
Employment Background Check Guidelines

***Complying with the Fair Credit Reporting Act,
conducting credit background checks and
running a criminal check to avoid negligent-
hiring lawsuits***

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Employment Background Check Guidelines:

Complying with the Fair Credit Reporting Act, conducting credit background checks and running a criminal check to avoid negligent-hiring lawsuits

Employers and HR professionals should make it their policy never to hire a candidate without an employment background check. Your organization could be held liable for “negligent hiring” or “failure to warn” should an employee turn violent on the job.

When conducting a job background check, make sure you comply with the Fair Credit Reporting Act, which regulates not only credit background checks but also checking criminal records and driving records.

Employment Background Check Guidelines shows you how to properly conduct reference/background checks, select third-party background firms and why screening candidates online on social networking sites is legally risky business.

Employment Background Check Guidelines #1

Make sure you comply with the Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) regulates how employers perform employment background checks on job applicants. Contrary to popular belief, this federal law doesn't cover just credit checks. It covers any background report, such as driving records and criminal records obtained from a “consumer reporting agency” (CRA).

Under the FCRA, you're typically free to conduct employment background checks and use the information *if* you have a clear business interest, such as hiring, firing, reassigning or promoting someone.

But you can't run a job background check on a whim. You must receive the person's written permission before obtaining the report. Then, if you decide to act on it (for example, fire a worker or reject an applicant), you must tell that person in writing that you based the decision, in part, on the background check.

Sometimes, background checks are mandatory. For example, jobs working with children, the elderly or the disabled usually require checks. Security positions also require background checks, as do jobs in which employees must be bonded.

Two trends now compel more employers to conduct employment background checks. First, terrorism threats and incidents of workplace violence have made companies more aware of the need for background checks.

Second, “negligent hiring” lawsuits are on the rise. Companies have a “duty of care” to protect workers and customers from employees the company knew—or should have known—posed a security risk.

For example, a hotel front-desk clerk broke into a room in the middle of the night and assaulted a guest. It turned out that the worker had a criminal record of burglary and violence, but the hotel never checked before handing over the keys to all the rooms. The hotel’s failure to conduct an employment background check virtually ensured it was headed for a negligent-hiring suit.

FCRA notification rules

Before obtaining a consumer report on an applicant or employee, you must:

1. **Notify the person** in a separate, written disclosure that you may seek a credit report for employment purposes.
2. **Obtain the person’s permission** in writing before ordering the report.
3. **Provide a summary** of FCRA rights.

If you decide to fire or not to hire someone based on employment background check results—even if it is only one of several reasons—you must:

- **Before taking action**, give the person a “pre-adverse action disclosure” that includes a copy of the credit report and a copy of a document titled “A Summary of Your Rights Under the Fair Credit Reporting Act.” The CRA that provides the report gives you this summary. It’s also available online at www.ftc.gov/os/statutes/2summary.htm.
- **After taking action**, you must give the person notice—orally, in writing or electronically—that you did so. Include the name, address and phone number of the CRA that supplied the report, a statement that the CRA did not make the decision to take the adverse action and a notice of the applicant’s right to dispute the information’s accuracy. The person has the right to an additional free consumer report from the agency upon request within 60 days.

Note: Under federal bankruptcy law, bankruptcy is not a valid reason to deny employment, and you can’t discriminate against an applicant because of it.

Online resources: FCRA

- The FTC's main FCRA site: www.ftc.gov/os/statutes/fcrajump.shtm
- An explanation of employer obligations under the law: www.ftc.gov/os/statutes/fcradoc.pdf
- For details about state FCRA laws, go to: www.verifiedcredentials.com/docs/compliance/State%20FCRA%20Laws.doc

Employment Background Check Guidelines #2

Steer clear of negligent-hiring lawsuits

If you fail to do an employment background check on applicants for certain positions, you could make your organization vulnerable to a negligent-hiring lawsuit by any worker or customer who's been hurt by a violent employee. You should check applicants' backgrounds for positions such as day care worker, security guard and sales representative.

A number of court decisions have established the principle that an employer has a "duty of care" to protect workers, customers and clients from injury caused by an unfit employee who an employer knew (or reasonably could have been expected to know) posed a risk.

