

Reference Services, Inc.

BACKGROUND SCREENING:

What You Don't Know Can Hurt Your
Organization



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Why do Employee Background Checks?

The benefits of comprehensive employment background screening include:

- Increased applicant and new hire quality
- Reduced workplace violence
- **Reduced negligent hiring liability**
- **Reduced losses from employee theft**
- Less turnover from poor uninformed hiring decisions
- Avoiding negative publicity

The bottom line is that pre-employment background checks help an organization be more successful.



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Increase Applicant and New Hire Quality

The first benefit of background checks is an increase in applicant quality. Many employers see an almost immediate improvement in the quality of applicants once it becomes known that they are conducting thorough background checks. A complete employee screening process:

- Results in fewer applications with serious discrepancies
- **Discourages applicants who are trying to hide something or be dishonest**
- Increases applications from applicants who want to work in a safe environment
- Increases the quality of new hires due to an improved applicant pool and improved selection process

This can be particularly important in employment segments where employees may feel less accountability because of wage, age or part time or seasonal status.



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Reduce Employee Theft & Workplace Violence

Employee Theft is Rampant & Growing

- **The FBI reports that employee theft is the fastest growing crime in the U.S.**
- \$53 billion is stolen annually from the U.S. retail industry by employees.
- 43% of workers admit they have stolen from their employer.
- **70% of people who steal will reoffend.**
- According to the most recent estimate from the Association of Certified Fraud Examiners, a **typical organization loses 5% of its revenues each year, with 20% of cases having over 1 million in losses. (Average loss is \$140,000.)**

The Staggering Cost of Violence in the Workplace

- According to a survey conducted by the US Department of Justice, **1.5 million workers are assaulted in the workplace each year** and 1.75 million days of work are lost each year by victims of workplace violence.
- The cost in lost wages alone accounts for about \$55 million per year.
- If all additional costs are considered, such as lost productivity, legal expenses, and damaged public image, the annual cost of workplace violence could measure in the billions.
- Among workplaces, retail trades have the highest number of occupational homicides.



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Protect Your Organization Against Negligent Hiring Liability

What is Negligent Hiring Liability?

Negligent Hiring is "the failure of the employer to investigate a job applicant's work experience, character, criminal history and other relevant data prior to the hiring of an employee."

- **Negligent hiring liability holds employers responsible both for what they do know and what they should have known about their employees.**
- Courts have repeatedly affirmed that employers have a duty to exercise reasonable care in hiring individuals who, because of the nature of their employment, may pose a threat to the public.

An Employer's Obligation

- Employers have a moral and legal obligation to provide a safe work environment.
- **Therefore, knowing whether a potential employee has been involved in criminal activity (such as drug or other substance abuse, reckless behavior, dishonesty, theft, or dangerous and violent behaviors) allows an employer to determine if an applicant is suited for the job and work environment, *and* helps the employer determine if the applicant poses a potential threat to other employees.**



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Protect Your Organization Against Negligent Hiring Liability (Cont.)

Costs of Negligent Hiring

According to the article, Avoiding Negligent Hiring Lawsuits (HR Management Magazine), **"Average settlements in negligent hiring lawsuits are now averaging SEVEN figures."**

- **Employers LOSE approximately 75% of negligent hiring cases**
- **Your organization CAN, and WILL, be held liable for the criminal or violent acts of its employees.**
- **Aren't the costs too great to put your organization at risk by hiring employees without performing a truly comprehensive background check?**
- ***"Juries in such cases will assume that if you could have known you were hiring someone dangerous or unfit for a job, you should have known."***

NOTE: Although all employers face a substantial risk for negligent hiring lawsuits, several categories are at increased risk – retail, health care, hospitality and any service provider going into a client's home.



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What Makes a Background Check Truly Comprehensive?

To protect your organization, a comprehensive background check can not only reduce theft & improve your hiring selections; it can also decrease liability & protect your brand.

The quality of the data used by the background screening firm is also **CRITICAL** in obtaining all criminal records and ensuring the information is accurate and up to date.

To minimize risk, all employers should include the following checks in their background screening packages:

- **A Nationwide Criminal Search**
- **A Social Security Trace**
- **Manual County Courthouse Searches for 7 years of applicant address history (2 – 3 counties on average – fewer counties for younger employees)**
- **Former Employer Verifications**
- Education Verification (if applicable)
- Professional/Personal Reference Checks (only if you want them)

And it's equally important to invest in the QUALITY of your background screening partner. Incredibly cheap screening packages are an immediate red flag.



