

Podcast: *Hiring to Firing* Podcast

Episode: *Catch Me If You Can*: The Fine Print of Background Checks

Hosts: Tracey Diamond and Emily Schifter

Guest: Chris Capurso

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Tracey Diamond (00:00):

In this episode of [Hiring to Firing](#), the podcast, Emily Schifter and I sit down with our colleague Chris Capurso to talk about background checks along with the great movie from 2002, *Catch Me If You Can* with Leonardo DiCaprio. Leonardo DiCaprio plays the character of Frank Abagnale Jr. who, with confidence, successfully impersonated several professionals: an airline pilot, a doctor, and a lawyer, among others. So, Emily, that leads to my question for you, which is the reason why Frank was so successful is because he just did all of these different jobs or acted like he was doing all these different jobs with confidence. So if you were able to do something that wasn't being a lawyer and you felt comfortable enough to do it with absolute confidence, what would it be?

Emily Schifter (00:44):

I don't know how much confidence I would need for it, but my dream job would be to be a children's book author. I read a ton of picture books to my kids, and one thing that I have learned about them is they are deceptively simple. It seems like it would be easy to write a good one. And we have some great ones. There are also some that are just not that great. The illustrations, the words, the story, it's all got to work together to hold attention of kids and adults. It is not as easy as it looks, for sure.

Tracey Diamond (01:07):

For sure. Yeah. But when they're good, they're magical, right?

Emily Schifter (01:10):

Exactly. Exactly.

Tracey Diamond (01:12):

That's a pretty difficult arena to jump into, but I have faith in you that you could do it with confidence.

Emily Schifter (01:17):

There we go. My second career.

Tracey Diamond (01:19):

Well, listen in to our episode about hiring in the age of AI, background checks and screening.

[INTRO]

Tracey Diamond (01:33):

Welcome to *Hiring to Firing*, the podcast. I'm Tracey Diamond, a partner at Troutman Pepper Locke, and I'm here with my partner and co-host, Emily Schifter. Together we tackle all employment issues from hiring to firing.

Emily Schifter (01:45):

Today, we are thrilled to have as our guest our colleague, Chris Capurso, counsel in our firm's Financial Services Group and also an experienced podcaster himself in his role as co-host of [Moving the Metal: The Auto Finance Podcast](#). Chris, welcome and thanks so much for joining us. Can you start by telling us a little bit more about your practice, your background, and your experience counseling clients and companies in the world of background screening, our topic for today?

Chris Capurso (02:09):

Yes, absolutely. And thanks so much for having me. It's fun to talk about something different for a change, because as you mentioned, we have *The Auto Finance Podcast*, but I am in the Consumer Financial Services Practice Group. And as much as consumer financial services sound like it's very financial in nature, a lot of different consumer areas, and one of those happens to be Fair Credit Reporting Act, background screening, consumer reporting generally, counseling clients, which could be anything from the consumer reporting agencies that prepare the consumer reports, the furnishers that provide the information, and the users who use it, providing them all sorts of compliance advice on how to tackle what is a very tricky law, written over five decades ago, certainly not anticipating what it would currently look like in this day and age, but still being used as the framework. So, very happy to be here and to be discussing background screening.

Tracey Diamond (03:00):

Well, we're very happy to have you here, Chris, and thanks for joining us today. We are taking inspiration from the 2002 movie *Catch Me If You Can*, which is such a fun movie to watch. For anyone who hasn't seen it, the movie is based on the true story of Frank Abagnale Jr., who became famous for successfully impersonating professionals, including an airline pilot, a doctor, and a lawyer, cashing millions of dollars worth of fake checks before he was even 21 years old. The movie is based on Frank's 1980 autobiography and was directed by Steven Spielberg and stars Leonardo DiCaprio as Frank and Tom Hanks as FBI agent Carl Hanratty, who spends years trying to track him down. Frank is a fascinating and controversial character. In fact, in more recent years, it has come out that some commentators suspect many of Frank's wild stories themselves

were a bit exaggerated, not really a surprise to me, so that even after his original con was over, some accused him of running another one in trying to sell his life story.

