


Pinnacle
INVESTIGATIONS


*Understanding Criminal
Record Searches*




**HR
US ROAR**
TRAINING FOR THE REAL WORLD

**Presented by:
Sandra Brewer**

Pinnacle Investigations' seminars are presented as a service to educate organizations on best practices in background screening and should not be considered legal advice. We encourage our clients to consult with legal council on all policies and procedures.



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Overview

- Hiring Statistics
- Criminal Backgrounds – Going to the Source
- Comprehensive Background Checks
- Federal Court Search
- Propriety Databases
- Fingerprints – What is Missing
- Mistakes to Avoid
- Marijuana in the Workplace
- FCRA and EEOC Compliance
- Mistakes to Avoid

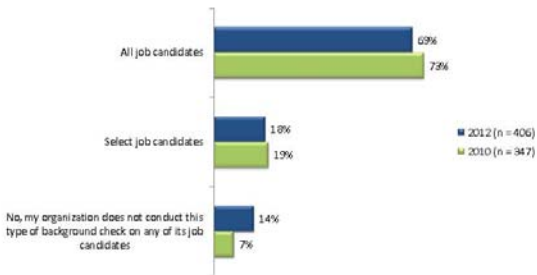


HIRING STATISTICS

Let's look at some stats SHRM put together from some surveys of HR professionals on background screening

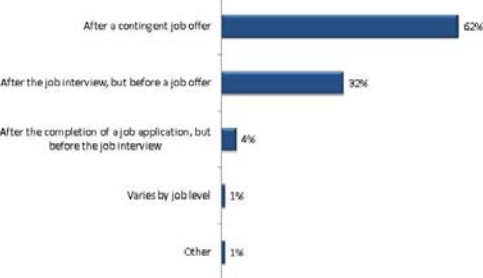


Does your organization, or an agency hired by your organization, conduct criminal background checks for any job candidates?

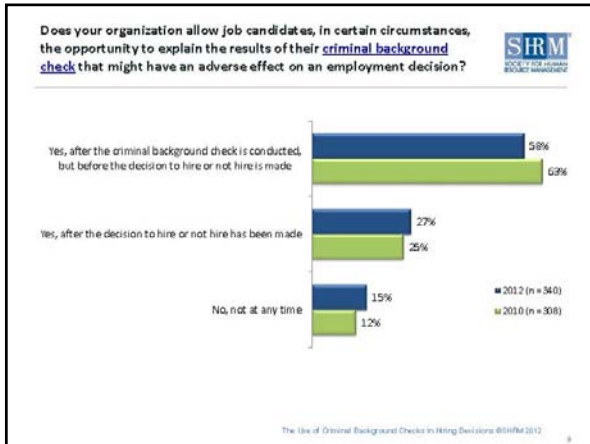


Note: All respondents who answered "not sure" were excluded from this analysis. Percentages may not equal 100% due to rounding.
The Use of Criminal Background Checks in Hiring Decisions ©SHRM 2012

When does your organization, or any agency hired by your organization, initiate criminal background checks on job candidates?



A = 348
The Use of Criminal Background Checks in Hiring Decisions ©SHRM 2012



JEOPARDY!

The answer is...

TO INSURE A SAFE, SECURE WORKPLACE

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Question:

JEOPARDY!

WHAT IS???

THE PRIMARY REASON EMPLOYERS CONDUCT BACKGROUND CHECKS

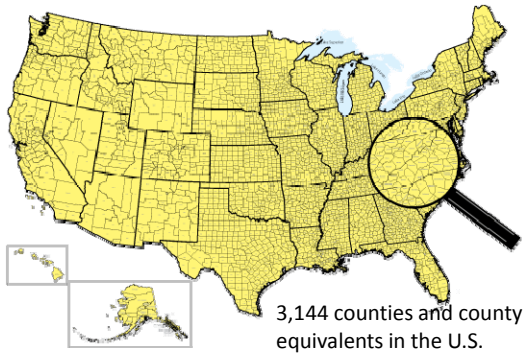
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Comprehensive Background Checks



Comprehensive Background Checks



Comprehensive Background Checks



- **85% of cases** are plea bargained down from serious crimes
- It can take **3-5 years** to even adjudicate a crime
- **21 states** have less than 65% of their cases adjudicated after 5 years
- These databases **do not** reveal reasons for dismissals, deferrals, arrests, and warrants
- **19%** of applicants have criminal records
- Only about **10%** of convictions result in incarceration



JEOPARDY!

The answer is...



SEARCHING THE COURT OF RECORD

JEOPARDY!

Question: What is???




THE MOST COMPREHENSIVE WAY
TO CONDUCT A CRIMINAL HISTORY SEARCH?

