Who Are Your Applicants And Employees Anyway? Conducting Lawful Social Media, Criminal History And Credit Checks

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Some Background On Background Checks
Employers’ Use Of Background Checks

- More than 90% of employers conduct criminal history checks
- **Job categories:** fiduciary responsibilities (78%); access to highly confidential employee information (68%); senior executive (58%)
- **Crimes most likely to disqualify:** violent felony (95%); non-violent felony (74%); violent misdemeanor (58%)
- **Reasons for checking:** safe work environment for employees (61%), reduce legal liability for negligent hiring (55%); reduce/prevent criminal activity (39%)

(SHRM Study Jan. 2010)
Retailers’ Use Of Background Checks

- 97% of retailers conduct background checks

Job Categories: senior executives (85%); corporate employees (85%); store management (78%); store associates (55%)

Types of Checks: criminal history (>90%); SSN trace (>65%); sex offender registry (>50%); credit check (>20%)

(National Retail Federation Oct. 2011)
Use Of Social Checks

- More than 90% of recruiters and hiring managers have visited a candidate’s social networking profile as part of the screening process
  - Facebook (70%); Twitter (53%); LinkedIn (48%)

- 69% of recruiters have rejected a candidate based on content found on a social networking profile
  - Inappropriate or discriminatory content/photos or drugs/alcohol (51%); negative comments/confidential information re previous employer (18%); lied about qualifications (13%)

- **When conducted?** After initial application (47%); after initial interview (27%); after detailed discussions (15%); immediately before final offer (4%)

(Reppler Survey Oct. 2011)
Online Searches Declining?

- In 2011, 26% of organizations used online search engines to screen applicants during the hiring process
  - A decline from 2008, when 34% reported using online search engines for this purpose.
- 64% have never used online search engines to screen applicants or used them in the past but no longer do so.

SHRM 2011 Survey of Employers
Why Check?

1. **Legal Requirement**: health care, financial services, child and elder care, education, security services

2. **Best Practices**: “Background verification checks on all candidates for employment, contractors, and third party users” (ISO 27002, §8.12)

3. **Customer Demands**: Routinely required in vendor contracts and business associate agreements

4. **Negligent Hiring Liability**:
   - “Family of bus victim gets $9.5M award” – Driver had 31 criminal convictions and a suspended license (Daily News Jan. 2012)
   - “$1 million awarded in camp lawsuit” – Counselor’s MySpace page: “Be quiet. This is going to hurt.” (Charleston Post & Courier Jan. 2012)
Background Check Basics
Fair Credit Reporting Act (FCRA)

- Applies to reports prepared by a third party that regularly assembles or evaluates credit or other information on a consumer (“consumer reporting agency”)
- Covers any inquiry for employment purposes bearing on an individual’s “credit, general reputation, personal characteristics, or mode of living”
  - Criminal history checks, credit checks, sex offender registry, motor vehicle record checks, employment and education verification
- Does **not** apply to inquiries by the employer’s own employees
- Does **not** apply to investigations by third parties into suspected misconduct related to employment
FCRA Procedure

1. Employer must provide notice and obtain authorization before procuring a background check report

2. Before taking adverse action, employer must provide notice, including a copy of the report and FTC Summary of Rights

3. Employer must wait 5 days before taking final action

4. Employer must deliver final adverse action notice
1. CRA’s must post a privacy policy on their website that (a) addresses the CRA’s privacy practices, (b) informs visitors whether the CRA offshores any personal information, and (c) provides contact information for a representative who can respond to questions in the event of a security breach.

2. **Effective 1/1/12:** Employers must include the URL for the CRA’s privacy policy in the employer’s background check notice and authorization.
FCRA Remedies

- Minimum statutory damages of $100 to $1000 for willful violations
  - Class action-friendly remedy
- Actual damages for negligent violations
- Attorney fees to a successful plaintiff
Other Laws Affecting Pre-Employment Screening

- State “mini-FCRAs”
- Credit check laws
- Anti-discrimination laws
- Genetic Information Non-Discrimination Act of 2008 (GINA)
The Spokeo Complaint

