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Trends

Employment Policies

Pre-Employment Background Screenings Are Prevalent, Exhaustive, Likely Here to Stay

CHICAGO--Like it or not, the era of aggressive pre-employment background screening has arrived, and likely will be a part of the hiring process for the foreseeable future.

Human resource managers say hiring today has less to do with attracting human assets and more to do with barring potential liabilities--such as litigation and reputational risks--from the front door.

Will the well-dressed woman interested in an information technology job wind up using company systems to steal trade secrets or sensitive customer information? Will the friendly man seeking a position as a delivery truck driver get drunk during a lunch break and cause a freeway disaster? Is the enthusiastic individual recommended for a maintenance job prone to bouts of mental instability that will culminate in an act of violence against co-workers?

The answer for a growing number of employers is easy: conduct an exhaustive background check by a professional screening company before extending a job offer. Through the verification and investigation services provided by such organizations, an employer can gain a wealth of information about an applicant's criminal past, credit history, driving skills, educational background and other aspects of their professional and personal lives. Employers say the money spent on such information is worthwhile because it sheds light on factors that could otherwise bring devastating physical, financial and reputational harm to the organization.

Jason B. Morris, chairman of the National Association of Professional Background Screeners (NAPBS), said various issues are pushing employers to integrate professional background checks into their hiring systems.

The trend is driven in part by state and federal statutes. For instance, various laws bar convicted sexual offenders from working in childcare facilities and schools. Other individuals convicted of a violent crime are barred from working with elderly and disabled populations. On another front, federal security statutes pertaining to transportation of hazardous materials require that many truck drivers undergo pre-employment criminal checks. Morris said the list of statutes requiring criminal checks seems to grow with each passing year.

"Employers focus on background screening based on the simple postulate that past behavior is the best predictor of future behavior," according to Gregory Davis, a labor and employment attorney in the Chicago office of Seyfarth Shaw LLP, who frequently counsels employers on screening issues.

Vast Pool of Data Available for Screening

According to the San Diego-based Privacy Rights Clearinghouse, screening organizations obtain their information on prospective employees from a variety of public and private sources. Key data comes to employers from criminal and civil court databases, credit agencies, and educational institutions.

But the PRC noted that those are just a small subset of the potential data pools a pre-employment screening company might sample during a background check. The list also includes driving records, vehicle registration

records, bankruptcy proceedings, Social Security records, property ownership records, military records, sex offender lists, incarceration records, drug testing records, professional licensing records, and workers' compensation records. Screeners also gather information from former employers, personal references, character references and former neighbors and co-workers.

While such services add costs to the hiring process, Morris insisted that a thorough background check is much cheaper than the cost of first hiring and then terminating the "wrong employee," and then having to hire and train the "right employee" as a replacement. Screening also avoids a whole menu of liabilities that come from hiring people toting potentially dangerous baggage.

"You see a return on your investment," said Morris, who is also president of Cleveland-based Background Information Services Inc. "You are hiring better qualified people. You are ensuring a safe working environment. You are hiring people at the salary they should be receiving rather than the salary they tell you they deserve."

Background Screening: Billion Dollar Industry

Morris characterized background screening as a \$2 billion-per-year industry, populated by a half-dozen large national firms, including Alpharetta, Ga.-based ChoicePoint Inc. He said the rest of the industry is comprised of more than 300 smaller firms providing services locally or to a specific economic sector.

Morris said the type of background screening done by NAPBS members varies based on the needs of employers. He noted, however, that his members can, at a minimum, verify and investigate everything on an application or resume. Additional information can then be compiled and presented to the employer based on the job requirements. The cost, depending on the depth required, ranges between \$20 and \$200 per applicant.

While opinions differ, Morris said employers should consider putting all new hires through the background screening process. He noted that some employers focus only on upper echelon hires, but other HR managers realize that workers up and down the organizational ladder carry large degrees of responsibility. Hotel housekeepers, for example, carry room keys. Janitors, drivers and secretaries have routine access to millions of dollars worth of organizational assets.

A 2004 report by the Society for Human Resource Management also pointed to the popularity of third-party background screening organizations. Fifty-two percent of the organizations that conduct background checks outsource some or all of that responsibility. Such services were most popular in large organizations, with 64 percent of large employers (500 or more employees) reporting that they outsource their pre-employment screening requirements.

