



## **Criminal Background Checks For Employment Purposes**

In recent years, criminal background checks have become a vital part of the employment process, both as a means to help screen out undesirable or dangerous employees and job applicants, as well as to assist in hiring the best possible candidate. But the process of obtaining a proper background check is fraught with difficulties that vary from state to state and even county to county. The ideal background check is **accurate, comprehensive, consistent, timely** and, of course, **legal**. Coordinating these factors is expensive and time-consuming, and the work involved differs depending on the location of the employee and where he or she has lived in the past. But getting the “best” background check possible is too important to the employment process to let budgetary or time constraints put limits on the process. Many background screening companies, along with the National Association of Professional Background Screeners (NAPBS), are focusing on developing “best practices” for conducting searches that address each of the five goals listed above. But because the background screening process is not regulated, employers that do not know how to evaluate a proper screening process may end up with a report that is either inaccurate, incomplete, or both. Although the range of employment and background screening services provided by background screening companies is very broad, the scope of this paper is limited to providing employers and other end users with information about the availability and limitations of criminal history data, including where it can be found, difficulties in obtaining accurate information, and strategies for being as thorough as possible. With this knowledge, purchasers of background screening products can be better consumers of criminal background information products.

### **Overview of Criminal Background Screening**

Many employers perform background checks on prospective employees as part of the hiring process. Increased use of criminal background checks by employers to pre-screen job applicants stems from the growth of claims alleging that an employer was negligent in hiring or retaining an employee who subsequently engaged in workplace violence or some other act that results in harm to a person (*e.g.*, sexual assault) or property (*e.g.*, theft). The proliferation of negligent hiring and retention claims greatly increases an employer’s exposure for large damages awards, making the use of background checks not only a means to prevent violence by employees, but also a defense to liability should violence occur. Beyond this, many companies also are performing criminal background checks on current employees, either as a matter of course or prior to a promotion, transfer or other change in the terms and conditions of employment.

Depending on the number of employees at issue and concomitant volume of background checks, it usually is not cost-effective for employers to perform background checks in-house. As a result, third party service providers have emerged whose business is to conduct background screening for employers. These organizations generally are better equipped to conduct thorough

and accurate background screening, assuming they adhere to certain guidelines and practices. Such companies also can be the best source of information about shortcomings in the system and suggestions for improvement. As explained in detail below, third party background screening companies are defined as consumer reporting agencies (CRAs) under the federal Fair Credit Reporting Act (FCRA), and the background screening reports they prepare are defined as “consumer reports.” Employers are the “end users” of consumer reports, and also are subject to FCRA compliance requirements, including providing notice to individuals that they will be the subject of background screening and obtaining their authorization to perform such screening.

## **How to Access Criminal Background Information Under the FCRA**

Criminal background information reported by a CRA is a consumer report governed by the FCRA. Employers utilizing consumer reports for employment purposes such as background checks must adhere to a number of legal requirements before they can obtain or use a criminal background check on an employee or job applicant. The first steps concern giving notice and getting authorization to obtain the report.

Prior to obtaining a consumer report, the employer must make a clear and conspicuous written disclosure to the applicant or employee that a consumer report may be obtained. This disclosure must consist of a separate document (*e.g.*, the disclosure cannot be incorporated into an employment application). The employer also must obtain the written authorization of the applicant or employee to request the report. Despite the “separate document” requirement, the disclosure and authorization may be combined into a single document.

If any adverse action will be taken based in whole or in part upon the consumer report, the employer must comply with a two-step process notifying the applicant/employee of the adverse action. Although few courts have addressed the issue, most experts who have considered the matter feel that an employer is within its legal rights to terminate any employee who refuses to provide authorization for a criminal background check. Similarly, an employer may refuse to hire any applicant who will not complete an authorization.

Before a CRA can provide a consumer report to an employer or other end user, the employer must certify to the CRA that: 1) the employer will distribute the required written disclosure and obtain the required written authorization; 2) the information being obtained will not be used in violation of any federal or state equal opportunity law or regulation; and 3) the employer will comply with the “adverse action” requirements described below.

