



Best Practices for Conducting Background Checks

Lisa Bergersen, Principal Attorney at EngageHR Law, Of Counsel at Buelow Vetter,
Former HR Director, City of Pewaukee

Background checks are an important best practice in human resources management. They can identify potential “red flags” about past performance or behavior. These checks verify data the candidate has provided. They also help assess whether a job candidate poses a risk of harm.

Employers have a duty to exercise reasonable care when hiring employees. Those who do not may be liable if a third party is harmed by the employee, and the potential for harm was discoverable in a background check.

What should a background screen include?

Proper and thorough background screens should include:

1. Criminal history (including state and federal sex offender registries)
2. Qualifications for the position (education, experience, licenses, driving record, etc.)
3. Previous employment (dates, job titles and duties, level of performance, and reason for separation)

Studies show that the best predictor of a high-level performer is past performance. Employers should attempt to get this information from former or current

supervisors, coworkers, or clients. Providing a copy of the candidate's signed authorization and release of liability form to those individuals helps to secure a substantive reference.

What are the legal and practical considerations in performing background checks?

1. Obtain a signed consent from the candidate. The consent form should identify what the screening process will check. It should also include a release of liability for the hiring employer and for the organizations or persons providing information.
2. Understand legal obligations under the Fair Credit Reporting Act (FCRA).¹ This act provides certain rights to candidates and imposes obligations on the employer when a third party is used to get a report on such things as the candidate's credit, character, reputation, personal characteristics, or mode of living. This includes criminal checks and employment references.
3. Limit credit checks to positions with significant financial responsibility. Credit checks may have a discriminatory impact on some protected groups. The Equal Employment Opportunity
5. While employers should check criminal records, they must still follow legal restrictions on use of those records. Wisconsin law prohibits consideration of a candidate's past arrest record. It also bars automatic exclusion of candidates with pending arrest or conviction records; it allows disqualification of candidates only when the circumstances of the offense are substantially related to the job position. Proper application of the substantial relationship standard is not always obvious, so it is important to know how case law has applied the standard in similar circumstances. The EEOC has also provided guidance around the considerations of arrest and conviction records under federal law.⁴
6. Use of social media is controversial, and employers should proceed with caution. On the one hand, it has the potential to provide valuable information, such as a candidate's

Commission (EEOC) cautions employers to check them only when related to the job.²

4. Never make an inquiry about bankruptcy. Federal law prohibits governmental employers from denying employment because of a bankruptcy filing.³
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6. Use of social media is controversial, and employers should proceed with caution. On the one hand, it has the potential to provide valuable information, such as a candidate's

use of hate speech, discriminatory comments about coworkers, or discovery that information provided is inaccurate. On the other hand, social media may reveal information employers may not consider, such as a candidate's religion, sexual orientation, or use of lawful products. A best practice is to use a third party to conduct social media checks to screen out protected class information and pass along only job-related information.

7. The background check should occur after acceptance of a conditional offer. Conducting screens before that time may reveal protected class

information, making an organization more vulnerable to discrimination claims. Further, the law prohibits employers from making medical inquiries about a candidate's physical ability until after a conditional offer. Also, the federal and state law trend is to ban inquiries about criminal history before a conditional offer.

8. Work with a reputable screening company. A good one provides swift results for a reasonable cost. These companies have access to information sources and technology that many employers do not, and as a result can gather more detailed data. Screening companies can assist with legal

compliance and show employers how to mitigate risks.

Conclusion

Background screening is a best practice to ward off legal problems and practical difficulties of a bad hire. Put the process into writing to ensure consistent application and to avoid discrimination. Ensure that the process complies with all applicable laws and regularly assess it to keep up with ever-changing legal requirements. Invest sufficient money and time, for the cost is minor compared to hiring the wrong person.

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1. 15 U.S.C. § 1681
2. https://www.eeoc.gov/laws/practices/financial_information.cfm
3. 11 U.S. Code § 525.
4. https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; https://www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm

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