Privacy Advocates Raise Concerns

But privacy advocates question the value of what employers call "hiring due diligence." They say HR departments are gathering and acting on dubious data about job applicants. In the process, the privacy rights and civil rights of job applicants are being trampled, they contend, and applicants have few, if any, options to object or seek recourse. In addition, HR departments are creating vast warehouses of personal information which they protect with few safeguards, according to privacy advocates.

In addition, "a job seeker can be rendered transparent by someone sitting at a computer, mining this data," said Matthew Finkin, a professor at the University of Illinois College of Law and the author of *Privacy in Employment Law*, by BNA Books, a division of The Bureau of National Affairs Inc. "What do companies do with it? ... Who's going to see it? Who has access? How long will it be kept? For what purpose will it be used? Are there any checks on accuracy? Our law really has no answers to any of those questions," said Finkin, who also directs the University of Illinois' Program in Comparative Labor and Employment Law and Policy.

Davis said employers also are fooling themselves if they ignore a wide range of legal limitations on their use of certain data in hiring situations.

"Employers need to be extremely cognizant of the parameters within which they can make permissible employment decisions based on the information they obtain," Davis said. "There is nothing wrong with making

informed decisions. That said, employers can get themselves into trouble when they base employment decisions on impermissible criteria."

Role of FCRA in Job Screenings


Lester Rosen, president of Employment Screening Resources in San Rafael, Calif., and the author of a book on safe hiring strategies, said employers should pay special attention to the Fair Credit Reporting Act as they develop their pre-employment screening systems.

Among other things, FCRA establishes national standards employers must follow as potential employees are screened. The law also provides job seekers with certain legal protections during this process. Compliance, however, is only triggered when the employer seeks a report from an outside "consumer reporting agency (CRA)," such as a credit bureau, a background screening company or an organization that gathers and resells public information. The Federal Trade Commission has authority to enforce certain FCRA requirements.

Under FCRA, Rosen said, employers must adhere to certain rules when they seek a background check from a CRA. He said the law is structured to balance the employer's need to exercise due diligence in hiring and the applicant's right to privacy and accuracy. Among other things the employer must:

- disclose to the applicant in a separate document that a report is being prepared;
- collect a signed release from the applicant before criminal, driving, credit and other records can be checked;
- and, provide the applicant with a copy of any report and a notice of legal rights if that report is used to deny employment.

Rosen noted that following an "adverse action" under FCRA, job seekers have certain rights if they believe there are errors in their reports. Specifically, job seekers can petition the CRA to remove or correct any inaccurate or unverified information.

The FTC in 2004 reached a \$325,000 settlement with Imperial Palace of Mississippi Inc., based on the casino company's failure to provide notice to rejected job seekers that dozens of adverse actions resulted from information culled from credit reports. An attorney with the FTC told BNA this may be the only pre-employment screening enforcement action ever taken by the agency (*United States v. Imperial Palace Inc.*, D. Nev., No. CV-S-04-0963-RLH-PAL, *settlement filed 7/13/04*; 137 DLR A-9, 7/19/04 ).

Privacy advocates say the protections offered to job applicants under FCRA are minimal at best. The Privacy Rights Clearinghouse said two significant loopholes exist in the law. First, background checks done on an in-house basis are exempt from FCRA's various notice and consent provisions. Only CRA-conducted checks trigger the FCRA requirements.

Second, employers subject to the rules can avoid compliance with the notice provisions by simply creating an alternative rationale for rejecting the applicant. In other words, the employer can simply tell an applicant that he or she was rejected for a reason other than a problem found in the background check.

Finkin and Lewis Maltby, president of the National Workrights Institute, said the paucity of pre-employment screening cases under FCRA demonstrates that FCRA is largely irrelevant to American job seekers. Indeed, the *Lewis* litigation in Ohio (*see below*) is they said.

Cautionary Tale, Subsequent Lawsuit

Lewis v. Ohio Prof'l Elec. Network LLC, is one of the only examples in the country in which a job seeker actually challenged a CRA under FCRA. Scott Lewis applied for a job as a medical products salesman five years ago. Lewis was promised the job contingent upon the completion of a background check. After hearing nothing from the employer, Lewis called the HR department and was warned that law enforcement would be

contacted if he ever tried to call the company again. After similar experiences with other employers, Lewis hired a private investigator to review the situation.