An “adverse action” is defined as a denial of employment or any other decision that adversely impacts any current or prospective employee (*e.g.*, termination, denial of promotion, failure to hire, etc.). Before an employer takes any adverse action, it must provide the applicant or employee with a copy of the consumer report obtained from the CRA, and a summary of the consumer’s rights under the Act. After providing these documents, the employer must wait before providing the actual notice of the adverse action. In a 1999 Federal Trade Commission (FTC) informal staff opinion letter, the FTC’s legal staff approved a five (5) day waiting period, but advised that legal counsel should be consulted in order to judge the appropriate waiting period on a case by case basis.

After the waiting period and upon taking the adverse action, the employer must provide to the applicant or employee the following notices: 1) notice of the adverse action taken; 2) the name,

address, and toll-free telephone number of the consumer reporting agency 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.

On the CRA side, each consumer reporting agency is required to maintain "reasonable procedures" to assure "maximum possible accuracy" of the information contained in consumer reports. For public record information (such as criminal history, driving records, etc.), the law requires CRAs to notify the individual that such records are being reported or maintain strict procedures to insure that such information is complete and up-to-date.

### **What is Included in a Criminal Background Check?**

Criminal background screening ideally encompasses all information about a person's interactions with the law that a company is entitled to consider in making employment decisions. Given limitations on record maintenance and retrieval, however, this goal is unrealistic and impractical.

The first thing an employer must understand is that there is a significant difference between what a CRA can report versus what an employer legally can use when making employment decisions. CRAs can report most varieties of adverse information (including, for example, arrest records) going back seven (7) years under the FCRA, and there are no time restrictions on a CRA's reporting of criminal convictions. The restrictions on an employer considering criminal histories for employment purposes are driven primarily by state law and are much more limiting. For example, approximately twelve states have enacted laws that specifically prohibit an employer from using an applicant's arrest record in making an employment decision. The state law prohibitions also extend to the use of some conviction records. The bright line example is California's restriction on using certain marijuana-related convictions to make employment decisions if the conviction is more than two (2) years old. Most states also restrict an employer's use of criminal records that are sealed, annulled, expunged and/or pardoned by the governor. Indeed, Hawaii prohibits all criminal history related inquiries until after an offer of employment has been made to an applicant. The state law restrictions on the use of criminal history information for employment purposes are as diverse as the number of states in the Union.

As if this were not enough, the federal Equal Employment Opportunity Commission (EEOC) and most state analogs also have weighed in on the debate. The EEOC has opined that the use of criminal records may have a disparate impact on minorities and, therefore, has recommended against their use in making employment decisions absent a justifying business necessity. Following suit, many state agencies have issued similar guidance in their state pre-employment inquiry guidelines.

In establishing these guidelines, the federal and state enforcement agencies seem to be balancing the proven effectiveness of utilizing background information in making employment decisions against the potential for a disparate impact on minorities. Conviction records, by definition, are adjudications of guilt, whereas arrest records are subject to the time honored principle of innocent until proven guilty. Thus, the agencies favor employment decisions based on criminal convictions because the offense has been objectively confirmed. Arrest records, conversely, are by definition inchoate and unreliable. As a result, employers generally are on safer ground

relying exclusively on criminal convictions when making employment decisions. Even so, the EEOC has made clear that an employer must consider (1) the nature and gravity of the offense(s); (2) the time that has passed since the conviction and/or completion of any related sentence; and (3) the nature of the job assignment in order to claim a justifying business necessity.

As a result of these and other various restrictions, employers must endeavor to understand what information they legally can receive from a CRA and use in the states in which they operate or conduct business. To this end, it is essential that the employer communicate actively with its CRA to restrict the flow of information outside of those bounds.

## **Identifiers and Sources of Criminal History Information**

A comprehensive criminal history check involves accessing numerous sources of information. Although screening companies should strive to create consistent procedures for all background checks, the availability of criminal records will vary by jurisdiction, meaning that search procedures used in one state may not yield the same body of information in another state. A search for criminal records contains several distinct parts: 1) source(s) of the records; 2) types of records available; 3) method of retrieval; and 4) identifiers used to locate a subject.

