

Criminal Background Checks: You Get What You Pay For *If you're serious about hiring employees, it pays to hire a professional*

by Jason B. Morris, president, Background Information Services, Inc.

A common misconception in the HR and Security industry is that somewhere in America, a giant computer available to the public holds everyone's criminal background history. This article will explore the components of a criminal background check, including what method may (or may not be) best for your company or organization.

“We're protected, right?”

Many of us breathe a sigh of relief just knowing that our company performs background checks. This allows us the safe feeling that “we're protected.” While sometimes true, most times this couldn't be further from the truth. Let me ask this simple question: “From exactly *what* are you being protected?” Many companies today conduct pre-employment background checks to protect themselves against negligent hiring lawsuits. This proactive stance creates a safe, secure working environment via a stronger work force.

Recently, I was asked to testify before the Pennsylvania House Committee on Housing and Tourism regarding the need to conduct background checks for the hotel industry. During my testimony, I was asked for the legal definition of a “criminal background check.” You'd think I'd have a concise answer, but in reality, each industry can answer this question in a different way. For example, if you're a teacher in Ohio, the state mandates that you must undergo a criminal background check by the State Bureau of Criminal Investigation and Identification (BCII); if you've lived outside of Ohio over the past five years, an FBI check is required instead.

A word of caution: the state BCII is an antiquated system that holds outdated records too long and updates them infrequently. Like many states, this required system lacks consistency, information and case follow-up.

Thorough searches begin with a Social Security number...

Industry experts agree that the most accurate criminal background check begins by tracing the applicant's Social Security Number to identify the names he/she has gone by, as well as the addresses they've had. Obviously, you should first verify the Social Security number itself before even starting. Next, you should take that information to the county courts in all the states they've lived, worked or attended school in the past 7-10 years. All alias and maiden names should be searched in these counties for any felonies and/or misdemeanors associated with the name, birth date and Social Security number. Finally, a search of the Federal District courts (using the same criteria) is an inexpensive step to complete the search.

Four Major Types of Criminal Background Checks

There are the four main types of criminal background checks. Along with the descriptions, I'll provide comments on each selected method.

Countywide Felony & Misdemeanor Search

This method can be summarized using the old cliché, “the shortest distance between two points is a straight line.” In the world of background checks, if you need records on someone, you go to where they’re maintained—the county and municipal courts. Countywide searches are usually performed manually on site. Reputable pre-employment screening companies like Background Information Services (BIS) actually sends researchers into these courts to conduct record searches. BIS has a network of over 3,500 court researchers who conduct manual searches in more than 10,000 courthouses.

Typically, the researcher uses the court’s public access terminal to search names, then uses other methods to access files when a match is found. Some courts only conduct a “clerk search” when the researcher makes a formal written request. Since these searches are done at the court’s convenience, it takes longer than “public access” type court searches. Some courts also offer split services, meaning they make misdemeanor records (typically found in municipal courts) readily available on a public access terminal, but felony record checks (usually found in superior courts) must be requested in writing.

Only a trained, professional researcher can conduct a thorough search that will ultimately result in a quality product. A great example is when a record comes back as a “Name Match Only.” When this happens, the researcher is trained to pull the court files and study the complaint and disposition to decide if the subject is, in fact, the person he or she is searching. Court files may also be reviewed for a clearer understanding of the final disposition.

To me, this method provides the most accurate picture of someone’s criminal history. I often remind clients that if the person were convicted yesterday, we’ll find it. We often find “hits” posted to the court records that very week or month.

Federal Searches

Federal searches work similar to those conducted within the county and municipal court systems. Crimes that fall under federal jurisdiction are found by searching these courts. These crimes include kidnapping, embezzlement, tax fraud, and most “white collar” crimes. This search is done via an online tool (available to approved subscribers) that comb federal district court records. Access to the online system is regulated, so once a “hit” is found, the federal court is contacted directly. Copies of actual court files are usually ordered for more detailed information.

Statewide Searches

Some states offer a criminal history repository, which—like the FBI repository’s NCIC—is designed as a tool to assist law enforcement pros in criminal investigations. A common misconception is that since this covers the entire state—which it doesn’t—it must be better. Unfortunately, this information is often outdated, incomplete or non-existent. A major disadvantage to repositories is that although some states make it available, it’s not mandatory for their counties to report to it. Even worse, county courts that *do* report only do it on a quarterly or annual basis. This puts employers at a major disadvantage.

There are other limitations. For instance, some states limit the type of records found in background searches. For example, Hawaii, Michigan, Kentucky and Missouri only report convictions. Arizona, California and Montana only list felonies. Ohio (only 66 of its 88 counties report on a limited basis) lists mostly arrest records. Minnesota lists some misdemeanors, but only convictions with limited dispositions. Fewer than 40 states have repositories which allow some employers with multiple locations to search different scenarios for different locations.