For an employer to be held liable for negligent hiring, the plaintiff must prove:

- 1. An employee intentionally injured** a co-worker, customer or client
- 2. Few, if any, pre-employment checks** were performed, and that if they had been, those checks would have likely revealed a worker's propensity toward violent behavior *or*
- 3. The employer, knowing a worker's propensity** toward violence, did not provide proper supervision and security.

Some states have even stricter standards for employers to meet. Because the exact standards for a finding of negligent hiring vary from state to state, you should check with an employment law attorney familiar with negligence law in your state. An attorney can help you establish policies for proper background checks that comply with employment laws and protect you from liability.

Self-test: Fair Credit Reporting Act

Would you be required to notify applicants if you:

- Refused to hire a person partly because of a bad credit history, but primarily because of a lack of experience?
- Got credit reports on all applicants, but didn't send rejection letters to those who weren't hired?

Answers: In both cases, the FCRA requires you to notify workers about credit background checks. In the first situation, the applicant is entitled to the notice because the credit report played a part—however minor—in your decision. In the second, you're not excused from notification merely because you didn't communicate with applicants.

Final note: Does contacting past employers count as an official credit check covered by the FCRA? That depends on who does the checking. The law does not cover a reference verified by the employer, but the FCRA does apply to a reference checked by a reference-checking agency.

Employment Background Check Guidelines

#3

Checking references: Legal safeguards

Contacting an applicant's former employers is an essential step in the screening process. Most employers seek two types of information from professional references:

- **Professional data:** verification of dates of employment with last employer, job title, salary, performance evaluation and attendance.
- **Personal data:** verification of academic credentials, driving records (if relevant) and others.

Keep in mind that you can't ask a reference any questions you are prohibited from asking an applicant. Restrict your inquiry to job-related issues.

You must also check information furnished by all candidates without discrimination against any group. Many employers have been snagged for making cursory checks of white applicants but probing more deeply in the case of minorities.

If you ask for references without the applicant's OK or ask the wrong questions, you risk getting sued. Therefore, make it your policy to:

- **Inform candidates** that you will check references.
- **Get a signed waiver** from the candidate authorizing you to contact references. (References may ask you to provide them with a copy of the authorization the applicant signed and a release of liability. So you may want to consider adding a statement to the authorization that the candidate releases references from liability for anything they say. The waiver should also provide that any reference material will remain confidential and that the candidate may not see it, whether hired or not. Without this assurance, many former employers and other common references are naturally reluctant to provide more than dates of employment and position held.)
- **Focus on the facts.** What were the job responsibilities? Under what conditions did the person work best? Why did he or she leave the company? Would you rehire that individual?
- **Ask references** only those questions that you can lawfully ask candidates.
- **Never rely** on a single reference.

It's legal to check public records to verify a candidate's credentials. You can call a university to confirm a degree or a licensing body to verify that a candidate is really certified. You can run a criminal records check to see if an applicant was ever *convicted* of a crime (although it's illegal to ask about a criminal *arrest*, which means the person was only suspected of a crime). Some states make it illegal to refuse to hire someone convicted of a summary offense or a misdemeanor. Always check with an employment law attorney.

Employment Background Check Guidelines #4

Background-checking firms: Sort out the best from the rest

Not too long ago, just a few dozen companies offered background-checking services. But the industry mushroomed in size and scope—but not necessarily quality—after post-9/11 security concerns, and ethics scandals drove up the demand for increased background screening.

The result: Nearly 1,000 vendors are in the screening industry now, making it difficult to sort out the top tier from the fly-by-night firms. Many sell cheap but incomplete background checks in minutes. Too often, they simply restate old information bought from private data brokers with no guarantee the data are current or correct.

The top four players in the industry—USIS, First Advantage, ChoicePoint and Kroll—account for about \$1.4 billion of the nearly \$3 billion industry. What about the others? *Good news:* There’s a new yardstick by which HR professionals can gauge their quality.

The National Association of Professional Background Screeners (NAPBS), a 650-member industry group, recently unveiled a comprehensive, six-pronged certification and accreditation process. *The goal:* Identify “gold standard” pre-employment screening firms that excel in the areas of consumer protection, legal compliance, client education, data quality, verification and business practices.

