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What is a background check?

While most HR professionals agree that the term 'background check' carries a clear-enough meaning, there are few who appear to actually understand how one is conducted. The root cause of confusion probably stems from the fact that the term itself has become a practical disambiguation: That is, the term "background check" has been marketed so extensively as a *commodity* that many laypeople actually believe this is so. It is not. Unfortunately, this pervasive misunderstanding is like a person who needs their taxes done refusing to hire an accountant because they believe they need to "buy" a tax return.

The reality, however, is that background checks are not pre-made any more than preparing a personal tax return; a background check is the result of diligent research, preparation and compilation by a professional on a particular subject. It is true that in many cases anyone who isn't afraid to do some research (and is willing to pay court fees) can obtain some of the raw information used by a professional pre-and-post employment screening company. However, it is the skill, experience, specialized technology and know-how involved with the process of locating, obtaining, translating, filtering and reporting public records as accurately as possible that makes "background checking" a service, and the firms who provide quality service so important.



Legal definition of a background check

To better understand the type of service a background check really is, a good place to start is the Fair Credit Reporting Act ("FCRA"). Found in 15 U.S.C. §1681, the FCRA is the federal law which defines the standards of governance and oversight of background checks (which are referred to therein as "consumer reports") as they relate to employers and applicants (referred to as "consumers" therein), and may justly be considered a 'gold standard' to which adherence in both policy and principal must be met or exceeded.

While the FCRA is straightforward enough (see sidebar) below, it is not the only consideration in background screening; the laws of the various states have plenty more to say on the subject. Thus, it is the business of any quality pre-and-post employment background screening firm to consider, as a matter of the utmost importance in rendering its services, the totality of the law. This gets complicated where the FCRA meets and intermingles with the laws of individual states and municipalities of the United States, but a professional screening firm will know all of this and help employers make necessary adjustments.

'This is a more precise definition of a "background check company" insofar as the services normally provided; to save space, however, this article will shorten the precision definition above to simply "screening firm".





What can an employer expect when first starting to work with a screening firm?

As mentioned above, the FCRA as well as unique state and local laws impose certain legal obligations on employers, consumers and screening firms. In fact, the law holds screening firms (who in the memorable words of one federal judge, “traffic[] in the reputations” of ordinary people) to a high standard of security and privacy: Some of these requirements pertain to and are satisfied simply by the verification of the existence of the entity requesting the background check; others are more detail-intensive, such as the maintenance of adequate data security protocols or the use of only very specific consent and release forms. Employers must remember that when first courting a screening firm, being asked to verify their good standing with their state or to provide a professional reference for their company, or even when their screening firm strongly recommends use of a certain form or set of forms – it’s the law, and not a mere whim of the screening firm.



Background checks in legalese

Insofar as federal law (that is, the F.C.R.A.) is concerned, a background check (“consumer report”) is as follows:

- (1) In General. – The term “consumer report” means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for –
- (A) credit or insurance to be used primarily for personal, family or household purposes;
 - (B) employment purposes; or
 - (C) any other purpose authorized under section 1681(b) of this title.

(15 U.S.C. §1681b)

Next: establishing a meeting of the minds

After the legal basics briefly touched on above, the next order of business is for the employer and the screening firm to ensure that they each clearly understand the other’s objectives. For the employer, to convey clearly what kinds of position(s) it is screening for will allow the screening firm to develop a series of “profiles” (a fancy word for a suggested template of a background check) so that the employer can choose how much protection it wants.

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This will ultimately help the employer save money and help the screening firm determine if it is necessary to customize profiles specifically for the employer or recommend pre-built searches. Of course, this will depend to a large extent on the uniqueness of the employer's needs, geography, and the employer's margins.



For the screening firm, their objective in creating profiles in the early stages of the relationship is practicality: the screening firm needs to know how much it will cost to conduct the searches most likely to obtain the types of records needed to meet the objectives of the employer. For instance, an employer who routinely expects a certain type of employee to drive while working may well request that a Motor Vehicle Records report ("MVR") is made available automatically in its user interface for every search. This kind of thing is common and a quality screening firm will gladly accommodate. It is best, of course, if the employer decides as soon as possible to avoid last-minute scrambles and missed records.

A warning: because the creation of profiles is one part art and one part science, it is always a matter that is to be discussed between the employer and a potential screening firm carefully.