Federal Court Checks

Crimes prosecuted in Federal Court include:

- Any Crime Committed on Federal Property
Banks, Indian Reservations, Bases, National Parks,
etc
- Crimes occurring across state lines
- Many white Collar crimes including:
 - Forgery
 - Embezzlement
 - Fraud (mail, tax, etc)
 - Identity Theft

Meeting your Legal Due Diligence

- As an employer you must meet applicable federal and state laws as well as meeting your *legal due diligence*
- These are two separate requirements
- State laws vary according to individual states
- Federal laws apply across the board and can vary by industry
- It is possible to meet state laws and not meet your legal due diligence



Meeting your Legal Due Diligence

- **Legal due diligence**
a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent person under the particular circumstances; not measured by any absolute standard but depends on the relative facts of the special case.
- **Layman's terms** – did you do everything possible and at your disposal to ensure that you have checked into your applicant's criminal background
- *What does that mean to Federal Criminal Court Checks?*



JEOPARDY!

The answer is...



FRAUD, CONSPIRACIES, INTERSTATE CRIMES,
DRUG CRIMES, GOVERNMENT,
TRIBAL FELONIES



JEOPARDY!

Question:
What are???

CRIMES ONLY FOUND IN FEDERAL COURT






**PROPRIETY DATABASES:
USE WITH CAUTION!!**

- National Sex Offender Registry
 - What information is included?
 - Who is responsible for entering information?
 - What is missing???

National Criminal Database – A Misnomer



- What information is included?
- How is the information entered?
- What is missing?

NATIONAL SEX OFFENDER REGISTRY

Each state has its own registry system

- Information requirements vary with jurisdictions
- Depending on jurisdiction, only courts will have the information
- The Convicted Sex Offender Registers
- Missing information from those who fail to register, current information from the courts

What is a National Criminal Check?



What is a National Criminal Check?

- Is this check a reliable criminal background check?
- What is the most complete background check?

It is easy to be misled into thinking there is such a thing as a 'National Criminal Database' which houses all of the criminal record information in the United States. Unfortunately, this simply is not the case and many organizations have been misled by this search and paid the price in litigation and PR problems. The information contained in this 'check' typically comes from a number of select state repositories, department of corrections, sex offender registries, courts, and other sources that are willing to make their data public or to sell data to corporate data brokers, who resell the information. This check is not the official court of record and can not be trusted to be complete or accurate. This check is a great marketing tool for database companies, but an unreliable and risky tool to rely on in the pre-employment process.



What is a National Criminal Check?

- Absolutely not! This check is not reliable, accurate, or current. The FCRA requires the public record information is accurate and current at the time it is reported. This means information from these national checks cannot legally be reported since they cannot be guaranteed accurate or current.
- The problems with this check are numerous and costly:
 - Not the official court of record
 - Outdated information—Information reported is often outdated by as much as 2 years
 - Lack of complete information—The data in this check does not always report final dispositions or complete case information
 - Lack of identifiers—many of the sources do not release personal identifiers such as DOB or SSN, so there is no way to associate the name with the record
- A National Criminal Database should not be referred to as a check, but rather a 'scan' of a limited private database. Both the FTC and the EEOC have released guidance restricting the use of these searches a criminal background report.



Database Checks- Legal Requirements

If a screening firm locates a criminal hit, then the screening firm has an obligation under the FCRA Section 613 (a)(2) to search the court of record. This section requires that a Consumer Reporting Agency must:

"...maintain strict procedures designed to insure that whenever public record information, which is likely to have an adverse effect on a consumer's ability to obtain employment, is reported, it is complete and up-to-date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up-to-date if the current public record status of the item at the time of the report is reported."

FCRA section 613(a)(1) provides an alternative procedure. Instead of going to the courthouse, a Consumer Reporting Agency (CRA) can notify the consumer that public record information is being reported by the consumer reporting agency and give name and address of the requester. However, some states, such as California, do not allow for this alternative. This is a potential compliance issue for employers who operate in states that do not allow the "notification" procedure to be used instead of the "strict procedure" method of double-checking at the court of record.



Database Checks- Legal Requirements

FCRA section 607(b) also applies under the 613 letter option, so even if a CRA uses the letter option, there is still an obligation under FCRA section 607(b) to use "reasonable procedures to assure maximum possible accuracy." That means that so-called letter option is not open ended and data sellers still have a general accuracy obligation. FCRA Section 607(b) sets forth in no uncertain terms the duty of a CRA to be accurate. The section reads:

(b) Accuracy of report. Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.



Mistakes to Avoid

Instant 'National' Checks (database checks)



NATIONAL CRIMINAL DATABASE DISCLAIMER

Important: The Public Records and commercially available data sources used in this system have errors. Data is sometimes entered poorly, processed incorrectly and is generally not free from defect. This system should not be relied upon as definitively accurate. Before relying on any data this system supplies, it should be independently verified. For Secretary of State documents, the following data is for information purposes only and is not an official record. Certified copies may be obtained from that individual state's Department of State. The criminal record data in this product or service may include records that have been expunged, sealed, or otherwise have become inaccessible to the public since the date on which the data was last updated or collected.

IRBSearch, LLC does not constitute a "consumer report" as that term is defined in the federal Fair Credit Reporting Act, 15 USC 1681 et seq. (FCRA). Accordingly, IRBSearch, LLC may not be used in whole or in part as a factor in determining eligibility for credit, insurance, employment or another permissible purpose under the FCRA.

