

THE LAW OF CRIMINAL BACKGROUND CHECKS

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I. INTRODUCTION

More and more employers are conducting criminal background checks on prospective and current employees, as well as including questions in the application process relating to prior arrests or convictions. According to a recent survey conducted by the Society for Human Resource Management:

- 82% of employers perform background checks, compared to 66% in 1996;
- 80% of employers perform criminal background checks, compared to 51% in 1996; and
- 35% of employers perform credit checks, compared to 16% in 1996.

II. GENERAL BACKGROUND CHECK MECHANICS

A. Benefits of Performing Background Checks

1. Reduce company costs caused by employee theft, embezzlement, violence, absenteeism and turnover
2. Minimize liability exposure for claims such as negligent hiring
3. Encourage applicant and employee honesty

B. What Information Does the Employer Want?

1. Social security number trace.
 - a. This verifies an applicant's identity by checking the social security number against credit bureau records, which can detect false numbers, and identifies names and addresses of other people who have also used or been associated with the number.
 - b. The trace typically provides the state and date of issue of the number and all addresses, employers and names associated with it. This check is useful in validating the addresses for conducting criminal background searches.
2. County criminal conviction records search. This provides a history of the applicant's convictions for the searched counties. The search typically

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verifies criminal history for the past seven years in the jurisdiction specified by the requesting employer. The background check vendor usually reports the results of criminal searches directly to the client within 24 to 78 hours. The search helps identify applicants who are prone to violence or sexual misconduct.

3. Sex offender database search. This provides the name of registered sex offenders in the state registry database.
4. Motor vehicle record search. This search is standard for positions requiring driving. The report reveals the applicant's type/class of driver's license, any restrictions or violations, convictions and license revocations and accidents.
5. Employment verification. This search includes contacting present or past employers to verify employment. The report typically verifies the dates of employment, job titles, salary, circumstances of termination, and eligibility for re-hire.
6. Other background screening services also are available to an employer: (a) statewide criminal records research; (b) multi-jurisdictional criminal records database search; (c) federal records research; (d) international criminal records research; (e) Pennsylvania child abuse history searches; (f) terrorist watch list searches; (g) credit history report; (h) current address searches; (i) education verification; (j) professional license verification; and (k) drug and alcohol testing.

C. Who Should Conduct the Background Check?

1. Factors in favor of background checks conducted by third-party vendor
 - a. Expertise in pre-employment screening
 - b. Ability to obtain most accurate and complete data and records information available
 - (1) Vendor can conduct nationwide search
 - (2) Vendor can avoid problems of mistaken identity and quickly detect attempted use of false identity
 - c. Cost effectiveness
2. Factors in favor of background checks conducted by employer
 - a. Data privacy and security of prospective and current employees

- b. Streamlined procedure (Fair Credit Reporting Act (“FCRA”) has limited applicability)
 - 3. Factors relating to background checks for temporary/outsourced workers
 - a. Liability exposure for failure to screen may offset economic efficiencies which trigger the use of temporary/outsourced workers.
 - b. Employers may want to require the staffing agency to conduct appropriate pre-employment screening, with agency indemnification for certain claims arising from the temporary worker’s conduct at the job site.
- D. How Does An Employer Use the Information It Receives?
 - 1. Prospective employees
 - a. Determine whether applicant is qualified for employment.
 - b. Identify applicants who provide incorrect personal and work history information on their application.
 - 2. Current employees
 - a. Determine whether employee is qualified for promotion or transfer.
 - b. If a position or department assumes responsibility over funds or confidential material, evaluate whether employee should be retained in current position.

III. KEY THEORY UNDER WHICH A PLAINTIFF MAY RECOVER UNDER FEDERAL LAW BASED ON A CRIMINAL BACKGROUND CHECK POLICY – DISPARATE IMPACT

- A. Analytical Framework: Disparate Impact Discrimination Under Title VII
 - 1. A plaintiff will prevail under a disparate impact theory if he “demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.” 42 U.S.C. § 2000e-2(k)(1)(A) (2000).
 - a. The EEOC defines adverse impact as “[a] substantially different rate of selection in hiring, promotion, or other employment

decision which works to the disadvantage of members of a race, sex, or ethnic group.” 29 C.F.R. § 1607.16 (2006).

- b. Employer justification for use of results of background investigation. When faced with a challenge to its policy, an employer must establish that any such employment practice is job related and consistent with business necessity. *Lanning v. Se. Pa. Transp. Auth.*, 181 F.3d 478, 487 (3d Cir. 1999).

B. Employer Consideration of Conviction Records

1. EEOC position: presumption of disparate impact

- a. The Commission relies on statistics which show that African-Americans and Hispanics are convicted “at a rate disproportionately higher than their representation in the population.” Conviction Records, EEOC Compl. Man. (CCH) ¶ 2088, at 2113 (1998).
- b. Based on these statistics, the EEOC adopts the presumption that any policy or practice which causes an adverse employment action to be taken based solely on an individual’s conviction record has an adverse impact on members of these protected classes. *Id.* at 2113-14. As a result, “an absolute bar to employment based on the mere fact that an individual has a conviction record is unlawful under Title VII.” *Id.* at 2114.
- c. Under the EEOC’s policy, an employer may rebut this adverse impact presumption regarding a hiring/promotion policy by offering statistical evidence showing either that African-Americans and Hispanics are not convicted at a disproportionately higher rate than members of other groups or that the convictions policy does not cause an adverse impact in its own hiring process. Conviction Records – Statistics, EEOC Compl. Man. (CCH) ¶ 2089, at 2114-15 (1998).
- d. As noted above, an employer may avoid liability once a disparate impact is established by showing that its policy of considering conviction records is justified by a valid business necessity. Under the EEOC’s policy, to meet this burden, an employer must demonstrate that it considered the following factors in making its specific employment decision based on an individual’s conviction record: (1) the nature and seriousness of the offense; (2) the time that passed since the applicant’s conviction and/or the completion of the individual’s sentence; and (3) the nature of the job held or sought. Conviction Records, EEOC Compl. Man. (CCH) ¶ 2088, at 2113.

2. Third Circuit approach

a. The Third Circuit has not addressed this specific issue, although district court decisions have considered this question, applying the Title VII analysis discussed above.

b. In *El v. Southeastern Pennsylvania Transportation Authority*, Civ. A. No. 02-CV-3591, 2005 U.S. Dist. LEXIS 14133 (E.D. Pa. July 12, 2005), the plaintiff, an African-American, disclosed in his job application that he had been convicted of second degree homicide in 1960. Despite this disclosure, he received a conditional offer of employment contingent on, among other things, the completion of a satisfactory criminal background investigation. Defendant subsequently terminated plaintiff's employment as a result of the prior conviction. He challenged the termination under Title VII, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Article I, Section I of the Pennsylvania Constitution, and the Pennsylvania Criminal History Record Information Act. *Id.* at *4.