Filed 6/30/10 by Center for Democracy & Technology

- Spokeo’s online consumer profiles compile information on religious and ethnic background, mortgage values, income, investments, “credit estimate,” “wealth level” and more

**Allegation:** Because Spokeo offers profiles for employment purposes, Spokeo’s reports are consumer reports subject to the FCRA

**Status:** Investigation pending
Social Checks & The FCRA

- **Social Intelligence Corp.** – Internet & social media background screening service for employers
- Reports include public information gathered from social networking sites
- **May 9, 2011 FTC letter**
  - Social Intelligence is a consumer reporting agency
  - Social Intelligence must comply with FCRA
Been Verified

- Mobile app that scours the web for information on individuals
- Pulled by Apple over privacy concerns after 1M downloads
- Relaunched in July 2011
- For $2 checks contact info and criminal and property records
- For $4 add social sites, Amazon reading lists and Pandora playlists
On February 7, 2012, the FTC warned mobile apps marketers that they may be violating the FCRA:

- Police Records (Everify)
- Criminal Pages (InfoPay)
- Criminal Records Search (Intelligator)
- Investigate and Locate Anyone (Intelligator)
- People Search (Intelligator)
- Investigator (Intelligator)
- Background Checks (Intelligator)

If a background screening app provides criminal history, the company may be operating as a CRA with obligations under the FCRA (e.g., ensure accuracy, provide notice).

FTC encourages companies to review their apps and their policies and procedures to be sure they comply with the FCRA.
Restricted Access Sites

- **Federal Stored Communications Act (SCA)** prohibits unauthorized access to electronic communications stored at an electronic communications provider
  - Criminal statute with civil remedies

- **Practical Impact:** SCA applies to content on a “friends only” Facebook page and other restricted access content

  Pietrylo v. Hillstone Restaurant 29 IER Cases 1438 (D.N.J. 2009)
Substantive Risks

1. Is the information reliable?

2. Is the information relevant?

3. Discovery of “bad” information not otherwise known, e.g., posts revealing age, disability or sexual orientation

4. GINA: Prohibits the intentional acquisition of “genetic information,” i.e., the manifestation of a disease or disorder in a family member

5. Non-U.S. data protection issues

Implications

1. Establish policies on when social media checks will be conducted, by whom, at which sites, for what information, and how will that information be evaluated.

2. Include social checks by third-party vendors in your organization's FCRA compliance program.

3. Prohibit anyone besides authorized employees from conducting background checks.
Implications

4. “Googling” by the employer’s own staff is **not** subject to FCRA

5. Do not bypass restrictions on access to social sites

6. Wall off decision makers from unscreened search results

7. Provide applicants the opportunity to rebut or explain adverse information

8. Comply with data retention requirements under Title VII and Executive Order 11246
What To Do About Credit Checks?
Statistics On Credit Checks

Whose credit is being checked?

- 47% of respondents conduct credit checks on selected applicants vs. 13% on all applicants

- Positions most commonly checked:
  - Fiduciary/financial responsibilities (91%);
  - Senior executives (46%);
  - Access to highly confidential employee information (34%);
  - Access to company’s or customer’s property (30%)

(SHRM Study 8/24/10)
Statistics On Credit Checks

➢ When is the credit check conducted?
  – 57% after conditional offer
  – 30% after job offer

➢ How far back are employer’s checking?
  – 60% check 4 to 7 years

➢ What credit information disqualifies?
  – Current outstanding judgments (64%)
  – Accounts in debt collection (49%)
  – Bankruptcy (25%)

(SHRM Study 8/24/10)
The Great Recession

Unemployment exceeded 9% for 28 of 29 months between May 2009 and September 2011

Millions of foreclosures since January 1, 2008

33% of workers earning less than $45K annually have poor credit scores caused by bankruptcies, loan delinquencies, divorce, medical problems or unemployment

Bad Credit = Bad Employee?

