

# Pre-employment Screening— Background Checks

This report provides information on the options available to employers in investigating the background of a prospective employee, referred to as pre-employment screening, and the limitations imposed on them by federal and state laws. A careful, thorough investigation into the background and fitness of a prospective employee is essential to the well-being of the business and may limit the financial consequences to a business from negligently hiring an employee.

## Introduction

Negligent hiring liability is a basis for recovery against employers for the wrongful and even criminal actions of employees against third parties, whether those actions are performed within or outside the scope of employment. The requirements of this tort are satisfied when the offending employee is hired without an adequate background investigation and when such an investigation would have indicated the applicant was a potential risk.

A body of case law exists that holds an employer liable for injuries to third parties when these injuries occur because of the employer's negligence in retaining an employee known to be dangerous to others. The thrust of such cases is that the employer knew, or with the exercise of reasonable care should have known, that the employee posed a danger to others.

Pre-employment screening is necessary for hiring the best personnel available for the success of an organization, and it can help in protecting against negligent hiring and

retention lawsuits as well. The courts are increasingly upholding the negligent hiring and retention doctrine. They are taking the position that the employer should make every effort to ensure that the employee selection process is a reasoned and useful exercise.

Guarding against negligent hiring lawsuits is only one reason for a business to have good hiring practices. Other reasons include controlling employee turnover, avoiding employee substance abuse problems, preventing loss of proprietary information, preventing theft, and avoiding employee-initiated lawsuits.

A great deal of information is available to an employer willing to invest the time and make a reasonable effort to screen employees. Public records, for example, can tell if an applicant has been convicted of a crime, if he or she has sued a previous employer, or if he or she has been the subject of a fraud investigation. Records can verify an applicant's identity, document his or her self-employed business experience, and answer many other questions.

Employers cannot know absolutely, in advance, that a prospective employee will later cause injuries to third parties. Therefore, employers are not exposed to liability simply because they failed to check an applicant's background. It is only when such a check would have revealed information indicating the undesirability of the applicant that the failure to obtain the information may be considered negligence.

While courts have imposed a responsibility on employers to use due care in screening job applicants, federal and state privacy laws impose restraints on employers that have made the task challenging. These laws determine the type of information an employer may request and prescribe how the information can be handled. An employer that does not comply with these laws can become the victim of a discrimination lawsuit initiated by a job applicant. For this reason, businesses must understand the privacy rights of job applicants. These rights are provided in laws, such as the Discrimination in Employment Act, Title VII of the 1964 Civil Rights Act, the Immigration Reform and Control Act, the 1973 Rehabilitation Act, the American with Disabilities Act (ADA), and the Fair Credit Reporting Act and the Privacy Act.

Employers have numerous available options, such as resumés, job applications, reference checks, interviews, and background checks, to screen applicants. While some tasks may be time-consuming and expensive, many are fairly straightforward and cost-effective. The failure to investigate properly may have more severe consequences.

Employers are advised to establish a company-wide policy regarding pre-employment screening practices and be consistent in applying the policy. If,

for example, the policy calls for criminal background checks on security officers, then these checks should be obtained for each applicant to be hired as a security officer. Additionally, all information obtained from the background investigation should be well documented, kept confidential, and secured in a safe place.

It should be noted that employment law is a very complex area and cannot be fully covered in this report. Employers are strongly advised to seek guidance from their legal and human resources departments or from outside labor counsel. Employers are also advised to avail themselves of the comprehensive "information services" on employment law.

This report discusses the pre-employment screening options available to employers and the limitations imposed on them by federal and state laws.

### **State Law**

Various state laws may overlap with some of the relevant federal laws; moreover, states may have additional requirements with respect to:

- Obtaining a consumer credit report
- Controlling illegal immigration
- Using criminal history in employee selection
- Safeguarding information
- Retaining records
- Blacklisting

While the particular requirements of the various state laws are beyond the scope of this article, employers should be aware that such laws create technical and highly specific rules concerning the nature, timing, and format of authorizations that must be obtained by employers and notices

and disclosures that must be provided by employers. An employment attorney can provide an employer with the necessary documents to ensure compliance with all relevant federal and state laws.

## Resumé and Job Application Form

A pre-employment screening program begins with a resumé and employment application form that obtains the necessary information for a thorough background investigation. A resumé or job application form provides the first opportunity to gather information about prospective employees and can make the screening process much easier.

