

SAFE SCREENING, SAFE HIRING

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In this time of economic uncertainty, employers have a variety of tools to assist them in choosing the best candidate for an open position. One essential hiring tool that most employers agree is now essential to the hiring process is em-

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The National Association of Professional Background Screeners (NAPBS) is an organization committed to helping both its members and the employers they serve conduct employment background checks thoroughly, properly, legally and safely. The NAPBS Best Practices Committee wrote this article for the purpose of helping employers identify best practice considerations that your organization can use to identify ways to reduce your legal risk, increase your quality of hires and appropriately balance the cost and effectiveness of your employment screening program.

ployment screening. Do the terms “FCRA,” “FACTA,” “Pre Adverse Action,” “Adverse Action,” or “Summary of Your Rights” sound familiar? If your organization conducts employment screening, they should. But do you really understand all the terms and do you really know your legal obligations? While conducting background checks is extremely valuable, it can also present legal and financial risks to an organization if conducted improperly.

WHY SHOULD EMPLOYERS HAVE AN EMPLOYMENT SCREENING PROGRAM?

In the last 10–15 years, employers have increasingly relied on background checks conducted within the framework of an employment screening program to help make hiring and employment decisions. By establishing a formal employment screening program that properly incorporates background checks into the hiring and on-boarding processes, employers accomplish several goals:

- Screening programs can help lead to a safer, more secure work environment for customers and coworkers because employers know who they are hiring.
- Companies that have implemented a quality screening program tend to attract higher quality candidates and employees who can consistently satisfy the requirements of that program.
- Screening programs can lower the risk of negligent hiring lawsuits. If an employee injures someone, whether that is physically, psychologically, or financially, some people may question whether a company should have known better than to employ such a person in the first place. Effective screening programs can lessen the risk of such unfortunate situations and help establish that the company exercised due diligence in the hiring process.

- Performing background checks as a part of a comprehensive screening program can also help companies comply with contractual or regulatory requirements. Some companies' clients mandate a screening program. Others are bound by local, state or federal requirements based in whole or in part on their industry.
- Screening programs also help ensure that employers hire and retain applicants with the proper skills to perform the job. They routinely reveal discrepancies between what applicants claim they can do or have done and what can be verified by a former employer or school.
- Screening programs help reduce employee theft and shrinkage. One study found that employee theft accounts for as much as 48% of a retail companies shrinkage, which can amount to nearly 2% of annual revenues. This study supports the notion that if someone is willing to lie on their resume or in an interview, what else might they be willing to lie about once they get the job?¹

KNOW THE LAW

Before developing your organization's employment screening program, you should be aware that a variety of federal, state, and local laws will apply to you and your screening provider. Background checks can be obtained by you, outsourced to a third party or portions conducted by both entities. Applicable laws include federal laws such as the Fair Credit Reporting Act (FCRA), Gramm-

Leach-Bliley Act, Drivers Privacy Protection Act, and others. Many states also regulate what information you can obtain in the hiring process as well as how you can use that information throughout the employment relationship.

The most far-reaching federal law governing both employers and companies who provide background screening products and services is the FCRA. Under that federal law, the background screening companies that your company uses to provide you products and services is typically considered to be a "consumer reporting agency" (CRA). A CRA is defined by the FCRA as any person who, for monetary fees, dues or on a cooperative non-profit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.²

When an employer seeks any written, oral or other communication (*e.g.*, not just a credit history, but also any criminal records, driving records, etc.) from a CRA about an applicant, employee or independent contractor for employment purposes, the FCRA will likely apply. Under the FCRA there are two types of reports available from CRAs: "consumer reports" and "investigative consumer reports." Consumer reports are defined as written, oral, or other communications by a consumer reporting agency which bear upon a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living and which is used (or expected to be used) as a fac-

tor in establishing eligibility for employment purposes.³ Criminal histories, driving histories, education verifications, credit reports, and licensure verifications are all examples of the type of communications that make up a consumer report and that are regularly relied upon by employers with employment screening programs. Thus, these reports and the CRA as well as the employers requesting the reports are all subject to the requirements of the FCRA.

