

Pre-Employment Background Checks (Part 1)

Here's a story that will turn your blood into ice water: In 1999, two armed burglars shot the owner of a high-dollar California home that they were ransacking. The thieves later "explained" the shooting by saying that they hadn't expected anyone to be there or anticipated any violence. Why? Because they knew about the owner's activities beforehand.

They had spent hours in his home — as carpet cleaners for a service with a wealthy clientele. Their MO went like this: One guy cleaned while the other "cased" the homes, assessing their doors, windows, locks, and security systems — and, of course, the value of their contents.

When the robbers were caught, the homeowners sued the carpet service for negligent hiring. The "cleaners," it turned out, had criminal records and felony convictions before they were hired. The first verdict against the cleaning company was \$11 million.

With increased sensitivity to national and personal security issues, background checks have become more important than ever. So we thought that we'd discuss some common questions about background checks along with their sometimes not-so-easy answers.

Q: Why should I perform a pre-employment background investigation?

A: It costs an estimated \$7,000 to replace a salaried employee, \$10,000 to replace a midlevel employee, and \$40,000 to replace a senior executive. Furthermore, studies indicate that 75 percent of all job applicants make one or more "minor misrepresentations" on their resumes and 30 percent make "significant misrepresentations," such as phony credentials or falsified work experiences.

When you consider the time and expense associated with recruiting, hiring, and training employees, the idea of verifying background details just makes good sense.

Q: Should *all* employers conduct extensive background checks?

A: No. Generally, it's a good idea for companies to carefully screen applicants for:

- jobs in health care, child care, eldercare, security, law enforcement, and education;
- jobs involving interaction with the public (particularly *vulnerable* members of the public) and/or work in customers' homes or offices; and
- jobs in which employees handle financial or other sensitive data.

Applicants for jobs that could place members of the public at risk should also be screened. For example, an examination of the driving record of an applicant for a phone

Pre-Employment Background Checks (Part 2)

Q: Can I pay an agency to conduct the investigation for me?

A: Yes, but if you use a third party to conduct background checks, you must comply with the FCRA's notice and consent requirements. The rules are very technical but basically require you to do the following before you can obtain a consumer report about an applicant:

- provide the applicant with a "clear and conspicuous disclosure" that a report may be obtained for employment purposes;
- ensure that the disclosure is written in a document that consists only of the disclosure; and
- receive the applicant's *written authorization* to obtain the report.

Things get *really* technical if you decide not to hire an applicant based on the report's contents, so that would probably be a good time for you to consult with legal counsel.

Q: Is there any limitation on my use of information obtained from a third-party background check?

A: Yes. The mere discovery of disparaging information about an applicant isn't necessarily enough to disqualify that person from employment. The deficiencies that you find must be shown to be "job-related," according to the Equal Employment Opportunity Commission.

Q: What types of questions should I ask the applicant's references?

A: People who agree to be identified as references for a job applicant will (obviously) be *generally* inclined to speak favorably about the candidate. But *specific* questions can oftentimes yield useful, job-related information, such as:

- Have you seen Bill's most current resume? Let me tell you what it says about his former job responsibilities and his accomplishments — is that a fair description?
- Have you ever observed Mary become frustrated or angry? How does she handle frustration? How does she resolve her anger?
- How does Jane resolve conflicts? Have you had any firsthand experience observing Jane supervising others?
- Do you believe that Fred is a trustworthy individual? Why or why not?

Q: Can I ask an applicant to submit to a drug test?

A: Yes, you can ask applicants to submit to a test for *illegal drugs* at any time. (A test for

legal drugs violates the Americans with Disabilities Act.)

Q: Can I insist that applicants take polygraph tests before I offer jobs to them?

A: Probably not. The Employee Polygraph Protection Act allows polygraphs only for employees who: (1) work with controlled substances, (2) hold high-risk security positions (*e.g.*, transporting nuclear waste), or (3) are reasonably believed to have participated in thefts resulting in economic loss to the employer.

Q: Can I ask applicants if they've ever been disciplined for any form of harassment or discrimination?

A: Yes — and you should! Ask for a description of the circumstances, too.

Q: What is the biggest background check "red flag"?

A: In a word, gaps — *i.e.*, unexplained lapses in a person's life or work history. Gaps are a problem because without knowing where someone lived, worked, or went to school, you can't determine the names of all of the counties in which you should check for criminal histories (because criminal records in some states are kept county by county).

Q: Is there anything that I *shouldn't* ask about when conducting background checks?

A: Yes, you shouldn't ask about arrest records. Why? Because an *arrest* isn't the same thing as a *conviction*, and inquiries about arrests tend to (1) discourage members of protected groups from seeking jobs because of their fear of being asked about the arrests and (2) encourage members of those groups to falsely answer the questions because of their fear that they'll be penalized for truthful responses.

Q: What are my liabilities if I fail to conduct a background check?

A: In general, a company that fails to investigate the background of an employee who works in a risk-sensitive position may be liable for "negligent hiring" if that individual is later involved in harmful misconduct or illegal activities.

Bottom line

Most background investigations involve very little time and cost only \$200 (or less). In contrast, a negligent hiring lawsuit consumes huge chunks of time and can result in a six-figure verdict — which makes the background investigation look like a pretty good value.

Detective Sergeant Richard R. O'Connor

sales job probably wouldn't be important, but it would be very important for a sales job that required frequent over-the-road travel.

Q: If I decide to do background checks, should I do them for all applicants, or can I decide on an individual basis?

A: You don't have to do background checks for everyone, but your *reasons* for doing them — or not doing them — should be reasonably related to legitimate business interests. For example, if your company has some employees who drive a fleet of trucks and the rest are administrative personnel, you may have a legitimate reason for investigating only drivers. But if you investigate one driver, you should investigate *all* drivers.

Q: When can I begin performing an investigation into an applicant's background?

A: Immediately! On the job application! Before the interview! During the interview!

Q: How can I investigate an applicant's background by using an employment application? How can I investigate before and during the interview?

A: Some applicants have a very casual relationship with the truth. The information that you obtain from them on the employment application and before the interview allows you to "investigate" their truthfulness during the interview.

Start with the job application. Most applications seek information about applicants' education and criminal history along with their social security number. Using a social security number and obtaining the applicant's consent (see next question, discussing the Fair Credit Reporting Act, or FCRA), you may be able to obtain arrest, court, and criminal records; credit reports and bankruptcy filings; driving records and vehicle registrations; records relating to workers' or unemployment compensation claims; military service records; and property ownership and state licensing records.

A review of that information and those documents *before* the interview puts you in the best position to ask informed, meaningful questions about the applicant's past.