It may be prudent to require all prospective employees to provide a resumé. Once the resumé has been reviewed to determine whether the applicant has the necessary qualifications for the position to be filled, the applicant should be requested to complete an employment application form.

The application form should be developed with the assistance of legal counsel. The form should declare that all false statements are grounds for rejection or immediate termination if hired. An employer should establish and follow a policy on the actions to be taken when such false statements are discovered. The application form should be signed by the applicant.

A release and authorization form, signed by the applicant, will allow for verification of all information on the application form. This form should also provide authorization for obtaining criminal and credit history checks.

The application form should ask for the applicant's full name, address, driver's license and social security numbers, as well as previous addresses, and whether the

applicant has worked under other names and social security numbers. Questions about the age of the applicant should not be asked to avoid possible charges of discrimination due to age. However, applicants can be advised that they will be required to produce verification of "minimum age" requirements.

The form should provide for at least a ten-year comprehensive overview of the person's work history, including periods of unemployment, military service, and applicant's addresses during these periods. For each job, the form should request the employer's name, address and phone number, start and end dates, supervisor's name, position description and duties, salary information, and reasons for leaving.

The education section should provide for information on names and addresses of schools, dates of attendance, subjects of study, degrees received, and any special honors, activities, or publications. Information on licenses, professional designations, professional organizations and publications is valuable.

The application form may include questions regarding whether the applicant has been convicted of any crimes, other than minor traffic violations (e.g., parking ticket).

Questions about an applicant's arrest record should be avoided, since court decisions show that questions of this nature can be grounds for a discrimination suit. Innocent people are sometimes arrested.

The application form should request the names, addresses, and phone numbers of at least three professional references—some employers also request a separate list of personal references. These references should not be relatives or previous employers, but should be familiar with the applicant's history.

Employers cannot ask for health-related information on an application form. Two federal laws, the 1973 Rehabilitation Act and the ADA, prohibit discrimination against those with disabilities. Compliance with the ADA means, among other things, that employers cannot make any pre-employment inquiries regarding an applicant's history of illness, injuries, workers' compensation claims, hospitalizations, treatments by psychiatrists or psychologists, treatment for alcoholism or drug addiction, or use of prescribed drugs. Following an offer of employment, this information may be requested.

Employers, however, may ask about an applicant's health history if this information is required by a federal regulatory agency. For example, in mining and aviation, where safety is a primary concern, regulators require employers to inquire as to an applicant's health history.

Once the application form has been completed by the applicant, it should be thoroughly reviewed. It should also be compared to the resumé to check for consistency. One study by a pre-employment screening company reported that 45% of job applicants lie at least once on their resúmes or application forms. Most lies were about the type of educational degree earned and job responsibilities.

## The Interview

Clearly, the objective of an employment interview is to obtain information about the applicant, as well as to get a sense of the individual's character. This is accomplished by letting the applicant talk. Yet, many managers are not very good at conducting interviews. Some tips on interviewing techniques include: use open-ended questions, do not signal the answer sought,

pose hypothetical problems, ask general questions about outside interests, do not ask questions that may result in discriminatory treatment (e.g., race, religion, marital status, etc.), and let the applicant talk.

Information provided on application forms and resúmes should be reviewed with the applicant and any inconsistencies questioned further. As with all information obtained, notes should be made and placed in the applicant's file for future use. Although these suggestions may appear obvious, many employers do not take a common sense approach to pre-screening.

## Background Investigation

Employers should establish a policy regarding when, and under what circumstances, background checks are to be performed. The amount of background investigation performed on an applicant should be proportional to the degree of risk presented by the position to be filled.

For employees who have frequent contact with the public or close contact with persons due to a special relationship, the courts have stated that the employer has a duty to use reasonable care in hiring the person. An example of an individual who may have close contact with persons due to a special relationship is a maintenance worker in an apartment complex who has unsupervised access to apartment units through the use of master keys. An example of an employee who has frequent contact with the public is a security guard.

The background investigation should include checks on an applicant's work history, references, education, criminal history, credit reports, motor vehicle records, workers' compensation records, and military records.

## Work History

Previous employers should be contacted to verify dates of employment, position or title, salary, job duties, and reasons for leaving. Information about an applicant's ability to get along with others, quality of performance, and interpersonal skills with outsiders (such as customers) may be relevant to the performance of the job.