The FCRA further delineates that it also governs "Investigative consumer reports," which are obtained by the CRA through communications with neighbors, friends or associates of the consumer or acquaintances of the consumer or others.⁴ Personal reference checking is one specific example of an investigative consumer report commonly used by employers.

In order to comply with the FCRA, you should ensure that any use of investigative and other consumer reports satisfies the FCRA's notice requirements, described below. Specific attention should be directed toward employment applications and other documentation used in the hiring process.

Notice Requirements with Respect to Consumer Reports

The FCRA requires employers using consumer reports for employment purposes to abide by certain notice requirements. Specifically, the FCRA mandates that employers make a clear and conspicuous written disclosure to the applicant or employee that a consumer report may be obtained. This written disclosure must appear on a document separate from an employment application (*e.g.*, the disclosure cannot be incorpo-

rated into an employment application), and it must be made *before* the consumer report is obtained or caused to be obtained. In addition to this disclosure, you must obtain the written authorization of the applicant or employee *prior* to requesting a consumer report.

Moreover, before a CRA can provide a consumer report to you, the employer must certify to the CRA that it will distribute the required written disclosure and obtain the required written authorization. The employer must also certify that the information being obtained will not be used in violation of any federal or state law or regulation. Lastly, the employer must certify that it will comply with the adverse action requirements set forth in the FCRA, as described below. You should see these certifications being made at the time you contract for services with the CRA.

Notice Requirements with Respect to Investigative Consumer Reports

The Act requires that you disclose to the applicant or employee that an investigative consumer report may be obtained. An employer must give a written disclosure to the consumer no later than three days after the report has been first requested from the CRA. Employers generally, however, provide a disclosure to the consumer of all the reports being conducted.

In addition, the FCRA requires that the disclosure include a summary of consumer rights under the FCRA; and a statement informing the applicant or employee of his or her right to request additional disclosures regarding the nature and the scope of the investigation.

If a request for additional disclosure is made within a reasonable time by the applicant or employee, the employer must make a complete disclosure of the nature and the scope of the investigation that was requested. The disclosure must be in writing and given to the applicant or employee no later than five days (under the FCRA) after the date on which the request was received or the report was first requested, whichever is later in time.

Notice Requirements with Respect to Adverse Action

If an employer takes adverse action on an applicant or employee based in whole or *in part* on information in a consumer report, it must comply with certain notice requirements. Under the Act, an adverse action is defined as a denial of employment or any other decision that for employment purposes adversely affects any current or prospective employee (*e.g.*, denial of promotion or failure to hire applicant). If an employer is contemplating taking adverse action as a result of obtaining a consumer report, employers must go through a two-step process. First, before the adverse action is taken, the employer must provide the applicant or employee with (1) a copy of the consumer report obtained from the consumer reporting agency (CRA), and (2) a summary of the consumer's rights under the Act. After providing these documents, the employer must *wait* before taking the adverse action. The Federal Trade Commission's (FTC) staff informally has approved a five-business-day waiting period. The appropriate period should be judged based on the particular facts of each case.

Although it is somewhat of a legal fiction that employers must act before taking adverse action, the Act is clear that employees/applicants should be given the opportunity to correct or challenge incorrect information on a consumer report before the employer actually takes adverse action.

Second, the employer must provide to the applicant or employee the following: (1) notice of the adverse action taken; (2) the name, address, and toll-free telephone number of the CRA that furnished the consumer report; (3) a statement that the CRA did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; (4) notice of the consumer's right to obtain a free copy of the consumer report from the CRA within 60 days; and (5) notice of the consumer's right to dispute the accuracy or completeness of any information in the consumer report furnished by the CRA.

Potential Employer Liability

State or federal private lawsuits are available to enforce compliance with the FCRA. Potential damages include actual damages, compensatory damages, attorney's fees; and for willful violations, additional unlimited punitive damages. Any person who knowingly and willfully obtains a consumer report under false pretenses may also face criminal prosecution.

In addition to the federal FCRA, there are 18 states that have their own analogs to the FCRA as well as a myriad of other state laws that regulate what you can use or obtain related to an applicant or employee's back-

ground. For example, many of these state laws put prohibitions on what an employer can ask relating to an applicant or employee's criminal history.

