

WHITE PAPER

Establishing a Best-Practice Background Screening Program

A look at the legal, financial, and business considerations



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INTRODUCTION

Why Do Businesses Need Background Checks?

Businesses need background checks to ensure they hire the right people the first time around. Background checks are good business because they:

- Are devices to help companies hire suitable employees.
- Can be used with current employees during investigations.
- Verifies candidates are who they say they are. This reason alone has become a great impetus for companies since September 11, 2001, when several of the terrorists involved in the airline hijackings used identification that was fraudulently obtained.
- Fulfills “due diligence” and protects you from negligent hiring or retention lawsuits.

Taken from LexisNexis Employment Forms and Policies

<http://www.lexisnexis.com/humanresources>

The end of the last century brought a new form of lottery to the forefront—the employment lawsuit. Unfortunately, several of the multi-million dollar verdicts awarded over the past years have been employment-related cases. For many years, human resource professionals have been advising managers and supervisors to document everything. The wisdom of these words has become even more important as employers learn that the best defense to many employment actions is found in the documentation leading up to a decision.

It is also helpful to have policies that define how decisions are to be made, and how problems will be addressed. Many times employees will allege that they have no knowledge of what is expected or how decisions are made. Having policies in a handbook, or separate policies that are to be signed and maintained in a personnel file, will assist in defeating these claims of ignorance. Policies also help eliminate unnecessary misunderstandings, provide a source for supervisors to consult when they are unsure of what action to take and help inform employees of what is expected of them in an organized, easy to understand manner.

The Legal Reasons for Background Checks

“Due diligence” describes the attention and research legally expected of a person or company. For example, if you hire someone who has a criminal past and place them in a position where they could harm another employee or patron, your company could be sued. Why? Because you could have known about this person’s past and should have known if you would have done a background check. We are not suggesting you shouldn’t hire someone with a criminal past. For the right positions, the ex-convict could be

a good match. But you should know upfront so that you can place the individual in the right position to manage the situation, not let the situation manage what happens after an incident.

Here are some examples where a \$50 background check could have saved these companies a lot of money. **The average jury award for negligent hiring is over \$800,000.**

NORTH CAROLINA

In North Carolina an employee shot and killed 3 employees and injured a 4th. Plaintiffs sued for negligent hiring. Verdict \$7.9 million.

CALIFORNIA

In Oakland a carpet cleaning company unknowingly sends an ex-convict into an upper Rockridge home where he murdered a pediatrician. Verdict: \$11.5 million.

In addition to the settlement, organizations incur other costs:

- Decreased employee morale and loss of productivity
- Increased turnover
- Building repair and cleanup
- Business interruptions with customers
- Increased workers' comp claims, medical claims, premium rates
- Additional attorney fees

*The easiest way to fire employees
who are creating legal liability problems?
Don't hire them to begin with!*

Applicant background checks have significantly increased over the past 10 years. Here's what has happened as reported by SHRM (Society for Human Resource Managers).

PERCENTAGE OF BUSINESSES DOING CHECKS

Type of Check	1996	2003
Overall General Background Check	66%	82%
Criminal Record Check	51%	80%
Credit Record Check	19%	35%
Education Verification (Degrees)	51%	55%
Motor Vehicle Record Check (MVR)	40%	44%
Military Discharge Record	16%	21%

WHERE TO BEGIN

Identify Motivating Needs

The first step in creating a financially and legally rewarding background screening process is to understand your company's needs so that you can ensure they are met. As an organization, identify your greatest concerns. Here are some examples:

- Reducing Turnover
- Avoiding Violence in the Workplace (threats or actual violence)
- Reducing Theft
- Reducing Loss of Proprietary Information
- Reducing Training Costs
- Avoiding Negligent Hiring or Retention Claims
- Increasing productivity

Consider Organizational Impact

Once you identify your greatest concerns, you can begin to create a measurement strategy to identify if pre-employment screening is helping you to achieve your objectives—for example, reduced turnover or loss prevention. Ask yourself these questions to focus how to begin tightening your pre-employment screening:

1. What will you measure to know if your background screening process is effective?
2. Do you currently have a process in place to complete this measurement?
3. Can it be measured in dollars? If so, what is the measure now in dollars?
4. What would you like it to be?
5. What's the value of the difference? What is the value over time? 6 months from now?
1 year from now?
6. Do you have the tools and resources available to complete this process and/or measurement tracking?
7. What can you do today to begin to make a difference?

