply research that improves the well-being and performance of people and the organizations that employ them
- The work of I-Os may include:
 - Employee assessment & selection
 - Leader identification & development
 - Improving diversity and inclusion
 - Studying job attitudes, employee job motivation, & retention



SOCIETY for
INDUSTRIAL and
ORGANIZATIONAL
PSYCHOLOGY

SCIENCE FOR A SMARTER WORKPLACE

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WHAT DO I-Os KNOW ABOUT CRIMINAL CONDUCT SCREENS?

- I-Os use scientific methods to analyze jobs, identify related job requirements, and create selection and screening procedures
- Understanding job content and requirements is critical to identifying job-related crimes appropriate for use in criminal history screening
- APTMetrics was among the first to develop and use evidence-based methodologies for establishing job-related criminal background checks
- My work in this area...
 - Serving as a settlement expert to implement consent decrees
 - Expert witness and consultant to counsel in employment discrimination cases
 - Working with employers to proactively develop fair and equitable screening practices



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Primer on Criminal Background Checks

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IMPORTANT CRIMINAL STATISTICS

- ~110 million Americans (1/3 adults) have a criminal record

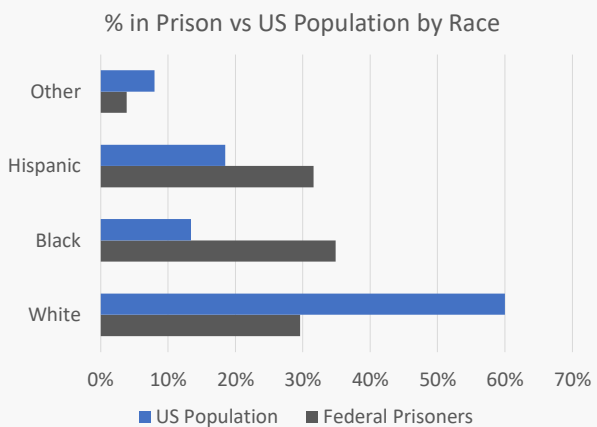
Source: Bureau of Justice Statistics, 2020

- Almost 600k are released from jail each year while another ~600k are jailed

Source: US Department of Justice, 2020

- People with criminal records have a 27% unemployment rate

Source: Prison Policy Initiative, 2018



Source: US Sentencing Commission, 2021 & US Census, 2021

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SO...EMPLOYERS USE BACKGROUND CHECKS...

- 95% of employers use criminal background checks
- A critical tool for keeping the workplace safe; employers believe...
 - Reduces employee theft
 - Avoids negligent hiring claims
 - Safeguards customers, other employees, and/or the general public
- Addresses concerns about brand reputation and negative press

BUT... THERE ARE DIFFICULTIES WITH IMPLEMENTATION

- Continuing changes in the legal landscape
- Conflicting state (or local) and federal laws
- Difficulty in assessing risk associated with hiring someone with a criminal record
- Adverse impact of criminal history screening
- Ensuring job-relatedness, fairness, and legal defensibility

VALUE OF HIRING EMPLOYEES WITH CRIMINAL HISTORIES

- Performance Potential
- Longevity Potential
- Social Responsibility / Community Benefit
- Talent Shortage / Great Resignation

Legal Landscape

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LAWS RELATING TO CRIMINAL BACKGROUND CHECKS

- Anti-discrimination laws
- Fair credit reporting laws
- Ban-the-box laws
- Fair chance laws
- Occupational licensing laws

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FEDERAL LAWS & REGULATORY GUIDANCE

TITLE VII – CIVIL RIGHTS ACT & REGULATORY GUIDANCE



- “Validate” in accordance with *Uniform Guidelines*
 - **OR**
- Use a “targeted screen” and individualized assessment applying the *Green* factors
 - Nature of job
 - Nature & gravity of offense
 - Time passed

FAIR CREDIT REPORTING ACT (FCRA)



- Disclosure
- Written consent
- Employer certification to vendor
- Adverse action
 - Pre-adverse action notice
 - Copy of report
 - Applicant may dispute
 - Adverse action notice

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STATE & LOCAL LAWS/REGULATIONS – EMPLOYMENT

