



Pre-employment Screening Best Practices

In today's litigious culture, employers simply cannot afford to hire employees who will put their company at risk. More often than not, employers are being held legally responsible for the wrongful acts of employees, as courts have found that it's an employer's duty to conduct a thorough background check on all potential employees.

The purpose of this article is to outline the best practices for a thorough and accurate pre-employment background check. Not all background checks are equal. Section 613 of the FCRA states that Consumer Reporting Agencies (CRA's) are to *"maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported, it is complete and up to date."*

Back Track Screening takes this responsibility seriously. Our own internal policies ensure that we will never return unverified or outdated criminal records to our customers.

Employers should be wary of companies which promise a 'complete and instant' search using a database, as a 'reliable' pre-employment screening tool. There is no such thing as a complete and instant criminal database, and relying on database records only can expose your company to very costly litigation.

The first thing an employer should know is that a single database containing all criminal records does not exist. Unfortunately, employers and background check agencies cannot simply enter an applicant's name, date of birth and/or social security number into a database and receive all criminal records belonging to that applicant. Instead, criminal records are stored in completely separate systems at County courthouses, in state repositories and through private database companies. This means employers should use a 'location-centric' and multi-faceted search approach.

The best practice for an accurate criminal search is to first determine where your applicant has lived, worked, and/or gone to school during the past 7-10 years. Back Track Screening utilizes a Social Security number search or trace product to produce an applicant's address history. With this information, Back Track Screening can make an informed decision as to where criminal searches should be performed.

With an applicant's address history, Back Track Screening will perform a criminal records search at the County courthouses in the County(s) where the applicant has resided in the past 7-10 years. County records are the most detailed, accurate and up-to-date type of criminal searches available. Unlike databases, the information contained in County records is usually updated in real time and will contain the most accurate case disposition.

Back Track Screening will utilize databases as supplements to County searches only. Searching statewide and multi-state databases casts a wider net and searches for crimes that may have been committed outside of an applicant's County or state of residence. From time to time, databases may produce criminal records in jurisdictions where there was no indication the applicant ever lived.

Statewide and Multi-State databases are usually not official records of the state. Some databases are "name only indexes" or may not contain records from every jurisdiction within the state. Because database records are not updated on a regular basis and old records are not typically purged from databases, the records reported in databases often have outdated or inaccurate dispositions. For example, an applicant might enter into a plea in abeyance for a felony in 2006. In 2007, the felony charges may be dismissed or reduced to a misdemeanor. A database search in 2010 may still report the record as a felony plea in abeyance even though the final disposition is dismissed or reduced to a misdemeanor.

Instant databases may also inadvertently report expunged records which should have been removed. Therefore, if records are found on a statewide or multi-state database, Back Track Screening will order the records from the County courthouse(s) of the reported offense(s). This ensures that only accurate and up-to-date records are reported to our customers. Databases should never be used as your only source for criminal records.

Finally, what should an employer do when criminal records are found? The EEOC does not permit employers to automatically disqualify an applicant because of a criminal record unless the employer can demonstrate a 'specific business necessity for doing so.' The EEOC states that a blanket policy of automatic disqualification because of a criminal record is discriminatory. 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:

Examine 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 provide access to weapons or drugs? Does the job require a high degree of trust and honesty? 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 or dishonesty? Would it be wise to place an applicant charged with theft in an accounting position? Consider the gravity of the offense; 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. (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:

Look at 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, 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 applicant/employees 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. Proper documentation can drastically reduce the possibility of being found guilty of negligence or discrimination.

***Legal Disclaimer:** This article is designed solely for informational purposes, and should not be inferred or understood as legal advice. Persons in need of legal assistance should seek the advice of competent legal counsel. An employer should engage in a careful analysis to determine they will not violate a state law or Title VII of the 1964 Civil Rights Act.