Two most common warning signs displayed by perpetrators of workplace fraud

- “living beyond financial means”
- “experiencing financial difficulties”

(Association of Certified Fraud Examiners (2010))

However, there is no empirical evidence quantifying the degree of high living or financial difficulties that are more likely to trigger fraud or other harmful conduct
State Credit Check Laws

- Seven states generally prohibit the use of credit checks for employment purposes: CA, CT, HI, IL, MD, OR, WA
  - CT, OR and WA generally prohibit the procurement of a credit check for employment purposes

- Restrictions generally do not apply to financial institutions
  - Definition of “financial institution” varies materially
Exceptions To Credit Check Bar

**General Rule:** Credit checks can be conducted if “substantially job-related.” Definition of “substantially job-related” varies from state to state.

1. **California:** (a) managerial positions (b) employees with regular access to PII (c) named signatory on bank accounts or authorized to transfer money or enter contracts (d) access to confidential information (e) access to cash > $10,000

2. **Illinois:** Access to (a) non-public, corporate financial information (b) sensitive information regarding company’s business strategy or (c) sensitive customer information subject to restricted access
Exceptions To Credit Check Bar

**Connecticut:** (a) managerial positions (b) access to customer or employee PII or financial information (c) employees with fiduciary responsibilities (d) employees with an expense account or corporate credit card (e) access to confidential information (f) access to cash > $2,500

**Maryland:** Same as Connecticut but omits (f)
Pending “Credit Privacy” Bills

- 18 states have “credit privacy” bills pending

CO, DC, FL, GA, KS, IN, MA, MI, MN, NJ, NV, NY, OH, OK, PA, SC, VT, WI
Pending Federal Legislation

Prohibits private employer from procuring or using credit reports, even with employee’s consent, except:

- When position requires national security or FDIC clearance
- For managers, executives, or professionals at financial institutions
- When required by law

➢ No federal preemption
➢ FCRA’s enforcement scheme applies
  - Statutory damages of up to $1,000 per violation for willful violations

“Equal Employment For All Act,” H.R.321
Federal law prohibits employers from discriminating against a current employee “solely because of” pending or prior bankruptcy (18 U.S.C.§525 (a))

The prohibition does not apply to job applicants

(Rea v. Federated Investors, 627 F. 3d 937 (3rd Cir. 2010))
10/20/10: “Employer Use of Credit History as a Screening Tool”

**Consumer Advocates:** Credit checks are being used increasingly, have a disparate impact, and are not predictive

**Business Interests:** Credit checks are being used in a reasonable and limited manner, do not have an adverse impact and are predictive

**Academic Interests:** There is inadequate information to conclude whether credit checks have an adverse impact or are predictive
Credit Check Class Actions Begin

Complaints asserting that employer’s use of credit checks for employment purposes has a disparate impact on African Americans

- **EEOC v. Freeman**, No. 09cv2573 (D. Md. 9/30/09)

- **Appolon v. University of Miami**, No. 1:10-cv-24166 (S.D. Fla. 11/22/10)

- **EEOC v. Kaplan Higher Education**, No. 1:10-cv-02882 (N.D. Ohio 12/21/10)
Adverse Impact Analysis

**Claim:** Bank’s occasional use of credit checks on conditional hires had an adverse impact on African Americans

**Ruling:** Summary judgment for bank

**Rationale:**

1. Policy was facially neutral and EEOC failed to produce evidence of disparate adverse impact

2. Credit checks served a legitimate business purpose because (A) employees “were exposed daily to a great deal of money,” and (B) customers might lose confidence in the bank if they knew employees who could not manage their own finances were handling customers’ money

Recommendations

Use credit checks:

1. Only with substantial caution
2. Only for positions that could be exploited for personal financial gain
3. Only in combination with other information which suggests an individual’s financial difficulties may be a manifestation or cause of other significant stressors
4. Only after giving the subject an opportunity to respond
The Criminal History Background Check
Some Statistics On Criminal Convictions

- 12 Million – Ex-felons in the U.S.
- 700,000 – Individuals released from prison every year
- 7-8 times – Degree to which young black men are more likely to be incarcerated than whites of their age group
Federal Restrictions?

- The FCRA imposes no restriction on the reporting or use of criminal conviction information.
- The FCRA imposes no restriction on the reporting or use of arrest information that is less than 7 years old.
- Criminal convicts and arrestees are not a protected class under Title VII of the Civil Rights Act of 1964.
EEOC 1987 Pronouncements on Criminal Background Checks

➢ “The absolute bar to employment based on ... conviction record is unlawful under Title VII.”