The new standards address a longstanding HR concern: the absence of a concrete benchmark to vet and verify the quality of the background screeners.

Advice: When choosing a background-screening provider or renewing your current one, look for NAPBS certification (www.napbs.com). Then, ask potential screening providers about their accuracy, specifically their error rate and resolution rate. It’s information they don’t always give out, but it’s important criteria to judge diligence, compliance and abilities concerning the background reports they provide.

Employment Background Check Guidelines #5

Screening candidates: To Google or not to Google?

Michelle, an HR director, was ready to make an offer to a candidate when she decided to run a Google search on the applicant. *The result:* “It saved me big-time. She had a ‘brandishing weapons’ conviction, and it was all there on Google.”

Such stories are becoming more common. HR professionals and managers increasingly use search engines and social networking sites (like MySpace) to dig beyond the typical résumé and cover letter. Many of the “red flags” uncovered include web postings by the candidates themselves—postings that the person obviously didn’t expect job recruiters ever to see.

The problem: **Googling candidates can carry certain legal risks.**

What if you Google only minorities? What if you inadvertently view information about a different person with the same name? What if your search shows a picture of the person in a wheelchair? All scenarios could raise discrimination charges if you reject the candidate. Two tips to avoid such legal risks:

1. Make sure you've got the right person. Even relatively rare names are duplicated, and many tall tales exist in cyberspace. “The way to deal with that is to bring (the Google result) to the person’s attention,” says Joe Beachboard, an employment lawyer with Ogletree Deakins in California. “I would always give the person the opportunity to confirm or deny it.”

2. Be consistent with your searches. As with other recruiting tools, you shouldn’t discriminate when Googling based on the person’s race, age, gender or name (national origin bias). Realize that Googling may pull up photos, which means you may have to explain whether you considered the individual’s race/age/disability in your hiring decision.

“You should be consistent about how you go about Googling candidates,” says Beachboard. “Maybe you do it for all candidates or just certain high-level candidates, but be consistent.”

% of employers that have Googled candidates:

Services	31%
Manufacturing	22%
Govt./nonprofit	20%

Source: National Association of Colleges and Employers

Employment Background Check Guidelines #6

How to protect yourself from Internet-related liability

When employers gather information about job candidates through websites such as Google, Facebook and MySpace, they expose themselves to discriminatory failure-to-hire lawsuits.

Getting to know you—too well

When it comes to discrimination, ignorance is often bliss. It’s impossible for an employer to discriminate based on information it does not have. Usually, employers take care not to ask applicants about their age, race, gender, disability

or other protected characteristics. But viewing a candidate's Facebook page may provide some of that information—and possibly much more. By accessing such information, the employer loses the ability to claim ignorance.

On the other hand, investigating a candidate on the Internet can provide valuable information that the employer might not otherwise learn. Employers need to balance the risks and benefits.

Keep in mind that information found on the web may not be accurate. Competition in the workforce is fierce. NBC's "Dateline" recently reported that some people have created fake web profiles on other people with the sole intent to harm other persons' reputations.

Don't consider the web a reliable substitute for traditional hiring practices. A YouTube video may provide a glimpse of a candidate's personality, but a face-to-face interview will probably reveal much more of a candidate's true personality. Plus, it won't expose your company to liability.

To minimize your organization's legal exposure to discriminatory failure-to-hire claims:

- **Don't search** for candidate information on the Internet. This eliminates the potential for relying on false and misleading information.
- **Develop interviewing skills** and techniques that will draw out the information necessary to enable a legitimate, nondiscriminatory hiring decision.
- **Use a third-party service** to conduct thorough background checks on candidates.

Employment Background Check Guidelines #7

Should background checks include sex offender registries?

Employers can find out much more about prospective employees than they could just a few years ago. A wealth of information is just a Google search away. There employers can find an applicant's postings to Internet chat rooms, personal web pages or even Facebook.com profiles.

One sort of "facebook" may be of particular interest to some employers: the government's sex offender registries.

Since the federal government passed “Megan’s Law” in 1996, states are required to keep a publicly accessible website that lists sex offenders and shows their pictures and home addresses.

Megans-law.net maintains a nationwide directory of state sex offender registries, as does the Klaas Kids Foundation.

