

Pre-Employment Screening Best Practices

(Courtesy of Omnidata)

In today's litigious culture, you simply cannot afford to hire employees who will put your company at risk. Employers can, and are, being held legally responsible for the wrongful acts of employees, as courts have established that it's an employer's duty to conduct a thorough background screening of all potential employees. Think of the thousands of dollars and manpower hours your company can save by hiring competent, efficient employees and avoiding troubled individuals. Now, more than ever, employers must make careful hiring decisions. Background Checks go a long way in providing for a safe, productive work environment and avoiding litigation as a result of negligent hiring.

Pre-employment screening can be a difficult topic to understand. Determining where and how to search for criminal records, and what to do when a criminal record is found, can be difficult. The problem is that finding out if someone is a criminal is more of an art than an exact science. Even the best screening companies on earth can miss a record or report a false positive. The entire process is subject to human error. One common myth is the idea that an enormous national database of criminal information is available for anyone and everyone to access. Unfortunately, this is not the case. There is no such thing as a "50 State National" database. So why even bother performing background checks if there are no guarantees? The answer is simple. If you do not check for criminal records, there is almost a guarantee that you will hire an employee with a criminal record and be confronted with the potential of a serious negligent hiring lawsuit. Average settlements in negligent hiring lawsuits are now approaching one million dollars. 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. Showing that you have exercised due diligence in making your hiring decisions will dramatically decrease your chances of being found negligent.

With this in mind, let's first examine the process of retrieving criminal records. Because there is no such thing as a national database, the best search option available is to retrieve records by hand from county courthouses where your applicant has resided, and possibly all nearby 'touch' counties. Employers may also consider conducting federal criminal searches. Although hits are rare, federal crimes tend to be of a more serious nature. County records are the most detailed, accurate, and up-to-date searches available. There are currently over 3,600 counties in the United States, and over 10,000 courthouses. And, unless you plan on spending an enormous sum of money searching every available jurisdiction, you'll probably want to narrow that search down just a bit. Employers must balance cost with risk tolerance to formulate the best possible background search for their needs

The best common practice for an accurate, cost-effective criminal search is to find out where your applicant has lived, worked, and/or gone to school during the past 7-10 years. With this information, you can then make an informed decision as to where you would like the searches to be performed. At this point, you're probably asking, "How do I know exactly where my applicant has resided during the past 7-10 years?" That's a valid question, especially since previous addresses and places of employment can be falsified. In case you're worried that a

search of every county an applicant has lived in during the past seven years can be costly and time-consuming: studies have shown that on average, a person has typically lived in only two to three counties during a seven-year period. Later, we'll examine ways to uncover an applicant's address and employment history.

Criminal record matching is typically achieved by matching the applicant's name and DOB to the record. Very few jurisdictions' records contain social security numbers. For those that do, matching is supplemented with a social security number match. Records may contain other identifiers, which may enhance any match. False positives are possible. Only fingerprint confirmation is exacting. Knowledgeable criminals may supply a fraudulent DOB; most commonly the day is altered to hide an offense. You may be asking, "How do I know the applicant gave me their real DOB?" Credit headers and social security searches are helpful for confirming a DOB, but may not be free from error. Driving records are a very reliable source for DOB confirmation, and it is permissible to verify the accuracy of personal information with the use of a driving record.

Statewide databases are also available to search for records. However, these databases are usually not an official record of the state. In addition, some databases are "name-only indexes", or may not contain records from every county within the state. Because databases can be incomplete or contain omissions, they should never be used as your only source for criminal records. Beware of companies, especially on the Internet, which offer instant database criminal records as a reliable pre-employment screening tool.

So are databases good for anything? The answer is yes; they can be very valuable when used properly. We recommend searching databases as supplements to county courthouse searches. This allows you to cast a wider net and to search for crimes that may have been committed outside of an applicant's county or state of residence. Criminals travel and cross county and state lines just like everyone else. From time to time, databases find criminal records in states or counties in which there was no indication the applicant had ever resided. When records are found using a database, they should be verified with a court search before being reported. ***When reporting public records (criminal records) the federal "FCRA" Fair Credit Reporting Act requires that the reporting agency must ensure that the information reported "matches the status of the item at the time the report is requested," This eliminates reporting records directly to an employer, without confirming the information with the courthouse. Internet based and other instant criminal databases are updated only periodically. Furthermore, criminal databases contain some records that are not reportable. For example: expunged records and records that are beyond the States reportable years or scope.*

Now back to our earlier question, "How do I know exactly where my applicant has resided during the past 7-10 years?" This is really a multi-step process, and includes the employment application, interview, and reference checking. These items provide an opportunity to look for unexplained gaps in employment and address history. If you do not know where your applicant has been, the interview and reference checks will provide an opportunity to find out. Credit headers and social security searches will also provide valuable data for determining where to search. A credit header is a small portion of a person's credit report. It will list the applicant's social security number, previous addresses, and past employers. A social security search or credit header will determine whether or not the applicant is actually who they say they are, and that they lived and worked in the places they say they have. Credit headers and social security

searches are invaluable tools for comparing information supplied by the applicant with the information from the credit header or social security search itself.

Let's look at the application in more detail. An employment application is essentially the first step when it comes to screening potential applicants. We have been trained, as members of common society, to fill out applications and questionnaires. Whether we're applying for a loan or visiting the doctor, we are constantly asked to answer questions of a personal nature. A job application is certainly no different. A clear, concise application will force your applicant to answer some very important questions, to be up front and honest, and will more than likely discourage applicants with something to hide. Whenever possible, have the applicant fill out the application on site. Allowing the applicant to take the application home can provide more time and opportunity to cleverly falsify information. Here are some tips for a more effective application.

