

EMPLOYEE BACKGROUND CHECKS AND STRATEGIC SCREENING

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I. SCOPE OF ARTICLE

This presentation will cover “EMPLOYEE BACKGROUND CHECKS.” An alternate title with equal validity, and how this program will be referred to throughout the presentation, is “EMPLOYEE BACKGROUND CHECKS AND STRATEGIC SCREENING.”

The outline on Employee Background Checks and Strategic Screening will cover the following:

- A. Discussion of Strategic Screening
- B. Determining Risk
- C. Screening Options
- D. Options for Consistent Interpretation of Results
- E. Contractors and Vendors – The Unseen Threat
- F. Overview of the Fair Credit Reporting Act (FCRA)

II. STRATEGIC SCREENING

In order for the human resources function in general, and the screening process specifically, to be considered an important part of the strategic program, the true return on investment (ROI) has to be understood.

Proactive Screening

Due to many well-publicized losses, the threat of lawsuits for negligent hiring, and even 9/11, we’ve come a long way from the time when “checking references” was the extent of our due diligence program. Still, it’s remarkable how frequently a basic reference and employment history check form the extent of the pre-employment screening program. In other cases, a perfunctory criminal background check may be conducted, but frequently only when the candidate is directly handling cash or other valuables or when government mandates require these checks.

Many human resources professionals will tell you that casting the appropriate net over where to search for criminal records is not an exact science. With more than 3,200 jurisdictions and 10,000 courthouses in the United States, the task of truly effective criminal background checks can be daunting and requires the budgetary support of the executive team. Unfortunately, the impact of a less than thorough or non-existent background check is equally daunting and can have a much larger impact on budgets, operations, and corporate reputation.

Why Strategic Screening?

Strategic Screening relates in large part to a broader, more comprehensive employment screening process that efficiently searches for the more typical personnel data as well as other more revealing information. Still, when discussing employment screening services, the emphasis is typically placed on the “how” of the process and not on the “why.” The “how” is populated with terms such as “Internet”, “fastest”, “cheapest”, as well as some more techie sounding phrases such as “electronic exchange,” “data mining,” and “ATS integrations.” Break it down to its component parts and the focus is predominantly on the process and technology, on the how, with precious little attention paid to the reasons for undertaking the screening process in the first place.

The How?

To be sure, technology (and the Internet) has made the screening process quicker, more efficient and less costly. Access to the comprehensive and customizable array of outsourced screening services is no longer limited to the traditional corporate client. Technology has now made the process more affordable and accessible for companies with semi-autonomous profit centers. This type of corporate environment, where the profit margins are narrower and the costs of losses potentially more critical truly showcase the benefit of a strategic approach to HR. Putting these risk management tools within reach of autonomous and semi-autonomous branches helps to protect thin profit margins.

Still, the real value of employment screening lies not so much in reduced costs involved in doing the screening but increased benefits to the company ordering the screening. Screening is part of a holistic approach to what can only be described as risk management.

The Why?

Why do we screen? We screen because there are people out there that we want to avoid inviting into our workplace. While most any business leader will tell you that his employees are among his greatest assets, the wrong employee(s) can be the company's greatest liability. They may bring with them to the job a fondness for malicious or criminal behavior, a deficiency in skills, a lack of commitment, or simply a misunderstanding of the job that they are hired to perform. Whatever it is, it inserts a "risk" that tends to become a drain on productivity, a burden on management's time, and, in the worst of situations, a financial and civil liability. And, whatever the outcome, it directly impacts a company's bottom line. Effective screening can help to filter out those individuals before the real costs begin to mount.

Checking the fit

A battery of legally permissible and highly effective competency tests can be conducted as part of the employment screening process to help ascertain which candidate best fits a job's requirements and the company's business culture. This includes tests for talent, cognitive skills, personality traits, and a candidate's capacity to grow. Such employment screening can reduce the costs incurred by poor employee retention.

The Payoff

Finally, what are the dollar benefits that this holistic, human capital risk management offers? What is the ROI the CEO so desperately wants to see? HR can make its case in the competitive budget process by citing verifiable statistics. The hard dollar benefit can be dramatic. For instance:

- A leading retail company reduced its "cash short" employee theft by over 50%
- A global call center reduced its turnover from 54% to 7% within 9 months
- A global IT company reduced its recruitment advertising 69%

Negligent Hiring

Executives and Risk Managers alike should do well to remember that more and more the business norm reflects increased use of pre-employment screening. If a loss occurs at your place of business, owners, shareholders and others have a right to question why a screening process was not in place. Additionally, if an act of violence or other problem occurs, fellow employees and/or customers have a strong case for negligent hiring if a reasonable effort to screen employees for prior criminal history is not made.