But should employers use any information gathered there when making a hiring decision, and what are job applicants’ rights?

Check state laws

Each state’s law is different. That means employers must check the rules before using sex offender registry information. For instance, California law prohibits employers from searching for a job applicant’s name on the registry unless they can demonstrate they are doing so to protect a “person at risk.” But the law doesn’t clearly define “person at risk.”

Employers in most states can—and probably should—scan the registry if an applicant will work around children or the disabled on the job, or will work unsupervised in people’s homes.

(In fact, employers hiring for these types of positions shouldn’t stop with the sex offender registry. A criminal background check to see if the applicant has convictions for violent crime is probably in order as well. If hiring for positions handling money, employers should check for convictions such as theft, embezzlement or theft by deception.)

Notification requirements

Several states require employers to notify applicants if they plan on checking a sex offender registry. Again, laws vary by state—a common regulation requires providing a public record to the applicant within a certain number of days.

- Notification requirements generally follow those required by the Fair Credit Reporting Act (*see page 3*).

Notification requirements allow applicants to challenge information in credit reports they believe to be inaccurate. Presumably, information in the sex offender databases is accurate, but that battle is between the applicant and the state.

Other convictions

Always check state law to see how you can use criminal convictions when making hiring decisions. Most states have a statewide criminal record database, which can be searched—usually for a fee. Call your local police department to find out what state agency handles criminal records in your state.

Employment Background Check Guidelines **#8**

Prevent new type of lawsuit: Credit-check discrimination

If your organization uses credit background checks in the hiring process, you'd better have a sound business reason for doing so or you could face a new type of litigation: Minorities who've been turned down for jobs because of their credit history are arguing that employers are using credit checks as a way of illegally discriminating against minority applicants.

The numbers back up their claims. According to a Texas Department of Insurance study in 2004, credit scores of African-Americans generally run 10% to 35% lower than those of white Americans. Hispanics' scores run 5% to 25% lower than whites' scores.

Credit background checks are becoming increasingly popular. While a 1996 Society for Human Resource Management survey found that only 19% of employers were pulling credit reports as part of the screening process, that number rose to 35% by 2003.

Understanding 'disparate impact'

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees or applicants based on their race, color, religion, sex or national origin. Illegal discrimination can occur in two different ways: disparate treatment or disparate impact.

Disparate treatment discrimination occurs when a worker is intentionally treated differently because of his or her race, sex, national origin, etc. This form of bias is spotted rather easily.

Disparate impact discrimination occurs when an apparently neutral company policy negatively affects one group more than the majority.

Advocates say business's growing reliance on credit ratings disparately impacts African-Americans, Hispanics and possibly women.

Show business necessity for test

The good news: Title VII gives employers an affirmative defense against disparate impact charges. If you can demonstrate that it's necessary for the person in that position to have good credit, then it's irrelevant how the requirement affects minorities.

But how easy is it to make that argument?

Conventional wisdom has held that people with bad credit are more likely to steal because they need the money to pay their bills. However, employee-theft studies have, so far, failed to show this to be the case.

Two recent studies say employee theft typically occurs in a Robin Hood model: Employees who feel wronged by the organization because of low pay or lack of advancement take out their frustrations by stealing from the company. These workers tend to be young, unmarried and more likely to work part-time.

However, a credit background check usually would not catch these workers beforehand. Being young, they have little established credit and therefore are less likely to have bad credit.

A Canadian study suggests that the larger thefts are carried out by well-educated, white-collar workers in their 30s. Typical "white-collar crime" is rooted in financial distress, but often it is simply greed. There are no clear data as to whether these white-collar criminals engaged in theft in previous jobs.

The bottom line: Credit background checks fill the employer's psychological need to "do something" when hiring a person who will be responsible for handling money. But credit checks offer no guarantee of sorting out the "bad eggs" in hiring.

If you use credit background checks in your hiring process, make sure you can point to a clear business necessity.

Also, focus on other nondiscriminatory approaches that can vet candidates and prevent theft more effectively than credit checks.

FAQs: Employment background checks

Here's a sampling of questions on reference/background checks submitted by readers of The HR Specialist newsletters, answered by employment law attorneys.