(1) To establish disparate impact, the plaintiff proffered an expert who opined that "minority employees of SEPTA's paratransit providers are disparately impacted by the SEPTA policy in that they are dismissed from employment due to convictions at a rate that is 200 percent greater than non-minorities." *Id.* at *19. Based on this expert opinion, the court concluded that the plaintiff proffered sufficient *prima facie* evidence that defendant's policy of minimum requirements for its drivers "had a disparate impact on African-Americans" in violation of Title VII. *Id.* at *18.

(2) However, the court granted summary judgment for the employer because it showed that its policy was job related and consistent with business necessity. Specifically, defendant satisfied its burden of proving that the criminal record policy at issue measured the qualifications required to be a successful paratransit driver.

(a) The court emphasized that defendant "does not automatically preclude a job applicant from a position with it because of a criminal record, but rather on a case-by-case basis gives such applications heightened scrutiny to determine whether the conviction is sufficient to find that candidate unsuitable for the position for which he or she has applied." *Id.* at *27.

- (b) Specific factors upon which the court relied included:
 - i) Paratransit drivers service the transportation needs of vulnerable physically and mentally disabled passengers;
 - ii) Paratransit drivers are in close physical proximity to passengers; and
 - iii) Drivers are often alone in vehicles with passengers.
- c. In *Field v. Orkin Exterminating Co., Inc.*, Civ. A. No. 00-5913, 2001 U.S. Dist. LEXIS 24068 (E.D. Pa. Oct. 30, 2001), plaintiff, a Caucasian, was terminated from her job as an office manager and bookkeeper after the defendant employer discovered that she had been convicted of a felony within the prior ten years. Although not a member of a protected class for this purpose, she challenged her termination under Title VII.
 - (1) The court permitted the plaintiff to amend her complaint to assert that the defendant's background check policy violated Title VII. It concluded that the plaintiff, even though she was white, stated a cognizable claim under Title VII because "[i]t has long been recognized that a blanket policy of denying employment to any person having a criminal conviction violates Title VII." *Id.* at *6. While the court noted that this rule evolved because of concerns about the possible disparate impact of such a policy on minority job applicants, it held that this protection applied to all job applicants. *Id.* at *7. The court did not, however, detail how the plaintiff should demonstrate the requisite disparate impact.
 - (2) The court tempered its approach by noting that a blanket policy would not violate Title VII "if the criminal conviction involved conduct which demonstrates a person's lack of qualification for the job," such as a bank teller applicant with an embezzlement conviction. *Id.*
- d. In *Washam v. J.C. Penney Co., Inc.*, 519 F. Supp. 554 (D. Del. 1981), defendant terminated the plaintiff's employment as a Security Manager because he allegedly violated the company's gun policy. He claimed that his termination was racially motivated. After he was discharged, he was convicted of a felony. J.C. Penney argued that it could not be compelled to reinstate

Washam because of his criminal record. The court disagreed, declining to conclude “that a felony conviction is an absolute bar to employment as a Security Manager.” *Id.* at 561. In fact, as Security Manager, Washam himself considered applicants even if they had criminal records. However, the court suggested that a convicted felon may be unqualified to serve as Security Manager if that position requires the employee to testify in court.

3. Representative cases from other Circuits

- a. Fourth Circuit. *Walls v. City of Petersburg*, 895 F.2d 188 (4th Cir. 1990). Plaintiff, an African-American, declined to complete a background questionnaire which asked, “[h]as any member of your immediate family . . . ever been arrested and/or convicted of a felony, misdemeanor, or other violation other than a minor traffic violation?” *Id.* at 190. The court rejected the plaintiff’s disparate impact claim, resting its decision on plaintiff’s failure to establish causation. Since the plaintiff never completed the questionnaire, the court explained that any suggestion that the questionnaire caused a disparate impact on any group was “completely speculative.” *Id.* at 191.
- b. Eighth Circuit. *Green v. Mo. Pac. R.R. Co.*, 523 F.2d 1290 (8th Cir. 1975). In this seminal case, the court considered whether the defendant’s “absolute policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense” had an adverse impact on African-Americans. *Id.* at 1292.
 - (1) The court explained that the plaintiff could satisfy his *prima facie* burden through the use of three kinds of statistical evidence: (a) statistics which show that the employment practice excludes African-Americans as a class, either nationally or regionally, at a substantially higher rate than Caucasians; (b) data which compare the percentages of African-American and Caucasian job applicants that are excluded by the employment practice; or (c) evidence that compares the percentage of African-Americans employed by defendant with the percentage of African-Americans in the region. *Id.* at 1293-94. The plaintiff demonstrated through statistical evidence that the employment practice disqualified actual and potential African-American job applicants at a substantially higher rate than Caucasians. *Id.* at 1295.

- (2) Defendant could not show that its blanket policy of exclusion based on an applicant's prior conviction constituted a valid business necessity.

C. Employer Consideration of Arrest Records

Employers increasingly seek information regarding a prospective or current employee's prior arrests. The EEOC permits an employer to take an adverse employment action against an individual only after weighing several factors. However, federal courts adopt a more flexible approach than that proffered by the Commission in evaluating employer reliance on an individual's arrest history.

1. EEOC position on use of arrest records

- a. As with its treatment of conviction records, the Commission concludes that "the use of arrest records as an absolute bar to employment has a disparate impact on some protected groups." Policy Guidance on the Consideration of Arrest, EEOC Compl. Man. (CCH) ¶ 2094, at 2131-37 (1998).
- b. As a result, such an employment policy is presumptively invalid unless an employer can establish a business necessity for it. In this context, the EEOC allows an employer to make an adverse decision based on an individual's prior arrest after it balances several factors.
 - (1) The employer must consider whether the employee actually "engaged in the conduct for which he was arrested." *Id.* at 2131. To this end, the EEOC states that the employer should examine the surrounding circumstances of the arrest, provide the individual with an opportunity to explain the arrest and conduct an additional investigation to assess the individual's credibility.
 - (2) The individual's conduct must be related to the job at issue and be relatively recent. *Id.* An employer may undertake "close scrutiny of an applicant's character and prior conduct" regarding positions that, for instance, (a) are related to law enforcement, (b) give the employee easy access to the property of others, or (c) involve responsibility for the safety of others. *Id.* at 2134.

2. Third Circuit Approach

- a. In *Ramos v. Equiserve*, Civ. A. No. 01-1407, mem. op. (D.N.J. July 28, 2004) (Doc. No. 32), *aff'd*, 146 F. App'x 565 (3d Cir. Aug. 18, 2005), the plaintiff, an African-American, became an employee of Adecco, a temporary employment agency. Through

Adecco, he received a job placement at Equiserve. As part of that temporary job, plaintiff consented to an FBI background check, which revealed an arrest history. Based on the results of this background check, Equiserve removed the plaintiff. He sued under Title VII. The court granted defendants' motion for summary judgment on the disparate impact claim, holding that Ramos did not satisfy his *prima facie* burden because he claimed only that his release from EquiServe was discriminatory. He failed to show "that conducting background checks has a discriminatory impact on a large number of minorities seeking employment." *Id.* at 10.