Whether or not, for instance, the screening firm specifically states that the criminal records database search ordered on applicants are "verified"² could mean all the difference in the word in terms of legal liability for the employer. And, as it is (much) cheaper for screening firms to forgo checking criminal records database hits at the appropriate courthouse, employers cannot rely on advertisements alleging "compliance" with the law (especially with an "instant" background check). Thus, discussions about the sources, methods, and results of the research of a screening firm another critical factor to prevent a cut-rate screening firm from stealing the desired effect of a background check – protection.

"The FCRA is the 'gold standard' to which adherence in both policy and principal must be met or exceeded by both the employer and the background screening firm."



Basic tools used in a background check

"Criminal records databases"³ were mentioned a moment ago as part of an example of what more or less amounts to "malpractice" in the background screening industry. Quality screening firms, for the sake of their own reputations as well as the protection of their clients, will usually not offer non-verified databases to their employer clients. However, it is not the intention of this article to disparage databases, and in fact, because every quality screening firm has what may not entirely incorrectly be described a mandate to protect its clients

²That is, the county courthouse which reported the records which were found in the criminal records database is searched by the screening firm to confirm the accuracy of the information. This is both useful and practical for employers, because both the FCRA and state law mandate that such procedures be observed and also, databases are notorious for leaving out important information that an employer needs to know.

³"Criminal records databases" are generally aggregated data composed of digitized public records uploaded by criminal justice agencies to a centralized computer storage system (usually called the Administrative Office of the Courts or "AOC") and are variously sold or accessed to third party resellers who are then in turn accessed by screening firms.

as well as they can, criminal records databases serve an important role: Given the mobility of offenders, it is desirable to cast as wide a net as possible to find records which may exist on an individual. Criminal records databases have been known to locate records which may otherwise be missed through merely “cherry-picking” a courthouse or two to search.



It is precisely because there are thousands of courthouses in the United States that databases have gained such popularity (and notoriety). Multiple “wide net” types of tools have arisen, some better than others. A very good source (that doesn’t use criminal justice records) is the *credit header*, which is, in essence, a search through a database containing records of the three major nationwide credit bureaus using the social security number of an individual. Credit headers may be used to find likely past addresses associated with an individual’s social security number, as well as returning aliases associated with the social security number. The significant added benefit of such aliases is that they may be cross-referenced in other search tools to increase the likelihood that the screening firm can pin down potentially important criminal records.

Without tools like these, the odds of finding records are pretty long odds; it is therefore common for screening firms to form the bulk of their search around either the credit headers or criminal records databases to ensure the employer is getting the protection they need.



Criminal records databases in screening

“Over-reliance on databases and “instant” criminal records is a trap too many firms succumb to. In a healthy number of states, there is either no AOC at all, or if there is, data-entry problems such as backed-up entry of new offenses or significant percentages of missing dispositions cause the database to be, as a practical matter, useless.”

However, a discussion of criminal records databases would be remiss if it didn’t present a clear and present caveat (one which such “instant” searches don’t purport to teach): over-reliance on criminal records databases is fraught with issues. In a healthy number of states, there is either no AOC (see footnote) at all, or if there is, data-entry problems such as backed-up entry of new offenses or significant percentages of missing dispositions may cause the database to be, as a practical matter, useless. Nevertheless, even with these limitations, the low cost and wide-ranging results returned when using databases makes them a useful addition to the arsenal of a quality screening firm so long as other tools are used.



To harp on about quality: the value of verification

As mentioned above, a non-verified criminal records database search result is problematic both legally and practically; therefore, quality screening firms employ a network of court-runners to confirm the validity of whatever criminal database records are returned.





These court-runners are frequently employed to go to the courthouses and, paying whatever access fees are charged (which are typically passed on to the screening firm), will search for and obtain whatever records the court holds. Usually, it is either the clerk of court or the court runner themselves, that, using the subject of the search's name, either over the phone, through the web, or by accessing the courthouse's own terminal, will pay the court fee and obtain the case documents. These findings are then reported the screening firm, who, in turn, will filter and assemble the information into a profile for their client. It should be noted that search fee charged by the courts is usually done by name searched, and quality screening firms will apprise their clients in clear and unambiguous language how fees are handled.

