

## **The Basics of Employment Background Checks**

### **The skinny on employment background checks**

An employer must ask permission to conduct a background check on a release form separate from the application.

Once consent is given, employers have broad spectrum of services to choose from to inquire into their applicant's background. According to the Privacy Rights Clearinghouse, a consumer rights organization, areas of inquiry can include:

- National, Statewide, and County Criminal Records
- Registered Sex Offender Lists
- Incarceration Records
- Motor Vehicle Records
- Employment Credit Reports
- Social Security Number
- Education records
- Federal Criminal and Civil records
- Character references
- State licensing records
- Drug tests
- Current and Past employer reference
- Personal references
- OFAC – Terrorist watch list

Employers can either research information on their own or hire a third party to gather the data and provide a report to them. Such third parties are companies known as Consumer Reporting Agencies.

### **Why employers want to know**

An employer's need to know about potential employees is driven by a number of factors, including:

- False or misleading information given by job applicants, estimated by some sources at 30 percent to 40 percent of all information given on resumes and job applications
- Federal and state legal requirements for certain jobs, including those that involve contact with children, the elderly or disabled, as well as some government jobs
- Fallout from corporate scandals, such as Enron and WorldCom
- Terrorism
- Negligent hiring lawsuits, where a company is sued because an employee caused harm to someone else
- Legal to work in the United States
- Validate Identity information and information presented on application

The cost of hiring and training employees has increased as well as the cost of bringing in an employee that poses a threat to co-workers or customers; one of the largest negligent hiring awards ever resulted from an apartment complex that did not perform an investigation on a handyman who entered a tenant's room after hours and committed rape. Retail stores that experience internal theft and or inappropriate sexual conduct to minors in dressing rooms, have caused their own downfall. Embezzlement has cost government agencies as well as private companies hundreds of thousands of dollars. The cost of a \$75.00 employment check now seems extremely inexpensive based on what employers have incurred as damage for not performing a simple background screening.

### **What they can't include**

The Federal Fair Credit Reporting Act (FCRA) put national standards in place for background checks. However, these standards only apply to companies that hire a consumer reporting agency to do the background check. Several states, most notably California and New York, have stronger protections for consumers in these situations than the FCRA.

The FCRA stipulates that the following information cannot be reported on an employer background check:

- Records of criminal arrests without disposition information; incomplete criminal records
- Accounts put in for collection after seven years from date of charge off
- Paid tax liens after seven years from date paid off

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While bankruptcies can be included in background checks, federal law prohibits discrimination against applicants who have filed for bankruptcy. In a number of, but not all, states employers cannot seek arrest record information on applicants, though such information is a matter of public record.

### **Applicant rights**

Under the recently passed Fair and Accurate Credit Transactions Act (FACTA), the applicant has the right to obtain a free copy of an employment background check if they are denied employment. Some states require that the employer send a copy to the applicant whether hired or denied employment.

An employer does not have to disclose what company is doing the screening.

If an employer is prepared to deny employment as a result of information obtained during the course of a background check, the employer must provide applicant with a "pre-adverse action disclosure" before that decision not to hire is actually made. This disclosure should include a copy of the report and an explanation of their rights under the FCRA and FACTA.

According to FACTA, if an applicant disputes the information on the Employment Background Screening Profile Report, it's the Consumer Reporting Agencies to responsibility to re-investigate the information and re-report the profile report with accurate information.

### **Application and Disclaimer Forms**

The FCRA does not restrict employers from asking questions in a job application form. Thus, while a background check can't include an arrest record, for example, there is nothing to stop an employer from asking if the applicant has ever been arrested for a crime.

Disclaimer forms are sometimes attached to an application, some states however such as California require the disclaimer form to be separate and dictate the size of font. The best practice now is to have the disclaimer separate from the application and have the applicant provide the pertinent information to perform the background check such as Date of Birth, Social Security Number, and Drivers License Number.