- b. In *Clinkscale v. City of Philadelphia*, Civ. A. No. 97-9644, 1998 U.S. Dist. LEXIS 9644 (E.D. Pa. June 16, 1998), the plaintiff, an African-American, unsuccessfully applied for admission to the Philadelphia Police Academy. He asserted that he was rejected because of the Police Academy's policy of excluding applicants who have a prior arrest history, regardless of whether they were convicted. He sued under Title VII, 42 U.S.C. § 1983 and various state antidiscrimination laws. In concluding that the defendant's policy was acceptable, the court focused on the specific nature of the particular, safety-sensitive job at issue. As it explained, "[e]ven an unjustified arrest may be indicative of character traits that would be undesirable in a police officer, such as quick temper, poor attitude or argumentativeness." *Id.* at *4. Ultimately, because the hiring of law enforcement personnel implicates "serious public safety concerns," the defendant's policy was enforceable. *Id.* at *4-5.

3. Representative cases from other Circuits

- a. Northern District of Illinois. In *Watkins v. City of Chicago*, 73 F. Supp. 2d 944 (N.D. Ill. 1999), the plaintiff, an African-American with a prior arrest history, unsuccessfully applied for a position as a police officer with the Chicago Police Department. Plaintiff asserted that her application was rejected based on her race in violation of Title VII because of Chicago's policy of excluding applicants with an arrest record. The court granted defendant's motion for summary judgment, concluding that the plaintiff failed to demonstrate that the policy in question caused the exclusion of applicants because of their race. Rather than focusing on general statistical evidence that African-Americans have higher arrest rates than Caucasians in the general population, the court rested its dismissal on plaintiff's failure to show "that there was any exclusion of applicants or any observed disparities" in the Chicago police department. *Id.* at 949. Absent evidence that there was any racial exclusion within the department itself, plaintiff could not

demonstrate that the policy had a disparate impact on African-Americans.

- b. Eastern District of Wisconsin. As in *Watkins*, the court in *Matthews v. Runyon*, 860 F. Supp. 1347 (E.D. Wis. 1994) dismissed plaintiff's disparate impact discrimination claim because he failed to establish causation. There, plaintiff asserted that he was not hired by the United States Postal Service because of its policy regarding the treatment of pending criminal charges. When plaintiff applied, he had a pending misdemeanor charge of carrying a concealed weapon and a pending felony charge of endangering safety by use of a dangerous weapon. While the plaintiff relied on regional arrest rates for African-Americans and Caucasians, the court concluded that this statistical evidence was insufficient because it did not show that nonwhites were disproportionately represented as mail handlers. Because plaintiff wholly failed to offer evidence regarding any racial disparity among mail handlers, the court dismissed his disparate impact claim. *Id.* at 1357. In addition, the plaintiff failed to demonstrate that any employment practice caused a disparate impact. *Id.*

IV. ALTERNATIVE THEORY OF RECOVERY – DISPARATE TREATMENT

A. Analytical Framework: Disparate Treatment Discrimination

1. To state a *prima facie* case of discrimination under a disparate treatment theory, a plaintiff must show that: (1) he belongs to a protected group; (2) he was qualified for the position; (3) he suffered an adverse employment action; and (4) the circumstances of the adverse employment action create an inference of discrimination. *Sarullo v. United States Postal Serv.*, 352 F.3d 789, 797 (3d Cir. 2003) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973); *Pivrotto v. Innovative Sys., Inc.*, 191 F.3d 344, 348 n.1, 352, 356 (3d Cir. 1999)), *cert. denied*, 541 U.S. 1064 (2004).
2. If a plaintiff succeeds in establishing a *prima facie* case, the burden of production shifts to the employer to articulate a legitimate, nondiscriminatory reason for its employment decision. *See Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981). A satisfactory explanation dispels the inference of discrimination arising from the complainant's initial evidence. *See id.* at 255.
3. If the employer meets this burden, the burden of production then shifts back to the employee to show that the employer's stated reasons are pretextual and not worthy of credence. At all times, the employee retains the burden of persuading the trier of fact that race was a determinative

factor in the employer's decision to take an adverse employment action against her. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

B. Application of Framework in Selected Cases

A disparate treatment claim arising from the use of criminal history information is less frequent and appears to be less successful. The plaintiff has a relatively easy *prima facie* burden of production. In defending against a disparate treatment claim, an employer should seek to establish a legitimate, nondiscriminatory reason for its treatment of an employee that is consistent and only partially based on the employee's prior criminal history. As with disparate treatment claims generally, however, his ability to prevail often will depend on whether he can show that the employer acted pretextually.

1. In *Matthews v. Runyon*, the plaintiff challenged the United States Postal Service's ("USPS") failure to hire him as a mail handler. Defendant relied on five primary reasons for not hiring the plaintiff: (a) he had more criminal convictions than other applicants; (b) he had a pending felony charge when he applied; (c) his employment history was poor; (d) defendant was concerned about protecting the mail; and (e) defendant was concerned about protecting other USPS employees. 860 F. Supp. at 1359. The court concluded that this series of independently valid reasons for adverse employment action "overwhelmingly state valid nondiscriminatory reasons" for not hiring the applicant. *Id.* The court concluded that there was no evidence of pretext; the handbook was followed and no impermissible factors were considered.
2. In *Ramos*, where EquiServe removed the plaintiff from its job site as a temporary employee because of his arrest history, the plaintiff raised disparate treatment claims in addition to his disparate impact theory of recovery. In reviewing the merits of this claim, the court dismissed it because, in addition to failing to satisfy his *prima facie* burden of production, plaintiff could not demonstrate pretext. The court noted that Ramos submitted nothing to show that EquiServe's explanation for removing him was pretextual, which is likely because "there is no evidence suggesting that Ramos' removal was based on any other reason other than the positive background check." Mem. op. at 13.
3. In contrast, the defendant employer in *Smith v. American Service Co. of Atlanta*, 611 F. Supp. 321 (N.D. Ga. 1984), *aff'd in part and rev'd in part*, 796 F.2d 1430 (11th Cir. 1986), proffered inconsistent reasons for its failure to hire an applicant. There, the plaintiff, an African-American, applied for a receptionist position with American Service Company of Atlanta. As part of that application process, the defendant required the applicant to undergo a polygraph examination, which showed that she was deceptive regarding her arrest record. Plaintiff was not hired and subsequently sued the company under Title VII and 42 U.S.C. § 1981.