BAN-THE-BOX LAWS



- Additional disclosure language
- Inquires can only be made after an interview or conditional offer
- Restrictions on reporting charges not resulting in conviction
- Ban use of any record older than 7 years even if conviction
- **15** states and **22** localities have adopted BTB for private employers

FAIR CHANCE “BEYOND THE BOX” LAWS



- Often complex, unique requirements
- Laws may require:
 - Heightened proof of job-relatedness (e.g., Wisconsin)
 - Individualized assessment (e.g., NYC)
 - Applicants have right to provide evidence of rehab or good conduct (e.g., CA, NYC)
 - Specific statements in job ads or solicitations (e.g., San Fran, LA)
 - Specific posters or notifications (e.g., Philly, San Fran)

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STATE & LOCAL LAWS/REGULATIONS – LICENSURE

OCCUPATIONAL LICENSING LAWS



- Historically, many states' occupational licensing statutes have
 - Blanket prohibitions against licensure
 - "Good character" provisions
 - Minimal restrictions on boards
- Deny licensure regardless of crimes' severity, relation to occupation, or time since crime was committed
- In past 5 years, 2/3s of states have implemented licensing reforms
- Newer occupational licensing statutes
 - Substitute standards related to specific occupation for "good character" criteria
 - Allow for preliminary decisions about whether a record will be disqualifying
 - Prohibit consideration of certain records considered unrelated to job performance
 - Require licensing agencies to justify negative decisions and allow appeals
 - Mandate oversight of licensing boards' decision-making

Ensuring the Job-Relatedness of Criminal Conduct Screens

VALIDATION OF CRIMINAL CONDUCT SCREENS

Validation is an empirical or evidence-based process for establishing that a selection procedure provides meaningful job-related information for predicting future job performance; for criminal history screening criteria, that process must consider exclusionary crimes and time periods



Involve job experts
and other subject
matter experts



Facilitated group
process to collect
empirical data



Make decisions
tailored to specific
job requirements
and characteristics



Document the
structured
validation process

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TARGETED SCREENS USING THE GREEN FACTORS

Instead of validation, **targeted screens using the Green Factors** may serve as the *foundation* for evaluating criminal history when paired with individualized assessment of those excluded based on the screens

The “Green Factors” are used to identify relevant crimes and time periods:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence; and
- The nature of the job held or sought

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EXAMPLE OF TARGETED SCREENS

Crime	Delivery Truck Driver	Customer Service Phone Representative
Assault	7 years	N/A
Fraud	4 years	7 years
DUI	4 years	N/A
Vehicular Assault	4 years	N/A

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NATURE AND GRAVITY OF THE CRIME

- What was the harm caused by the criminal conduct? What was the impact on others?
- What are the legal elements of the crime? (e.g., felony theft may involve deception, threat, or intimidation)
- Was the crime identified as a misdemeanor or a felony?

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THE TIME ELAPSED

- Conviction date or incarceration release
- Time elapsed is a proxy for risk of committing a crime in the future

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NATURE OF THE JOB

- What are the duties and responsibilities of the job?
- What are the circumstances under which the job is performed (e.g., the level of supervision, security measures in place)?
- What are the job characteristics that may contribute to risk of committing a crime (e.g., access to vulnerable populations, access to money)?
- Where is the job performed (e.g., warehouse, private home)?

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HOW TO ESTABLISH JOB-RELATED SCREENS

An Evidence Based Approach for Employers, Licensing Boards, etc.

1. Compile a list of **important and critical job duties** performed with **reasonable frequency**
2. Understand and describe the **work environment** and **job characteristics**
3. Compile a list of **risk factors** associated with the job duties and work environment. Example risk factors to consider:
 - Access to cash, credit cards, or checks
 - Access to sensitive or confidential information
 - Access to keys or key codes

HOW TO ESTABLISH JOB-RELATED SCREENS (CONT.)

