

Law.com's In-House Counsel

Select 'Print' in your browser menu to print this document.

© 2008 *In-House Counsel Online*

Page printed from: <http://www.inhousecounsel.com>

[Back to Article](#)

Employee Background Checks: Dos and Don'ts

Carrie B. Rosen
The Corporate Counselor
July 18, 2005

Whether your company is in the *Fortune* 500 or is a small independent business, hiring and retaining qualified honest employees is critical to your success. In fact, a recent study showed that almost half of all job applicants submitted inaccurate or incorrect information to their potential employees. [See [ADP 2004 Hiring Index](#).] Given these alarming statistics, it is vital that you conduct background checks even before making hiring decisions.

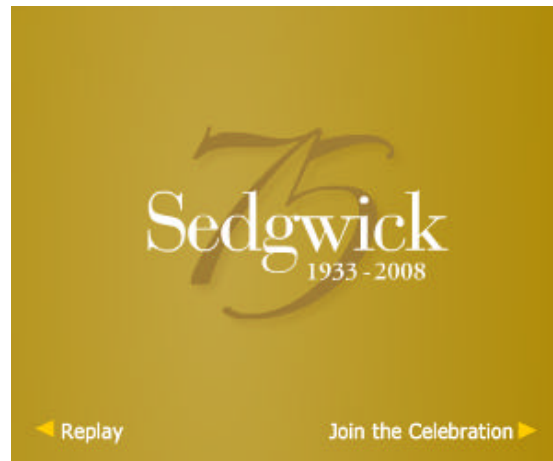
WHY SHOULD YOU RUN EMPLOYEE BACKGROUND CHECKS? THE LAW MAY REQUIRE THEM

First, and perhaps most importantly, certain employers are required by law to conduct background checks on their employees. Depending on your company's industry, you may need to conduct background checks and may be precluded by statute from hiring employees convicted of particular offenses. A random sampling of requirements in a few industries/states demonstrates.

- **Health Care Facilities/Providers.** Many hospitals and health care facilities and those who provide services to the elderly are required to conduct criminal background checks and often child abuse/elder abuse checks. Many of these states have statutes listing the particular offenses precluding the hiring of an applicant.

For example, California law requires background checks of unlicensed individuals who will be providing non-medical or domestic/personal care to an aged or disabled adult in the adult's own home. [See Cal. Welf. & Inst. Code §15660. Pennsylvania and Illinois have similar laws. See generally 35 Pa. Stat. Ann. §§10225.501 to 10225.508; 225 Ill. Comp. Stat. 46/10-46/55.] In Texas, nursing homes, custodial care facilities, assisted living facilities, home health agencies, adult day care providers and other specifically listed entities may not employ a person if the person was convicted of an enumerated offense. [See Tex. Health & Safety Code Ann. §250.001-.009.]

New Jersey mandates background checks for nurses aides and personal care attendants, assisted living facility employees and home health aides. [See N.J. Stat. Ann. §26:2H-83 to 86, §26:2H-7.18, §45:11-24.3-24.5.] New York requires that operators of mental health facilities conduct criminal records history checks on prospective employees who will have regular and substantial unsupervised or unrestricted physical contact with clients and must deny employment to those who have a felony conviction for a sex offense or a felony conviction in the past 10 years involving violence, among other enumerated offenses. [See N.Y. Mental Hyg. Law §§16.33 and 31.35 and N.Y. Exec. Law §845-b.]



- **Security Personnel/Private Investigators.** New York and California both require background checks for security personnel and private investigators. [See N.Y. Gen. Bus. Laws §§70, 81, 83 and 89-f through h; Cal. Penal Code §11105.4.] Security agencies in New York (i.e., security guards and/or private detectives) are prohibited from knowingly retaining any employee convicted of a felony, any offense involving moral turpitude, or any of the misdemeanors or offenses specified by statute.

- **The Securities Industry.** New York requires employees associated with the sale of securities to submit fingerprints and undergo a national criminal background check by the FBI as a condition of employment. [See N.Y. Gen. Bus. Law §359-e.] Failure to comply with the fingerprint requirement is a violation of New York's securities fraud laws.

