

Developing Screening Policies and Procedures

The Employer's Role

The employer's role in the background check process will vary depending on the nature and extent of the employer's pre-employment screening program. For example, some employers outsource not only the investigation of criminal history and credit information, but reference checks and drug testing as well. Some even arrange for the background check company to review applicants and provide a "competitive" or "not competitive" recommendation. Whether outsourcing or not, the employer retains ultimate responsibility for fundamental aspects of the background check process, including but not limited to the following:

- Understanding and managing the federal and state compliance issues related to background checks (e.g., fair credit reporting issues, discrimination issues, privacy issues, etc.).
- Selecting a background check vendor and putting in place documents such as an appropriate "end-user" agreement between the two companies.
- Identifying the class or categories of jobs requiring background checks and the corresponding types of background checks (e.g., criminal records, motor vehicle records, credit history information, etc.). Taking measures to ensure consistent background check standards by the class and categories of jobs.
- Articulating and documenting the "job-relatedness" of criminal and credit history investigations, if any, for the designated class or categories of jobs, particularly for credit history inquiries (e.g., position has cash handling responsibilities, etc.). Evaluating whether written job descriptions and job postings – which may be exhibits in any legal proceedings – need corresponding revisions.
- Determining whether initial background checks will be sufficient or whether periodic (or "rolling") background checks will be required for some positions (e.g., executives, officers, etc.). Evaluating whether current employees in the same positions without prior background checks will be required to submit to background checks.
- Developing and documenting standards for evaluating information disclosed in background check reports (sometimes known as "adjudication criteria"), and considering how much and what types of information the company wants reported back to it by the background check company.
- Reviewing the Company's employment application to ensure that it lawfully elicits information to cross-check against the background check report, and clearly states that falsification or discrepancies, whether material or not, will result in disciplinary action up to and including termination of employment. Reviewing all other pre-employment/pre-hire paperwork to ensure coordination with the background check process.

- Developing FCRA-compliant authorization and disclosure forms, “adverse action” letters and document destruction policies.
- Training recruiters and HR staff in the proper use of these and related materials (e.g., interview guidelines). Training managers and supervisors to ensure they are familiar with the particulars of the compliance program.
- Safeguarding private information, such as social security numbers.

The Vendor’s Role

The background check company’s role in the background check process will vary depending on the nature and extent of the employer’s pre-employment screening program. For example, some employers outsource not only the investigation of criminal history and credit information, but reference checks and drug testing as well. Some even arrange for the background check company to review applicants and provide a “competitive” or “not competitive” recommendation. At a minimum, the background check company’s role in the background check process includes, but is not limited to, the following:

- Complying with the federal and state laws that regulate the operation of background check companies and the exchange of information with employers (e.g., fair credit reporting issues, discrimination issues, privacy issues, etc.).
- Working together with the employer to implement the employer’s pre-employment screening program and to put in place documents such as an appropriate “end-user” agreement between the two companies.
- Timely reporting complete, accurate and up to date background check information to employers (e.g., criminal history information). Making trained staff members and other resources available to employers to facilitate informed decision making by the employer.
- Safeguarding private information, such as Social Security numbers.

The Importance of Consistency

An employer need not perform exactly the same investigation on every applicant, provided that any differentiation is based upon legitimate business needs and an investigation policy reasonably calculated to further those needs. For instance, an employer may wish to more thoroughly investigate the backgrounds of prospective employees who have applied for positions involving confidential information such as financial data, trade secrets, or other sensitive material.

Likewise, an employer may reasonably desire to conduct extra investigation of persons who may have access to corporate or customer funds or to other valuable property. An employer also may legitimately determine that applicants for managerial, supervisory, or policymaking positions will undergo a more rigorous background investigation due to their anticipated value to the employer and the greater potential for damage arising from their wrongful conduct. An employer must avoid any disparate treatment that may violate any equal employment opportunity laws, however.

Outsourcing

Outsourcing background checks is discretionary for the employer. No federal or state law requires the outsourcing of background checks. Of course, employers have direct access to information about job applicants, including résumés, letters of reference, writing samples and personal references. Increasingly, employers are even requiring job applicants to provide copies of performance evaluations from current and prior jobs. Some employers are also searching for information on the Web (e.g., pages posted on Myspace.com). Realistically, though, employers have somewhat limited access to important records, including criminal history information. Also, the average employer may not have the expertise and resources available to interpret background check information in a timely, cost-efficient way.

Employers also should be mindful of the laws regarding negligent hiring when deciding whether to outsource. Employers typically require background checks to safeguard against the risks associated with hiring unfit employees, particularly ex-offenders. When deciding whether to outsource, an employer should balance the costs-savings from performing background checks in-house, on the one hand, and the employer's available resources and expertise, on the other hand. A reasonably strong argument can be made that the most effective pre-employment screening strategies combine in-house due diligence (for example, thorough and effective job interviews and reference checks) with formal background checks through a reputable background check company.