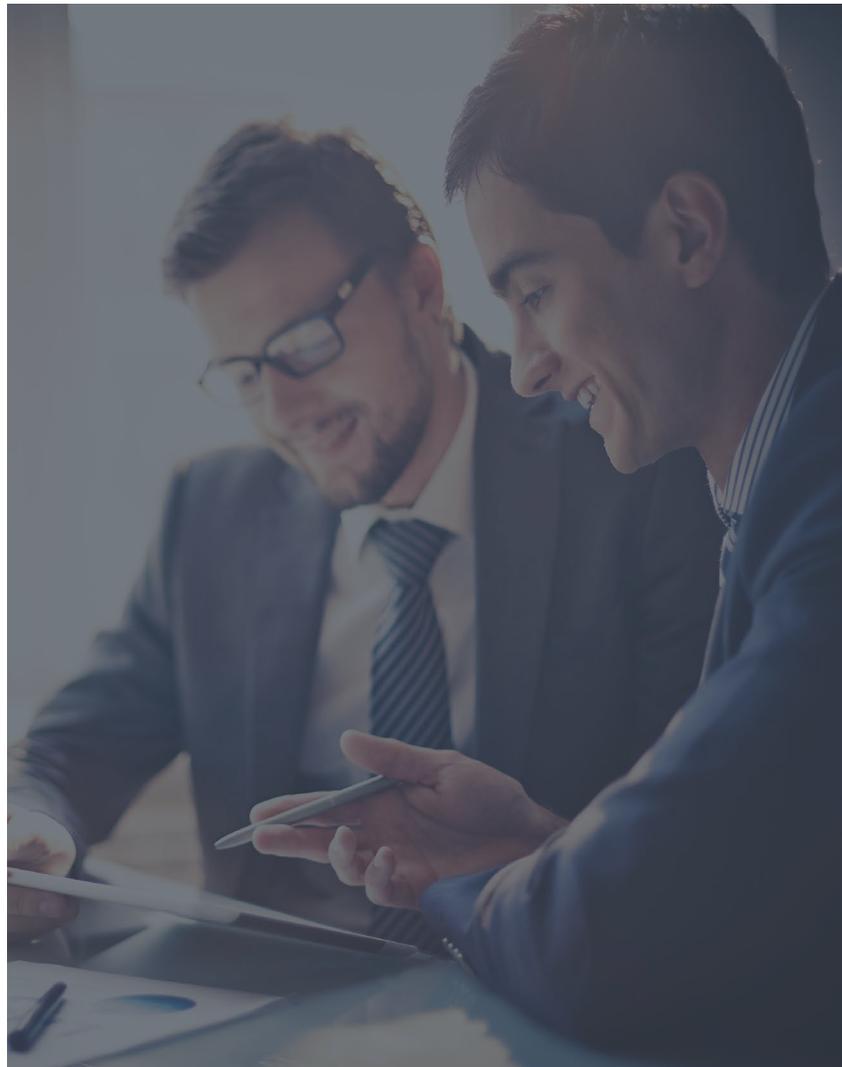


Additional sources of information for the quality screening firm

Of course, the courts aren't the only place that the quality screening firm will search. As the earlier example of the employment of the driving employee and the MVR demonstrates, certain non-criminal justice records can be highly relevant (and practically useful) in the employment or individuals for a particular position.



Indeed, in addition to the Department of Motor Vehicles, other pertinent public records are handled by various state and federal agencies such as the Department of Homeland Security (list of sanctions and trade embargos), the Officer of the Inspector General (debarment and Medicaid exclusions lists), and the FBI (the most wanted list). All of these (and many more at the state level) should be searched on every applicant. Employers should always insist that these types of databases are searched by their screening firm. Additional useful non-public record related services such as resume or reference verifications and E-Verify assistance may also be offered by the screening firm, which an employer may find it cost-effective to take advantage of.





Other important considerations

So far, the discussion of this article has focused on what a background check really is, how a screening firm and an employer should expect to work together, and how some of the basic tools used in the construction of satisfactory profiles work. However, it is worth noting again that the typical quality screening firm is first and foremost service-based; presenting quality profiles to its clients isn't all that will be offered. Often, there are numerous other reasons why an employer may select a screening firm to help with background screening, such as the availability of dedicated account representatives who will courteously service the employer's account and answer questions; 24/7 easy paperless order processes and free applicant management software ("ATS"), and quick, secure and easy account set-up and maintenance are typical of a quality screening firm. The screening firm who will proactively update clients with information about court closures is generally a highly professional organization.