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Where do Criminal Records come from?

- DOJ (Departments of Justice)
- AOC (Administrative Offices of the Courts)
- State & National Sex Offender Registries
- State DOC (Departments of Correction)
- City, County & State Police Departments
- County Courthouse Systems
- Special Sources such as:
 - OFAC
 - OIG
 - EPLS
 - US Department of the Treasury
 - FBI Most Wanted
 - Bank Sanction lists, etc.
- **But the problem is that a background screening firm isn't required to subscribe to all of this data because no one in the industry forces us to do so . . .**



Nationwide Criminal Search - It All Starts with Good Data

A **Nationwide Criminal Search** is the foundation of all comprehensive background checks. It's a report designed to catch **CONVICTIONS** by searching criminal record sources including (some) counties (which are likely not up to date), Departments of Correction (DOC) & Administrative Offices of the Court (AOC). **It identifies felony convictions, including incarceration.**

Background screening firms DO NOT use the same data!

- **Nationwide Criminal Searches ONLY search the data the background screening firm subscribes to. Quantity does matter.**
- No one regulates what sources are used or NOT used in passing on criminal records. Sound crazy? It's true.
- Every company chooses their own sources – as few or as many as they care to pay for.
- **The number of records searched varies WIDELY among background screening firms with variances in the hundreds of millions of records.**
- Some contain a sex offender registry & other watch lists, such as OFAC – others do not.



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So what does that mean for employers?

Know how to protect yourself & know your screening firm.

ALL YOU NEED TO DO IS GOOGLE “Background Screening Lawsuits” and you may be shocked at what you will find.

- Many firms have violated consumer rights
- **Endangered employers and put them in harm’s way for litigation**
- Prevented good people from getting much needed jobs
- **Frequently and knowingly passed on bad data and performed no order review process to ensure criminal charges belonged to an applicant**

Ask About Data Sources

- **Ask to see a Nationwide Criminal Source List**
- **Ask how many records are searched & how many data sources are used**
- Ask if their firm is nationally accredited by the NAPBS
- Ask if their team members are FCRA certified



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A Sample of Nationwide Sources

- MI Michigan Sex Offender Registry , Offender Tracking Information System (OTIS) , Antrim County - Circuit Court , Leelanau County - Circuit Court , Macomb County - Circuit Court , Bay County , Genesee County - 67th District Court - Historical Data {Inactive: 5/20/2009} , Kent County - 61st District Court , Saginaw County - Circuit Court , Jackson County - District Court , Wayne County - Circuit Court , Grand Traverse County - Circuit Court , Grand Traverse Band of Ottawa and Chippewa Indians Sex Offender Registry , Oakland County - Circuit Court , Keweenaw Bay Indian Community Sex Offender Registry , Nottawaseppi Huron Band of the Potawatomi Sex Offender Registry , P.R.I.O.R.S.
- MN Minnesota Sex Offender Registry , Minnesota Dept. of Corrections , Minnesota Dept. of Public Safety , Minnesota Judicial Branch , Bois Forte Band of Chippewa Sex Offender Registry , Red Lake Nation Sex Offender Registry , Methamphetamine Offender Registry , P.R.I.O.R.S.
- MS Mississippi Sex Offender Registry , Mississippi Dept. of Corrections , Hinds County , Mississippi Parole Board , Harrison County , Desoto County , Hinds County - Justice Court , Mississippi Band of Choctaw Indians Sex Offender Registry , P.R.I.O.R.S.
- MO Missouri Sex Offender Registry, Missouri Dept. of Corrections, Missouri Dept. of Corrections – Supplemental, Missouri Admin Office of Courts (Delayed), P.R.I.O.R.S.
- MT Montana Sex and Violent Offender Registry , Montana Dept. of Corrections , Fort Belknap Indian Community Sex Offender Registry , Fort Peck Tribes Sex Offender Registry , Chippewa Cree Tribe Sex Offender Registry , Blackfeet Nation Sex Offender Registry , P.R.I.O.R.S.
- NS OFAC - Specially Designated Nationals List , OIG - Health and Human Services Exclusions , System for Award Management (SAM) - Excluded Parties List , Australia Sex Offender Registry , INTERPOL Most Wanted , Denied Persons List , OTS - Enforcement Actions List , Fugitive List , Directorate of Defense Trade Controls - Debarred Parties List , Bank of England Sanctions List - Historical Data . . .