Emily Schifter (04:04):

It's fascinating. Thankfully, most employers are not interviewing candidates who are secretly pretending to be doctors, lawyers, or airline pilots. But the movie and his story raises a question that I think is incredibly relevant in today's hiring environment, which is how do you figure out who the right fit is? How do you distinguish confidence from competence? And especially in today's world where candidates have more tools than ever before to present themselves in a polished and professional light, of course, referring to AI. AI can help write resumes, can prepare interview answers, and even sometimes assist during remote or virtual interviews, particularly enterprising candidates. And not to say that employers should be assuming that candidates are dishonest or trying to game the system, but it does mean that employers need thoughtful processes, as they always have, to evaluate whether someone is actually the right fit for the role. So, how do you trust but verify the right way? That's our topic for today. And Chris, I'll start with you. Before we get into the legal requirements, from your perspective, because you have a 360-degree view with your counseling on the Fair Credit Reporting Act, do you think in general the hiring process has become more challenging because it's harder to evaluate what people can actually do?

Chris Capurso (05:17):

It's one of those things that as technology, as processes get better, the technology and processes to get by those technology and processes gets even better as well. That happens in everything. We see it in credit, we see it in employment, we see it everywhere. So it's one of those things where as we get better at one thing, it gets harder to tell another. And in this case, as you mentioned, with AI being able to help in so many different ways, the remote interview process, I didn't even know that was something where it's starting to seep into. So it's one of those things where you want to have the right tools in place to be able to tell these things. But I think overall, tools change, but the process, having something in writing just there that you can follow, that everybody in the organization can get behind, that's something that transcends industry. That's something that everybody needs to have in place to be able to handle difficult and tricky topics like this.

Tracey Diamond (06:04):

AI brings its own conversation and the subject of several of our podcast episodes. But even leaving that aside, even the basics of telling whether you're interviewing the person who says they are who they are and not someone else in their place has become really challenging in the remote hiring environment that most companies are working in these days. I actually had a client who had an applicant who turned out to not be the applicant himself. He had somebody else interview for him. And because it was done remotely, they weren't even aware of that right away. So, it's very challenging to know who it is you're speaking to. And to Emily's point, what is confidence versus what

is a con, right? So that leads us to our first clip where Frank successfully convinces people he's an airline pilot despite lacking the qualifications. Let's take a listen.

[BEGIN CLIP]

Stewardess (06:53):

Frank. Captain Oliver. John Larkin, the co-pilot.

Captain (06:56):

Hello.

Stewardess (06:57):

Fred Telly, flight engineer.

Frank (06:58):

Frank Taylor, Pan Am. Thanks for giving me a lift, boys.

Captain (07:01):

Go ahead and take a seat, Frank. We're about to push. What kind of equipment you on? DC-8?

Frank (07:05):

707.

Captain (07:08):

You turning around on the red-eye?

Frank (07:09):

I'm jumping puddles for the next few months trying to earn my keep running leapfrogs for the weak and weary.

Captain (07:16):

No shame in that. We all did it.

Stewardess (07:19):

Have a seat.

Frank (07:22):

Thank you.

Stewardess (07:25):

Would you like a drink after takeoff?

Frank (07:27):

Milk.

[END CLIP]

Tracey Diamond (07:29):

I love the Pan Am flight attendant outfits.

Emily Schifter (07:31):

It was so glamorous...

Tracey Diamond (07:32):

I know.

Emily Schifter (07:33):

To travel back in the day. I miss that.

Tracey Diamond (07:35):

Having just gotten off a plane last night with my sweatpants on, I can attest to the fact that it's no longer glamorous. [laughter] One of the reasons Frank is successful is that he appears confident and credible. People believe him because he acts like he belongs. As his movie character quotes his father as saying, "Why do the Yankees win? Because people are busy looking at their pinstripes." Not really quite sure if that's true, but hey. So, Emily, what lessons can employers take from that when evaluating candidates?

