



Pre-Employment Background Checks

You may need them, but be careful.

BY WILLIAM J. LYNOTT

Editor's Note: Bill Lynott, a long-time contributor of financial and management-related articles to PM, passed away in 2020. This article originally ran in 2017, and we felt that the information herein held particular relevance for this issue's special Staff Management theme; thus we are re-running it (with a bit of updating in the introduction).

Editor's Update: Many states, such as NY, have laws that prohibit employers from discriminating against an applicant based upon previous criminal convictions unless there is a direct relationship between the criminal offense and the employment sought (e.g., theft conviction and a job working at a bank). See New York Correction Law Article 23-A: <https://www.nysenate.gov/legislation/laws/COR/752>.

Some municipalities, such as New York City, even go further in protecting the rights of individuals with a history of criminal convictions. NYC recently adopted a law that requires a conditional offer of employment be made before a criminal background check can be done. See: <https://www.jdsupra.com/legalnews/new-nyc-law-requires-two-step-6246024/>. It is important that employers check their state and local laws with regard to background checks, since they are often more expansive than FCRA.

These days every new employee brings a possible threat to your practice. Among them: theft, sexual harassment, physical violence, identity theft, fraud, and drug use. The potential for ruinous legal actions is clearly higher today

than ever before. That's why a background check before you hire an applicant could save your practice.

However, it's essential that background checks be conducted within the maze of laws designed primarily to protect job applicants. Here are some things you need to know before you decide to use them:

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working with children, the elderly, or the disabled."

Despite the need of adherence to applicable laws, many employers feel that the positive benefits of background checks far outweigh the inconveniences. Here's a look at both the pros and cons:

Benefits of Background Checks

"A comprehensive background check, including criminal con-

The use of background checks is governed by a multitude of federal, state, and even local laws and regulations.

tions," says labor law attorney David Roth, at Fisher Phillips, Denver, CO.

"For example, the Fair Credit Reporting Act requires advance notice to the applicant that a background check will be made, and the applicant must provide written consent for the procedure. Further, it requires that the employer provide a copy of the report to the applicant before and after taking any adverse action."

The Fair Credit Reporting Act along with other laws and regulations makes it advisable that you consult with an attorney experienced in labor law before adopting a policy of making pre-employment background checks.

"Some laws actually require employers to conduct background checks," says Roth. "For instance, Background checks are usually required for applicants who will be

victions, civil filings, credit history (where permissible) and social media, will reduce the number of people hired with a history of violent, anti-social or otherwise undesirable behavior," says labor attorney Todd Wulffson, Managing Partner, at Carothers, DiSante & Freudenberger, LLP, Irvine, CA. "This will likely reduce the risk of hiring persons who may harm the company, its employees or customers."

Wulffson also points out that a comprehensive background check reduces the risk of "negligent hiring" cases against the employer by precluding applicants who, if they commit any bad act in the workplace, provide an easy argument that they should never have been hired because of their history.

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“Another benefit,” says Wulffson, is that eliminating applicants through various types of background checks reduces the pool of applicants, thus simplifying the interviewing process.”

Attorney Roth adds that other benefits of pre-employment background checks include such things as:

- An increased ability to ensure quality employees.
- A clean background check may indicate that an applicant is trustworthy, reliable, and responsible.
- A clean background check may help predict job performance.
- Pre-employment background checks often discourage applications by individuals who are trying to hide something.
- Increasing an employer’s ability to provide a safe workplace, and may decrease instances of workplace violence.
- Increasing an employer’s ability to minimize theft losses as a result of employee dishonesty.

The cost for a limited background check in a single state can be as low as \$25.

- Increasing an employer’s ability to avoid negative publicity should an employee’s actions or history become public.

Disadvantages of Background Checks

The cost for conducting background checks has dropped sharply in recent years. Still, it’s a cost that must be factored into the hiring process. “There is no way to avoid the cost, time, and manpower necessary to request and review a background check,” says Roth.