The first step is to compile personal identifiers about the individual that will help locate the correct criminal records. As explained below, different databases of criminal records contain different identifiers. The federal database, for example, does not contain date of birth (DOB) or Social Security Number (SSN) information, making an exact match difficult for individuals with common names. Full name and DOB are the most common identifiers, but SSN and driver's license numbers may be used as well. Because common names may pull up records for a number of different individuals, it is important that employers ask individuals to provide full names (including middle), maiden names and any other names used in the past. For the same reason, individuals should provide home addresses going back as many years as will be searched. It also is fairly common for CRAs to identify past addresses for an individual by running a Social Security Number trace. By using a variety of identifiers, a CRA can verify that the correct records for a particular "John Smith" are being accessed. Previous address information also will assist the CRA in deciding which county databases should be searched.

The types of records available and method of retrieving data varies depending on the source of the criminal records, as follows:

County Courthouses: Counties are the source of criminal information and, as such, generally have the most complete criminal history information. Many CRAs consider that a criminal background check is not complete without a search of all of the counties in which the employee has lived during the relevant time period. County records generally contain information about felonies, misdemeanors, infractions, and traffic violations in addition to arrests, cases without disposition and expunged cases. The records are available to the public and generally go back 20-30 years but, as explained above, it may be unlawful for CRAs to report and/or employers to use all the available information, such as arrest records. Depending on the county, a search may be performed on-line or on-site, either by a court clerk or private individual. **Note:** information is available only for cases originating in that county. Available data may be further limited to the particular courthouse containing the records.

State Repositories: State databases of criminal information are compiled from the underlying county criminal history data. Thus, state repositories rely on local jurisdictions to report criminal information. Such reporting can be inconsistent or infrequent from locality to locality, and all levels of offenses may not be reported. Proper identification of the subject can be difficult because common identifiers may be omitted from the index, even if the information sought is publicly available. State law determines what types of records will be transmitted from the counties to the state criminal databases. For the most part, those records include felonies, misdemeanors, infractions, traffic violations, arrests, cases without disposition and expunged records. Juvenile records may also be available.

As with county courthouses, searches may be performed on-line or in person, depending on the state. Unlike county records, which are in the public domain, states own and maintain their own criminal databases, and state laws may restrict access to various types of records. State repositories maintain a “rap” sheet on each individual, initiated at the time of arrest. The entire criminal history is available based on information that is considered publicly accessible pursuant to that state’s laws. **Note:** searches may require fingerprints and cases may be reported without final disposition. State repositories can be useful for identifying the appropriate county in which to search for a particular subject’s criminal records.

Federal records center: As the name suggests, only federal felony and misdemeanor records are available from this source, which constitutes a fairly narrow body of information (as the vast majority of criminal activity concerns violations of state law). The primary method of retrieval is on-line, through the federal courts’ “Public Access to Court Electronic Records” (PACER) or “Case Management/Electronic Case Files” (CM/ECF) systems. These records generally are in the public domain although, in some cases, the information stored only goes back to 1985. While there is more consistency at the federal level than at the county and state levels, the scope of available information still varies somewhat by court. For federal cases, the only identifier available is name (because DOB and SSN# have been removed), which can make identification of a particular individual difficult.

Federal IAFIS system: In addition to the federal criminal records that are publicly available through PACER and CM/ECF, the Department of Justice (DOJ) has created an “Integrated Automated Fingerprint Identification System” (IAFIS) to conduct criminal background checks. These checks require the use of an individual’s fingerprints and, currently, very few employers are authorized to obtain criminal information from the IAFIS system. The DOJ is evaluating the possibility of making the IAFIS system available to employers, and NABPS submitted comments regarding the pros and cons associated with allowing such access. At this time, the major weaknesses of the IAFIS system are that a typical search takes far longer than the three days expected to complete a search for employment purposes, and the information can be inconsistent to the extent it relies on reporting from state databases.