4. Identify **crimes associated with risk factors**. Consider:
 - How frequently will an individual experience a risk factor in the course of their job (e.g., hourly, daily, monthly)?
 - Are individuals supervised or unsupervised when they experience a risk factor?
 - Do policies or procedures exist to prevent criminal or illegal behavior (e.g., what security measures are in place)?
5. Leverage recidivism research to **set exclusionary time frames** for crimes identified as directly related

EXAMPLE OF AN EVIDENCE-BASED STUDY



Pennsylvania Act 53 of 2020

- Act 53 sets forth a new way of considering the criminal history of prospective occupational licensees in the state of Pennsylvania
 - Disqualifying criminal offenses must be “directly related” to fitness or ability to perform duties or responsibilities of the profession
 - Boards must identify and publish a list of “directly related” crimes for the profession or occupation they license
- I-O review of initial “directly related” crimes lists published by the boards identified deficiencies in job-relatedness
- A demonstration exercise was conducted to illustrate how an evidence-based process could be used to identify appropriate “directly related” crimes

Nurse Practitioners diagnose and treat acute, episodic, or chronic illness, independently or as part of a healthcare team. They may focus on health promotion and disease prevention. They may order, perform, or interpret diagnostic tests such as lab work and x rays. They may prescribe medication. Must be registered nurses who have specialized graduate education.

Key Work Activities are included in the table below.

Certified Registered Nurse Practitioner Key Work Activities
Administer non-intravenous medications and immunizations.
Advise patients on effects of health conditions or treatments and/or healthcare system processes.
Analyze quantitative data, test data or images to inform diagnosis or treatment and/or determine the effectiveness of Rx or therapies.
Apply bandages, dressings, or splints.
Consult & collaborate with other healthcare professionals to plan or provide treatment.
Record patient medical histories
Communicate detailed medical information, medical procedures, test results, diagnoses, Rx plan, and/or care to patients & family members.
Develop medical treatment plans.
Diagnose medical conditions.
Order medical diagnostic or clinical tests.
Establish nursing policies or standards.
Follow protocols or regulations for healthcare activities.
Examine patients to assess general physical condition, functioning, capabilities, and/or health.
Maintain medical or professional knowledge, including maintaining licensure.
Monitor patient conditions during treatments, procedures, or activities.
Operate diagnostic or therapeutic medical instruments or equipment.

KEY NURSING JOB DUTIES

NURSE WORK SETTINGS

Common work settings are included in the table below

Certified Registered Nurse Practitioner Work Settings
Hospitals (federal, state, local, and private)
Nursing Homes/Extended Care Facilities
Clinics (e.g., Urgent Care, Minute Clinics)
Physicians' Offices
Nurse Practitioner Offices
Home Healthcare Services
Schools
Private Homes
Prisons
Hospices
Ambulatory Surgical Centers
Telehealth

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Risk factors were reviewed and edited in focus groups with nursing professionals. The focus group participants determined that the risk factors were common across Certified Registered Nurse Practitioner, Registered Nurse, and Licensed Nurse Practitioner roles.

Nursing Risk Factors	
Risk Factor	Definition
Access to Personal Property	Ability to access property belonging to coworkers, patients, and/or patients' families at any place in the hospital/facility, including patients' rooms, breakrooms, offices, lockers, etc.
Access to Hospital/Facility Property	Ability to access property belonging to hospital/facility including medical equipment and supplies (e.g., N-95 masks, PPE).
Access to Sensitive Information/Medical Records	Ability to review and record information of patients, coworkers, and other individuals, including personally identifiable information (e.g., date of birth, social security) and medical history available in medical records and regional & statewide electronic records.
Access to Drugs	Ability to access or divert prescription drugs, other forms of medication, and/or prescription pads.
Access to Secured Areas	Ability to access secure areas within the hospital/facility (including medicine storage cabinets, lock boxes, supply rooms, & offices), patient homes, or other work settings, and to provide access to someone not authorized to access those areas (e.g., badging family or friends into secure areas).
Access to Patients	Ability to interact verbally or physically with patients any place in the hospital/facility, including areas that may place them in vulnerable positions such as patient rooms, treatment rooms, restrooms etc.