An entirely different challenge is how states legally *define* felonies. Some states classify the same crimes as felonies, while others classify them as misdemeanors.

The State of New York currently offers the Unified Court Systems Office of Court Administration (OCA) statewide database, which mandated (effective July 2003) this standard search for many of the its counties and boroughs. This process has its own flaws—particularly with showing records that have been previously expunged. (An employer who uses an expunged record against an applicant is skating on thin ice). Because disposition information is very limited, and record information often incomplete, this search is very expensive.

Here's another example of the pitfalls of a non-standardized record-keeping system: a colleague wanted to perform statewide searches exclusively, but discovered that whenever a "hit" (match) would appear, the disposition would only list limited information. When he did get arrest records, he found that there was no way to tie them to a conviction because the information was never updated.

National Criminal Record Databases

The most misunderstood national source is the FBI's National Crime Information Center (NCIC). In the past, a company's security director would have an inside bureau source "run" an individual's records as a favor. This is now a federal crime (the FBI keeps a better track of who uses the system), so it's virtually inaccessible to the outside. NCIC data is not available without federal permission and legislative authority. It also faces the same challenges as statewide repositories—county courts and states aren't required to continually update records.

There are other options for nationwide searches. While not practical, you could send a researcher into every county court. You could also access the private databases compiled by larger companies who assemble these from extensive public record data.

National Database Searches: Why You Shouldn't Do-It-Yourself

As experts in pre-employment screening issues, Carl R. Ernst and Les Rosen have written extensively on the parameters of employer liability. In an article written for BRP Publications, they insist that pre-employment screening is best done by professionals. This eliminates the liability from these four common pitfalls that can occur when using do-it-yourself national database services.

1. *Lack of diligence.* An employer who relies on his/her own search of a criminal history database could be liable if a criminal record was missed. Most times, a traditional courthouse search by a competent pre-employment screening firm would have easily found it.
2. *Incomplete data.* An employer risks legal action if he/she makes an adverse employment decisions based upon a proprietary criminal history database without confirming the candidate's identity, or ensure that the background information is complete and up-to-date.
3. *Impermissible use of data.* Employers who purchase public record information (directly or indirectly) must be aware of the legal use of this information under Equal Employment Opportunity Commission (EEOC) rules concerning the use of criminal records. The EEOC rules that an employer may not deny employment to a candidate unless it's due to a business necessity. The three criteria are: The nature and gravity of the offense; the amount of time that has passed since the conviction or sentence completion; and the nature of the job being held or sought. (Unless the employer has pulled information from a primary source, such as the actual court records, it may not be able to make this determination.)
4. *Use of arrest records and other impermissible records.* Many public record and proprietary databases are compiled from records provided by law enforcement or correctional authorities—not by courts. While these records contain arrest information, they may not explain what—if anything—happened in court.

An employer also needs to know if its state prohibits considering arrests that don't result in convictions. In California, for example, it's a misdemeanor for an employer to obtain or consider arrests records that don't result in a conviction. (California says that an employer may only rely on convictions or pending cases.) Even if a state allows considering arrest records, the EEOC mandates that an employer must independently verify the underlying behavior. (The critical determinant is the behavior—not the police record.)

Some states have special rules about the use of certain misdemeanors or cases that resulted in some sort of special disposition (like pre-trial diversion). There are also limits on using cases that have been judicially eradicated after probation, or were granted a governor's pardon.

It's also important to note that under common law, negligent hiring lawsuits typically rule in favor of the plaintiff, since the court feels if the defendant "could have known, the potential employer should have known." Because employers have a better search type at their disposal, this should never be used as a sole indicator for criminal records for employment purposes.

Conclusion

Based on these search descriptions, BIS recommends to its clients that using a combination of tools and methods—beginning with a search of national database criminal records, followed by a countywide felony and misdemeanor search. We recommend

conducting a Social Security trace, then searching all criminal records in the county(s) where the subject has lived, worked or have gone to school in the past 7-10 years. Adding a statewide repository search and national criminal search can enhance this search. Not only does our industry prefer this method, but it's also how most U.S. companies perform pre-employment screening. Note, however, that some methods are highly efficient, while others can lead you down a dangerous path. Because pre-employment screening is a critical and necessary step in hiring, a company shouldn't cut corners to save costs. (Oddly enough, some companies spend more time on selecting a new fax machine than they do their new employees.) Since employees are a company's greatest liability, due-diligence should always be used when selecting someone. In this tough economy, it's tempting to cut the pre-screening budget, but consider this: when you pick a 50-cent cheeseburger over a filet mignon, you get what you pay for.

Jason B. Morris is president and COO of Background Information Services (BIS), Inc., based in Cleveland. Morris serves on the board of directors of the National Association of Professional Background Screeners (NAPBS).

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