Emily Schifter (08:06):

So I think to your point, AI is one buzzword in this area, but I think people have been able to kind of present themselves well in an interview in a way that maybe isn't always lasting once they actually get into the job for years, even when they were doing it in person. And so I think being cognizant of that and trying not to let just the first impression or the pinstripes on the uniform, the good initial interview that you have, deceive you and really focusing on fit and skills and having a good sense of what you're looking for so that you can really evaluate in kind of a more objective way which candidate's the best fit. We've seen clients take different approaches beyond just having sort of the traditional interview behavioral questions or a more formal assessment, even asking candidates to complete something, a writing sample or some sort of an active, "Here's a situation we've had come up. How would you respond to it?" I've had clients have that go awry where people are able to use AI to come up with a really great answer, and so you have to kind of think that through, but something that's giving you the chance to kind of see the candidate think on their feet a little bit. Obviously, you can't go too far with this. I think everyone's heard horror stories of people going through multiple rounds of interviews and putting together fake case studies, and they've done 30 hours of work for you before they've ever gotten an offer, and you can slow down

your process and turn people off by doing that. But thinking through ways that they can show you practically how they do rather than just giving you an initial first impression.

Tracey Diamond (09:31):

It's a pretty large administrative burden, but these days a half an hour interview is just not going to be enough to tell the story, right?

Emily Schifter (09:38):

I think that's right. I think it is an administrative burden for sure because you're having to compare all of these different work product that isn't ultimately real. But to your point, there's also a huge administrative burden to making a bad hire. So figuring out where you can kind of draw that line in a way that it's adding value but not slowing down the process, I think is really important.

Tracey Diamond (09:55):

Yeah, that's a good point. So, this feels particularly relevant right now as we've been discussing with the advent of AI. We've seen reports of candidates using AI tools during interviews or relying heavily on AI-generated application materials. What challenges does that create for employers?

Chris Capurso (10:12):

Yeah, it's interesting because you've got kind of the two prongs to it. You've got AI creating the documents that may be fraudulent themselves, like saying you have a skill that you don't have. But then there's also kind of the operational aspect of it where it's maybe AI is the skill that you have, or it is by extension you doing the skill that you're saying that you're doing. So you've got to kind of balance first, is the paperwork lying? And two, okay, maybe the paperwork's not lying, but is the skill... Is it you? Is it some technologically aided to the point that it's not really going to help if we hire you? So I think that's a very interesting thing to be able to look through. Separately, and this kind of goes back to what I had said earlier, is just the idea of having consistent processes. And again, this is something that transcends whatever you're doing where technology changes, the times change, but it's always good to have the processes down so that there is something that can be repeated and followed. And if it's going to be, "Okay, with AI we now have to look at X," build X into the process, and then you're not going to have it kind of be ad hoc and trying to figure it out as you go. You've got it built in and so it's being considered from the beginning. But it's as with every industry right now and basically every walk of life, trying to figure out AI is just kind of a piece where we're trying to see how it goes. And it was unbelievable last week listening to, we had a webinar here at the firm talking about, this has really been since late 2022. I try to think of all the things that have happened since late 2022. It feels like AI has become very much part of life, and yet late 2022, it was almost mind-boggling to me that that's four years ago.

Emily Schifter (11:57):

Pretty unbelievable to think about. And I think you raised such a good point too. It's so ubiquitous. We're not getting away from AI. And I think employers do in certain roles, in many roles, want candidates who know how to use AI and who can do a good job with it. And so to a certain extent, using it in the interview process may not be a bad thing. It's just if it's masking, maybe covering up for a skill gap where it could cause a bigger problem. But I think you're exactly right that maybe being able to use AI efficiently is going to become a differentiator. So I think the conversation can become a little binary sometimes, like either AI is just awful and it should never be used and people are cheating, or AI is going to change everything and we're just going to have resume screeners make all our hiring decisions. But of course the truth is somewhere in the middle. So, how do you think employers should think about AI in the hiring process? Tracey, maybe I'll start with you.

Tracey Diamond (12:46):

Well, I mean, I think to Chris's point earlier, I'm not as worried about AI putting false information in a resume any more than an employee manually putting false information in a resume. But I think the issue is more the outside information that, the writing product, for example, or performing some kind of assessment where the candidate may be using an AI tool to mask their inability to do it or do it well. But to both of your points, AI also is sort of a mandatory function of so many jobs these days that making sure that the candidate is able to nimbly use AI tools is also an important component. It's sort of another side of the coin, right? I think that it kind of comes down to what we've been saying of you have to do your homework as an employer. If you're looking at a resume, don't take it at face value, but follow up to make sure that the person was educated where they say they were educated and worked at the places that they said that they worked, probe the resume to make sure that it's accurate. And when it comes to writing samples, perhaps having a timed writing sample where there is somebody supervising the actual doing of the writing may make sense. It's sort of old-fashioned in a way, but going back to those sort of old-fashioned skills to avoid technology masking incompetence may be important.