NURSING RISK FACTORS

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JOB-RELATEDNESS EXERCISE

		Nursing Occupation to Crime Linkages X = Risk factors that are the basis for Subject Matter Experts' linkages									Directly Related Time Frame Years since conviction that the crime should be considered directly related
		Linkage Yes/No	Access to Personal Property	Access to Hospital/Facility Property	Access to Sensitive Information / Medical Records	Access to Drugs	Access to Secured Areas	Access to Patients	Access to Vulnerable Populations	Access to Patients' Families, Vendors, and Coworkers	
CRIMINAL CHARGE	CRIME DESCRIPTION										Short (1-3), Medium (4-6); Long (7-9)
Forgery	Makes/issues/alters money, tokens, credit cards, badges, etc.; Forges signatures: Creates/executes/issues documents such as wills, contracts, etc.	No									
Identity Theft	Possesses or uses the identifying information of another person (e.g., SSN, driver's license, electronic signature) for an unlawful purpose including financial identity theft.	Yes	X		X			X	X	X	Medium
Drugs - Possession with Intent to Distribute	Distributes/manufactures/delivers drugs; dispenses without prescription; includes intent to distribute	Yes				X	X	X	X		Short

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Challenging Criminal Conduct Screens

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HOW TO CHALLENGE CRIMINAL CONDUCT BARRIERS

An Evidence Based Approach for Direct Service Advocates

1. Gain an understanding of **key duties, work environment, and characteristics** of the job your client applied for; using:
 - Job postings
 - Company websites
 - O*NET at <https://www.onetonline.org/>
 - Professional association or degree program websites
 - BLS Occupational Outlook Handbook at <https://www.bls.gov/ooh/>
2. Think through the **risk factors** associated with the job duties and work environment. Example risk factors to consider:
 - Access to cash, credit cards, or checks
 - Access to sensitive or confidential information
 - Access to keys or key codes

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HOW TO CHALLENGE CRIMINAL CONDUCT BARRIERS

3. Determine if the crime(s) that excluded your client are associated with the job-specific risk factors you identified. Consider:
 - How frequently will an individual experience a risk factor in the course of their job (e.g., hourly, daily, monthly)?
 - Are individuals supervised or unsupervised when they experience a risk factor?
 - Do policies or procedures exist to prevent criminal or illegal behavior (e.g., what security measures are in place)?
4. Leverage recidivism research to identify issues with the employer's **exclusionary time frames** and argue that your client's risk of committing a crime is unlikely

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Using Recidivism Research to Ensure Job-Relatedness

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RECIDIVISM RESEARCH

- **Recidivism:** “A person's relapse into criminal behavior, often after the person receives sanctions or undergoes intervention for a previous crime” (National Institute of Justice)
- Tells us about the probability of being arrested or convicted in the future
- Tells us when criminal history is “stale” because a stable pattern of non-criminal behavior has been shown
- Tells us about factors that influence the likelihood of recidivism

Recidivism research has implications for...

- Decisions re: exclusionary time frames for crimes
- Individualized assessment of risk

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TIME SINCE CONVICTION

- Past behavior is the strongest predictor of future behavior; however,
 - Vast majority who recidivate will do so within 3 years; 2 out of 3 people with convictions are rearrested within that time frame
 - If an individual has gone 6-7 years with no convictions, there is a much lower risk of recidivism; risk is close to that of a person without a criminal record
- Exact time frame it takes for the risk of criminal behavior to equalize varies depending upon the type of crime
 - People who commit serious crimes (violent, personal) have convictions that span over longer periods of time and are slower to desist
 - People who commit mid-level crimes (high-level misdemeanors, low-level felonies), have very high risk of recidivism in short term, but desist more quickly
- Recency of the crime is the most important predictor of recidivism!

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NUMBER AND VARIETY OF OFFENSES

- The number of crimes predicts recidivism; more crimes = more recidivism
- The variety of offenses predicts recidivism, potentially more than the number of crimes
- People, especially younger people, who commit crimes tend to do so opportunistically; i.e., they take advantage of risks put in front of them, rather than specializing in a particular crime type

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FACTORS THAT MITIGATE RISK

Education and employment

- Post-conviction employment is one of the strongest predictors of decreased recidivism risk
- Secondary and post-secondary education (obtained in or out of correctional facility) also decreases risk of recidivism

Age at time of conviction

- Most people with juvenile records do not have adult convictions
- As age increases, risk decreases – meaning individuals who were younger at time of conviction carry a high risk for a longer amount of time
- Risk increases up to age 18 and then begins to decrease between the ages of 18 and 25; after age 25, risk of recidivism decreases rapidly

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Evaluating Employers' Criminal History Screening Practices

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LEGAL & REGULATORY REQUIREMENTS

- Are they complying with federal law (Title VII, FCRA)?
- Are they following the requirements of state/local law where it differs from federal law (ban-the-box, fair chance laws) regarding, for example...
 - permissions?
 - notices and other communications?
 - where in the hiring process criminal history information can be considered?
- Are they using the Green Factors or validated criteria when screening criminal history?
- Are they using **only** convictions to deny an employment opportunity?
- Are the same standards applied to all candidates when making adjudication decisions?