Even aside from concerns of loss and liability is a moral responsibility. A case in point is the August 27th shootings in Chicago. According to media reports, Salvador Tapia, a 36-year old former employee of Windy City Supply who had been fired six months earlier, illegally obtained a firearm – a .380 caliber semi-automatic – and allegedly returned to his former place of employment to extract revenge. He shot and killed six innocent employees, before police shot him dead.

When the surviving family members sue the company for negligence, as they are almost certain to do, their attorneys will point to several facts (as outlined in media reports):

- Tapia had a 14-year long criminal rap sheet
- Tapia had been arrested on suspicion of violent criminal acts at least 13 times prior to his employment
- Tapia's crimes included possession of a machine gun in 1989, armed theft, weapons possession (a separate incident), holding his own family captive at gunpoint, and an aggravated assault charge in 1996 wherein he threatened "I'll kill you." Additionally, his driver's license had been revoked due to numerous alcohol-related driving arrests

Tapia was hired despite his long criminal record, his long alcoholic record and his long violence record. In retrospect, Tapia was clearly not a wise employment candidate. Many psychologists may argue that no one can accurately predict who will or won't break into a violent or homicidal rage, or what incident or incidents may provoke that rage. This however misses the point of pre-employment screening. Making a reasonable effort to find a qualified candidate with the appropriate background for the job.

III. DETERMINING RISKS

As a risk consultant, I am often asked how much protection from risk is enough protection from risk?

While strategic screening is an investment with an actual ROI, the fact remains that there are budget realities. To properly set the budget and determine the level of screening needed, a manager has to determine how much risk reduction is enough? This question is best answered through a risk assessment. Since security professionals utilize risk assessments on a daily basis, we will review their protocol for assessing risk. NOTE: Determining risk and developing a strategic screening program does not necessitate a full security focused risk assessment. However, the principals outlined below are important and should be considered when developing a screening program.

Conducting a risk assessment is a three-phased exercise that involves defining the criticality and vulnerability of the asset being protected and the probability of a loss. While most assets can be viewed as a whole, consideration within this exercise has to determine when an asset is best viewed independently of others. Some assets, such as people, proprietary information, and electronic equipment, are more critical and deserve a more thorough review of their individual vulnerability. Determining criticality and vulnerability are relatively straightforward missions. What can be more difficult to determine is the concept of probability.

Probability is a matter of an experienced review of trends. To conduct a trend analysis requires collection of data from a variety of public and private sources. The key to the assessment of this data is to begin locally, at your facility, and proceed to national trends. It is important to note that there is no way to accurately predict an incident. The manager's goal should be to look for trends that might identify an increasing probability of a particular risk. By using focus teams, discussed below, the manager can more readily identify risks.

The following guide can be used to as a tool to determine the probability of a security incident.

- A. Campus – Review incident report trends for at least 18 months. It is helpful to create a graph looking at incident types, days, times, and actual losses. It is also a good idea to question staff for information involving incidents that might not have been reported through official channels. An anonymous survey form, sample included at the end of this article, can be an excellent means for obtaining previously unreported risk information.
- B. Area and City – Review business incident data from local law enforcement and peers in your neighborhood and city.
- C. Industry – Many associations compile data and statistics on incidents. This information can be used to quantify the probable risk associated with a particular facility or industry by studying national trends.

NOTE: When reviewing the above information, look at the risk potential from a people perspective. How many of these incidents were the result of employees (both current and former) or vendors. Could proper screening have prevented these?

- D. Screening Procedures – After determining the level of risk from employees and vendors/contractors, look at the screening program. How is hiring conducted? Are employees screened for criminal records and drug use? Are vendors controlled and contractors screened at the same level as employees? Each negative response to these and similar questions increases both the risk of and probability of a security incident.

Why is this important?

Security is layered like an onion. Each layered peeled away reveals yet another layer. Risk constantly pushes against these layers looking for vulnerabilities. If risk, whether the criminal element or some type of crisis, makes it through one layer, the model places another roadblock in its path.

Layered security works from the outside in. The asset that is being protected is at the center of the layers. Typical layers include:

- A. Perimeter – Think of the concept of a moat. Perimeter protection should deter or prevent those with criminal intent from entering the campus.
- B. Exterior – The exterior layer typically includes the parking area, walkways, and access points into the facility.
- C. Interior – Interior security consists of compartmentalizing departments and areas according to their security sensitivity.
- D. Procedural – The procedural layer involves, as a whole, the security management plan and specific departmental policies.