Emily Schifter (14:01):

Yeah, we'd be remiss too not to mention, and it is a topic for a different podcast, that there are tons of laws popping up in this space governing what employers can do with AI in the screening process, kind of speaking from the employer side in terms of resume screening and filtering and all those sorts of tools. So another nuance to consider if you're an employer looking to say, "How can I use AI to make my hiring process better?"

Tracey Diamond (14:24):

Absolutely. So, as we've said, even before AI ever existed, employers have wanted to use tools to verify the stories candidates tell about themselves, or they should at least be wanting to use these tools. And that brings us to our next clip. In this clip, Frank,

even as a high school student, manages to convince a class that he's the substitute teacher.

[BEGIN CLIP]

Principal (14:42):

Mr. and Mrs. Abagnale, this is not a question of your son's attendance. I regret to inform you that for the past week, Frank has been teaching Mrs. Glasser's French class.

Mrs. Abagnale (14:49):

He what?

Principal (14:57):

Your son has been pretending to be a substitute teacher, lecturing the students, giving out homework. Mrs. Glasser has been ill and there was some confusion with the real sub. Your son held a teacher-parent conference yesterday and was planning a class field trip to a French bread factory in Trenton. Do you see the problem we have?

[END CLIP]

Tracey Diamond (15:23):

Frank's story is an extreme example, of course, but the fact that someone could walk into a room and convince them he was in charge is an example of why employers regularly have to evaluate information provided by candidates: resumes, education, employment history, references, the whole shebang. Chris, what should employers be thinking about in terms of verification tools?

Chris Capurso (15:44):

Beyond the fact of if you're in a school and trying to check if the guy pretending to be the teacher is on the class roll and trying to avoid that whole thing, the basic verification. Yeah, I mean, there's a lot of information out there, right? So I mean, you're obviously going to look at employment history, education. In some cases, folks can look at credit in very limited instances, which I guess is something we'll teaser for later. But there's a lot of information out there. And to Emily's point earlier, trying to make the process... I mean, it's an overload of information, right? Like trying to assess all that and trying to come up with a hiring process that makes sense of all of it where it's not information overload, you're getting too much that you can't really discern what's important, what's not, while also not having a gap where it's like, "Hey, this was actually really important, it just kind of flew right by." So I guess to kind of boil it down, there's a lot of information out there and trying to, maybe not filter, but get it to a point where you're considering the actual important things, kind of seeing the forest through the trees and just being able to identify, okay, this is what we need, and this is the information we're going to look at to make sure that it is what we need.

Tracey Diamond (16:53):

So many employers regularly run background checks on candidates or after a conditional offer has been made. But they may not really understand what happens after they submit that request. Oftentimes it's through a third-party vendor. Chris, can you walk us through what happens behind the scenes?

Chris Capurso (17:10):

Yeah, yeah. And this is where the consumer reporting agencies come in. And earlier I had mentioned Fair Credit Reporting Act. The name itself is a little bit of a misnomer because obviously credit's in there, but it covers... I mean, a consumer report is broad. It's information about a consumer. It's not just credit information. So you're talking criminal history, you're talking verifying employment history, you're talking verifying rental or housing situations. All that stuff is consumer report information under the Fair Credit Reporting Act. And that's initially a first thing when people hear Fair Credit Reporting Act, they're like, "We're not doing any kind of credit." And it's like, that's not what it's about, despite the name. So, obviously the CRAs, the consumer reporting agencies, will bring this type of stuff together. And on the employment side... I should split it up. There's kind of the credit side where there's the ones you think of, kind of the big three as it's called, and they are typically kind of the repository for credit information. On the employment side, with background verification, criminal history, things like that, there are a lot of specialty consumer reporting agencies that specialize in those very specific things. And they have their own methods for getting that, whether that's going to the courthouse themselves, getting scrapes, whatever it's going to be. There's a lot of different ways for them to get that type of information. And these specialty CRAs will bring all of this information together, and that is the third party, your vendor, you're talking about, the person that the employer is going to submit that request to get that information back. But there is a lot happening in the background at the CRA to try to make sure things are accurate, make sure things actually match up to the person that you are seeking the information on. It's one of those things where I'm sure for a lot of employers it's send out the request, get it back, and then deal with it. But what happens between sending it out and getting it back, there's a lot going on.