"...a typical screening firm will provide numerous value-add services such as answering questions, updating clients with information about court closures, etc."



Also, employers will notice that it is commonly the case that a quality screening firm will repeatedly emphasize the importance of a quick turn-around time (or, "TAT" for short) on profiles. Elements of infrastructure for a screening firm concerned with getting accurate results to the client on time include specialized technology, a strong court-runner network, and skilled personnel. This is a critical matter for employers who understand the money-value of time. Sinking resources into an acquisition isn't limited to the cost of performing a background check: the cost of using a headhunter or staffing service, documentation management costs, lost profits because of a missing employee, and the loss in productivity by diverting management to the training of the incoming employee all are real considerations of a business owner. Thus, the quicker the screening is done, the quicker the hiring is done. However, intervening factors such as a decision by a courthouse to pull identifiers from its records can conspire to make files difficult to locate; there is also the ever-present reality of unforeseen *force majeure*-type events: strikes or inclement weather can cause a mass delays.

A quality screening firm knows this and will proactively help to meet this critical objective of the employer while keeping the highest possible standard of accuracy.

Another key value indicator of the quality screening firm is the amount of care in which the firm filters out impermissible or erroneous data before it is presented to the employer. It is not uncommon for the intrepid individuals who go into the business of records retrieval to be surprised at how discordant, illusive and simply jumbled public records (criminal or otherwise) really are. Important information has the misfortune of being entered by fallible human beings at numerous points in the overall journey of the files; in the case of criminal justice records, it is often that from arrest to conviction names may be misspelled, incorrect dates may be recorded, dispositions may be non-existent, expungements are missing, and on and on it goes, ad infinitum. Sorting out the chaff from the legal wheat is an important aspect of screening.

Nonetheless, a quality screening firm deals with these things and more every day and still works to do the best possible job for its clients. It is the law; in fact, "maximum possible accuracy" is such an important factor in assembling background checks that the FCRA explicitly declares that background checks must conform to this standard. By ensuring profiles are reviewed for completeness, accuracy and relevancy, a screening firm signals its commitment to this standard of quality.



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A word about the value of “risk mitigation”

Make no mistake: within the lengthy text of the FCRA, the law makes it unambiguously clear is that it was and is Congress’s intent that specific guidelines should exist for the procurement, correction, and use of background checks for the screening firm and the employer alike. Although a screening firm can assist an employer in preparing for the basic realities of screening, a careful review with legal counsel of all the ‘moving parts’ in the FCRA (and the specific state and local laws involved) is necessary. There is good reason to do so; the FCRA is notably prone to lawsuits: According to statistics from WebRecon LLC, in June of 2016 FCRA lawsuits have risen comparatively from June of 2015 by 33.7%⁴. This trend appears to be increasing. In fact, the same study indicates that the June statistics are a 34.5% increase from May 2015 to May 2016. These statistics should underscore the reality that any background check done wrong (either by the employer or a lackluster screening firm) is a liability time-bomb.



“In June of 2016 FCRA lawsuits have risen comparatively from June of 2015 by 33.7%⁴”

Nonetheless, as is wont of human beings, some employers will rationalize the statistics above as a mere abstract risk of doing business and may make the mistake of carelessly viewing hiring. From using a cheap, slipshod screening service (see, “instant”) to ignoring the FCRA and state law outright, there are numerous opportunities for employers to gamble. Explaining a “gut instinct” on why an applicant was the “right fit” won’t help convince a jury in a negligent hiring lawsuit.



This is unfortunately exacerbated by the fact that, as mentioned elsewhere herein, some of the sources of information named in this article can be obtained by those employers with a little patience and know-how. For small employers who work locally and rarely hire, this may not be a bad idea (so long as they adhere to FCRA and state regulations); however, for the employers who would be better served by utilizing a screening firm (and who may not have the time to deal with the myriad compliance issues), the availability of public records may actually be a stumbling block: more employers than should underestimate the challenge of doing it themselves, and attempt on their own to obtain and use public records for hiring, to their own legal and financial detriment.



“Should I do it myself?”