First, your application should state that you perform background checks. This simple statement will "self-screen" or weed out applicants who already know they probably won't pass the screening process. "A criminal conviction is not an automatic disqualification" should follow. Your application should also ask if the applicant has ever pled guilty or no contest, or been convicted of a crime. It's probably a mistake to ask only about felony convictions. In general, felonies are crimes that are punishable by prison. Misdemeanors, on the other hand, are crimes that are typically punishable by up to one year in county jail. The severity of felonies and misdemeanors varies from state to state, and misdemeanors can be serious crimes that you probably want to know about. Also, felonies are often reduced to misdemeanors through the process of a plea bargain. State laws vary, please review the laws within your state to ensure these questions are allowed or formatted correctly.

Be sure to include a statement that "any fraudulent material is grounds for termination." The EEOC supports an employer's decision to refuse to hire an applicant or to discharge an employee on the basis of falsified answers to questions regarding their conviction records. Therefore, a clear, strongly-worded application could make it easier to dismiss a troubled applicant for providing false information.

Other things to watch for include an applicant failing to provide the name of his or her last supervisor. They may not explain why they left a previous job or they may fail to explain a gap in employment. They may not sign the application or they may leave the criminal question blank. The applicant may also have several changes or scribbles on the application as if they are making it up as they go.

The interview process is your second line of defense in the hiring process. The interview provides an opportunity for the applicant to clarify any unexplained gaps in employment. If everything checks out and there are no unexplained gaps, chances are that the applicant has not spent time in jail or prison. We also suggest that you take the time during the interview to inform the applicants that a criminal background check will take place. This is best accomplished in the form of a question such as, "Here at ABC Company, we perform background checks on all applicants. Is there anything you might be concerned about?" This allows the applicant to be self-disclosing. If the applicant has nothing to hide, this is probably of no concern. However, an

applicant with a criminal record is more likely to be honest and inform you of any criminal history he or she may have. Most applicants with a criminal record would rather inform you personally of any convictions rather than have you find them later on. Don't assume that you are getting the entire truth. Just because an applicant tells you about his or her past offenses, this does not mean everything they tell you is accurate. Their version is told from a different perspective and can certainly be sugarcoated. As further verification, you might also inform the applicant that you will contact all past employers. Another sample question might go something like this, "We also contact all past employers; how might your supervisors describe your abilities?" Again, if there is bad news to be had, most applicants would rather tell you themselves.

Next, check employment references! While many employers may not provide answers to all your questions in a reference check, the basic concept is the same. You must know where your applicant has been! With the employment application, interview, and reference checks in place, you should be able to verify the identity, address, and employment history of your applicant. If you cannot verify this information, a criminal search is of little value. Checking employment references may uncover resume fraud, and any discovery of unexplained gaps in employment is a possible sign of incarceration.

Finally, what happens if, even after your best efforts to uncover gaps in employment from your application/interview and reference checks, a criminal record is found? The EEOC and many state laws do not permit employers to automatically disqualify an applicant because of a criminal record, unless the employer can demonstrate a business necessity for doing so. A blanket policy of automatic disqualification because of a criminal record may be discriminatory. Therefore, the EEOC suggests an employer take the following factors into account when considering prior convictions in making the hiring decision:

The nature of the position held or sought

Look at the nature of the position. Take into consideration the job description, requirements, and responsibilities associated with the position. Does the position require heightened sensitivity to an employee's conviction record or involve a high degree of risk to the public? For example, does the position involve care for children or invalids, or does it give access to weapons or drugs? Does the job require a high degree of trust and honesty? An applicant convicted of a theft may not be a good candidate as a bank teller or bookkeeper. Does the position require, by law, an inquiry about arrests or convictions?

The nature and gravity of the offense or offenses

Examine the nature of the crime committed. Was it a crime of violence, or theft/dishonesty? Would it be wise to place an applicant charged with theft in an accounting position? Consider the gravity of the offense. Or in other words, just how serious was the crime? You might consider an applicant charged once with a DUI more than you might consider an applicant charged once with Aggravated Assault(after factoring in all other considerations).

The time that has passed since the conviction and/or completion of the sentence

You should also consider the length of time between the conviction and the employment decision. A conviction 10 years ago may not be as alarming as that same conviction one year ago.

The number of convictions

Examine the number of convictions the applicant has on his or her record. Is there a pattern of convictions? Does the applicant have a propensity towards violence, or towards theft?

The facts surrounding each offense

Look at the facts surrounding each offense. Are there any mitigating circumstances or facts that add to the seriousness of the offense?

The person's employment history before and after the conviction

Take notice of the applicant's employment history before and after the conviction. Is their employment history stable? Do all references check out?

The applicant's efforts at rehabilitation

Finally, consider the applicant's efforts at rehabilitation. Is the applicant making a sincere effort to change, become productive? This is an especially important consideration if past offense(s) are of a more serious nature.

We cannot stress enough the importance of consistently following a fair screening policy and documenting your decisions. You must document why and how you did or did not choose a certain applicant for a certain position. If unfortunate circumstances arise, your best protection is the documentation you have on file. Again, there are no guarantees. Properly documented pre-employment screening will not automatically protect you from being sued. It will, however, drastically reduce the possibility of being found guilty of negligence or discrimination.

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