Emily Schifter (18:52):

And I feel like we sometimes have the situation where somebody says, "Well, that's not me, that's wrong, that's the wrong name," or it pulled up a false hit. And how do employers walk that line? Is it a mistake from the third-party agency? Is the candidate trying to cover up something in their past? I'm sure it's a long answer, but is there an easy way to figure that out if you're the employer or the candidate?

Chris Capurso (19:13):

I guess for employers there should be some comfort in the fact that CRAs have their own accuracy obligations. And to the separate part, the accuracy obligations are not perfect accuracy. It's maximum possible accuracy. So that is a different standard. Things could be about the wrong person. It's just the nature of records, the nature of the

millions upon millions of datasets going around. But CRAs are expected to have maximum possible accuracy, and the FCRA is a very litigated statute. So, these accuracy standards are being tested constantly.

Tracey Diamond (19:47):

And just to be clear, when we say CRA, we're talking about consumer reporting agencies, right?

Chris Capurso (19:51):

We are, correct. So, as far as what the consumer reporting agencies have in place to match to the proper consumer, to determine whether the element of information is even correct in the first place, there are a lot of processes going on in the background to try to make sure that works. So for the employers themselves, I think the most important thing is making sure the information that is sent to the CRA to try to pull these records is correct. And that kind of goes to your point, Emily, like, what if that's wrong? What if the person lied about something and it's the wrong social or something like that that on the CRA end they pull a record on somebody totally different? So it's one of those things that's always going to be there with this kind of system. But I guess in words of comfort for employers, there is a lot going around in the background with consumer reporting that is trying to ensure maximum possible accuracy of the records coming back.

Emily Schifter (20:42):

That's interesting and hopefully does give some comfort to employers. And I guess taking a step back, I mean, we have so many clients who just sort of run background checks as a matter of course as part of the onboarding process. But we do have some every now and then who don't or have not made it a part of their process. And they hear about the litigation involving the Fair Credit Reporting Act and they're like, "Oh, gosh, maybe this isn't something I want to do." But why is it advisable to run a background check? Why is that an important thing to do? Why does all this exist, Tracey?

Tracey Diamond (21:09):

Well, so beyond what we've been talking about in terms of just basic verification to make sure what the employee or the candidate is saying is accurate in terms of their skills and experience, there's negligent hiring and negligent retention claims that other employees may bring if you bring a bad actor onto the scene, into the facility that causes damage to person or property. So concerns about criminal background, making sure that your coworkers and your property and the property of your coworkers is going to be safe by not bringing in a candidate who has a criminal background that pertains to violence or is otherwise substantially related to the job in question. Concerns about bad credit could be an issue, particularly where you're hiring someone for a job that involves access to the company's funds or money. And then some roles require background screening, for example, education or child-facing roles, Department of Transportation drivers, and other regulatory-type positions. Other forms of screening can be advisable or even required beyond the background screening that we're talking about. One

example of that would be drug screening, which is heavily governed by law and really is a topic for another whole podcast. So, the FCRA has been around for a long time, but we continue to see litigation involving background checks, as you alluded to, Chris. Why is this such a challenging area?

Chris Capurso (22:33):

It's challenging for a couple reasons, I think. First, just talking purely the FCRA, there are a lot of technical requirements, especially in employment, because the FCRA, as I mentioned, very broad statute, covers credit uses, covers employment, covers insurance uses, covers really any kind of use of a consumer report. Employment has some very specific requirements under the FCRA that are different. Specifically, there are specific authorization requirements to get a consumer report for employment purposes under the FCRA. And then in the adverse action process, which is the notice saying we've had to take an adverse action, we've had to take a decision against your interests based on a consumer report that is covered by the FCRA. For all the other uses of reports, there is adverse action notices, and that's no different for employment. The difference for employment is there's something called the pre-adverse action notice, which is we're going to tell you that based on what we have right now, basically, an adverse decision could be coming unless you can show us something else, some kind of mitigating circumstances, something that the report is incorrect or something has happened to make us not make the same decision based on this report once we've heard from you. That's a very different thing for employment.