A wise man once said that a penny today can cost a dollar tomorrow. Similarly, however non-compelling a reason future risk-mitigation may seem today as justification for retaining a quality screening firm (compared to engaging a cheap “instant” option) employers should consider the cost in time of lengthy and intrusive depositions and discovery processes, other litigation expenses, lost revenues and damage to reputation involved with failing to be compliant. Likewise, to help demonstrate why do-it-yourselfers can also be in for a difficult time if they’re like many small to mid-size businesses, here are four key considerations the law demands any time a background check is to be done (and that a screening firm will to a large extent handle):



(1) **What records are needed?** Has the employer ensured that a proper **due diligence** standard is being met for the particular employee? What justification/proof is there that all “similarly situated” employees are being treated the same? Will employer’s efforts be enough to convince a jury in a lawsuit?



(2) **Preparing to obtain records:** Are all needed notices and consents for a background check in place? Is only legally relevant information being requested from the applicant for the screening? What additional state laws address these matters?



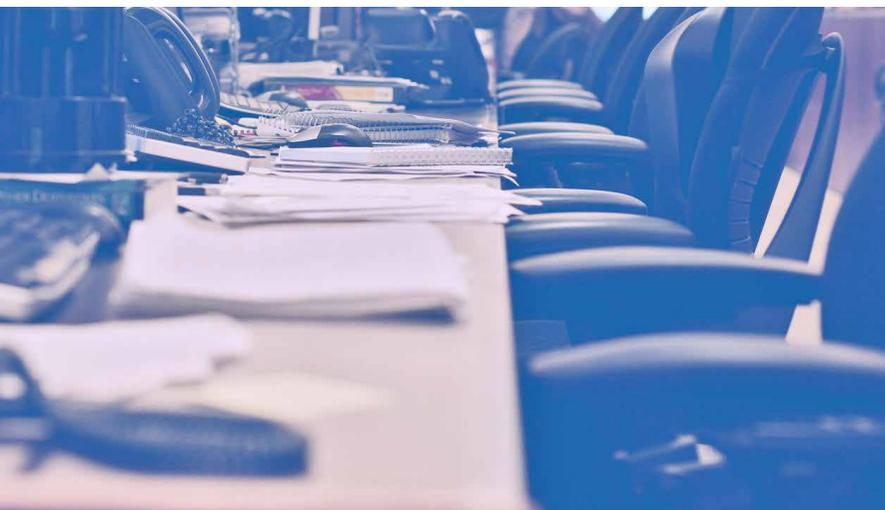
(3) **When searching for records:** What public records can employers access? Which county courthouse stores the appropriate records? How does that/those particular courts allow employers to search for these records? Where do employers find court-runners, and are the rates competitive compared to those of a quality screening firm?



(4) **When using the records:** Which records are legally relevant to the employer’s decision to hire/promote/retain? What adverse action protocols are in place? Do these records even belong to the applicant? What dispute procedures are in place if the applicant says the records aren’t his/hers?

These considerations cover everything from the legal compliance requirements to the operational practicality of instituting a background screening process. Tackling on these myriad requirements is an extensive, risky and expensive task; this is why many employers have chosen to mitigate the cost in infrastructure and risk in this especially litigious arena by using a quality screening firm.

As (repeatedly) emphasized in this article, a background check is nothing less than a professional service rendered by a screening firm which should be judged by the skill, courtesy, and infrastructure used in the provision of such service. Despite what the media may have employers believe, comparing two different screening firms is not a comparison of two brands of Walmart-brand canned soup. Rather, a background check is an important business investment in the most important of assets: their employees.





Conclusion – Services are defined by...the quality of service

While employers may vary tremendously in their operations, they all successfully grow their business because they are able to rationally execute their plans, set goals and make strategies. The reality is that just as hiring is an integral part of business, background screening is (now) an integral part of hiring. A background check, then, is a logical aspect of running a successful business. Therefore, this article's intent in dispelling the mischaracterization of the nature and substance of a "background check" is to establish for employers that the quality of a screening firm is the decisive factor in a quality background check.



About Hirelect

Hirelect is a 21st century screening firm that offers low-cost profiles which meet stringent compliance requirements. Thus, employers can rest assured that their goal in ordering background checks – risk mitigation – will not be frustrated by mistakes or compliance errors. By providing the appropriate forms, general compliance assistance, and assembling quality applicant profiles on time and within an intuitive, web-based platform, Hirelect can reduce time-to-hire and the cost per acquisition for employers.

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SOURCES:

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