Ohio plaintiff attorney Sylvia A. Goldsmith, Lewis's attorney, said the investigation disclosed that Lewis' Social Security number showed a criminal record featuring several felony convictions, including a murder. The Social Security number confusion occurred because a police officer keying in arrest data about a different man mistakenly combined a portion of the criminal's Social Security number with his telephone number, and inadvertently entered Lewis' Social Security number.

Lewis responded by filing suit against a company that resold criminal information and a non-profit law enforcement organization that maintained criminal information. The case settled for an undisclosed sum in 2003 after a federal judge the previous year granted in part a motion for summary judgment, finding Lewis was entitled to take action against the defendants under the FCRA (*Lewis v. Ohio Prof'l Elec. Network LLC*, S.D. Ohio, No. 2:00-cv-1131-ALM-TPK, 3/19/03).

While the Lewis case is one of the few background screening cases to have been litigated, Goldsmith said she believes Lewis' predicament is not uncommon.

"I think there are a lot of mistakes in this information," said Goldsmith, of the Law Office of Sylvia A. Goldsmith in Avon, Ohio. "If you have situations where mistakes are made, you need systems to correct them so this information doesn't ruin people's lives. There ought to be a heightened level of responsibility when you're dealing with something as sensitive as criminal information."

Even if criminal databases were flawless, Maltby said there is a much more insidious quality to the HR community's increasing reliance on background checks. Maltby said employers are making hundreds of thousands of hiring decisions each year based on highly prejudicial information that has little to do with an applicant's true abilities.

For instance, Maltby said a five-year-old marijuana misdemeanor conviction on a criminal check or a series of late payments to a medical office found on a credit report have nothing to do with someone's ability to repair computers, ring up groceries or sell aluminum siding. American workers are losing jobs based on such characterizations, he said, and the trend is leading to a class of unemployable Americans.

"The hiring process ought to be about finding the best person, and that is not the way it is working anymore," Maltby said. "HR departments have moved away from trying to talk to references. Instead we look at everything under the sun--a drug test, a credit check, a criminal background check. They are looking at all these litmus tests except how well the person has done a job before. It's a crazy way to run a railroad."

EEOC: Risk of Disparate Impact Suits

John Hendrickson, Chicago regional attorney with the Equal Employment Opportunity Commission, said employers run the risk of a disparate impact lawsuit from his agency under Title VII of the Civil Rights Act when arrest records are used in the context of employment decisions.

"Like it or not, African-Americans are more likely to have these kinds of records, so if you make having a clean record a precondition of employment, there could be trouble," Hendrickson told BNA. "No one should be ruling out workers based on arrest records. If you use conviction records, there has to be some nexus between what you were convicted of and the nature of the job. The passage of time is another issue. If you are using these factors as blanket exclusions, you're looking for trouble."

Davis agreed and advised employers to take a close look at their state civil rights statutes as well. Those laws vary widely with respect to the use of criminal information in the hiring context. In many cases, Davis said states require employers to go through a "job relatedness analysis" before rejecting an applicant based on information in a criminal background check.

"In those states, if you don't undertake an analysis to determine whether the criminal record you are holding is actually related to the job functions the person is seeking to perform, you may have violated the law," he said.

Hendrickson said the EEOC has not brought any disparate impact cases based on information found in credit reports, but this is becoming an area of increasing concern for the agency.

"Increasingly, credit reports have been used as a pre-employment screener," he said. "We are investigating some charges where that is an issue. All I can say is that this is an area of concern for us. We are still trying to determine the impact of these reports."

Heading Off Negligent Hiring Claims

Background checks can help organizations head off negligent hiring lawsuits, Morris said. Hiring someone with a violent past or a history of sexually harassing co-workers could easily lay the foundation for a lawsuit accusing the employer of failing to exercise due diligence in their hiring and retention processes. Morris said the average verdict in a negligent hiring action is \$2 million.

The PRC reported that other factors are contributing to the growing interest in background screening. Frauds engineered by top executives at Enron Corp. and WorldCom forced many employers take a closer look at incoming white-collar employees. The "war on terrorism" has caused many employers to heighten their scrutiny of any potential employee who would be involved in public safety and homeland security.