And unlike the just final adverse action requirements under the FCRA, the pre-adverse action requirements for employment, there is a private right of action. There is not for the final; there is for the pre. So that's a difference in just how the FCRA operates. The second big thing I would say, even beyond the FCRA, is states get very involved in this, obviously, and there's a lot of action there. The FCRA should be seen as the floor, and the states build upon it, whether it's the use of criminal history information, to your point, Tracey, the use of credit information. Sometimes there are additional disclosure requirements right up front saying, "I'm going to pull a credit report." Sometimes there are additional requirements in the pre-adverse action where you have to specifically disclose what you used, if it's criminal history, for example. And there could also be separate requirements for the final adverse action notice related to filing a complaint or things like that. There's different state requirements along the way. And I'd be remiss to say there's also local requirements now peeking in where we've got very specific jurisdictions, very large jurisdictions that have their own requirements on top of this. So just taking, let's call California, and let's use somebody who lives in Los Angeles. You could have the FCRA requirement, you could have California-specific requirements under what they call the Investigative Consumer Reporting Agencies Act or the Consumer Credit Reporting Agencies Act. Then on top of that, if they're in LA, there are differences between the County of LA and the City of LA.

Tracey Diamond (25:15):

Wow.

Chris Capurso (25:16):

So you've just got a wild patchwork of potential laws and regulations and ordinances that are coming into play. So you say, why are we seeing litigation on this? It's very complicated. There's a lot out there, and this is a sensitive topic, what somebody's prior history is as they're seeking employment. So it's just bringing it all together and you've got what we currently have, which is an area where we see a lot of litigation.

Emily Schifter (25:42):

And this could be a class action type of a case, right? If an employer is just not doing this right, not sending the pre-adverse action notices, this suddenly becomes something that affects all their applicants and not just a one-off. Do you see these being brought as class actions?

Chris Capurso (25:56):

Yeah, and I mean, it's kind of that systemic error that's always the fear with a class action where just one small blip on a piece of paper, say you have your pre-adverse action notice template and it's missing one line, but you sent that to how many people? And then all of a sudden there's that kind of risk. So yeah, it's one of those areas that it needs to be buttoned up.

Tracey Diamond (26:17):

Yeah, the requirements are very specific and technical, and it's really easy to mess it up. And to your point, Chris, when there's varying state laws, just being in compliance with the federal FCRA is not enough. You have to make sure that you're in compliance with every state and local jurisdiction in which you do business. Yet another headache to add to the list of headaches for our multi-jurisdictional employers, for sure.

Emily Schifter (26:38):

That's right. Separate from FCRA, speaking of more compliance hurdles, what are the other legal considerations out there associated with using information in a background check? Tracey, you had mentioned before we're running this check after an offer is made. That comes from some of the ban-the-box laws. What else is out there that employers need to be thinking about?

Tracey Diamond (26:55):

Yeah, and just to clarify that, many states have... I'm not sure if all of them at this point, but many states have ban-the-box laws that limit the ability of an employer to ask about a candidate's criminal history or consider their criminal history at least prior to giving them a conditional offer of employment. So employers should not be running background checks on candidates until they've made that conditional offer of employment. So in addition to that, the EEOC and other guidance, government

guidance, there's guidance out there on the use of information about arrests versus convictions. And generally speaking, you cannot consider someone's arrest record if it did not result in a conviction. And then there's the general concerns about avoiding discrimination and making sure that the decisions that you are making are related to the job at hand and not just discounting someone because of a general criminal background. A good example of that is if someone has, let's say, a DUI, but their job doesn't require them to drive a car, it may not be so relevant that they have a DUI on their record. And some state laws are very specific about how far back you can look in terms of the criminal background and requiring that the criminal conviction is directly related to the job that you're hiring for. And then there's salary history bans and pay transparency laws that have also changed the hiring landscape. And for that, you should check out our prior episode where we talked about the movie classic and Dolly Parton favorite, 9 to 5, when we talked about those issues. So background checks are only one part of evaluating a candidate. Employers sometimes want to know more than just whether someone has a criminal history. So let's talk about references. Some employers don't even bother to call references anymore because they feel like they won't get much information out of the prior employer. Others view references as a critical step. So, Emily, do references still add value?