Each layer has one or more components. Some of these components consist of:

- A. People – Personnel should be the first and most important component of every layer. The people component includes security personnel as well as vigilant staff, volunteers, and even visitors. Again, it is important to note that people is the most vital component of every layer.
- B. Technology – To include CCTV, duress alarms, access control, communication and other devices.
- C. Perimeter Barriers – Patrols, fencing, shrubbery, sidewalks, access control, and other physical and psychological barriers.
- D. Exterior Barriers – Patrols, doors, windows, locks, lighting, and reception stations.
- E. Interior Barriers – Patrols, departmental compartmentalization, asset protection, office security.
- F. Security Awareness – Focused security awareness programs modeled after crime prevention and community based policing.
- G. Management Oversight – Management by walking around, being involved, and proactively checking for program implementation and effectiveness.

What is most important in this discussion is the PEOPLE COMPONENT. In fact, people are the most important component for every security layer. If a company is failing to appropriately screen, they are greatly increasing their risk.

IV. SCREENING OPTIONS

Now that risk has been defined, screening options can be reviewed with an emphasis on reducing the defined risk. The list of what to check when establishing or reviewing a screening program is varied. To accurately determine the level of check requires an assessment of the work duties, potential access to sensitive materials and information, the industries served and other facts. Outlined below is a list of search and services options with an explanation of what is covered in the search and the benefit of the option. This list should be reviewed by a team made up of Human Resources, Risk Management, the executive team, and someone with expert knowledge of the FCRA and screening programs. Based upon this review, a program can be implemented and monitored.

SERVICE OPTIONS

Service	Description	Benefit
Compliance Fulfillment	Assists you by fulfilling your FCRA adverse hiring decision responsibilities. Both Pre-Adverse letters (and reports) and the Adverse Action letter can be sent by a service provider to your applicant, whose background screening has uncovered information that may lead to a no-hire decision.	Eliminates the FCRA mandated burden of developing Pre-Adverse and Adverse Action letters and their subsequent distribution for each applicant whose background screening uncovers information that can potentially lead to an adverse (no-hire) decision.
Drug Testing	Provides you and your applicant with drug site and specimen collection coordination, chain of custody documentation, medical review officer access, and test results for common illegal and/or prescriptions drugs.	Helps you to reduce the number of workplace accidents, limit your liability, and improve productivity by providing a single-source of contact for the entire drug-screening process.
Random Drug Testing	Establishes a consistent drug-testing program for current employees that uses approved random selection software for the percentage and interval of your choosing.	Helps to ensure that your workforce is compliant with company drug policies, weeding out undesirable drug users.
Pay Guard	A service provider analyzes your payroll records on a regular basis to ensure that all employees have been screened.	Prevents your employees from "falling between the cracks"; thus ensuring complete screening program compliance and making your workplace more secure.
Candidate Scoring	Utilizes your criteria of what is acceptable and not acceptable (sometimes varies by position) to score criminal, MVR, education, and social results (other products can potentially be included) and deliver a red (do not hire), yellow (needs further review), or green (hire) light.	Allows you to customize the decision making criteria initially, but frees your resources from having to review and decipher each application to which your criteria is applied by having A service provider (the experts) do it for you.
Contractor Program	Closes the "back door" by utilizing a customer-supported mandate that requires all contingent workers (temps, consultants, etc.) to be screened utilizing the same criteria that your full-time employees are screened by.	Provides you with assurance that all individuals who have access to your facilities and proprietary knowledge have been screened in the same manner as your full-time employees. Contingent worker providers are charged at your negotiated rate.

CRIMINAL RECORDS JURISDICTIONS

Federal	Searches "local" federal jurisdictions for federal crime information (i.e. kidnapping, bank robbery, drug trafficking, etc.). There are usually several federal jurisdictions per state.	Uncovers criminal records that are filed only in Federal court systems and are thus unavailable in Local or Statewide searches.
Local	Most up-to-date and complete type of criminal record search. Mostly conducted on-site at city and county (local) courthouses where most criminal records originate.	Applicant's criminal background search is conducted at "most likely" local jurisdiction(s), i.e. local jurisdictions indicated by applicant's social locator search (address history), uncovering most recent and complete criminal record information.
Sex Offender Registry	Initiated by the Pam Lychner Sexual Offender Tracking and Identification Act of 1996, and empowered by Megan's Law (1996), each state must maintain programs that register and track all known sexual offenders. Each state must also provide regular updates to the FBI to enable coordinated national tracking. Information made available to the general public varies greatly from state-to-state.	Provides the ability to search each state as a whole on a state-by-state basis. Additional information that might otherwise be disallowed by the 7 year reporting guideline is available because sexual offenses are often regarded as "special circumstances".
Statewide	Most comprehensive and broad-scoped type of traditional (direct from "official" source) criminal records search. Each state requires all Local court systems to channel their criminal records to the state so that the state may maintain and utilize a centralized repository/database. Many states do not make their databases available.	Offers access to all of the local jurisdictions for a given state in a single search for those states that provide access. Often used in combination with specific local searches within the state because there are often delays between the time criminal information is filed at the local courthouse and when the information is channeled into the statewide repository.