The ADA prohibits an employer from asking previous employers or other sources about an applicant's disabilities, illnesses, workers' compensation history, or any other question the employer may not ask of the applicant. The previous employer may be asked about job functions and tasks performed by the applicant, the quantity and quality of the work performed, how job functions were performed, attendance records, and other job-related issues that are unrelated to a disability.

Because of fear of being sued for defamation, many employers are reluctant to provide any information, other than confirming dates of employment, about a former employee. However, a previous employer may be sued for negligent misrepresentation or fraud for failing to exercise reasonable care in communicating information about a former employee.

## References

It is almost too obvious to suggest that references be checked on applicants. Yet, many employers have been found negligent for not doing so. References should be checked, but which ones are the best? If an applicant lists two or three personal references, will those people give anything but positive information about the candidate? Can they be candid?

References can verify other information provided by the candidate and, perhaps, can give some commentary about the candidate's character in general. All information obtained should be well documented and placed in the applicant's personnel folder.

## Education Records

Transcripts of school records and copies of professional licenses are invaluable tools for screening job applicants, especially for managerial or technical positions. The Family Education Act, however, limits access to school records unless authorized by the applicant.

If the applicant is a finalist for the position, transcripts should be obtained. It is illegal for someone to fabricate his or her educational background, and this would be grounds for immediate termination. One cannot assume that documents received from the applicant are legitimate, and as such, the applicant can be requested to have the college send the transcripts to the prospective employer. Colleges require the name, social security number, and dates attended when requesting transcripts.

## Criminal History Data

Recently, the use of criminal background checks and credit histories has received legislative scrutiny because of its potential discriminatory practices. New guidelines have also been released by the Equal Employment Opportunity Commission (EEOC) surrounding the use of criminal background checks in hiring decisions. Information about prior criminal convictions can be obtained fairly readily in many states and with varying degrees of difficulty in others. Similar to drug screening, there has

been considerable legal activity on the issue of the individual's right to privacy versus the public's need to know.

Many negligent hiring cases have been successful where it was established that the assailant/employee had a prior criminal record for violent crime. Based upon the trend in negligent hiring case law, the failure to obtain or attempt to obtain criminal history data is the single most common reason for negligent hiring liability.

In *Paul v. Davis*, 424 US 693 (1976), the U.S. Supreme Court ruled that criminal records are not covered by the right to privacy. As a result, information about prior convictions can be obtained and used in the screening process. However, federal and state civil rights laws (e.g., Title VII of the 1964 Federal Act) prohibit denial of employment solely on the basis of a prior criminal record that is unrelated to job performance. The nature and severity of the conviction, as well as job-relatedness, should be considered along with the applicant's age at the time of conviction. Furthermore, an employer may not inquire about misdemeanor convictions that are more than five years old or arrest records.

Most criminal cases are tried at the state level. Many serious crimes, such as mail fraud, interstate drug trafficking, and civil rights violations, are heard in a federal forum. Therefore, both federal and state records checks should be performed.

Some states allow employers to search a statewide repository for criminal records. Other states have no records or allow access only to criminal justice agencies. The largest repository of criminal records is the Federal Bureau of Investigation's Identification Division.

To avoid litigation for the wrongful use of this information, employers should consider a few factors: arrest data cannot be used because studies have shown that such records tend to discriminate against minorities; convictions should be relevant to the position being filled; and the time period between the conviction and employment should be weighed, along with the age of the applicant at time of conviction and the overall work history.

See Liability Report LB-70-51, *Criminal Background Checks*, for additional information on criminal records.

### **Credit Reports**

The use of credit reports in pre-employment screening has gained in popularity as employers discover their availability and utility. Obviously, these reports reflect the applicant's financial stability, but frequently, they also contain other useful information, such as a prior address and/or a previous employer.

The use of credit reports poses certain legal risks to employers. If used to exclude an applicant from consideration, the Fair Credit Reporting Act (16 USC s.1681) requires that the applicant be notified of the source of the report, allowing for correction of errors in the report. State laws also may impose additional restrictions on their use. Also, the use of credit reports could result in violations of state and federal civil rights laws due to their discriminatory impact on minorities. The Consumer Financial Protection Bureau (CFPB) is responsible for enforcing the Fair Credit Reporting Act (FCRA). An employer that uses results of background checks in making employment decisions should be familiar with and use the Summary of Consumer Rights and the Notice of User Responsibilities forms from FCRA. The FCRA requires employers to provide individuals with the

Summary of Consumer Rights before taking adverse employment action based on such results. The Notice of User Responsibilities summarizes the duties of employers as users of consumer reports under the FCRA.