Manual County Searches

This is a jurisdictional hand search of the court records in any one of the more than 3,347 counties in the United States.

These records provide the most up to date information available and include pending charges, dismissed charges *and* any deferred charges (such as drug charges that may be deferred due to the offender's willingness to complete a deferral program such as probation or rehabilitation).

- **A Nationwide Criminal Report will only capture convictions, so a County Search is essential in obtaining information about pending charges.**
- Cases held at the County level include felonies and misdemeanors as well as criminal traffic offenses.
- **HR best practices recommend doing searches for 7 years of address history per applicant and this is consistent with court findings that define what is a comprehensive background check.**

Note: Research shows that on *average* an individual lives in 2 – 3 counties in 7 years.



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Manual County Searches vs. Instant County Data

Employers should be educated as to the importance of doing true MANUAL county searches and not buying cheap online “junk” data.

- If a background screening firm is returning county search information to you instantly or within hours, it’s coming from an “instant” online purchase – not a real search.
- Instant online county data isn’t guaranteed to be up to date, which defeats the purpose of doing a background check. Manual county searches are the only place you’ll find:
 - Pending charges
 - Arrests that didn’t result in a conviction
- In a recent test by RSI, we ran side by side instant county searches vs. manual county searches & found that in 90% of the 250 searches run, SIGNIFICANT records were missed including SEX OFFENDER records, violent battery, theft & drug charges. Cheap data is not good data.
- Many counties also don’t report up to a Nationwide data source and no one requires counties to report their information to any source databases, so doing in person “manual” searches is the only way to receive accurate information.



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Order Review

The Key to Accuracy

What is “order review”, who does it, and how can it help me as an employer?

- Order review is the process of reviewing criminal records & applying specific criteria & identifiers that:
 - Ensure the records really belong to the applicant
 - Ensure that an employer is ONLY seeing records that they are legally able to see
 - Arrests vs. Convictions
 - State Laws (California)
 - Client Specific Criteria
- **Most firms simply “NARROW” their database parameters, which limits the number and type of records you’re receiving**
- **By doing this you miss many potential records, which defeats the purpose of doing background checks**



What does this mean for employers?

It means:

- You may not be receiving ALL the record information you need (narrow parameter vs. wide)
- Records may or may not belong to your applicants (Order Review), and they may or may NOT be up to date and actionable

***Ask what order review process is completed on each order with a “hit” and by whom? Is the person or team FCRA Certified?**



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Fingerprinting – NOT the Gold Standard

The U.S. Federal Bureau of Investigations (FBI) has a collection of multiple databases, known as the National Criminal Information Center (NCIC). A component of the system is the Integrated Automated Fingerprint Identification System (IAFIS).

- So it would seem this data would serve as a fantastic source for background screening, right?
 - WRONG!
- **The FBI databases were never intended to be used for background screening – nor were they intended to be comprehensive. Instead, they function as a sort of index composed of arrests for law enforcement reference.**
 - In 2006 the U.S. Attorney General's report estimated that **HALF of the FBI records did NOT include final dispositions.**
 - It's also estimated by the National Employment Law Project that as many as **600,000 background checks using this data contained incomplete or inaccurate information in 2013.**



Fingerprinting – NOT the Gold Standard (Continued)

- The NCIC Data is also surprisingly incomplete, containing only 50-55% of all available criminal records in the U.S.
- **ALL reporting to this database is VOLUNTARY**
 - Anyone submitting information – such as police departments, municipal courts, etc. – must enter, modify & remove their own information.
 - As a result, the records are only as thorough as the individuals responsible for maintaining them.
 - According to a report by The Justice Department in 2010, (the most recent available on this subject) in HALF of the states who do report their state information to this database records were missing in 40% of the final outcomes. **And 27 out of 38 states reported a backlog of disposition data. How old the information is varies – ranging from a day delay in Delaware to 555 days in Kansas.**



Fingerprinting – NOT the Gold Standard (Continued)

- More Statistics on FBI Data
 - The NELP (National Employment Law Project) also reported that since TSA (Transportation Security Administration) began requiring FBI screenings for port workers in 2007, more than 120,000 applicants were initially disqualified. Over half of them filed appeals to dispute the records and 94% were successful in proving they were inaccurate.
- When should you do fingerprinting/FBI data searches?
 - Only if required to do so by state statute or government requirement or contract
 - AND
 - **DON'T rely solely on this data as the sole source of your hiring decision/background check**



Credit Reports, State Searches & Federal Searches: Can I run them & should I?