V. INTERPRETATION OF RESULTS

Interpretation of results can be difficult to manage for both large and small screening operations. There are several keys to remember:

Consistency – For legal and fairness reasons, it is important for a company to be consistent in their hiring decisions. The fastest path to a lawsuit is to deny employment for one candidate and hire another for a similar position with a similar criminal record.

Defining Criteria – Each job classification should have defined criteria associated with it regarding what might be considered an “acceptable” criminal record. These criteria should be outlined in writing with all hiring decision makers receiving documented training.

Be Objective – Hiring is a very subjective exercise. Whenever possible a company should use objective criteria. Especially when considering whether or not to hire someone with a criminal record, poor credit, or other concerns. If using an outside vendor, ask if they offer a scoring guide. These guides are used to gauge a candidates suitability based upon their background. Through a thorough review of job qualifications, criteria is established and the vendor should be able to give you a recommendation of the persons suitability based upon their background and your defined criteria.

VI. CONTRACTORS AND VENDORS

1. Some Actual Cases:

VII.

- A. A guard conspired with two outsiders to steal \$200,000 worth of gold from a manufacturing plant
- B. A woman in an apartment complex is raped in front of her son by a maintenance person
- C. A man is murdered in his apartment by a painter
- D. A seven-year old boy is sodomized by a janitor at an apartment complex
- E. A computer company has the hard drives stolen from 15 PCs and 3 servers. 10 janitors from the contracted cleaning service suddenly disappear. Data apparently from the hard drives subsequently appears on a competitor’s winning proposal for a defense contract.

F. A chauffeur provides details of executive's movements to kidnappers

VIII.

2. Some Common Denominators:

IX.

A. All perpetrators were in a position of trust

B. All had been given master keys to provide unescorted, unlimited access to the facilities in which they worked

C. None of the perpetrators had an adequate background check conducted

D. The maintenance man, the painter, the janitor: all had prior criminal convictions for crimes of violence

E. The perpetrator's employees were all sued. Awards ranged from \$200,000 to \$1.75 million with an average of \$750,000

X.

3. Solution

The solution is as simple as this – All contractors and vendors should be properly vetted using the same criteria as used for employees.

XI. OVERVIEW OF THE FCRA

The best source for an overview of the FCRA is the Federal Trade Commission. Outlined below is information pulled directly from the FTC website. This information will be summarized in class discussion.

Using Consumer Reports: What Employers Need to Know

Your advertisement for cashiers nets 100 applications. You want credit reports on each applicant. You plan to eliminate those with poor credit histories. What are your obligations?

You are considering a number of your long-term employees for major promotions. Can you check their credit reports to ensure that only financially responsible individuals are considered?

A job candidate has authorized you to obtain a credit report. The applicant has a poor credit history. Although the credit history is considered a negative factor, it's the applicant's lack of relevant experience that's more important to you. You turn down the application. What procedures must you follow?

As an employer, you may use consumer reports when you hire new employees and when you evaluate employees for promotion, reassignment, and retention — as long as you comply with the Fair Credit Reporting Act (FCRA). Sections 604, 606, and 615 of the FCRA spell out your responsibilities when using consumer reports for employment purposes.

The FCRA is designed primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. Amendments to the FCRA — which went into effect September 30, 1997 — significantly increase the legal obligations of employers who use consumer reports. Congress expanded employer responsibilities because of concern that inaccurate or incomplete consumer reports could cause applicants to be denied jobs or cause employees to be denied promotions unjustly. The amendments ensure (1) that individuals are aware that consumer reports may be used for employment purposes and agree to such use, and (2) that individuals are notified promptly if information in a consumer report may result in a negative employment decision.

What is a Consumer Report?

A consumer report contains information about your personal and credit characteristics, character, general reputation, and lifestyle. To be covered by the FCRA, a report must be prepared by a consumer reporting agency (CRA) — a business that assembles such reports for other businesses.