SELECTING A SCREENING STRATEGY

The next step is to complete the actual background check—to find out if an applicant is telling the truth on his or her resume and application. Background checks can protect you against liability, showing a “reasonable effort” to protect your current employees, customers, and patrons. However, not all checks need be nor should be performed for every job title. The typical types of background checks include:

- Identity
- Criminal
- Civil
- Employment
- Education
- Licensing
- Motor Vehicle
- Credit
- References

How Background Checks are Typically Completed

To complete a background check, you will need to obtain a name, social security number, and addresses for the past seven years. Here’s a heads up, you usually can’t obtain a birth date before a job offer—otherwise you could be liable for age discrimination. For this reason, we recommend you complete a background check AFTER a job offer is made, but contingent upon passing the check and BEFORE they start work.

The data of birth is needed for a thorough background check. So the social security number, date of birth along with the addresses and phone numbers are used to validate identity. This is usually the first type of check you would want completed. If the identity is correct, then you can complete additional types of checks like criminal, degrees, and references. If identity is in question, you would not want to continue paying for any other checks until the identity issue is resolved.

This is a summary of the type of checks usually required by businesses.

Type of Check	How It's Done	Who Can Do It
Identity	This is done electronically and almost instantly through a series of database checks.	You must have developed the software program. Usually outsourced.
Criminal	This is done at the Federal, state and county levels—all of which maintain separate records. National Criminal Search is an online database that can identify records that need additional research. For complete legal coverage, however, you would need to go to the source documents and not use databases that can become outdated quickly. 9% of the public have been convicted of a crime.	These are public records available to anyone with a signed release.
Civil	Civil records are also kept at the county level. Currently no connection exists between the record departments. For complete legal coverage, you would need to go to the source documents and not use databases that can become outdated quickly. Civil records give a complete picture of possible employment-related lawsuits for anyone considered for a supervisory position.	These are public records available to anyone with a signed release.
Employment	Previous employers are called to verify titles and salary. This is a time consuming task. On average, 33% of applicants misrepresent their work history.	Can be done in house, but because of time commitment, this is usually outsourced.
Education	Verification of education levels and degrees. Done in person with the learning institution.	These are public records available to anyone with a signed release.
Licensing	Verification of professional licenses. Done in person with the licensing board.	These are public records available to anyone with a signed release.
Motor Vehicle	Driving records can be released to appropriate consumer reporting agencies with a signed release.	These are public records available to anyone with a signed release.
Credit	Credit records can be released to appropriate consumer reporting agencies with a signed release.	These records are available to anyone with a signed release.
References	Done in person to verify work habits and skills.	Can be done in house, but because of time commitment, this is usually outsourced.

Identify What Screening is Needed for Each Job

The next step is to identify what screening is needed for each job title. One idea is to divide your applicants into job categories. Here is an example:

CATEGORY 1

Individuals who have access to your workspace only. Examples would be cleaning staff, vendors or contractors, or employees who do not have access to your systems or operational processes.

CATEGORY 2

Most of your regular or part-time staff that have access to your day-to-day workspace, systems or operational processes. This will probably be your largest category.

CATEGORY 3

Individuals who have a high degree of access to critical systems or information. Examples would be senior management, department heads, internal auditors, corporate security personnel, IT security personnel, and CFO personnel who have access to funds disbursement.

Now decide what checks should be performed on applicants from each category.