Wulffson agrees. “Background checks can be expensive—either because one has to retain a company to do the searches, or because employee hours are directed to background checks instead of more productive company business.”

“There are other factors to be considered when deciding whether to use background checks,” says Roth.

Pre-Employment Background Checking

The digital age has made it easier than ever to conduct pre-employment background checks. There are hundreds of online companies available to conduct searches from the most basic up to the highest level, including criminal backgrounds. These few are a sampling:

www.truthfinder.com
www.backgroundalert.com
www.beenverified.com

For more information on how to conduct a background check log on to <http://www.howtodobackgroundchecks.org>. **PM**

- There is the potential that the information in the background check report is incorrect, which may improperly disqualify a good candidate or, conversely, permit the hiring of an undesirable candidate.
- Pre-employment background checks cannot always indicate whether an individual with a problematic

laws and regulations may be complex and difficult to follow, and may require the assistance of legal counsel.

“If the background check process eliminates a great number of applicants,” says Wulffson, “most of whom are of the same race, the federal Equal Employment Opportunity Commission, a state agency, or an enterprising plaintiff’s attorney may claim that the employer used the background check as a means to discriminate in the hiring process.”

“Also, if the employer does a background check before legally compliant notice and consent has occurred, and someone other than the employer does the check, the company may have violated federal law. The Fair Credit Reporting Act (“FCRA”) or state equivalents carry penalties on their own, and may be used as the basis for an invasion of privacy or failure-to-hire case.”

- Background check information, especially if taken from social media sites, may not always paint an accurate portrait of an individual, and decisions based on social media may be more susceptible to claims of discrimination.

“Keep in mind,” says Wulffson, “that the employer does not need the applicant’s consent to review publicly-available information about the applicant—which can include criminal records, civil filings and social media sites.”

“However, if the employer does not apply the same level of scrutiny

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past has since reformed and become qualified for the job.

- There is the potential of negatively affecting the morale of employees because they may feel that a policy of conducting background checks invades their privacy.

“Also,” says Wulffson, “if an employer does comprehensive background checks, particularly if he does them early in the application process, it can develop a reputation as an employer who invades the privacy of applicants/employees, and is therefore an undesirable place to work. This poor reputation can prevent otherwise strong candidates from applying. This is especially true among Millennials—the ‘culture’ of the company is very important to members of Generation Y.”

- Improperly conducted checks could potentially violate federal, state, or local laws, and monetary penalties for noncompliance with those laws can be significant. These



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to all applicants, or learns personal information about the applicant that cannot legally be used to make a hiring decision (e.g., religious affiliation, sexual orientation, cultural or national origin identity, marital status,

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disability status, etc.), the company risks a lawsuit for invasion of privacy or discrimination if the applicant is not hired.”

- Obviously, there is risk and expense involved in the use of pre-employment background checks. Still, increasing numbers of professionals

and small business owners are looking to them as a first line of defense against the potential problems introduced each time a new employee is hired.

We asked attorney Wulffson to summarize his thoughts for an employer considering the use of background checks.

“Any background check should involve a cost/benefit analysis,” he says, “and this requires a full understanding of the actual costs and risks. This will usually require consultation with competent employment counsel or a human resources professional.”

“Our advice for an overall best practice is that the benefits of a standard background check—i.e., a criminal records check and verifying employment/references—outweighs the burdens. Checking these two areas is not expensive, and the risk to the employer for not doing such a minimal and reasonable check is simply too high.”

“Credit checks should only be done where legally permissible and relevant to the position. Civil records checks, such as finding cases where the applicant was a plaintiff or a defendant in a past lawsuit, should only be performed for executives or other high-profile positions.”

“Finally, social media checks should only be done when social media skills are relevant to the job, or the position will be high-profile with the company. Although applicants must be told upfront what background checks are to be done, the checks must be done only after an employment offer has been made, but before employment begins. This provides a system that is legally compliant, as fair as possible to the applicants, and protective of the employer’s interests.” **PM**

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