Employers often do background checks on applicants and get consumer reports during their employment. Some employers only want an applicant's or employee's credit payment records; others want driving records and criminal histories. For sensitive positions, it's not unusual for employers to order investigative consumer reports — reports that include interviews with an applicant's or employee's friends, neighbors, and associates. All of these types of reports are consumer reports if they are obtained from a CRA.

Applicants are often asked to give references. Whether verifying such references is covered by the FCRA depends on who does the verification. A reference verified by the employer is not covered by the Act; a reference verified by an employment or reference checking agency (or other CRA) is covered. Section 603(o) provides special procedures for reference checking; otherwise, checking references may constitute an investigative consumer report subject to additional FCRA requirements.

Key Provisions of the FCRA Amendments

Written Notice and Authorization.

Before you can get a consumer report for employment purposes, you must notify the individual in writing — in a document consisting solely of this notice — that a report may be used. You also must get the person's written authorization before you ask a CRA for the report. (Special procedures apply to the trucking industry.)

Adverse Action Procedures.

If you rely on a consumer report for an "adverse action" - denying a job application, reassigning or terminating an employee, or denying a promotion — be aware that:

Step 1: Before you take the adverse action, you must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" — a document prescribed by the Federal Trade Commission. The CRA that furnishes the individual's report will give you the summary of consumer rights.

Step 2: After you've taken an adverse action, you must give the individual notice — orally, in writing, or electronically — that the action has been taken in an adverse action notice. It must include:

- the name, address, and phone number of the CRA that supplied the report;
- a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

Certifications to Consumer Reporting Agencies.

Before giving you an individual's consumer report, the CRA will require you to certify that you are in compliance with the FCRA and that you will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

In 1998, Congress amended the FCRA to provide special procedures for mail, telephone, or electronic employment applications in the trucking industry. Employers do not need to make written disclosures and obtain written permission in the case of applicants who will be subject to state or federal regulation as truckers. Finally, no pre-adverse action disclosure or Section 615(a) disclosure is required. Instead, the employer must, within three days of the decision, provide an oral, written, or electronic adverse action disclosure consisting of: (1) a statement that an adverse action has been taken based on a consumer report; (2) the name, address, and telephone number of the CRA; (3) a statement that the CRA did not make the decision; and (4) a statement that the consumer may obtain a copy of the actual report from the employer if he or she provides identification.

In Practice...

- You advertise vacancies for cashiers and receive 100 applications. You want just credit reports on each applicant because you plan to eliminate those with poor credit histories. What are your obligations?

You can get credit reports — one type of consumer report — if you notify each applicant in writing that a credit report may be requested and if you receive the applicant's written consent. Before you reject an applicant based on credit report information, you must make a pre-adverse action disclosure that includes a copy of the credit report and the summary of consumer rights under the FCRA. Once you've rejected an applicant, you must provide an adverse action notice if credit report information affected your decision.

- You are considering a number of your long-term employees for a major promotion. You want to check their consumer reports to ensure that only responsible individuals are considered for the position. What are your obligations?

You cannot get consumer reports unless the employees have been notified that reports may be obtained and have given their written permission. If the employees gave you written permission in the past, you need only make sure that the employees receive or have received a "separate document" notice that reports may be obtained during the course of their employment — no more notice or permission is required. If your employees have not received notice and given you permission, you must notify the employees and get their written permission before you get their reports.

In each case where information in the report influences your decision to deny promotion, you must provide the employee with a pre-adverse action disclosure. The employee also must receive an adverse action notice once you have selected another individual for the job.

- A job applicant gives you the okay to get a consumer report. Although the credit history is poor and that's a negative factor, the applicant's lack of relevant experience carries more weight in your decision not to hire. What's your responsibility?

In any case where information in a consumer report is a factor in your decision — even if the report information is not a major consideration — you must follow the procedures mandated by the FCRA. In this case, you would be required to provide the applicant a pre-adverse action disclosure before you reject his or her application. When you formally reject the applicant, you would be required to provide an adverse action notice.

- The applicants for a sensitive financial position have authorized you to obtain credit reports. You reject one applicant, whose credit report shows a debt load that may be too high for the proposed salary, even though the report shows a good repayment history. You turn down another, whose credit report shows only one credit account, because you want someone who has shown more financial responsibility. Are you obliged to provide any notices to these applicants?

Both applicants are entitled to a pre-adverse action disclosure and an adverse action notice. If any information in the credit report influences an adverse decision, the applicant is entitled to the notices — even when the information isn't negative.

Non-compliance

There are legal consequences for employers who fail to get an applicant's permission before requesting a consumer report or who fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties.

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to www.sba.gov/ombudsman.