The defendant never clearly articulated why it selected a Caucasian employee over the plaintiff. Instead, it repeatedly changed the stated justification for its decision not to hire the plaintiff. As a result, the court concluded that the employer failed to satisfy its burden of showing that it acted for a legitimate, nondiscriminatory reason. *Id.* at 328. Further, the court held that the inconsistent reasons were belied by the record and determined that the employer acted pretextually. *Id.*

V. ALTERNATIVE THEORY OF RECOVERY – § 1983

Individuals seek to sue governmental entities for violation of their civil rights by government employees who were not properly screened by a background check at the time of hire and later took improper actions against them.

A. Analytical Framework: 42 U.S.C. § 1983

1. Under § 1983:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable in an action at law, suit in equity, or other proceeding for redress”

42 U.S.C. § 1983 (2000). To prevail on a § 1983 claim, a plaintiff must establish that (a) the conduct complained of was committed by a person acting under color of state law; and (b) the conduct complained of deprived the plaintiff’s rights, privileges or immunities under the law or Constitution of the United States. *Kost v. Kozakiewicz*, 1 F.3d 176, 184 (3d Cir. 1993). While a municipality may be held liable under § 1983, it cannot be held liable based on a theory of *respondeat superior* liability. *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 691 (1978). Instead, a plaintiff must identify a specific policy or custom that proximately caused the violation of plaintiff’s protected rights. *Berg v. County of Allegheny*, 219 F.3d 261, 275 (3d Cir. 2000). If the policy or custom at issue is facially valid, “a plaintiff must establish causation by demonstrating that the defendant’s action ‘was taken with deliberate indifference to its known or obvious consequences. A showing of simple or heightened negligence will not suffice.’” *Bornstad v. Honey Brook Twp.*, Civ. A. No. 03-CV-3822, 2005 U.S. Dist. LEXIS 19573, at *75 (E.D. Pa. Sept. 9, 2005) (quoting *Berg*, 219 F.3d at 276).

2. It is difficult for a plaintiff to establish a *Monell* claim based on a single hiring decision. In *Board of County Commissioners of Bryan County v. Brown*, 520 U.S. 397 (1997), a reserve deputy physically restrained the

plaintiff during the course of a traffic stop. Plaintiff asserted that Bryan County violated § 1983 because it did not adequately screen the reserve deputy's background, which included guilty pleas for several misdemeanors, including assault and battery, resisting arrest and public drunkenness. The Supreme Court concluded that plaintiff's failure to screen claim failed. It explained that "a court must carefully test the link between the policymaker's inadequate decision and the particular injury alleged." *Id.* at 410. In discussing the plaintiff's burden of establishing deliberate indifference, the Court noted that "only where adequate scrutiny of an applicant's background would lead a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire the applicant would be a deprivation of a third party's federally protected right can the official's failure to adequately scrutinize the applicant's background constitute deliberate indifference." *Id.* at 411.

3. In *Morris v. Crawford County*, 299 F.3d 919 (8th Cir. 2002), the court reviewed *Bryan County* and its progeny, emphasizing the difficulties facing a plaintiff who seeks to establish a *Monell* claim based on a hiring decision. The court explained that "[t]he prior complaints in an applicant's background must be nearly identical to the type of officer misconduct that caused the constitutional deprivation allegedly suffered by a plaintiff. Courts routinely reject attempts to satisfy *Bryan County's* causal connection requirement where none of the prior complaints in an applicant's background were of the same or similar type of officer misconduct that caused the plaintiff's injury." *Id.* at 923. There, the court affirmed the district court's dismissal of plaintiff's § 1983 hiring claim.

B. Application of Framework in Selected Cases

1. Eastern District of Pennsylvania. In *Maslow v. Evans*, No. 01-CV-3636, 2003 U.S. Dist. LEXIS 20316 (E.D. Pa. Nov. 7, 2003), three female plaintiffs asserted that various Pennsylvania State Police ("PSP") defendants, including Trooper Michael K. Evans, violated § 1983 because they improperly screened Evans, who then engaged in sexual misconduct toward them.
 - a. When Evans applied for employment, the PSP conducted a background investigation. During this investigation, the investigating trooper discovered that, while Evans was a city police officer, a former supervisor alleged that Evans made racist remarks and was overly aggressive. The investigating officer also learned that Evans had sexually harassed a female at a Police Training Institute and that an Allentown police officer said that Evans was "f---ed up sexually." *Id.* at *12. Based upon this information, the investigating officer did not believe that Evans was an appropriate candidate for a PSP trooper position. However, the PSP had a procedure which prevented the hiring

committee from considering the investigating trooper's opinions. Further, the background report that was given to the PSP Hiring Committee could only include substantiated allegations. The investigating officer was unable to corroborate the comment made by the Allentown police officer. *Id.*

- b. The court dismissed the claim under § 1983, explaining that “[w]hile the background investigation revealed unsubstantiated negative allegations about Evans’ sexual history, Plaintiffs have failed to show that Evans’ subsequent sexual misconduct perpetrated upon [the plaintiffs] was a plainly obvious consequence. *Id.* at *42 (internal quotation omitted). The court held that, while the PSP investigating and hiring policies and procedures were “clearly deficient,” *id.*, it was not clear that improved policies and procedures would have prevented Evans’ conduct. As a result, these policies and procedures did not show that the PSP defendants acted with deliberate indifference.
2. First Circuit. In *Young v. City of Providence*, 404 F.3d 4 (1st Cir. 2005), the First Circuit recognized that it is especially difficult for a plaintiff to prevail on a hiring claim because a plaintiff must show that the hiring decision caused the deprivation and that the hiring decision reflected deliberate indifference to the right at issue. *Id.* at 30.
 - a. There, Providence Police Officer Michael Solitro and another police officer shot and killed Cornel Young, an off-duty police officer. Plaintiff, as administratrix of Young’s estate, asserted that Providence violated § 1983 because it failed to conduct an adequate background investigation of Solitro, which should have revealed a conviction for assault.
 - b. The court affirmed the district court’s dismissal of the plaintiff’s deficient hiring claim because the background investigation procedures were not sufficiently flawed to constitute deliberate indifference. Providence conducted a background investigation that revealed the prior conduct, which was considered by the hiring board. Moreover, there was insufficient evidence of a hiring pattern that constituted deliberate indifference. The court opined that “[a] pattern of previous bad hiring decisions leading to constitutional violations (perhaps of the same type as the one at issue) would likely be necessary to get one outside the ‘single incident’ analysis in *Brown*.” *Id.* at 31.
 3. District of Minnesota. In *Jones v. Stoneking*, Civ. No. 02-4131 (JNE/RLE), 2005 U.S. Dist. LEXIS 3096 (D. Minn. Feb. 24, 2005), the court denied the defendants’ motion for summary judgment on plaintiff’s inadequate hiring claim. Robert James Stoneking, a Cass County civilian

transport officer, had sexual contact with a female prisoner he transported. This woman sued under § 1983, alleging that Cass County failed to conduct an adequate background check on Stoneking, which would have revealed prior instances of sexual misconduct. The Cass County sheriff who hired Stoneking did not contact any of his prior employers. Given this record, the court held that a reasonable jury could conclude that the sheriff acted with deliberate indifference and that such indifference caused plaintiff's injuries. *Id.* at *12.