Emily Schifter (28:47):

I think you're exactly right that it's one where people are tending to just say the bare minimum. The concern, obviously, being if another company calls me up and says, "What did you think of so-and-so?" and I say, "Well, they were the worst person I've ever dealt with and you should never hire them," maybe it's a defamation claim that you're facing for, if you are giving your opinion about that person. If you're preventing them from getting a job, they're going to say you interfered with my business opportunity. So it certainly can create some risk, and that's why, of course, you see many employers who have just sort of their standard policy, we'll verify dates of employment, maybe your last position held, maybe your final pay, and that's it. But we do see people give sort of informal references sometimes, and sometimes that is valuable because if someone's asking you and somebody was a bad fit or you feel like there's something that's important to share, you're worried about not sharing that information if you've got a good contact. And so it's definitely a gray area. I would certainly say the best policy is the shortest and most factual answer. But sometimes there's ways to ask questions or to give an answer. Sometimes what you don't say can be revealing in its own way. So it's a fine line and definitely if you're thinking about sharing an opinion about somebody, maybe something worth running by HR or by counsel to make sure you're not creating that risk. But it is definitely an area where we see people get a little bit nervous these days.

Tracey Diamond (30:04):

Yeah, I've seen some companies allow various individuals to say that they're not speaking on behalf of the company, but they're willing to give a reference on a personal level. Although, question whether or not, if that person has authority, even if they're

saying they're not speaking on behalf of the company, are they in fact speaking on behalf of the company? And frankly, at a bare minimum, just doing a reference check just to check dates of employment and last position held is valuable information to make sure that the resume is accurate. So, Emily, what about situations where an employer learns something concerning that's concerning to them during the hiring process? How should they think about that?

Emily Schifter (30:40):

Yeah, I think it just sort of depends on what the information is. As Chris mentioned, if they're relying on something that came up in a background check, there is a very strict required process that they have to follow if they're going to act on that under the FCRA and some of the state laws. If it's something that's a little bit different, or maybe it's just you weren't the best interview based on all the other candidates, that's a little bit more of a gray area. I think that's where having a consistent process is important. I think to your point, as you mentioned earlier, thinking about the relevance to the job, if you learn about something in someone's past that really doesn't have anything to do with what they're going to be doing for you, consider whether that's an assumption that you're making before, just being sure about that. And then having clear documentation if you're making a decision to not hire somebody. I think we've talked about this in other podcasts, but sometimes employers can forget that applicants can have a cause of action. Failure to hire is a claim. It can be a discrimination claim. There can be risks associated with that. So just like with any employment situation, being really clear about, here's what we learned, here's the objective reason we made the decision, here's why we picked the candidate we did, can never be a bad practice to have. Are there any other tools or creative options for employers to use when they're trying to think about making better hiring decisions?

Tracey Diamond (31:54):

There are structured interviews. That's where you ask the same set of questions to every candidate and use some kind of objective scorecard to rate the candidate's responses. We've talked a little bit before about skills assessments and as well as sort of writing or other types of work samples. Those are all helpful tools to get beyond that initial 20 or 30 minute interview to really assess whether this candidate is the right fit for the job. Consider also making things clear on the front end. So having clear and accurate job descriptions and job postings, for example, can make finding the needle in the haystack easier. And also having clear qualifications can help narrow the field. Consider options for promoting or hiring from within and also referrals from existing employees can be very valuable. Sometimes employers will offer bonuses for this purpose so that their employees are encouraged to promote somebody that they've actually had experience with, as opposed to having to sort of take a chance on a stranger. I think many HR professionals have experienced a candidate who interviews incredibly well. Everyone loves them, and then after they start, the reality doesn't match the interview. Why does that happen, Emily?