Employment Credit Reports

Because of increasing concern over the potentially disparate impact of employers' use of credit checks as a pre-employment screening tool, a number of states restrict the use of credit checks.

- The EEOC has taken the position that employers should not conduct applicant credit checks unless doing so is needed for the employer "to operate safely or efficiently."*

Can I Run A Credit Report & Should I? **MAYBE**

- Ensure a credit check is "substantially related" to the job duties of the position.
- These duties must be "credit sensitive", i.e., access to client or company credit card information or banking information, positions that handle money, including taking payments or making deposits, those that have authority to make agreements or purchases on behalf of the company.

*According to Dianna B Johnston, Assistant Legal Counsel, EEOC, "Title VII: Employer Use of Credit Checks"



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Credit Reports, State Searches & Federal Searches

State Searches

State searches are searches of a state's criminal records repository system, which varies by state. The search should contain records from a variety of agencies throughout the state, including SOME AOC's, Departments of Law Enforcement, Crime Information Centers, State Police Departments, Departments of Public Safety and State Bureaus of Investigation.

Problems with State Searches

- The record sources vary so greatly. Some contain almost exclusively traffic tickets or arrests by a State Police Department.
- **No one mandates that these records are kept up to date. Delays in updates range from weeks to 555 days.**
- Reporting to a state source is voluntary for most states, so it's not a solid source for criminal record information.
- **Many state databases don't contain final dispositions – which means you can't act on the data.**

Can I Run A State Search? **YES.** Should I? **NOT** unless required by law. And if so, **never exclusively.**



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Credit Reports, State Searches & Federal Searches

Federal Searches

Federal Searches are searches for FEDERAL criminal case files in 94 U.S. District Courts. U.S. District Courts are trial courts for matters involving ONLY federal law.

- Only crimes involving the FBI are prosecuted at a federal level, such as drug trafficking across state lines, arms trafficking, gang violence, mortgage fraud, child pornography & money laundering.
- Federal searches do not pick up common crimes such as theft, battery and even murder, unless the FBI was involved in the prosecution of the case, as referenced above.

Can I Run Them? **YES**. Should I? **MAYBE**.

- Employers in the banking industry SHOULD run a federal search because it's the ONLY place a money laundering charge can be found. (Section 19 of FDIC Regulations).
- Healthcare employers may benefit & some government contracts & entities require federal searches.
- Dangers are that this search is a NAME MATCH ONLY, so common names can be troublesome and may not be accurate.



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Who Regulates Background Screening & Why

■ The Governing Bodies

- FTC (Federal Trade Commission)
- Newly formed CFPB (Consumer Financial Protection Bureau)
- **FCRA (Fair Credit Reporting Act) – Governs ALL Areas of Background Screening**
 - **Federal law enacted in 1970 that governs the collection, assembly & use of consumer information.**
 - **Criminal Records AND Credit**
 - **ANY Consumer Information**
 - **Federal Adverse Action Requirements**
- EEOC
 - Title VII – Civil Rights Act of 1964 – employment discrimination
 - The “New Guidance” – April 2012
- State Laws (such as CA & Ban the Box)
- City Ordinances (Newark, NJ & Richmond, VA)
- DOT (Department of Transportation)



Common Compliance Problems & How to Avoid Them

ON THE LEGAL FRONT

The last 5-6 years have been a hotbed of activity regarding legal actions taken against employers related to noncompliant background screening practices, but we had yet to see the rise in class actions lawsuits that we did from 2013-2014 – from 613 to 1681. An increase of over 500%.

Here are the top issues and areas of action:

Adjudication Matrices

- **Cases: Numerous Class Actions**
 - TYRONE B. HENDERSON, SR., TERESA S. HOLMES, DERICK SEALEY & ALBERT HOLLOWAY, JR. on behalf of themselves & all others vs. WAL-MART & STERLING INFOSYSTEMS, INC.: Case 3:14-cv-002-REP
 - NY Correction Law Article 23.A-2009 AOD No. 09-165
Atty. Gen. of NY vs. CHOICE POINT (Screening Firm) DONALD ACOSTA on behalf of all vs. US FOODS, INC.

