

## **Dirty Deeds - They're Not Found Dirt Cheap**

Although the subject in the song by AC/DC boasts, "I lead a life of crime," it's not always easy to spot someone with a history of criminal convictions. Pre-employment screening is on the rise, and companies are finding that researching criminal records is a complex and time consuming effort.

### **Screening Trends**

The latest statistics from the Society for Human Resource Management (SHRM) show that almost 80% of the companies surveyed are conducting background checks on potential employees. With an estimated 70-80% of companies now adopting policies to provide only basic reference information, such as dates of employment and position, employers are relying more on criminal records in the screening process. Retrieving criminal records at local courts can take several days and sometimes longer. Most companies are looking to onboard applicants as quickly as possible.

With the proliferation of privately owned criminal record databases, the prospect of fast and inexpensive information is alluring to employers. Although these databases claim to contain millions of criminal records, in reality the search hardly qualifies as a national criminal record check. Many cast a wide net in terms of sources of information, often times too broad, including results that are neither verified nor reportable. At the same time, significant gaps have been found in the information provided.

### **Costly Shortcuts**

The truth is, there is no single, comprehensive source for accurate and up-to-date criminal information. A thorough criminal record check might potentially encompass searches from federal, state, county and municipal courts, each possessing distinct procurement and reporting guidelines, turnaround times and associated costs. Often additional inquiries are necessary to obtain updated disposition information and confirm an applicant's identity. Even the National Crime Information Center (NCIC), the FBI's database, has been found to be less than complete, as it relies on state repositories and often does not include misdemeanors.

In this area, the old adage applies--if it seems too good to be true, it probably is. This is the hard lesson companies are learning about so-called national criminal record checks. Just ask any of the companies that are being sued for negligent hiring or libel and slander because the background check process was flawed. The highest percentage of errors in screening is found in the criminal record check component. The Bureau of Labor Statistics reported that employers lose 79% of negligent hiring lawsuits and the average jury award in employment-related lawsuits exceeds \$1.6 million.

## *Case Studies*

In a recent Texas case, the family of a 77-year old Alzheimer patient who was raped by a 38-year old registered sex offender is suing the background screening firm and the company that placed Michael A. Gilbert in a position to care for the woman at an assisted-living center. The family claims the background check was flawed, relying only on results of a privately owned criminal record database check. Gilbert, who served 11 years in prison for sexual assault on a 12-year old, was on probation as well as listed in the state's sex offender registry.

Or consider the Pennsylvania case of James R. Gorman, a manager of multi-million dollar client accounts for the Vanguard Group, whose insurance license renewal background check turned up a felony conviction for loan and credit card fraud. After being fired, Gorman learned the conviction belonged to a subject with the same name, but different Social Security number, date of birth and address. Though subsequently reinstated, Gorman sued for failure to exercise due diligence in checking personal identifiers and the matter was settled out of court.

## *Knowledge is Power*

What can you do to protect your company against potential risks associated with the background screening process?

### **1. Identify Pre-Employment Screening Regulations**

There are many federal, state and industry-specific regulations that dictate how background investigations are conducted and reported, and what components must be included. Consult with government departments, state agencies, legal counsel, professional industry associations and your screening vendor to determine guidelines applicable to your business.

Federal consumer reporting laws regulating the use of personally identifiable information include the Fair Credit Reporting Act (FCRA), the Fair and Accurate Credit Transactions Act (FACTA), the Gramm-Leach-Bliley Act (GLB), and the Driver's Privacy Protection Act (DPPA). Many states have enacted analogues that expand upon the provisions of the federal acts and have also established specific criteria for the reporting of criminal information.

Examples of regulated industries include nuclear, transportation, financial and healthcare, and are governed by the provisions of the Nuclear Regulatory Commission (NRC), the Department of Transportation (DOT), the Department of Commerce (DOC), the Department of Health and Human Services (HHS), and the Department of Homeland Security (DHS). In addition to routine background screening components, drug testing, psychological assessments and searches of specialized government informational

databases may be required. Most states have additional screening regulations covering specific positions, like those dealing with vulnerable populations, such as children, the elderly and the disabled.

## **2. Understand Your Background Screening Program**

The implementation of a background screening program requires an open, fluid and communicative partnership between your company's human resources department and your screening vendor. In determining the most effective and cost-efficient program to meet your business needs, consideration should be given to establishing different screening profiles based on position; re-screening due to promotion, change of position or suspected wrongdoing; retroactive screening; and to ensuring that independent vendors and contractors used by your company are subject to similar screening requirements.

It is imperative to develop an adjudication standard and understand your responsibilities as an employer in the screening process, especially with regard to notice, consent and adverse action. Background screening is not infallible, and as there are limitations to what may be reported, it is important to understand what may or **may not** be revealed in the background investigation. Even if negative information is uncovered, it must be considered in context of history, underlying behavior and nature of position.

## **3. Understand Criminal Record Searches**

Unless otherwise dictated by federal or state law, consideration should be given to searching criminal records based on an applicant's residential and employment history for a period of seven years as well as searching alias and/or maiden names in the same jurisdictions, but bear in mind that not all criminal information is reportable.

National database searches, whether from the FBI's NCIC, the National Criminal Record Locator (NCRL), or a privately owned database may be used as an "overlay" search to surface potentially reportable information outside the identified geographic scope of the investigation, but should be supplemented by traditional county, state and federal courthouse searches. A federal criminal search reveals warrants, pending cases and convictions based only on federal law, but each search is limited to a single federal jurisdiction and a thorough investigation may require a search of multiple jurisdictions. State repositories, when accessible, may have prolonged turnaround times and excessive fees, and do not draw from all court sources. A study conducted by BRB Publications, using U.S. Department of Justice survey statistics published in 2006, revealed significant shortcomings in many state repository records due to deficient levels of automation, quality control and timeliness in receiving and entering disposition data. County court searches are characteristically the most up-to-date and accurate, and a thorough investigation may require a search of multiple counties. Supplemental inquiries to confirm identity and disposition should be made before reporting negative criminal information.

Understanding your screening vendor's search methodology, validation process and reporting terminology is key to reducing liability.

#### **4. Trend Results**

After six months of administrating a screening program, you should start to measure key metrics of your program by trending statistics such as the criminal hit ratio. Criminal hit ratio is calculated by dividing the total number of applicants with criminal records by the total number of applicants. Understand your criminal hit ratio based on industry and location, and trend against compiled data within your industry. If your industry typically yields a 10% criminal hit ratio in your region and your ratio is 2%, you may want to revisit your criminal search methodology. Nationwide studies reveal 8% of applicants possess criminal records. Your screening vendor may be able to provide periodic management reports with this information.

#### **5. Screen Your Screener**

A screening vendor should have the specialized expertise and resources to effectively and efficiently obtain meaningful results in a timely manner, demonstrate understanding of and compliance with legal requirements, as well as familiarity with issues germane to your industry and flexibility in meeting your needs. Assessing a vendor's credibility should include consideration of:

- Licensing, bonding and insurance coverage
- Legal status and control
- Length of time in business
- Location and territory covered
- Services provided
- Pricing structure
- Reporting methods
- Information safeguards
- Screening, training and supervision of screening investigators
- Vetting and credentialing of third-party service providers
- Membership in professional associations
- Client references

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