VI. FCRA ISSUES

A. Analytical Framework: FCRA

1. The FCRA allows an entity to obtain information regarding an individual's "credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living" if the information is going to be used to determine an individual's "eligibility for . . . employment purposes." 15 U.S.C.A. §§ 1681a(d)(1), 1681a(d)(1)(B). FCRA defines "employment purposes" as "evaluating an [individual] for employment, promotion, reassignment or retention as an employee." *Id.* § 1681a(h).
2. To comply with FCRA, an employer must obtain written authorization from the individual for whom it seeks a report. *Id.* § 1681b(b)(2)(A). In connection with the authorization, the employer must give a clear and conspicuous disclosure stating that the employer may obtain a report on the individual for employment purposes. This disclosure may be on the same document as the actual authorization (and it is probably advisable that the two are on the same piece of paper). *Id.*
3. If the employer decides to take adverse action based upon the report it receives (i.e., to terminate employment or not to hire an applicant), the employer must give the individual a copy of the report it receives from the outside agency and a written description of the rights of the consumer under FCRA. *Id.* § 1681b(b)(3)(A).
4. Statutory Liability
 - a. An employer, as a user of information, is liable under FCRA for negligently or willfully failing to comply with its provisions. *Id.* §§ 1681o, 1681n.
 - b. However, FCRA also limits the liability of an employer as a user of information. *Id.* § 1681h(e). A consumer may not bring an action for defamation, invasion of privacy or negligence with respect to the reporting of information against a user of information (i) based on the information disclosed or (ii) based on information disclosed by the user to a prospective or current

employee against whom adverse action is taken as a result of the report. This provision does not apply to false information furnished with malice or willful intent to injure the consumer.

B. Application of Framework in Selected Cases

1. Third Circuit. In *Kelchner v. Sycamore Manor Health Center*, 135 F. App'x 499 (3d Cir. 2005), Presbyterian Homes, Inc. ("PHI"), the corporate parent of Sycamore Manor Health Center, a nursing home, required all employees to sign an Annual Statement of Personnel Policy Understanding, which was a blanket authorization to permit defendants to obtain employee credit reports in the future. Kelchner, a Sycamore employee, was discharged when she refused to sign the authorization. The Third Circuit affirmed the district court's grant of summary judgment to defendants, holding that PHI's request for a waiver comported with the requirements of FCRA.
 - a. As an initial matter, the court concluded that PHI identified several potential needs for obtaining a report which qualified as valid employment purposes. *Id.* at 501-02. The company asserted that it required access to employee credit reports "to investigate theft, fraud and other dishonesty if and when it arises." *Id.* at 501. The Third Circuit agreed with PHI that "its ability effectively to investigate allegations pertaining to an employee would be substantially impaired if it had to wait until the investigation was underway before it could obtain authorization" from the employee. *Id.*
 - b. The court also explained that FCRA did not prohibit an employer from obtaining a blanket authorization from an employee regarding access to her credit report. Rather, "the plain language of the statute authorizes the employer to obtain an employee's written authorization at 'any time' during the employment relationship." *Id.* at 502 (citing 15 U.S.C. § 1681b(b)(2)(A)(i)).
 - c. Finally, the court held that FCRA does not prohibit an employer from discharging an at-will employee if she does not permit her employer to obtain her credit report. *Id.*
2. Southern District of New York. In *Obabueki v. International Business Machines Corp.*, 145 F. Supp. 2d 371 (S.D.N.Y. 2001), the plaintiff applied for a marketing manager position with defendant IBM. In completing the application form, plaintiff failed to disclose that he had been arrested and convicted of fraud in obtaining welfare aid. After the company extended a conditional offer of employment to him, it conducted a background check which revealed the prior arrest and conviction. At

that point, IBM withdrew the conditional offer because the applicant lied on his application.

- a. The plaintiff asserted that IBM violated FCRA because it withdrew the conditional offer of employment without allowing him to address his criminal history. The court dismissed this claim, concluding that an employer's "internal decision to rescind an offer is not an adverse action." *Id.* at 391. Internal discussions prior to notification of a formal decision cannot constitute an adverse action under FCRA. Instead, plaintiff only suffered an adverse effect when IBM formally withdrew the conditional offer of employment in a letter to him.
- b. The record established that the plaintiff was informed by letter that it intended not to employ him based in part on information contained in the credit report, and attached a copy of the report and a written description of his rights under the FCRA. Five days later, when the plaintiff was unable to present additional evidence concerning the dismissal of his conviction for a reconsideration of this decision, he was informed that the offer was formally withdrawn. *Id.* at 377-78.

VII. STATE APPROACHES TO CRIMINAL BACKGROUND CHECKS

A. Pennsylvania Law

1. Statutory restrictions

- a. Pennsylvania requires that certain kinds of employers, such as schools, obtain criminal history record information regarding prospective employees. *See* 24 Pa. Cons. Stat. Ann. § 1-111 (2005) (background check requirements for public and private schools); 53 Pa. Cons. Stat. Ann. § 752.3 (2005) (individual with felony or serious misdemeanor conviction may not be a law enforcement officer); *see also* 3A Empl. Prac. Guide (CCH) ¶ 39-23,600, at 9581, through ¶ 39-23,601.04, at 9588 (2004) (summary of Pennsylvania law regarding background checks).
- b. Despite these specific statutory requirements, Pennsylvania also restricts the extent to which employers generally may rely on a job applicant's criminal history in making hiring decisions.
 - (1) Under 18 Pa. Cons. Stat. Ann. § 9125 (2005), an employer may only consider an employee's felony and misdemeanor convictions "to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied." *Id.* § 9125(b). The employer must provide written notice to the applicant if it decides not to

hire the applicant based on his criminal history record information. *Id.* § 9125(c).

- (2) In *Cisco v. United Parcel Service, Inc.*, 476 A.2d 1340 (Pa. Super. Ct. 1984), Joseph Cisco, an employee of defendant United Parcel Service (“UPS”), was charged with theft and trespass as a result of a specific delivery. He asserted that UPS forced him to resign because of the pending charges. After he was acquitted, he unsuccessfully sought reinstatement several times. In reviewing the applicability of Section 9125, the Superior Court of Pennsylvania suggested in *dicta* that the statute may preclude an employer from considering any arrest history in making individual hiring decisions. However, the court summarily explained that the statute did not apply because Cisco was arrested for conduct engaged in during the course of his employment, and defendant was a private company that made the employment decisions at issue. Finally, the court emphasized that “the reputation and business activity” of defendant “were jeopardized by a mere arrest.” *Id.* at 1344.
- (3) An Eastern District of Pennsylvania court recently imposed an important limitation on the scope of liability under the Act. In *Foxworth v. Pennsylvania State Police*, Civ. A. No. 03-CV-6795, 2005 U.S. Dist. LEXIS 33639 (E.D. Pa. Dec. 19, 2005), the plaintiff applied to be a cadet with the Pennsylvania State Police and stated on his employment application that he committed a theft when he was 18. 2005 U.S. Dist. LEXIS 30136, at *4-5. This offense had been expunged from plaintiff’s record and was not revealed when PSP obtained his criminal history. As a result of the applicant’s self-disclosure, he was disqualified as a cadet. The court held that Section 9125 did not apply because the defined term “criminal history record information” does not include information that is “voluntarily provided” by an applicant. 2005 U.S. Dist. LEXIS 33639, at *5.