Background checks: Weigh convictions, not arrests?

Q. We're going back and forth on this question: On an employment application, can we legally ask about an applicant's prior conviction record or arrest record? —T.F., Nevada

A. This is a common employer mistake. As a general rule, when making hiring decisions, you can consider a prospective employee's criminal history record only if it includes convictions. You should not take into account criminal charges and arrests that didn't result in convictions. So on applications and in interviews, you should ask only about convictions, not arrests. Also, the EEOC suggests that employers look at the nature and gravity of the conviction, how long ago it happened and whether the offense relates to the job being applied for.

Consent required to run background checks on internal applicants?

Q. We are considering applicants for a management position, including several internal applicants. Our policy is to obtain background checks on all candidates from a consumer reporting agency. If the internal applicants signed consent forms when we originally hired them, do we need to get new consent forms from them? — J.P.

A. It depends. If the original consent forms the internal applicants signed when they initially applied for employment specifically state that you may obtain consumer reports on them *for employment purposes other than the original hiring decision*, then they are likely sufficient to permit you to obtain new reports without the need to get new consent forms.

If you have any concerns about the sufficiency of the original consents, however, you should go ahead and obtain new ones. The employees are motivated to cooperate, since the reports are necessary for you to consider their applications for the promotion. You can stipulate that internal candidates who decline consent will be disqualified from further consideration for the position.

Obtain OK to share background-check info with clients?

Q. Our company routinely runs background checks on all people to whom we offer positions. Can we legally disclose an employee's background information to a customer who requests it? (The employee is working on the customer's job site.) — L.B., North Carolina

A. Generally, you can't share information obtained during a background check with a third party (including clients) unless the employee gives his or her OK in writing. Giving away that info without written approval could violate the employee's rights under the Fair Credit Reporting Act and possibly state laws.

However, you can require employees to authorize disclosure of background check information to third parties as a condition of continued employment. For example, you could properly tell the employee, "If you want to continue working here, you must authorize me to share your background check information with Customer A." Likewise, you can require that an employee authorize a customer to conduct its own background check.

Employment Background Check Guidelines #9

Refusing to hire former criminals: Is it race discrimination?

by Mindy Chapman, Esq.

Does your organization have a blanket policy of refusing to hire any applicants with criminal records? If so, make sure you can explain exactly why.

A recent Pennsylvania court ruling shows that across-the-board “no ex-cons” policies can quickly run into legal trouble unless you can prove the restriction *for a specific position* was “job-related and consistent with business necessity.”

Because minority applicants are statistically more likely to have criminal records, requiring a clean criminal-record history for all jobs could have a “disparate impact” on minorities and thus violate Title VII’s race discrimination policies.

Case in point: A bus company that caters to disabled customers hired Douglas El, who is black, as a driver. But a few weeks later it fired him after learning he’d been convicted of second-degree murder in 1960 for his role in a gang fight. He’d served three years in prison.

El filed a race discrimination lawsuit, alleging the company’s ban on hiring convicts had a disparate impact on minorities. The bus company won because its policy barred applicants who had a violent conviction (it feared for the safety of disabled riders). And the company presented evidence linking past criminal behavior with recidivism. (*El v. Southeastern Pennsylvania Transportation Authority*, 3rd Cir.)

Lesson learned

Stay away from across-the-board bans on hiring anyone with a criminal record. Consider each case individually.

The EEOC’s *Compliance Manual on Race and Color Discrimination* says employers must “be able to justify [banning hiring based on a conviction] as job-related and consistent with business necessity. This means that, with respect to conviction records, the employer must show that it considered the following three factors:

- “1. The nature and gravity of the offense.
- “2. The time that has passed since the conviction and/or completion of the sentence.

“3. The nature of the job held or sought.

“A blanket exclusion of people convicted of any crime thus would not be job-related and consistent with business necessity.”

So, when faced with an applicant with a criminal record, evaluate the position for the risk that potential employees would pose. For example, jobs that allow access to customers’ homes may justify cleaner criminal records than jobs with limited public contact.

Also, take into account the nature of the offense and how it relates to the position. Barring applicants with traffic violations for a fast-food job is excessive, while barring applicants with violent convictions may be justified.