

CRIMINAL BACKGROUND CHECKS: A CHECKLIST OF THE PROS AND CONS

Long gone is the time when hiring decisions were simply an interview and a handshake. Companies are instituting diverse and sophisticated selection tools to determine the best candidates and weed out those who are not a fit for the position or organization. Options in selection include intelligence testing, background checks, interviewing, phone screens, assessment centers, outsourced hiring, credit checks, references, psychological profiling, drug and alcohol screens, education verification, and so much more. An HR professional could spend months sorting out the best techniques.

Criminal background checks are a selection device that is becoming more and more common as a result of increased access to information and increased liability for failure to tap into that information. This white paper lists the reasons companies are using criminal background checks and challenges encountered in this process and juxtaposes risk and rewards of criminal background checking.

Reasons to Conduct Criminal Background Checks

1. Reduce theft and embezzlement.
2. Limit legal exposure for negligent hiring and retention (see reference checking section).
3. Increase applicant quality.
4. Check for potential discipline problems.
 - a. Most employers want to know this type of information about potential employees as it has a bearing on employee success and organizational liability.
 - b. This type of information is particularly hard to get from past employers due to fear of defamation lawsuits.
5. Verify application information. Asking and verifying such information is a simple and inexpensive integrity and honesty indicator.
6. Decrease insurance costs. Some insurance companies will give discounts to organizations that conduct background checks or drug screening.
7. Discover drug/alcohol problems in applicant.
8. Decrease workplace violence.
9. Discourage applicants who have something to hide.
10. Limit uncertainty in hiring process.
11. Enable the company to know who it is hiring.

Challenges in Conducting Criminal Background Checks

1. Limited access to records.
 - When private employers check criminal records, they at times do not have access to restricted or nonpublic governmental criminal databases.
 - Private employers often can check criminal records only by going to individual courthouses and looking through the records that are kept by each court. Since there are

more than 10,000 courthouses in America, a nationwide criminal check may not be practical.

- If searches are only done in specific locales (where the applicant lived for past seven years, for example), employers may miss criminal activity in other locales.

- There may be legal limits as to how far court researchers can go in reporting convictions (usually seven years), even if the conviction is a very serious one.

2. Mistaken identity.

- Because of the way public records are maintained, errors are always possible and cases of mistaken identification have occurred.

- A good background checking vendor should have plans in place to deal with cases of mistaken identity that include limiting employer liability and providing errors and omissions insurance.

3. Legal limitations on information that can be used by employer.

- Employer may not ask about or consider information about arrests or detentions that did not result in convictions. Only convictions and pending cases can be considered.

- Employer may not consider crimes that have been sealed or expunged or where the applicant participated in a special pretrial alternative program. Juvenile activity may also be restricted in reporting.

- There are limits concerning misdemeanors. Most employers will ask about both felonies and misdemeanors on applications, but a misdemeanor cannot be considered if probation was completed and the case dismissed or for minor marijuana offenses more than two years old (Rosen, 2001.)

4. Limits on across-the-board convictions bans.

- Courts have found that a policy of automatically denying employment can result in discrimination against certain groups.

- Instead, employers must examine whether there is a sound business reason to not hire an individual with a criminal record, taking into account the nature of the offense, whether it is job-related, when it occurred and what the person has done since.

- Some states have laws prohibiting discrimination against people who have a criminal record. It's advisable to check with the state Department of Labor before securing the criminal record information.

5. Criminal background checks are subject to the Fair Credit Reporting Act (FCRA).

- Organizations that use outside entities or individuals to conduct applicant background checks or investigate current employees must comply with the requirements of the FCRA. Some states, such as California, Minnesota, Oklahoma and Connecticut,

have additional disclosure requirements. Local regulations should be checked by employers.

- The steps a business must take to comply with FCRA, if required, depend on the type of report the consumer reporting agency provides: a “consumer report” or “investigative consumer report.”
- The Federal Trade Commission, which enforces the FCRA, treats criminal background checks as investigative consumer reports.
- Generally, before obtaining an investigative consumer report, an employer must:
 - o Certify to the consumer-reporting agency that the employer is in compliance with the FCRA and will not misuse the information it receives.
 - o Disclose to the applicant or employee, on a form separate from the job application, that it plans to obtain a consumer report or investigative consumer report and that the report will be used solely for employment purposes.
 - o Obtain written authorization from the applicant or employee.
 - o Inform the individual of his or her right to request additional information on the nature of the report and the means through which such information may be obtained.
 - o Inform the applicant that the consumer report may include information obtained through personal interviews regarding the individual’s character, general reputation, personal characteristics and mode of living.
 - o Provide the individual with a summary of his or her rights under the FCRA.
- If the company decides not to hire an applicant or to take adverse employment action against a current employee based on information in the consumer report, the employer must:
 - o Inform the individual that it plans to take adverse action.
 - o Give the individual a copy of the consumer report.
 - o Advise the individual of his or her rights under the FCRA to dispute inaccurate or incomplete information contained in the consumer report.
- When the employer takes the adverse action, it must notify the individual and again advise the individual of his or her rights under the FCRA to dispute inaccurate or incomplete information.

Risks Versus Rewards Summary

1. Risks of conducting criminal background checks:

- Expense in checking criminal backgrounds.

- Time spent in checking backgrounds—some state repositories take up to six weeks or longer to confirm a conviction. This delay can cause loss of applicants.
- Limited access to records.
- Legal limits on use of records uncovered.
- Inaccuracies such as mistaken identity resulting in unfair or undesirable rejection of a quality candidate.
- Potential adverse impact (though an organization may be able to justify this legally).
- Time and expense in complying with the FCRA.

2. Rewards of conducting criminal background checks:

- Higher quality applicant pool.
- Discouragement of applicants who have something to hide.
- Reduced theft and embezzlement.
- Reduced legal exposure for negligent hiring and retention.
- Increased applicant quality.
- Potential decrease in discipline problems.
- Possible decrease in insurance costs.
- Potential to uncover drug/alcohol problems in applicant.
- Reduced workplace violence.
- Peace of mind.