Your categories might break out like this:

CATEGORY 1

InstaCheck
Drug Screening
Criminal Background

CATEGORY 2

InstaCheck
Drug screening
Criminal Background
Education Verification
Employee Verification
Moving Violation Record

CATEGORY 3

InstaCheck
Drug Screening
Criminal Background
Education Verification
Employee Verification
Moving Violation Record
Civil Background
Professional Licenses

Then consider the time limits for each category. A suggestion is:

CATEGORY 1

5 years

CATEGORY 2

5 years

CATEGORY 3

7 years

Finally, identify the criminal criteria that disqualify applicants. You will probably want to disqualify individuals from consideration if their crimes fall within the following categories:

NO TIME LIMIT
FELONY

Homicide/Attempted Homicide
Crimes Against Persons; i.e. Manslaughter
Child Molestation
Robbery
Arson
Felony Assault
Felony Battery
Felony Drug Conviction
Any 2 Felony convictions for any Felony offense;
violent or non-violent

10 YEAR LIMIT
FELONY

Burglary
Fraud
Crime against property
Theft
Other non-violent Felonies

5 YEAR LIMIT
MISDEMEANOR – VIOLENT

Crimes Against Persons; Simple Assault
Sex Offenses
Weapons Violations
Child Abuse
Domestic Violence

5 YEAR LIMIT
MISDEMEANOR – NON-VIOLENT

Fraud
Theft
Gambling
Drug possession
Driving while intoxicated
Prostitution

Note: All time limits should be calculated from the date of the conviction or the date of release from jail, prison, probation or parole whichever is most recent.

Now you are ready to perform the background check. Make sure you are consistent in your application of policies, procedures, and criteria. Most importantly, abide by the FCRA guidelines or limitations discussed later in this document. Some final points to consider during the process:

- Create and follow screening policies and procedures.
- Audit your hiring processes—syncing job descriptions, application forms, release forms, and interview questions to ensure background information is obtained.
- Remember to keep track of how this is affecting the overall organizational goals you are trying to achieve by completing background screening.

Create and Follow Screening Policies and Procedures

Your policies and procedures are the backbone of business practices and provide the legal foundation upon which background screening is built. Successful background screening is tied to policies and procedures that CARE:

- Criteria for employee conduct.
- Application procedures that emphasize required skills and performance standards.
- Rejection requirements.
- Explanations of how results are communicated.

Make sure you:

- Require a completed job application from all applicants.
- Ask for current and prior residences and places of employment for the last 5 years.
- Have the applicants sign an authorization to perform a background check or drug test consent (separate documents).
- Run an InstaCheck identity verification on every serious applicant. It only takes 10 to 30 seconds to get a response. InstaCheck provides you with a list of counties in which your applicant's name appears. This list can guide your county selection for criminal conviction searches. Make sure you elect to perform a criminal record search.
- Compare the list of addresses returned against those found on the application. If there are gaps or omissions, resolve them before you proceed with hiring that particular applicant.
- Make your employment offer contingent on the successful passing of the drug screen and background check.
- Perform a drug test if your policy is to drug test new and re-hires. The drug test should be at least a 5-panel test.

If you did a thorough check, but failed to uncover any negative information, you should not be held liable for making a negligent hiring decision. If you do have procedures for performing such background checks, make sure you follow those policies, review the information collected, and contact the appropriate references. Nothing is worse for an employer than to discover that negative information was returned during a background investigation, but that information was never revisited before the individual was hired.

SCREENING ACTIONS TO AVOID

- Asking for medical information or a medical exam before the post-offer/pre-employment stage.
- Asking for worker's comp history.
- A policy that does not provide for applicants to get copies of requested credit reports.
- A policy where applicants who are denied employment or advancement based on their credit reports are not notified.

Audit Your Hiring Processes

You may want to use a checklist like this to ensure consistency through all stages of the hiring process. Review your existing policies and procedures against these checks. Remember, you need to have it in writing as proof of your efforts.

APPLICATION CHECKS

	Yes	No
All fields completed?		
Any gaps in time?		
Does it document past history and timelines that can be verified?		
Is it signed and dated in ink?		
Is the pre-employment background screening release signed and dated?		
Does it warn of consequences for providing false information?		
Is the application over 90 days old? No application should be considered after 90 days without re-interview of the applicant.		

PRE-EMPLOYMENT BACKGROUND SCREENING CHECKS

	Yes	No
All references checked?		
Social security number correct?		
Any inconsistent information identified?		
Convicted of any felonies/misdemeanors?		
Are all necessary professional licenses in order?		