➢ If the policy has an adverse impact, the employer must demonstrate “that it considered ... three factors to determine whether its policy was justified by business necessity.”
What Are The EEOC’s 3 Factors That Must Be Considered?

1. The nature and gravity of the offense;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job.
EEOC Recommendations

1. Focus on convictions that are related to the specific position in question
2. Focus on convictions that have occurred within the past seven years
3. Restrict use of inquiries into arrests
4. When there is a business justification, limit the inquiry to arrests for offenses that are job-related
5. Give the applicant a reasonable opportunity to dispute the validity of an arrest record

September 7, 2011 Letter from EEOC to Peace Corps
The Academic Research

- Except for sex offenders, most criminals are generalists, not specialists.
- Age matters: the highest crime rate individuals start the earliest.
- Age matters: a 45 year old who has been out of prison for a few years is not nearly as likely to commit a crime as a 22 year old.
- There is academic support for policies that place a limit, such as seven years after release from prison, on how long most prior offenses should be considered.

EEOC ENFORCEMENT

- **January 2012:** EEOC announces Pepsi’s agreement to pay $3M to settle claims that its criminal background check policy was racially discriminatory.
- EEOC has recently initiated more than 20 actions against background check companies and employers. Examples include:

**Against Staffing & Background Check Companies**
- Williams v. Prologistix
- EEOC v. Manpower
- OAG v. ChoicePoint

**Against Private & Public Employers**
- Dozens pending: Lowe’s
- Dozens pending: Select Truckers Plus
- Arroyo v. Accenture
- Johnson et al. v. Locke (US Census Bureau)
- EEOC v. Freeman
- OAG v. Radio Shack

**Source:** National Employment Law Project (Mar 2011)
Implications

1. Avoid reliance on arrest records
2. Avoid blanket prohibitions on hiring applicants with criminal conviction history
3. Generally limit consideration of criminal convictions to those that are less than seven years old
4. Consider other factors: (a) nature of the offense(s); (b) number of convictions; (c) time since the offense; (d) “good citizenship” since release
State Law Restrictions
Restrictions On Use Of Conviction Records

- Eight states restrict the use of conviction records for employment purposes: CA, GA, HI, MA, NV, NY, PA, WI

- **CA**: Restrictions on use of minor, marijuana-related offense and sex offender registry

- **GA**: Restrictions on use of first offenses

- **HI**: Prohibition on use of convictions that are more than 10 years old

- **NV**: Restrictions on use of sex offender registry

- **PA/WI**: Employment can be denied only if conviction is substantially job related
Massachusetts CORI—Criminal Offender Record Information

- State database of all interactions with state police and state courts, includes information on arrests
- Scheduled to be available to all employers over the Internet as of 5/4/12
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<th>Preconditions To Use</th>
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<tr>
<td>1. Verify subject’s identity by reviewing at least one government-issued ID</td>
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<td>2. Obtain subject’s authorization</td>
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<td>3. Certify compliance with (1) and (2) under penalty of perjury and retain certification for one year</td>
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<td>4. Provide applicant with a copy of CORI</td>
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<tr>
<td>- Before asking applicant about criminal history record</td>
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<td>- After taking adverse action based on criminal history record</td>
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Additional Requirements

1. Create and implement a criminal records policy
2. Provide a copy of the policy to applicants when taking adverse action based on CORI
3. Log details of disclosure of any CORI and retain log for one year
4. Prohibit disclosure of CORI to third parties except in response to a request by the employee
5. Destroy CORI no later than seven years from rejection of applicant or termination of a hired applicant’s employment
Massachusetts’ Fair Employment Practices Act — Amendment

Application for Employment

Criminal History
Have you ever been convicted of a felony?

Yes ☐ No ☐
| **Who?** | Massachusetts employers with more than 6 employees |
| **What?** | Remove criminal history question from “initial written employment applications” |
| **Where?** | Only Massachusetts and Hawaii |
| **When?** | Effective November 4, 2010 |
| **Why?** | To improve job opportunities for reformed offenders |
| **Guidance?** | [www.mass.gov/mcad/crimrec.html](http://www.mass.gov/mcad/crimrec.html) |
What Can Employers Do?