2. Associated common law causes of action

a. Negligent hiring, supervision and retention

- (1) Failure to obtain criminal background information about an employee who later engages in inappropriate conduct may lead to claims under common law. An individual who is harmed by an employee’s conduct may assert a claim against the employer for negligently hiring, supervising and retaining the employee.

- (a) Such a claim arises under Pennsylvania tort law, as well as Restatement (Second) of Torts § 317 and the Restatement (Second) of Agency § 213. As the Superior Court of Pennsylvania explained in *R.A. v. First Church of Christ*, 748 A.2d 692 (Pa. Super. Ct. 2000), “these Restatement sections do no more than to restate the existing tort law of Pennsylvania.” *Id.* at 697; *see also Hutchison v. Luddy*, 870 A.2d 766, 773 (Pa. 2005) (discussing recoverable damages under Restatement (Second) of Torts § 317 claim); *Brezenski v. World Truck Transfer, Inc.*, 755 A.2d 36, 40-42 (Pa. Super. Ct. 2000) (discussing Restatement (Second) of Torts § 317 and Restatement (Second) of Agency § 213 in the context of a negligent hiring and retention claim).
- (b) An employer also may be liable for acts which former employees were able to commit only because of their access to certain information during the course of their employment. In *Coath v. Jones*, 419 A.2d 1249 (Pa. Super. Ct. 1980), a former employee of defendant Jones Electronic Service Co. entered plaintiff’s home by misrepresenting that he was there on behalf of the company. He had, in fact, been at that residence before as a Jones Electronic Service Co. employee. Once inside the home, the former employee sexually assaulted the plaintiff. The court concluded that the defendant may have had an obligation to warn its customers that it no longer employed the individual if the defendant should have known that the ex-employee had an inclination to assault women. *Id.* at 1250-51.
- (2) Federal courts similarly exercise pendent jurisdiction over negligent hiring, supervision and retention claims under Pennsylvania law based, for example, on an employer’s failure to obtain criminal record information about an applicant.
- (a) In *Vellafane v. Foundations Behavioral Health*, Civ. A. No. 03-1019, 2005 U.S. Dist. LEXIS 11283 (E.D. Pa. June 8, 2005), a patient at a mental health facility was sexually assaulted by an employee of the defendant. Defendant argued that it could not have known that the employee had any propensity

to engage in sexual misconduct, and that the defendant employer determined that the employee had no criminal record or other known problems when it hired him. While the court acknowledged that a pure negligent hiring claim may have failed given these facts, it denied defendant's motion for judgment on the pleadings because "there is sufficient evidence for a finder of fact to conclude that [defendant] failed to train and supervise [the employee] properly." *Id.* at *3.

- (b) In *Barry v. Manor Care, Inc.*, Civ. A. No. 97-5883, 1999 U.S. Dist. LEXIS 5928, at *8-9 (E.D. Pa. Apr. 29, 1999), the court denied defendant's motion for summary judgment on plaintiff's negligent hiring, training and retention claim. Plaintiff was admitted to a rehabilitation center which was operated by the defendant to recover from a fractured hip. While there, Ronelle Custis, an employee at the facility, struck the plaintiff on her temple. During Custis' prior employment at other similar facilities, she was disciplined for striking individuals. She also was arrested and charged with assaulting an elderly patient at a nursing home where she worked. In reviewing her performance, the defendant noted concern about Custis' treatment of residents. This evidence of prior conduct was sufficient for plaintiff to proceed with her claim. *Id.* at *8-9.

b. Defamation

- (1) Defamation claims may result from statements made in connection with the reasons for terminating someone in connection with a prior criminal conviction. The elements of a defamation claim under Pennsylvania law are:
 - (a) the defamatory character of the communication;
 - (b) publication to the defendant;
 - (c) application to the plaintiff;
 - (d) understanding by the recipient of its defamatory meaning;
 - (e) understanding by the recipient of it as intended to be applied to the plaintiff;

- (f) special harm to the plaintiff; and
 - (g) abuse of a conditionally privileged occasion. 42 Pa. Cons. Stat. Ann. § 8343 (2005); *see also Miketic v. Baron*, 675 A.2d 324, 327 (Pa. Super. Ct. 1996).
- (2) Under Pennsylvania defamation law, a defendant may assert a conditional, or common interest, privilege to a defamation claim. This conditional privilege exists “when (1) an interest of the publisher of the defamatory statement is implicated; (2) an interest of the recipient of the defamatory statement or that of a third party is implicated; or (3) a recognized public interest is implicated.” *Easton v. Bristol-Myers Squibb Co.*, 289 F. Supp. 2d 604, 613 (E.D. Pa. 2003) (citing *Miketic*, 675 A.2d at 327). Once a statement is subject to this conditional privilege, the plaintiff must show that the defendant abused the privilege. *Miketic*, 675 A.2d at 329.
- (3) For example, in *Easton*, the court applied this conditional privilege to bar a defamation claim which arose from statements made about plaintiff’s conviction record. There, several managers met with the plaintiff employee to allow her to explain her prior felony conviction. Because “only people whose interests were implicated were present,” the court concluded that any statements made were subject to the conditional privilege. 289 F. Supp. 2d at 613 n.8. The court explained that this privilege “is regularly applied to such intra-organizational communications concerning employees.” *Id.*

B. Delaware Law

1. Statutory restrictions. Delaware imposes extensive pre-employment screening requirements on certain kinds of employers, such as public schools and health care facilities. *See* 3 Empl. Prac. Guide (CCH) ¶ 8-23,600, at 8321, through ¶ 8-23,650.51, at 8323-27 (2004) (summary of Delaware law regarding background checks). There is no broad-based statute applying more generally to employers. *Id.*
2. Negligent hiring, supervision and retention
 - a. Like Pennsylvania, Delaware recognizes a cause of action for an employer’s negligence in hiring, supervising and retaining its employees. For example, in *A.R. Anthony & Sons v. All-State Investigation Security Agency, Inc.*, Civ. A. No. 82C-AP-18, 1983 Del. Super. LEXIS 647 (Del. Super. Ct. Sept. 27, 1983), defendant

All-State hired John Davis as a security guard without talking extensively with his employment references, several of whom were related to him, and without contacting any of his former employers. Less than a week after he was hired, Davis set fire to one of the buildings he was ostensibly guarding. Immediately prior to his employment at All-State, Davis worked at a fire company where he was suspected of starting fires. Even though a background check did not contain any criminal record information, the Superior Court of Delaware denied the defendant's motion for summary judgment on plaintiff's negligent hiring claim. *Id.* at *7. The court recognized that "[a]n employer may be negligent because he has reason to know or in the exercise of reasonable care should have known that an employee has an undue tendency to cause harm." *Id.* at *5. In concluding that summary judgment was inappropriate, the court heavily relied on Restatement (Second) of Agency § 213. *Id.* at *5-6.