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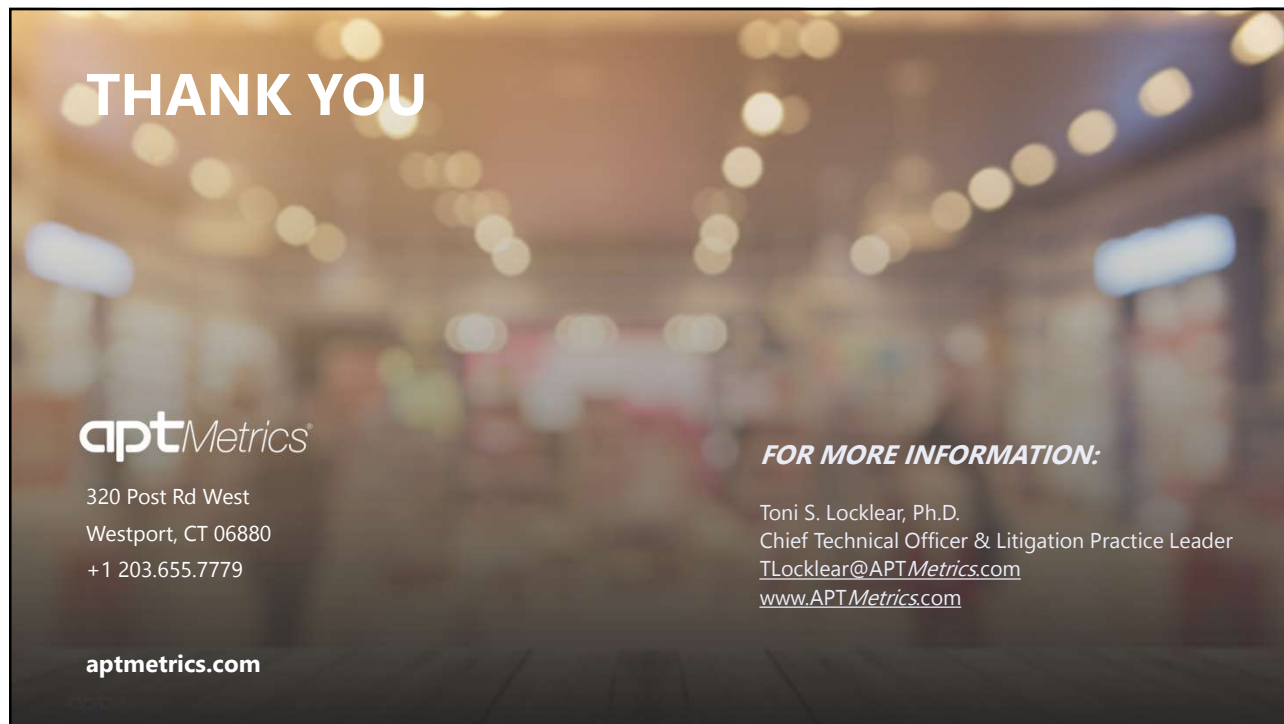
OTHER PRACTICES

- Do they have a documented justification for the job-relatedness of exclusionary crimes and time frames?
- Are they ensuring the confidentiality of criminal records and only using the records for the purpose for which they were intended?
- Do they have an appeals process for candidates denied opportunity based on criminal history?
- Do they allow candidates to submit information on rehabilitation and other mitigating factors even where state/local laws don't require it?

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Participant Questions and Concluding Remarks

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THANK YOU

aptMetrics®
 320 Post Rd West
 Westport, CT 06880
 +1 203.655.7779

FOR MORE INFORMATION:
 Toni S. Locklear, Ph.D.
 Chief Technical Officer & Litigation Practice Leader
TLocklear@APTMetrics.com
www.APTMetrics.com

aptmetrics.com

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