Credit reports should be used with discretion because many EEOCs and state laws now prohibit their use when an employer cannot present a compelling business rationale for such reports. Quite simply, they should be reserved for positions meriting credit scrutiny.

### **Motor Vehicle Records**

Any position that requires the employee to drive a vehicle for the employer should also require the production of a Motor Vehicle Report from each state where the driver held a license. These records are easily obtained from the respective state Department of Motor Vehicles and can be helpful, particularly if the individual has had a series of serious violations, in identifying high-risk employees. Like many other types of information discussed in this report though, driving records are only one piece of the proverbial puzzle. See Commercial Vehicle Report CV-20-04, *Motor Vehicle Records*, for further information on obtaining motor vehicle records.

### **Military Records**

The Federal Privacy Act makes it illegal for an employer to gain access to an applicant's military or related federal records without the express written consent of the applicant.

### **Investigative Agencies**

Lack of time and inability are probably the two most common reasons many employers delegate the responsibility for background investigations to outside firms. Outside investigative firms are helpful because they have the expertise and the time to

investigate potential employees. Costs vary directly with the level of investigation sought and can be established initially by contract.

There are two issues for potential users of these services to consider. First, many of the people actually doing the investigation are paid on a per-investigation basis; thus, there is an incentive to get the work done as quickly as possible. This could result in "cutting corners" and incomplete information. As such, employers using these services should find the basis used to pay the investigators. Second, the risk of negligent hiring liability can be shared with these agencies, although most of them will probably try to include a disclaimer in their contracts.

### **Specific Industry Mandates**

For some jobs, federal or state law requires a background investigation. For example, in 2007, the U.S. Department of Homeland Security issued an interim final rule that requires chemical plants to conduct background checks of current and future employees and contractors who have unescorted access to the facilities.

## **Using Consumer Reporting Agencies**

In some instances, particularly when hiring for a position that involves high-level responsibilities or access to valuable company assets, an employer might wish to conduct a background check by using a consumer reporting agency (CRA), such as IntelliCorp. IntelliCorp is a provider that will work with an employer to perform employee background screening services. More information is available at [www.intellicorp.net](http://www.intellicorp.net). Other providers can be evaluated by reviewing information at the National Association of Professional Background Screeners at <http://www.napbs.com>.

These services regularly engage in gathering or evaluating information about individuals for the purpose of providing reports to third parties. The state laws also contain requirements governing the conduct of the CRAs themselves, so selection of an established and reputable CRA is important. A human resources association or a reputable employment lawyer should be able to provide recommendations and additional advice. Human resource professionals responsible for pre-employment screening have access to various tools to help them research and select background-screening partners.

## Summary

Negligence in hiring is defined as the failure of an employer to exercise reasonable care in selecting an applicant in light of the risk created by the position to be filled. Because of the potential severity of the consequences to a business from negligently hiring an employee, a careful, thorough investigation into the background and fitness of a prospective employee is essential to the well-being of the business. Reasonable investigation may be costly in terms of time and money, but failure to investigate may lead to more severe consequences.

However, while courts have imposed a responsibility on employers to use due care

in screening job applicants, federal and state privacy laws also impose restraints on employers. These laws are intended to protect against discrimination and an employer that does not comply with these laws can become the victim of a discrimination lawsuit.

The following legal resources provide guidance for an employer who is seeking to perform background investigation activities:

- Fair and Accurate Credit Transactions Act (FACT Act), <http://www.ftc.gov/os/statutes/fcrajump.shtm>
- Equal Employment Opportunity (EEO) laws, <http://www.eeoc.gov/>
- Immigration Reform and Control Act of 1986 (IRCA), <http://www.justice.gov/crt/about/cor/byagency/doj1255a.php>
- Form I-9, Employment Eligibility Verification, <http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=31b3ab0a43b5d010VgnVCM10000048f3d6a1RCRD&vgnnextchannel=d029c7755cb9010VgnVCM10000045f3d6a1RCRD>
- E-Verify, <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=75bce2e261405110VgnVCM1000004718190aRCRD&vgnnextchannel=75bce2e261405110VgnVCM1000004718190aRCRD>

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