It is important to note, that while state laws regulate employers, they also may regulate what a CRA can provide to employers. Thus, it is imperative that as an employer, you are aware of what your CRA can and is providing to you. This leads to our second tip.

CLEAR COMMUNICATION AND PARTNERING WITH YOUR SCREENING PROVIDER

A key component in having an effective employment screening program is to know what you are getting from your service provider. Often, it is the relationship between the provider and a client which is most instrumental in executing a successful, safe, compliant screening program. With an open, honest dialogue comes a clear understanding of goals and objectives.

A good starting point when creating a screening program is to understand the "language" of background checks. The individual elements of a background check, also referred to as a search, are known by many names that are not always intuitive. "The Standardization of Common Industry Terms"⁵ was developed by NAPBS to educate companies and introduce common terms within the employment screening industry. Knowing the industry terminology will assist you in making sure you are getting what you want.

A key step is understanding exactly what you are requesting. For example, suppose you decide you want to have a criminal check conducted on an appli-

cant. Do you want a full criminal record check of every place the candidate lived, worked and went to school? A "criminal record check" can be conducted at a County Court, a Federal Court, a State Court, or even through a variety of types of electronic databases. The length of court records available can vary by courthouse. Some courts have a limited amount of information they will release to the public (e.g., seven years). Other courts have criminal records that go back much longer. Additionally, the law may prohibit the information that a CRA can provide to you. For example, CRAs are not allowed to report arrest records that occurred more than seven years from the date of the consumer report.

There are other areas where clarification is necessary. Do you want to check the applicant's entire educational history or just their M.B.A.? What if the candidate is attending college but has not yet graduated? Is it important to review someone's credit report if the candidate is not handling cash? Answering these questions, with the help of counsel, the rest of your HR team and your screening partner will allow you to create the most effective, safe, cost-efficient screening program.

It seems simplistic, but if your screening provider is unsure of what you hope to accomplish, that impacts their ability to help you manage risk. Sharing clear, consistent, communicable goals gives a screening partner the direction they need to execute a screening program in accordance with your wishes.

Organizations interested in taking advantage of their screening provider's knowledge should

also look to them for answers when trying to align their organizational policy with others in the marketplace. Ask your screening partner what comparable companies do. What services do firms in similar industries ask for? While they will not be told specifics about company XYZ, a screening partner should specify the 4-5 services most commonly ordered by companies in the insurance industry, the construction industry, etc. Rely on their expertise to guide you to a solution that appropriately balances what you want with what you need.

At the same time, a provider may try and steer you away from services that may not be in your best interest. Working on a tight budget? Don't be surprised if your provider guides you away from interviewing your candidate's college roommate to verify he was a great guy. Depending on your industry and your needs, there may be a more effective use of your screening dollar. A strong partner will not be shy about leading you toward products and services that provide you the strongest risk management solutions given your dollar and other limitations.

One area in which a screening provider may be able to blend serving your broader screening policy with the mechanics of a day-to-day background check process is technology. IT and HR executives are often lured in by the bells and whistles of an Applicant Tracking Systems (ATS) or HRIS that are useful for recruiting, benefits, background checking, onboarding, etc. But even standard, off the shelf integrations can be expensive. Want a customizable option? That may cost even more. Future software and

security upgrades may also have to be customized to handle what was previously customized.

Aside from the financial impact, there are some operational challenges. For example, companies that use an ATS may rely on electronic signatures rather than a traditional “wet” signature. It is simpler and faster for some companies, especially those with multiple locations across the globe. Capturing the electronic signature may allow for a smoother process on the front end. However, many high schools, colleges and employers do not recognize the validity of an electronic signature and insist on viewing the actual signature before releasing information. Therefore, the applicant may have to be tracked down, come into the office, sign some forms, etc. A day or two can easily go by. Ironically, technology was the reason for the delay and the efficiencies that were gained on the front end now cause delays on the back end.

This is just an example. But for some companies, using a highly complex technological solution is the most appropriate decision. While for others, a low technology solution is also a well thought-out plan. The most important thing is to make sure you do not sacrifice what is important to you. But, at the same time, if there is something you do now that is not possible through an ATS, decide if it so important that you are willing to forego the benefits of an ATS for it. A screening partner should address the benefits and drawbacks of each, as well as help you assess and project the impact of your decision.