FCRA Violation (15 U.S.C. § 1681) Adverse Action §604(b)(3)(A)

- **Cases: Numerous Class Actions**
 - Jeff Willis & all others vs. State Farm: Case 5:14-cv-00151-DCR

FCRA Violation (15 U.S.C. § 1681) Applicant Authorization Form

- **Cases: Numerous Class Actions**
 - Erin Knights & Class vs. PUBLIX SUPERMARKETS: Case 3:14-cv-00720
 - Eric Pitt & all vs. K-Mart Corporation. K-Mart Corporation: Case 3:11-cv-00697-JAG
 - Class Action against Whole Foods Market: Case3:14-cv-00592-VC



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Common Compliancy Problems & How to Avoid Them

FCRA Violation (15 U.S.C. § 1681) Applicant Authorization Form

- **The authorization form cannot be attached to the application in ANY way**
 - FCRA §604 (b)(2) Disclosure to Consumer.

(A) *In general.* Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless –

 - (i) **a clear and conspicuous disclosure has been made in writing** to the consumer at any time before the report is procured or caused to be procured, in a document that **consists solely of the disclosure**, that a consumer report may be obtained for employment purposes
- **No “waiver” or indemnification language. A document that is supposed to serve as a notice of a consumer’s rights cannot purport to serve as a “waiver” of those same rights in any way.**
- **A Summary of Consumer Rights must be provided along with disclosure & authorization form, as well as state specific forms for CA, VT & NY if applicable.**



Common Compliancy Problems & How to Avoid Them

FCRA Violation (15 U.S.C. § 1681) Adverse Action §604(b)(3)(A)

In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, **before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates .**

(i) a copy of the report; and

(ii) a description in writing of the rights of the consumer under this title, as prescribed by the Bureau under section 609(c)(1) (Summary of Rights)

- **Pre-adverse Action Letter**
 - Mail it – don't email
 - Include along with the letter a copy of the record and the Summary of Consumer Rights
- **Wait 5 days – minimum – if no dispute**
- **Adverse Action (or Post Adverse Action) Letter**
 - Repeat the process above including the letter, the records & the Summary of Rights



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Common Compliancy Problems & How to Avoid Them

Adjudication Matrices

- In light of the “new” EEOC Guidance of 2012 a matrix with a Pass/Fail, Red Light/Green Light methodology, by nature of its design denies a consumer of the Federal Adverse Action process AND can create a disparate impact on minorities.
- Although you can certainly create internal criteria, you cannot deny employment after a background check is run without allowing a consumer the opportunity to dispute the information.
- Be sure to consider performing an individualized assessment to validate a fair hiring decision



Common Compliancy Problems & How to Avoid Them

What can you consider/look at on an applicant's criminal record(s)?

- **Convictions stay on a record FOREVER**
 - **Exception: In certain states, you cannot view or consider a criminal conviction beyond 7 years old (i.e., CA, MA, MT, NV, NM & District of Columbia has a 10 year restriction.)**
 - In certain states there are monetary restrictions on consideration of convictions beyond 7 years old. (For example: In NY if an applicant earns less than \$25,000 per year, you can only consider convictions that aren't older than 7 years. The following states have similar restrictions with varying amounts – KS, MD, NH, WA.
- **What about arrests that don't turn into convictions?**
 - **Arrests can be viewed/left on criminal records for 7 years from arrest date (except in certain states). Exceptions are AK, CA, KY, NY – No pending or non-convictions.**
 - After that they must be removed & a good background screening firm will do this BUT be sure they can demonstrate they are knowledgeable of compliance regulations.
- **Can I even consider arrests that aren't convictions? Why look at them?**
 - Although the EEOC says that you shouldn't base a decision on a "non-conviction", you can consider "underlying conduct" as part of your decision making process and evaluate risk, potential for harm, etc., if there's a pattern of conduct.



Common Compliancy Problems & How to Avoid Them

Disputes – “It’s Not Me.”

- Under the FCRA, all consumers are entitled to a copy of their criminal records
- They’re also entitled to dispute the record information if they believe it’s not accurate
- A CRA has 30 days to investigate disputes, but a good background screening firm will begin immediately
- An employer should never be involved in this process



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