- Ask applicants about criminal history later in the hiring process
  - Ask only about convictions
  - Do not ask about certain misdemeanor convictions
  - Do not ask about sealed or juvenile offenses
- Obtain criminal conviction history information from other sources
- Base employment decisions on an applicant’s or employee’s criminal conviction history
Massachusetts Applicants: Do not answer this question at this time. The Company reserves the right to inquire into criminal convictions during the interview process or as part of a criminal background check. At that time, a candidate with a sealed record on file with the Commissioner of Probation may answer “no record” with respect to an inquiry about prior arrests, criminal court appearances, or convictions. In addition, a candidate may answer “no record” with respect to any cases of delinquency or as a child in need of services which did not result in a complaint transferred to the superior court for criminal prosecution. Massachusetts candidates should not disclose information regarding first-time misdemeanor convictions for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace. Finally, Massachusetts applicants should not disclose convictions for other misdemeanors where the date of conviction or the end of any period of incarceration was more than five years ago unless there have been subsequent convictions within those five years.
“It is estimated that approximately one-fifth of Philadelphia’s population has some type of criminal record”

**Effective June 16, 2011:** Prohibits any business employing ten or more people in Philadelphia from making any inquiry into an applicant’s criminal history (A) until after the applicant has submitted an employment application, or (B) before or during the first interview.

If the employer does not conduct an interview, the employer cannot inquire into conviction history.
Art. 23-A, N.Y. Correction Law, generally prohibits discrimination based on criminal conviction except where it has a “direct relationship” to the job, or the conviction suggests an “unreasonable risk” to property or the safety of others.

Effective 2/1/09, employers must:

1. Post Art. 23-A in the workplace
2. Provide Art. 23-A to applicants with the FCRA/NY notice & disclosure
The New York “Individual” 6 Factors

1. Specific duties and responsibilities of the job;
2. Bearing the criminal offense(s) will have on the applicant’s ability to perform the job;
3. Amount of time that has elapsed since the criminal offense(s);
4. Age of the person at the time of the offense(s);
5. Seriousness of the criminal offense(s); and
6. Information produced with regard to rehabilitation and good conduct.
Vendor Issues
Information Requested By Hospital

Contractor must provide the following documents for each employee performing services to the Hospital:

1. Resume
2. Application for employment
3. Current licenses, certifications or accreditations
4. Documentation of competency
5. Description of specific skills
6. Two recent work references
7. Performance evaluations
8. - Conn. Gen. State § 31-128f
9. INS forms and accompanying documents
   - 8 U.S.C. § 1324a
10. Background check results
Information Security vs. Privacy

1. Vendors need to know what they can lawfully disclose
2. Vendors need to be prepared to suggest alternatives
3. Vendors need to be prepared to request appropriate confidentiality and indemnification provisions
4. Customers need to be wary of aiding and abetting liability
5. Customers need to be wary of joint employee status
6. Customers should review their handling of sensitive vendor information
Hospital’s Criminal Check Criteria

Contractor must conduct a criminal history check 30 days before commencement of employee’s assignment and annually thereafter.

- **FAIL FACTORS**
  1. Any conviction for a felony or misdemeanor involving violence, nonconsensual sex or children.
  2. Any controlled substance offense within the last 7 years.
  3. Any other felony conviction within the last 7 years.
  4. Any misdemeanor conviction within the last 3 years.
**Hospital’s Criminal Check Criteria**

**Provisional Factors:** Must be reviewed by hospital

1. Any pending misdemeanor of felony case
2. Any felony conviction more than 7 years old
3. Any misdemeanor conviction more than 3 years old
4. Any bankruptcy within the last ten years
5. Any other finding significant enough for further review
Information Security vs. Discrimination

Customers should consider reviewing their criminal history criteria through the eyes of an employer

- **Recent EEOC Document Request**: “Produce a copy of any and all [Company] policies and procedures that require [Company] contractors, subcontractors, vendors, temporary agencies, and all other contract entities, nationwide, to obtain criminal history information for their applicants, new hires, and current and former contract employees, as a condition of working or providing services in or at a [Company] building, facility, or worksite.”
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THANK YOU

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