**ASIS reports that 5% of all professional applicants falsify some aspect of their educational background.*

INTERVIEW CHECKS

	Yes	No
Asks why leaving past job? The more complicated the answer, the greater the need for detailed investigations.		
Asks for explanations for any gaps.		
Explains pre-employment screening policy.		
Asks if the person has any concerns or additional information he or she would like to share—this is important to give the applicant an opportunity to explain anything that may be found during the background check.		
Verifies all information on the application form.		

OFFER CHECKS

	Yes	No
Is the pre-employment screening information completed?		
Are all discrepancies accounted for?		

***Note: Any investigation which included information or which results in an adverse employment decision, should be retained in file for a minimum of 3 years. Any information that is gathered must be relevant and reliable.*

FINAL TIPS

What You Should Consider

- Check identity first. If the identity doesn't match the information on the resume, you have a problem.
- Check all counties in which the person has lived, worked, or studied. Crimes are usually committed close to home or work.
- Match the type of checks with the job description. This can be set up with company-specific job titles.
- Ask if "live" searches of records are completed. Databases become outdated quickly.
- Remember to be aware of the currency or recency of conviction. If it happened seven years ago and will not specifically affect job duties, you may want a policy and procedure in place to handle negative information that would not preclude the person from performing well for identified job duties.
- Type of conviction—a driving ticket does not necessarily mean a propensity to harm others and is probably not a threat of violence. In summary, a criminal record may not mean that the person should not be considered for the job.

THE LEGAL RESTRICTIONS EMPLOYERS FACE WHEN CONDUCTING CHECKS

When completing background checks, you must consider:

- FCRA Screening Limitations
- Americans with Disabilities Act Screening Limitations
- Equal Employment Opportunity Screening Limitations

Fair Credit Reporting Act (FCRA) Screening Limitations

The FCRA:

- Applies only to background checks conducted by third parties.
- Requires disclosure and consent when requesting a “consumer report” for employment purposes.
- Applies to background checks on current employees when conducted by third parties.

Important Notes to Consider

- You need not obtain prior notice when investigating employee wrongdoing even when done by third parties.
- Disclosure of investigative consumer report must be made no later than three days after the report is requested.
- In-house investigations are not covered, unless public records are used (this only applies in some states).
- Remember to provide copies of investigative consumer reports upon request or when adverse action is taken based on the report to the applicant.

The Four Steps for Basic FCRA Compliance

The four steps to ensure you are compliant with the FCRA are as follows:

- Provide disclosure and obtain written consent.
- Communicate certification to the consumer reporting agency.
- Provide documents before adverse action.
- Provide notice after adverse action.

STEP 1: PROVIDE DISCLOSURE AND OBTAIN WRITTEN CONSENT

- Separately disclose potential report request.
- Obtain written consent.

CHECK YOUR KNOWLEDGE

QUESTION	ANSWER
<p>1. <i>Is it sufficient to include the disclosure that a report may be requested in the job application?</i></p> <p><i>The answer is No.</i> The disclosure must now be provided to a job applicant in a separate document. Nevertheless, the employer may include such disclosure in the job application package as an additional notice.</p>	<p>Yes / No</p>
<p>2. <i>Is consent language in the job application sufficient, when the application is signed by the applicant?</i></p> <p><i>The answer is Yes.</i> There is no requirement that the consent language be contained in a document separate from the job application. Employers must, however, make the consent language conspicuous. However, remember that the disclosure of the applicant’s rights under the FCRA must be in a separate document that does not refer to other subjects.</p>	<p>Yes / No</p>
<p>3. <i>Are there additional disclosure requirements applicable to investigative consumer reports?</i></p> <p><i>The answer is Yes.</i> Where an employer seeks to obtain an investigative consumer report, the FCRA requires an additional disclosure. This disclosure, the required timing of which is different from that for consumer reports, must specify that:</p> <ul style="list-style-type: none"> • An investigative consumer report, which must be clearly defined, may be obtained; and the employee or applicant may request additional information as to the complete and accurate nature and scope of the investigation. 	<p>Yes / No</p>
<p>4. <i>May the employer phrase a consent such that it applies not only to consumer reports related to the job application, but also to any reports that might be obtained after commencement of the employment relationship?</i></p> <p><i>The answer is Yes.</i> One document can be drafted to accomplish a broad consent in this regard. The FCRA provides that the disclosure may be made “at any time before the report is procured or caused to be procured.”</p>	<p>Yes / No</p>

THE FACT ACT

The FACT ACT stands as the Fair & Accurate Credit Transactions Act signed December 4, 2003. FACT excludes from the definition of consumer reports misconduct investigation reports and investigation reports regarding “compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.”