While your screening partner can be a tremendous resource to-

ward bridging the gap between creating a comprehensive and effective screening program, it is possible at times they can appear to be a barrier toward accomplishing every goal. Ideally, you chose your partner because you have faith in their ability to serve you, protect you, and do so at a reasonable price within a reasonable time frame. Unfortunately, a background check is not always a streamlined, predictable process. Unavoidable delays sometimes occur, resulting in a missed hiring class or the loss of a candidate to a competitor.

But a worse alternative is a rushed background check to meet a client mandate that leads to a poor hiring decision at best and a potential legal issue at worst. Despite your screening partner’s best efforts, sometimes a court employee or a high school guidance counselor simply does not fax over that important piece of paper fast enough. It is not normal for a quality screening provider to without exception meet every deadline. If your team continually sees background checks come together at the last minute, it could be cause for concern. Again, having clear communication and knowledgeable expectations is critical.

Finally, don’t forget about the internal integration of your screening program. You should train your staff, audit your processes and regularly re-evaluate your policy. Organizations that struggle with their screening program often do so because of a lack of continual engagement with their provider. High-level HR practitioners who are heavily involved in the RFP and selection process who pull away too fast,

risk losing over time, the ongoing benefits of a strong partnership.

Take into consideration changes within your organization and the evolution of your strategic hiring goals. Look to your screening provider as well as your counsel for changing regulatory or legal requirements. The background check industry is rapidly evolving. There are often new services and technologies available. Does the original screening program still meet current and future goals?

While upper-level executives do not need to know details on each background check, there is value in a monthly, quarterly, or annual review of the program. Staying abreast does not have to be an elaborate process. Just touch base with the team you assigned to oversee this. Ensure your screening partner is on the same page. It is important that your screening partner has access to you and others within your organization to hear what may benefit your organization and mitigate future risk.

ESTABLISH AND FOLLOW A POLICY

All screening programs should include a written policy and procedure. Having a proper background screening policy will set the tone for your company philosophy and provide critical guidance to your organization on how background checks should be performed. That guidance will not only serve to protect the organization by establishing a standardized and efficient hiring process, it will ultimately mitigate risk, avoid litigation, and reduce the operating costs of the organization. If you are unsure where to start you may want to consult your own legal counsel to

ensure what you prepare is proper and lawful for your organization.

Essential components of any policy include: definitions regarding its purpose and scope, the organizational responsibility and authority for following the policy, the legal parameters and/or guidelines to be followed and the process that has been designed to support it.

For example, clearly state who the policy is designed to protect—employees, customers, visitors, contractors, etc. If your organization has multiple locations, address whether it covers all locations or only certain locations—domestic versus international, warehouse workers versus corporate offices, etc. Finally, you should clearly identify the positions within the organization which are covered by the policy—those dealing with the general public, executive positions, employees who handle cash or merchandise, financial/accounting positions, those in contact with vulnerable populations (children, elderly, disabled, sick, indigent), safety or security positions, etc. As you develop and identify the scope of your policy, keep in mind the aforementioned federal and state laws, which in many instances require certain positions to undergo background checks. There are often specific criteria which define what minimal type of check must be performed.

Once you have defined the purpose and scope of your policy, the next critical element is to identify and communicate who is responsible for administering and managing it. Whoever is responsible should be a part of the overall hiring process and is ultimately answerable for ensuring it

followed. A common challenge arises when those within your organization whom have been tasked with this do not understand the broader strategic goal. Unfortunately, there are some decisions that simply cannot be made by the screening provider. Despite everyone's good intentions, problems can arise when neither can articulate the overall objective. It should also include clear guidelines addressing the role of the hiring managers and outline how they will be trained and monitored to make certain they adhere to it.

The next step is to state with clarity the legal parameters for decision making. This section of your policy should (at a minimum) give reference to the FCRA, as amended, and any related state screening laws. An added benefit of a screening policy is to additionally aid your organization in minimizing the opportunity for disparate treatment of varying individuals by standardizing the screening process for all. Accordingly, referring to the various anti-discrimination laws at the federal and state level is also appropriate in this portion of your policy.