[laughter]

Emily Schifter (33:05):

I think it's all the reasons you said. We do the traditional 30 minute interview format and if that's all you're doing, sometimes that's just not enough. People can really turn it on for a short amount of time. So I think it's all the things we've discussed about thinking about are there multiple ways we can evaluate candidates, making sure you know exactly what it is that you're looking for, what skills you're looking for. I think everyone's been in the situation where you're hiring and all of a sudden as the hiring process goes on, you realize that maybe we didn't know, we don't all agree on exactly what it is we're looking for. Bringing multiple perspectives into the process so that multiple people can weigh in on whether somebody is a fit and being really cognizant of your sort of unconscious bias and your first impressions. You might really, really enjoy talking to a candidate because you went to the same school and you're talking about the football game that happened this weekend, but trying to separate that from their skills and their experience I think is important. But it's also more of an art than a science. So it's something that managers and HR teams can really work on, I think, to be actively trying to improve their skills on interviews and not just showing up for the interview and thinking that was a good conversation. So that leads us to our last clip, and this one's actually from the real Frank Abagnale talking in an interview about why it is that he thinks that he was so successful. So let's take a listen.

[BEGIN CLIP]

Frank Abagnale (34:20):

Everything was all these opportunities, but always the confidence that I could pull it off. And that became just from age. But if you believe that you're good at what you do and you strive to be good at what you do, you don't need to worry about what other people think. You need to be able to understand that you have your own confidence that you can do whatever it is you're required to do, and other people will see that confidence in you. The minute you start doubting yourself, other people will see that you're doubting yourself, and that becomes a weakness in your personality. So you always want to be confident in everything you do, that you can do it, you can get it done, you'll find a way to get it done.

[END CLIP]

Tracey Diamond (34:57):

We've talked about a lot of different tools today: interviews, references, background checks, as well as the legal compliance issues that come with all of them. Ultimately, though, this episode comes back to one question, how can employers thoughtfully verify that they're hiring the right person while remaining fair, compliant, and focused on what really matters? Chris and Emily, this question is for both of you. What is the biggest piece of advice for employers here?

Emily Schifter (35:22):

I think training and having a process and treating this as this is a skill that needs to be learned, just like anything else. Having good policies in place so that you're being consistent across the board and being thoughtful in your process, making sure that your process is measuring the things that you actually need and want it to measure. And of course, being aware of all of your legal obligations.

Chris Capurso (35:43):

Yeah, I would echo all of that. And two things. First, it's not going to be a static process. It's not one of those set it and forget it type things. As we've said, there's a lot of legal requirements, but there's also changing technology and operational things that are going on. So it can't be just the thing where today it is what it is, a year from now it is going to be the exact same thing. It's probably going to be iterative. It's probably going to change a lot, and just being prepared for that. The second part would be kind of AI on the flip side. We're talking about people submitting documents using AI or having skills that are really backed as AI. As far as being an employer and using AI to keep on track of all of these different types of legal compliance requirements, that's good. And, I mean, it's nice to be in the know, but tricky situations come up, especially with employment situations where the questions we typically get, at least on my end, are the sticky ones. There isn't a ultra-clear answer from what I can see. So I would say reach out to legal counsel. It's the most commercial thing that I could possibly say. But AI is a helpful tool. Again, it is a tool. And we deal with these types of things all the time. If there's something that comes up that's just... I mean, some weird stuff can come up, right? Reach out to legal counsel, solicit the ideas, have a discussion just to talk through everything and see what the best path forward is. Because sometimes just seeking out the internet or just seeking out the AI, that's not going to do it. It really helps to have an attorney who understands the area, understands what's going on with your business to talk to and try to field these issues out.

Emily Schifter (37:22):

Well, one reason *Catch Me If You Can* remains such a compelling story, I think, is that Frank Abagnale's success depended on one thing: people believed the story he was telling them. And hiring obviously is different. No one's trying to pull anything over on anyone. Employers aren't trying to catch people in a lie; they're trying to make good decisions. And so I think exactly what we've been saying: asking thoughtful questions, evaluating skills, verifying information, but doing so in a way that's compliant with the law. Hopefully employers can build their teams with the confidence that they have got the right people on board while staying on the right side of the law. So, Chris, thank you so much for joining us today. Thank you to our audience for listening in to today's episode. Don't forget to visit our blog, [hiringtofiring.law](https://www.troutman.com/blog/hiringtofiring.law), and subscribe so you can get the latest updates. And please make sure to also subscribe to this podcast on your favorite podcast platform of choice. And don't forget to check out our firm's other podcasts, including *The Auto Finance Podcast* on [troutman.com/podcasts](https://www.troutman.com/podcasts). We look forward to next time.

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