Not all investigative consumer reports are equal. For example, say you suspect an employee of copying a client’s intellectual property. You hire a cyber sleuth to track down the electronic trail. You are now engaged in obtaining an investigative consumer report. True or False?

In this case, the answer is False. The FACT Act excludes from the definition of consumer reports misconduct investigation reports and investigation reports regarding “compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer.”

STEP 2: COMMUNICATE CERTIFICATION TO THE CONSUMER REPORTING AGENCY

Communicate the following to the third party background screening company:

- Disclosures and consent have been made and obtained.
- Pre-adverse action disclosures will be made if required.
- Additional investigative consumer report disclosures will be made if applicable.
- Further disclosure concerning investigative consumer reports will be made if requested.

This step is usually done all at once when the account is set up and as part of the ordering process.

STEP 3: PROVIDE DOCUMENTS BEFORE ADVERSE ACTION

A written notification must be provided to the applicant if adverse information is found.

The notification must include:

- Copy of consumer report.
- Summary of rights prescribed by the Federal Trade Commission.
- Statement that adverse action is contemplated.

CHECK YOUR KNOWLEDGE**Question:**

After complying with the requirement that copies of the consumer report and FTC summary of rights be provided to the applicant or employee, how long must an employer wait before implementing an adverse action based on a consumer report?

Answer:

The law is silent on this point. A reasonable interpretation of this silence is that no particular timing is required by law. Some employers may wish to adopt reasonable procedures allowing applicants and employees an opportunity to respond before implementing adverse actions based on consumer reports so as to avoid potential difficulties arising from inaccurate reports. Nevertheless, this will likely be impractical for many, if not most, employers.

Also worth noting is that the accuracy of consumer reports is primarily the responsibility of consumer reporting agencies. The FTC, however, has issued three staff opinion letters stating that an employer must wait a “reasonable” amount of time after supplying the pre-adverse action materials but before taking final adverse action. These opinion letters, while acknowledging that the statute is silent on this issue, opine that a reasonable period of time is required, because the purpose of the FCRA is to allow consumers (applicants or employees) to discuss the report with employers before adverse action is taken.

One staff opinion letter states that a five-day waiting period between the pre-adverse action notice to the applicant or employee and final adverse action appears “reasonable,” but also states that “the facts of any particular employment situation may require a different time.”

STEP 4: PROVIDE NOTICE AFTER ADVERSE ACTION

A written notification must be provided to the applicant if adverse information is found.

The notification must include:

- The consumer reporting agency contact information.
- Statement that the agency is not the decision-maker.
- Statement of right to obtain a free copy of the report.
- Statement of right to dispute report.

CHECK YOUR KNOWLEDGE

Question:

Do you have to provide written notification if a consumer report contained negative information about an applicant or employee that did not ultimately influence the adverse action or would not change the result even if the report was revised to omit such information?

Answer:

Under these circumstances, the employer is not technically required to forward a copy of the report or the FTC summary of rights before taking adverse action. Employers in this situation must, however, be mindful that employees and applicants enjoy a private right of action under the FCRA and may allege that the report in fact influenced the decision to some degree.

Such claims would be particularly troublesome where negative information contained in a report is inaccurate. For these reasons, and to avoid claims focusing on this technical aspect of the FCRA's requirements, an employer in this situation should consider sending a copy of the report and the summary of rights along with a cover letter indicating that this is a courtesy and that the report has been determined to be irrelevant to the decision-making process. Employers may wish to review any contracts or agreements they have with consumer reporting agencies to ensure that the contract or agreement allows them to disclose to the applicant or employee a copy of the report.

Question:

Does the Act now require that the employer provide an explanation to job applicants or employees about which part of a consumer report influenced the adverse decision?

Answer:

No.

ADA Screening Limitations

The ADA or Americans with Disabilities Act prevents you from acting in certain ways that would discriminate against anyone with a disability. This law, when applied to background checks outlines what you cannot and can do before and after the job offer is made.