- b. In *Knerr v. Gilpin, Van Trump & Montgomery, Inc.*, C.A. No. 85C-JL-71, 1988 Del. Super. LEXIS 138 (Del. Super. Ct. Apr. 8, 1988), a resident of an apartment complex was assaulted and robbed by Herman Thomas, who was hired by the defendant as a newspaper carrier for the building. The individual who hired Thomas knew that he had a theft problem. The court denied defendant's motion for summary judgment on the negligent hiring, supervision and retention claim based, in part, on a disputed issue of fact regarding whether the employee criminal history made the subsequent conduct foreseeable. *Id.* at *13. The court accepted without discussion the plaintiff's argument that foreseeability based on criminal history is a jury question.

C. New Jersey Law

1. Statutory restrictions. Like Delaware, New Jersey imposes extensive pre-employment screening requirements on certain kinds of employers, such as schools and health care facilities. *See* 3A Empl. Prac. Guide (CCH) ¶ 31-23,600, at 9185-28, through ¶ 31-23,651.08, at 9186 (2005) (summary of New Jersey law regarding background checks). New Jersey also imposes several requirements on employers that seek to use criminal history record information to reject a job applicant or to terminate an employee. N.J. Admin. Code 13:59-1.6 (2006). In such a situation, an employer must provide the individual with adequate notice and a reasonable period of time to confirm or deny the accuracy of any information contained in the criminal history record. *Id.*
2. Negligent hiring and retention
 - a. In *Di Cosala v. Kay*, 450 A.2d 508 (N.J. 1982), the Supreme Court

of New Jersey recognized the tort of negligent hiring or retention of an employee. As a result, an employer may be liable for injuries proximately caused to third parties because of that negligence. To state such a claim, a plaintiff must establish that the employer knew or had reason to know of the “particular unfitness, incompetence or dangerous attributes of the employee and could reasonably have foreseen that such qualities created a risk of harm to other persons.” *Id.* at 516. A plaintiff also must show that the employer’s negligence proximately caused him harm. *Id.*

b. More recently, the Superior Court of New Jersey determined in *Lingar v. Live-In Companions, Inc.*, 692 A.2d 61 (N.J. Super. Ct. 1997), that the trial court erred in dismissing a plaintiff’s negligent hiring claim. There, Kenneth Mack, an employee of defendant Live-In Companions, was expected to care for a disabled individual while his wife was away. Instead, Mack abandoned the individual and stole several items from their home.

(1) Defendant employer had a cursory pre-employment screening process. It conducted telephone and in person interviews of applicants, but generally undertook no further investigation. While Mack stated on the application that he had never been convicted of a felony in the prior seven years, he actually had been convicted of various offenses, including possession and distribution of cocaine, shoplifting, trespassing, and receiving stolen property. Because defendant did not conduct a background check, it did not learn about this prior conduct.

(2) The court concluded that a jury could certainly determine that Mack’s employer failed to make an adequate inquiry before hiring him. In discussing an employer’s pre-employment screening obligations, the court noted that employer liability “is not to be predicated solely upon failure to investigate the criminal history of an applicant.” *Id.* at 66. Rather, a court should consider the totality of the circumstances surrounding the hiring decision, including consideration of the work performed.

VIII. DEVELOPING APPROPRIATE EMPLOYMENT POLICIES AND PRACTICES REGARDING CRIMINAL HISTORY INFORMATION

A. An employer may properly condition employment on a background investigation. (*See ATM Corp. of Am. v. Unemployment Comp. Bd. of Review*, No. 1560 C.D. 2005, 2006 Pa. Commw. LEXIS 21, at *24-25 (Pa. Commw. Ct. Jan. 23, 2006) (employer acted properly when it discharged an employee for insubordination

because she declined to consent to a background check); *see also id.* at *22 (“It is beyond peradventure that Employer has a legitimate need to protect the confidential information of its customers to which accounting department employees, including Claimant, have daily access. A background check on these employees is a reasonable way to protect that confidential information, particularly where demanded by Employer’s financial partners and customers.”).

- B. Although there are risks associated with conducting the background investigation, they may be minor when compared with potential liability for negligent hiring or retention claims.
- C. Risks in conducting the background investigation can be limited:
 - 1. An employer should conduct a narrow inquiry into prior conduct.
 - 2. The investigation should target information that is job related, relatively recent and consistent with business necessity.
 - 3. Individual employment decisions should be made carefully, after examining why the criminal history information is related to the job at issue and requires disqualification of the candidate, taking into consideration the particular type of business in which the employer is engaged.
 - 4. The employer should document the legitimate reasons for any adverse employment action that it takes. Such documentation supports a more effective defense to any discrimination claim.
 - 5. All information contained in the background check should be maintained in as confidential a manner as possible.
 - 6. The information should be used only in a manner consistent with the law of the particular jurisdiction.
- D. If a third party is utilized to conduct the background checks, the protections set forth in the FCRA must be provided. Complying with these protections for the applicants also protects an employer if an adverse decision is made.
- E. Employers should notify prospective and current employees that they are expected to provide accurate information in response to specific questions posed to them by the employer and that providing false information can lead to rejection or termination of employment.

Workplace Problems and Screening Solutions Table

Potential Workplace Problems	Service Intervention	Features & Benefits
Identity Theft & Employment Eligibility (Potential for terrorism, theft, fraud, violence & negative publicity)	Social Security Number (SSN) Trace	<ul style="list-style-type: none"> - Fast, basic screen; first line of defense. - Match submitted name to SSN. - Identify state and date of issue for SSN. - Provides prior addresses, employers & names. - Pinpoint suspicious applications and someone with something to hide. - Determines where to search for criminal records.
Work Site Security (Potential for theft & violence)	Photo Identification Badges	<ul style="list-style-type: none"> - Customized photo badges. - Use badges to supplement controlled-entry program. - Typically same day turnaround.
Undisclosed Criminal Record (Potential for theft, fraud, violence, harassment & negative publicity)	Criminal Background Checks	<ul style="list-style-type: none"> - Protects employer from negligent hiring exposure and can reduce threat of workplace violence, theft and operations disruption. - Applicant's failure to disclose conviction can be a basis not to hire. - Maximum protection should include all counties lived, worked or schools attended in past 7 years. - Search county, state, federal and multi-jurisdictional court records. - Research felony and misdemeanor convictions, and pending cases, usually back 7 years. - Serious offenses can be classified as misdemeanors. - Comprehensive reporting.
Cultural Fit / Quality of Work (Attendance, punctuality, authority, drug use, violence and ability to do the job)	Integrity and Knowledge Testing	<ul style="list-style-type: none"> - Additional data for making employment decisions, and aligning candidates with appropriate jobs. - A job applicant survey can uncover behavioral issues in such areas as attendance, punctuality, substance abuse, theft, violence, customer service & sales. - General knowledge and cognitive skills testing is available and useful in determining an applicant's ability to learn.
	Employment Reference	<ul style="list-style-type: none"> - Develops a realistic assessment of a candidate from a former employer. - Promotes better fit, confirms the hiring opinion, and protects expensive hiring investment.