Proprietary databases: These are privately owned databases of criminal information maintained by various companies and made available online to users for a fee. The type of information available varies by database both in scope and completeness, but usually will include felonies, misdemeanors and infractions – as well as, in some cases, information concerning past searches done about the individual. This latter service is unique to proprietary databases. For the most part, companies that provide such information endeavor to populate their proprietary databases with bulk information available electronically from country and/or state sources. Not all records are available electronically, however, which means that proprietary databases may not always be

as current as the source records. As detailed above, federal law requires that CRAs notify the individual of a search that public records are being reported *or* maintain strict procedures to insure that such information is complete and up-to-date. Smart consumers of proprietary databases should (at a minimum) insure that their CRA is complying with this federal standard and any related state laws that may impose additional safeguards beyond those of the federal law to insure that criminal reports are current and accurate. As it relates to compliance with the federal law (especially where the CRA is not notifying the individual of the search), many experts recommend that any background check performed using a private database subsequently be verified by reviewing the source criminal records.

A review of these access points for criminal history information reveals that, contrary to popular belief, there currently is no one-stop comprehensive source (*i.e.*, an all-inclusive national database) for criminal background information. It is essential, therefore, for employers to work closely with their CRAs to devise an appropriate background screening procedure that efficiently accomplishes the goals of accurate, comprehensive, consistent, timely and legal reporting.

### **Strategies for Searching**

There are a couple of strategies that end users should employ to insure that the criminal background checks they order and purchase are as complete, accurate and thorough as possible. This guidance applies to employers and CRAs, who must partner closely for the best possible result:

Notice: Employers must give notice to and obtain authorization from the individual as required by the FCRA and state laws. As part of the notice and consent process, employers should ask for as much identifying information as possible, including maiden and former names, middle names and initials, and any other name by which the subject is known. It also is a good idea to ask for both current and past addresses, going back as many years as will be searched. The more information available to identify a subject, the easier it will be to locate the correct criminal records and avoid mistakes.

Where to Search: A comprehensive background search will include a search for records in several different locations, as described above. State repositories and several large proprietary databases can be used as pointers for the more specific and complete local searches. A federal PACER or CM/ECF search may be included as well. The most comprehensive searches are confirmed by cross-checking databases. For example, if a search reveals a “hit” (that is, the individual has a criminal history) in one of the proprietary databases, an employer should consider whether that “hit” should be confirmed by a search of the relevant local records.

How to Handle Incomplete Records: Due to the limitations inherent in the system, it is possible or even likely that some of the records received from various sources will be incomplete and/or inaccurate. Under the federal law as construed by the FTC, an employer intending to take adverse action on the basis of a consumer report must give the individual an opportunity to come forward with additional information about the report including, potentially, that it is incomplete or inaccurate. This opportunity arises in between the two adverse action notices. The process is as follows: (1) the employer must give a copy of the report to the individual *before* taking adverse action; and (2) during the waiting period that follows – and prior to the employer actually taking the adverse action – the individual must have an opportunity to bring forward additional information. The timing of the waiting period must be gauged to give the individual

enough time to come forward if s/he so desires. If the individual does not come forward or the additional information offered is not compelling, the employer may move forward with the adverse action process, part of which involves notifying the individual that any further disputes regarding the accuracy of the report should be raised directly with the CRA, thus taking the employer out of the equation. Assessing any additional information offered is a sensitive matter that only can be done on a case by case basis.

## **Conclusion**

Criminal background screening for employment purposes should not be undertaken lightly. As valuable as it has proven to be, background screening is a process that implicates a broad variety of privacy and safety concerns that people hold very dear. Ideally, employers who seek criminal history information want to be able to make informed decisions about whether an individual will contribute to a safe and productive workplace or potentially will cause some harm to person or property if employed. This decision cannot be fully informed until employers appreciate the scope of what it means to conduct a criminal background check, including understanding how to do so legally, what sources of information are reliable, and what to do when the accuracy and/or completeness of information is called into question. To this end, it is essential that employers engage in a dialogue with their providers to create and maintain the most efficient and effective background screening process possible.