BEFORE A BONE FIDE JOB OFFER IS MADE:

- Cannot gather medical information.
- Cannot inquire about the existence, nature, or extent of a disability.
- Cannot makes inquiries that would reasonably lead to the disclosure of such information.

AFTER A BONA FIDE JOB OFFER IS MADE:

- Keep medical information private and separate from other personnel records.
- Cannot use medical information about disability against a person unless there is a business necessity.
- Use the interactive process to determine any reasonable accommodation that need to be made.

AFTER A JOB OFFER, HERE ARE SOME GREAT HINTS TO COMPLY WITH THE ADA:

- Keep medical information private and separate from other personnel records.
- You cannot use medical information about disability against a person unless there is a business necessity.
- Use the interactive process to determine any reasonable accommodation that need be made.
- Remember that these apply only after a job offer is made.

EEO Screening Limitations

Thee EEO or Equal Employment Opportunity also affects background screening. Keep in mind that to comply with the EEO, you:

- Cannot gather information about protected categories.
- Cannot gather information about arrests.
- Can inquire about job-related abilities if done in a non-discriminatory manner.

Final legal thought: The Employer is Responsible!

- Employers are responsible for everything a 3rd Party Investigative Services service says and does.
- Employers are responsible for the content of hiring products.
- Employers will be responsible for discriminatory impact.
- You cannot hire someone else to discriminate for you!

FOLLOWING UP ON THE BACKGROUND RESULTS

This last section addresses what needs to “follow up” to establish a best-practice background screening program.

Respond to Appeals

If applicants advise that the background check results are inaccurate, then refer the applicant to LexisNexis (or your 3rd party investigation service) to resolve.

OR

If applicants agree with the background check results, then check to see if they disclosed that information on their application and take the following steps:

- If the applicant has falsified the application he or she should be eliminated from consideration and any offers should be revoked.
- If the applicant disclosed the accurate information you should convene a panel to decide whether or not you should hire the applicant in spite of the background check failure. The appeal panel should include: HR, Legal, Security, Hiring Department head, or similar functional positions. At least three out of the four should agree on accepting the risk. Ultimately it is senior management’s responsibility to assume the risk of hiring an individual.

Train Employees

Make sure you spend the necessary training dollars to make sure your employees know your policies and apply them correctly. By following these best practices, you will mitigate your risks in a measurable, cost-effective way.

Show a Return on Your Screening Investments

The ROI (Return on Investment) calculator was developed by LexisNexis to help you gather data that will help you track:

- How do you measure the problem?
- What is the measure now in dollars?
- What would you like it to be?
- What’s the value of the difference?
- What is the value over time?

Each calculator directs you to the information you will need to gather to validate your screening efforts. Knowing your ROI will show how you can add to the bottom line of business rather than being a

cost center. Contact LexisNexis if you would like a free copy of this tool. The LexisNexis Screening Solutions ROI Calculator workbook contains the following sections:

- Loss Prevention
- Negligent Hiring or Retention
- Turnover
- Intellectual Property Loss
- Violence in the Workplace

Each section consists of a worksheet that allows you to perform easy-to-follow calculations that helps you determine your company's effectiveness in each of these areas:

- Current Costs
- Potential Savings
- Long-term ROI (three-year projections)

Identify Overall Benefits

The ROI calculators can identify monetary benefits; however background screening offers other benefits such as these:

- Just telling applicants you complete background screening discourages those with problem pasts from even applying. This saves you time, effort, and headache.
- Background checks encourage applicant truthfulness and forthcoming. During the interview, reinforcing they will have a background check gives an applicant the opportunity to bring up any problems and provide an explanation for the behavior. This gives them a chance to explain something that may be difficult to discuss yet may not take them out of the running for the job.

SUMMARY

The purpose of this white paper is to provide a methodology for establishing a best-practice background screening program.

A best practice program includes identifying what you want to accomplish, developing policies and procedures that support that outcome, complying with federal laws, and tracking your success.

If you are interested in receiving a copy of the ROI calculator or learning more about how LexisNexis can help you please contact:



LexisNexis®

LexisNexis Screening Solutions

1-877-447-9473