<p>Drug Addiction</p> <p>(Potential for theft, absenteeism, punctuality, accidents, injuries, high insurance rates & excessive turnover)</p>	<p>Drug Screening</p>	<ul style="list-style-type: none"> - Effective in deterring drug users from applying to your company. - Uncover recent drug usage. - An effective tool for moderating the behavior of current employees who may be substance abusers. - Comprehensive-screen for up to 5 categories of illegal and controlled substances. - Highly accurate, with low false-positive rate. - Fast results returned in same day.
<p>Application Fraud</p> <p>(Unqualified staff)</p>	<p>Employment Verification</p> <p>Education Verification</p>	<ul style="list-style-type: none"> - Verify applicant-submitted work dates, title, and reason for leaving. - Helps eliminate any unexplained gaps in employment. - Determines whether an applicant was incarcerated for a serious offense. - Receive qualitative report. - Data shows 30% of all job applicants falsify educational background. - Verify schools attended, dates, graduation and degree obtained. - Confirms education and ability to do job.
<p>Licensing Issues</p> <p>(Unqualified staff)</p>	<p>Professional License Verification</p>	<ul style="list-style-type: none"> - Confirm whether applicant has the required credentials or licenses. - Verify current license status. - Discover suspensions & violations.
<p>Financial Distress</p> <p>(Potential for fraud, theft and unethical behavior)</p>	<p>Credit History</p>	<ul style="list-style-type: none"> - Helps determine applicants suitable for positions handling cash or the exercise of financial discretion. - Should be ordered only for relevant positions. - Discover worker solvency and fiscal responsibility. - Includes tax liens, judgments, and civil suits.
<p>Driving-Related Convictions</p> <p>(Motor vehicle accidents, injuries, high insurance rates & negative publicity)</p>	<p>Motor Vehicle Records (MVR) Check</p>	<ul style="list-style-type: none"> - Helps verify identity. - Uncover restrictions, suspension & DWIs. - Provides insight into applicant's level of responsibility. - Consider applicant's commitments to appear in court or pay fines, and any drug/alcohol problem. - "Driving for work" is very broadly defined in most jurisdictions and is not limited to driving positions.

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12 Steps to an Effective Background Screening Process

1. Implement a written screening policy

Effective background screening starts with a policy that requires all hires and employees to go through the process. The policy should be communicated to all employees – current and prospective. Since many organizations recruit from employee referrals, a policy establishes clear expectations of which past and current behaviors are acceptable for employment purposes.

2. Create job descriptions for all positions

Properly written job descriptions can be an effective tool for outlining key responsibilities, expectations, duties and competencies of positions. They are essential to establishing what competencies and behaviors are needed for effective work performance and can help determine what types of past behaviors (e.g., criminal history or poor driving record) would be unacceptable for specific jobs.

3. Conduct telephone screens on all job candidates

Telephone screens help to determine candidate's interest and motivation for applying to your company. They can also be effective in determining which candidates to interview by discovering their salary requirements, willingness to relocate, consent to a background check or drug test, approximate start dates, and who possess the minimum technical requirements.

4. Require all applicants to complete job applications

Applications typically require applicants to provide accurate and truthful disclosure of such information as name, current and former addresses, references, current and former employers and any criminal convictions. Falsification by applicants can be grounds for immediate termination should a background check reveal that the information disclosed was inaccurate (e.g., citing a college degree that turns out to be false).

5. Obtain a completed consent/release form

This document is necessary for applicants to authorize the investigation of his/her background, and provides them notification of their rights under the Fair Credit Reporting Act (FCRA).

6. Evaluate the job application and resume (if applicable)

Carefully reviewing specific information such as coursework, schools attended, employers, volunteerism and other relevant information can be instrumental in determining whether applicants possess the basic requirements for the position. Take the necessary time to carefully complete this process, taking note of any unexplained gaps in employment or sudden job/career changes.

7. Interview applicants

Use a structured or systematic approach to interview applicants, which will save valuable interviewing time and improve the accuracy and consistency of selecting the right applicants for employment. Data shows that interviewers who rely on "Pet" questions and subjective criteria as the basis for employment decisions subject their organizations to higher costs due to turnover, bad hires, low productivity and legal claims and insurance. Interviewers should ask tough and legally permissible questions when appropriate that are related to specific job requirements.

8. Conduct a criminal background check

Due to lower cost, faster turnaround of results and technology efficiencies, background checks can be performed by reputable outside vendors on the final few candidates prior to extending employment offers. This provides many advantages to the employer. By verifying whether all final candidates have the appropriate backgrounds, the employer creates back-up candidates should the final candidate decline the employment offer. A basic pre-employment screen may include a social security number trace to verify an applicant's identity, a criminal background check in the local county of residence and verification of past employers. Typical results are available in 1 to 24 hours.

9. Provide applicants with an offer letter

An offer letter is an effective tool in confirming the basic conditions of the employment offer, such as start date, compensation & benefits, and hours of work. Typically, it clearly states the employment offer is contingent upon the satisfactory results of the background check, which may include the most recent employer, a drug test and professional references.

10. Conduct reference checks, drug screening and further background check (if needed)

Post-offer background investigations are typically more comprehensive and may include drug testing, professional reference checks, driving records research (if applicable), current employer and education verifications. The typical results for post-offer background checks are available in 1 to 3 business days.

11. Provide follow-up training and orientation to new hires

This is a very important, yet widely underutilized part of the process that will ensure that new employees are properly integrated into the organization. Basic training and orientation with new hires should include a review of the human resource policies and workplace expectations. New employees should provide written acknowledgement of their receipt and understanding of such policies as workplace harassment and violence prevention, confidentiality and grievance procedures.

12. Review results and provide continuous oversight of the screening program

An effective background screening program should improve the quality of employees hired over time and, in fact, lower employment-related costs. For example, implementing a drug testing program should discourage drug users from applying to your organization, and encourage current employees who may be recreational drug users to reduce or refrain from future usage. Identify and measure select human resource metrics (measures) over time, such as employee work performance ratings, turnover ratio, employee absences, promotions, worker compensation claims, and health insurance rates to determine whether the screening program is effective.