A trend toward exaggeration and misrepresentation in applications and resumes has also driven many employers to verify and investigate all applicant-supplied information. Estimates on this trend vary greatly, but NAPBS contended that 56 percent of applicant-supplied information contains one or more significant discrepancies. SHRM's background checking survey does not point to a specific number, but more than half of HR professionals reported they "always" or "sometimes" find inconsistencies in the information supplied by job applicants.

"With a 56 percent discrepancy rate on applicant-supplied information, there are obviously people without the right credentials trying to come through your door," Morris said.

Job Seekers: Few Rights

Both Finkin and Maltby called for reforms to preserve job seekers' rights in an environment in which they have few rights.

Finkin said the United States should consider establishing a European-style statutory structure governing privacy in the employment context. Under this comprehensive approach, statutory certainty would be delivered to employers and job seekers on key questions such as rights of notice to the job seeker, consent requirements, rights to correct background reports, rules on the maintenance of background information, rules on cleansing or expunging records, and the use of background information for purposes not related to their initial employment.

Maltby called for reforms that would notify job seekers about fundamental problems in their background records. Such a statutory approach would combat the emergence of a class of unemployable Americans, he said.

"The law should require employers to tell people why they weren't hired," Maltby said. "You should at least be entitled to an honest answer, if only for career planning purposes. If you knew why you didn't get the job, you would be in the position to do something about it."

Finkin said employers' broad enthusiasm for background checks has led to an environment in which job seekers have been "rendered transparent." Relevant or not, expansive tracts of information about job applicants' lives are being delivered to employers. He said job seekers have few if any privacy rights as they stand before employers. He added that the future promises additional erosion of privacy rights.

"The more privacy invasive policies companies deploy, the less expectation of privacy you have," Finkin said. "And the fact that you have a lessened expectation of privacy is then used as a justification for the next privacy invasive thing a company does. People are slowly accepting this as the norm."

Maltby said employers' implicit faith in the data developed through background screening creates a number of frustrating problems. First of all, the information in background checks, especially from criminal databases and credit reports, is frequently flawed, he said.

"Criminal histories and drug tests can be wrong," Maltby told BNA. "I started my career as a criminal defense attorney and I've seen a lot of rap sheets. I wouldn't want to stake my career on the typical rap sheet being correct."

The NAPBS supported that conclusion with respect to the FBI's criminal database. The association pointed to a recent study by Craig Winston, an assistant professor of criminal justice at Sonoma State University. Among other things, Winston found that a significant percentage of database searches turned up "erroneous or incomplete information" about the target of a background check. Winston also found that the database featured a large number of missed records and false positives.

The NAPBS' Morris said employers would be better served by information generated by a professional screening company and culled directly from county courthouse records and state criminal databases.

But Maltby said those data sources are not infallible either. A frustrating aspect of the issue is the fact that job seekers generally are not given a reason for being rejected--and therefore are not in a position to seek a correction. Job seekers could find themselves wandering from employer to employer without knowing about an error in their criminal or credit histories.


Technology Makes Screenings Easier, Cheaper

Finkin said technology and cost are the biggest factors pushing employers toward vigorous and potentially intrusive background checks. Twenty or thirty years ago, employers interested in criminal, driving and credit information about job applicants had to hire private investigators and wait several weeks for the results. The emergence of hundreds of databases covering vast areas of each American's life have made such checking swift and cheap.

"The technology has made all of this much, much easier," Finkin said. "In the old days, if you wanted to run a criminal background check on someone, you had to know where he lived and you had to send someone to research the records at that particular county courthouse. With computerization, more of these records are being brought into statewide databases. Now there is talk of national databases. So it becomes very cheap."

Finkin said background screening will probably get easier and more pervasive in the coming years. One indicator of this trend is a Department of Justice initiative that could lead to wider use of the FBI's criminal databases for non-criminal-justice purposes.

Under the Intelligence Reform and Terrorism Prevention Act of 2003 (Pub. L. 108-458), Congress instructed the Justice Department to develop a report on criminal background checks under existing statutes. The department was also asked to make recommendations on improvements to its databases and procedures for non-criminal-justice purposes, such as employment and licensing.

Most employers can only access the FBI's records through state agencies. The Justice Department's process, however, could lead to policies and procedures permitting direct access by employers. The department completed a public comment process on this question on Aug. 5. It is still unclear what sort of access to the FBI's databases might emerge from this process. 

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