Another step in preparing a comprehensive screening policy is to define the process to be followed when ordering individual background checks. This section should identify with specificity the type of check to be performed on each position within your organization, the frequency that those checks will be performed (sometimes referred to as recurring checks or infinity screening) and any criteria for or limitations imposed on hiring. Generally, the key to an effective employment

policy is consistency in application. However, in the background screening context, you must take care not to establish bright-line rules that automatically disqualify certain types of applicants (e.g., no convicted felons will ever be hired). There has been litigation challenging such a policy.⁶ The EEOC has also issued guidance on multiple factors you should consider when making employment decisions based on criminal history. In addition, several states have introduced laws indicating that employers may only consider criminal or credit information to the extent it is related to a particular job in question.

Final elements that you may want to address in your policy include the privacy of information, access to and transmittal of personally identifiable information, record retention and record destruction rules.

CONCLUSION

While creating a consistent, compliant, cost effective screening program is not easy, by knowing your obligations under the law, partnering and communicating with your screening provider, and having a comprehensive screening policy in place, you will be well on your way to doing so. Pulling together all these elements requires cooperation and consultation with a variety of stakeholders, both within and outside your organization. It is a challenging mix that requires listening, trust, communication and continued oversight. But an organization that adopts a “best practices approach” to background checks greatly reduces litigation and other risks. The more time you spend thinking through your

screening program, the less time you will need to spend defending your screening program later.

NOTES

This article should be used for informational purposes only and should not be construed as legal advice. Any company, organization or employer operating a background screening program should consult with its attorney to ensure that it is complying with all federal, state and local laws.

1. University of Florida, 2002 National Retail Security Survey, by Richard D. Hollinger, PhD, Director and Jason L. Davis, Graduate Research Associate, Department of Sociology and the Center for Studies in Criminology and Law, <http://www.soc.ufl.edu/srp.htm>.
2. 15 U.S.C. § 1681a.
3. 15 U.S.C. § 1681a.
4. 15 U.S.C. § 1681a.
5. The Standardization of Common Industry Terms, http://www.napbs.com/images/pdf/Member_Resources/Standardization_of_Common_Industry_Terms.pdf.
6. See *El v. Southeastern Pennsylvania Transp. Authority (SEPTA)*, 479 F.3d 232, 100 Fair Empl. Prac. Cas. (BNA) 195, 89 Empl. Prac. Dec. (CCH) P 42743 (3d Cir. 2007) (3d Cir. 2007).

EXHIBIT 1

Resources

- FTC Guidance:
 - * <http://www.ftc.gov/credit>
 - * Using Consumer Reports: What Employers Need to Know: <http://www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm>
 - * Fair Credit Reporting Act: <http://www.ftc.gov/os/statutes/fcradoc.pdf>
 - * NOTICE TO USERS OF CONSUMER REPORTS: OBLIGATIONS OF USERS UNDER THE FCRA: <http://www.ftc.gov/os/2004/11/041119factaapph.pdf>
- For more information about NAPBS go to the Web site at <http://www.napbs.com>
 - * Background Screening—Past, Present and Future. NAPBS white paper: <http://www.napbs.com/images/pdf/HistoryBackgroundScreening.pdf>
 - * “A History of Background Screening”: <http://www.napbs.com/images/pdf/HistoryBackgroundScreening.pdf>
 - * The Standardization of Common Industry Terms http://www.napbs.com/images/pdf/Member_Resources/Standardization_of_Common_Industry_Terms.pdf
 - * Background Screening-RFP Proposal Guide
 - * http://www.napbs.com/images/pdf/Education/NAPBS_Background_Verification_Request_for_Proposal_Guide.pdf
- ASIS Preemployment Background Screening Guideline: <http://www.abdi-secure-ecommerce.com/asis/ps-728-30-1636.aspx>
- Safe Hiring Manual, Lester Rosen, 2006, Facts on Demand Press, Phoenix AZ
- Background Screening and Investigations, W. Barry Nixon & Kim M. Kerr, 2008, Elsevier