Federal law also mandates background checks for employees engaged in particular industries. The Office of Inspector General of the Department of Health and Human Services maintains a list of individuals who are excluded from participation in any of its federally-funded healthcare programs, due to convictions for program-related fraud and patient abuse, licensing board actions and default on health education assistance loans. Therefore, employers in affected industries should check the [OIG Exclusion list](#) before hiring employees who might work in such programs.

THEY MAY PREVENT NEGLIGENT HIRING LAWSUITS

Regardless of whether the law requires your company to do so, conducting background checks makes good sense, and potentially, could prevent future negligent hiring lawsuits. Some states recognize the tort of negligent hiring/negligent retention. For example, New York identifies a cause of action for negligent hiring when an employer "knew or should have known of the employee's propensity to commit injury. Moreover, an employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee." [See *T.W. v. City of New York*, 729 N.Y.S.2d 96, 97-98 (App. Div. 2001) (reversing summary judgment and holding that genuine issue of material fact existed as to whether a youth organization had a duty to conduct a background check of an employee prior to hiring the employee where the employee allegedly sexually assaulted a minor child attending the youth organization).]

Similarly, in Illinois an employer may be held liable for negligently hiring an employee that the employer "knew or reasonably should have known was unfit for the job in the sense that the employment would place the employee in a position where his unfitness would create a foreseeable danger to others." [See *Carter v. Skokie Valley Detective Agency, Ltd.*, 256 Ill. App. 3d 77, 80 (1st Dist. 1993).]

Conducting a background check may enable you to avoid the following scenario. John Doe applies to your company for employment as a long-distance truck driver. Had you performed a criminal background check on John Doe, you would have discovered that Mr. Doe was convicted of raping a hitchhiker while driving a truck for his prior employer. You did not perform such a check, however, and Mr. Doe sexually assaults another hitchhiker while driving your company truck. The victim sues your company for negligent hiring. If you had performed the background check and discovered this conviction, your company would not have hired Mr. Doe. Now, your company faces the expense, publicity and legal consequences of defending your decision to hire Mr. Doe in court.

This example is not so far-fetched. Nearly identical facts were at issue in *Malorney v. B&L Motor Freight, Inc.*, 496 N.E.2d 1086 (Ill. App. 1986) where the court held that the employer had a duty to entrust its truck to an employee fit to drive an over-the-road truck that was equipped with a sleeping compartment, and therefore, denied the employer's motion for summary judgment in a case where the employee was accused of sexually assaulting a hitchhiker.

THEY CONFIRM RESUME AND EDUCATIONAL ACHIEVEMENTS

Finally, if the above two reasons do not sway your company to begin conducting background checks, this one should. Conducting background checks allows employers to confirm the accuracy of information in a prospective employee's job application.

Consider the following example. Jane Doe applies to your art preservation/restoration company. She indicates that she has a degree in art history from a reputable university and has worked for several major museums, restoring precious pieces of art. You rely on Jane's word and hire her to restore a painting for your leading client, a prominent art gallery. As it turns out, Jane Doe is a fraud: Her degree is from an unlicensed Internet school and the closest Jane Doe has been to art is her grade school art class. Now your client has pulled all of their art restoration work from your company. Had you contacted Jane Doe's prior employers and confirmed her degree status, you could have avoided this embarrassing and costly situation.

Once again, this example is very close to reality. A recent study by ADP Screening and Selection Services indicates that of the 3.7 million background verifications performed by the company in the 2003 calendar year, 52 percent of the employment, education and/or credential reference checks revealed a difference of information between what the applicant provided and what the source reported. [See ADP 2004 Hiring Index.]

WHAT INFORMATION ARE YOU ALLOWED TO CONSIDER?

The type of information you are eligible to obtain -- and ultimately use -- will vary by state. Most states prohibit employers from using arrest information when determining eligibility for employment. For example, New York prohibits employers from inquiring into or acting on information about an arrest not resulting in a conviction or that resulted in a favorable outcome for the person involved. [See N.Y. Exec. Law §296(15) and (16).] California similarly prohibits employers from even asking prospective employees to disclose information concerning an arrest or detention that did not result in conviction, with limited exceptions. [See Cal. Lab. Code §§432.7 and .8.] Pennsylvania will not release arrest information where 3 years have elapsed since the arrest, there was no conviction and there are no proceedings pending. See, 18 Pa. Con. Stat. Ann. §9121. Illinois will allow employers of 15 or more employees to access prospective employee's criminal records subject to restrictions. [See 775 Ill. Comp. Stat. 5/5-101 and 103.]

How you use this information in rendering employment decisions will also vary by state. New York prohibits employers

from denying employment because of a prior conviction, unless the offense has a direct bearing on the employee's fitness or ability to perform the job sought. [See N.Y. Correct. Law §§750-755.] Pennsylvania has a similar limitation. [See 18 Pa. Con. Stat. Ann. §9125.]

Some states also mandate that employers obtain employee consent prior to conducting background checks. For example, New Jersey requires employers to obtain signatures of prospective employees prior to obtaining criminal history information and to provide prospective employees with adequate notice and an opportunity to confirm/deny the accuracy of the information. Similarly, Pennsylvania and New York require employers to notify applicants if the decision not to hire is based in whole/part on criminal history.

THE FAIR CREDIT REPORTING ACT AND BACKGROUND CHECKS

Before obtaining background history information on employees/ prospective employees, keep in mind that the federal Fair Credit Reporting Act (FCRA), 15 U.S.C. §1681 et. seq., may regulate how you obtain and use background history information. The FCRA governs the acquisition and use of background information regarding employees and prospective employees.

The FCRA applies to consumer reports and investigative consumer reports prepared by consumer reporting agencies (which includes background check vendors, private investigators, and detective agencies) for the purpose of providing information to a third party (typically, the employer). Consumer reports may consist of background reports, credit history checks and DMV records. Investigative consumer reports contain information regarding an applicant or employee's character, general reputation, personal characteristics or mode of living -- obtained through personal interviews with friends, neighbors and/or business associates, as well as through employment verification with prior employers.

If you use a consumer reporting agency to procure background history information, then you will be required to adhere to the FCRA's steps for compliance, including disclosure and authorization, certification, advance notice of adverse action, and notice of adverse action.

Employers who intend to obtain background checks on employees and applicants need to:

- Provide a written notice to the employee/applicant explaining that a consumer report will be obtained; if an investigative consumer report is to be obtained, then the notice must specifically indicate that fact.
- Obtain the employee's signed consent for the background check in a document separate from an employment application or an employee handbook.
- Certify to the consumer-reporting agency that the above steps have been followed and that the employer will comply with FCRA.
- Provide advance notice of any intended adverse action to the individual and provide a copy of the report to the individual, along with the "Summary of Your Rights under the Fair Credit Reporting Act," written by the Federal Trade Commission prior to taking adverse action. The purpose of the notice is to give the individual an opportunity to dispute or explain any inaccurate or incomplete information in the background check report.
- Supply the applicant, upon taking adverse action, with a copy of the report, the "Summary of Your Rights" document and the contact information for the consumer-reporting agency that furnished the report, as well as a statement that the consumer reporting agency did not make the adverse decision and cannot explain why it was made.

Failure to comply with the FCRA provisions can subject employers to damages, including actual damages, punitive damages, costs and attorneys' fees. Employers may also be liable for fines and/or imprisonment if they knowingly and willfully obtain a consumer report under false pretenses.

This summary is by no means exhaustive of all background check requirements. Companies are advised to carefully check the laws and requirements of the states in which they operate. Even if your company is not required by law to conduct background checks, it is good practice for your company to do so. Knowing your employee's background could ultimately curb costs and liability.

Carrie B. Rosen is an attorney in the labor and employment department of the law firm of Cozen O'Connor. She may be reached at crozen@cozen.com.

[Subscribe to The Corporate Counselor.](#)