Hide

Note: Not all of the information contained in these search results is derived from governmental agencies. Some information may have been enhanced by additional sources.



The Reality

There is no National Criminal Database or central reporting authority for criminal records.



JEOPARDY!

The answer is...

National Criminal Database



Question:
What is???

JEPARDY!

The Most Incomplete Way to Complete a Criminal Background

Fingerprints: What's Missing

Reliance on individual municipalities to report fingerprint records leaves gaps in the FBI database.

The Reality

Though perceived by many as all encompassing, the FBI database is not considered reliable as a single source for background screening purposes. Even for those entities that are required to use the FBI's database, it is recommended that other sources be used to supplement the FBI search. Even the FBI acknowledges that its NCIC database is limited, noting that it contains only about 50 to 55 percent of all available criminal records, along with information taken from fingerprint submissions retained by the FBI in connection with arrests and, in some instances, federal employment, naturalization, or military service.

- National Association of Professional Background Screeners

The Reality

Data Quality Issues and the Opportunity to Correct Information

No single source exists that provides complete and up-to-date information about a person's criminal history. The FBI-maintained criminal history database, however, is certainly one of the better sources because it is based on positive identification and can provide, at a minimum, nationwide leads to more complete information. If provided such access, however, users may not want to rely exclusively on an FBI and state repository check and may also want to check other record sources, such as commercial databases and local courthouses to obtain more complete and up-to-date information in support of criminal history background screening.

- U.S. AG Report, 2006



Fingerprints and Background Checks

In 1998, President Clinton signed into law the Volunteers For Children Act as Public Law 105-251, which amends the National Child Protection Act of 1993 (42 U.S.C. Sec. 5119). For the first time, any business or organization, whether public, private, for-profit, not-for-profit or voluntary, that provides care, treatment, education, training, instruction, supervision, or recreation to children, the elderly, or individuals with disabilities, has the lawful right to request fingerprint-based national criminal history background checks of their volunteers and employees through the FBI. Access to the FBI would come through each state's Criminal History Records Repository.

This opened the door and since then an FBI fingerprint check seems to be the favorite answer.



Problems with Fingerprinting

Many fingerprints reported do not include the following:

1. Plea Bargains
2. Dispositions (Guilty, Not Guilty, Dismissals)
3. Dismissals-fingerprints not always sent



Problems with Fingerprinting

- States can take up to 2 years to report to the FBI
- Municipalities, Cities, must also be responsible to report
- States are not required to send dispositions
- Contains only the records that have been fingerprinted
- Many states do not fingerprint all felonies

WARNING:

Original guilty dispositions are changed to dismissed after court ordered stipulations/ treatments are completed



JEOPARDY!

The answer is...

Up To Two Years



Question:
What is????

JEOPARDY!

Length of Time for
States to Report Fingerprints



A Complete Picture







1. Potential Employee stating they have legal experience with over 12 years as a paralegal and law library clerk Department of Justice experience

2. Nuclear Plant Applicant

3. Volunteer at a Non Profit

4. Potential Employee with release signed and personal information provided

A. Federal Offenses for Impersonating military personnel, Felony Kidnapping, Felony Pointing a Gun at another, Felony Fraud, Identity theft – using the SS# of a deceased 83 year old female, Current warrants for arrest.

B. Federal prisoner with 18 guilty charges out of 94 federal charges, felony theft charges, felony forgery charges, Bail jumping and Controlled substance charges

C. Favorite website – Anarchist's Cookbook

D. Actual date of birth was one day off listed date of birth. Criminal history included 4 Failure to Appear for Misdemeanor Traffic charges and a guilty Assault charge. No criminal history under the date of birth provided.

Mistakes to Avoid

Instant 'National' Checks (database checks)

These databases, compiled by large data brokers, contain limited information from a few counties and state criminal records repositories and often miss more records than they find. They are also notorious for associating records to the wrong people.

FCRA section 613 (2) states that CRA's must ensure that the information is (among other things) accurate & complete



Mistakes to Avoid

State Checks

- Most states do not verify the provided Social Security Number
- Does not search all names associated with SSN
- May only provide convictions
- Does not contain information from other states
- Does not contain information from Federal Courts



Mistakes to Avoid

FBI Fingerprints

- Many locations do not fingerprint all convictions (misdemeanor and/or felony)
- Many locations do not have time or personnel to send information to the FBI
- Locations can take 6 months to 2 years to report to the FBI
- Delays in getting fingerprint results



Marijuana in the Workplace

Although marijuana is still illegal under Federal Law, recently a few states have legalized it for recreational use and thrust it back into the employment spotlight. There are a few things employers should note:

- Employers can still maintain a drug free workplace and do not have to accommodate those who use it for recreational or medicinal purposes
- Colorado (Amendment 64) specifically allows employers to have policies restricting the use of marijuana and Washington (Initiative 502) makes no provisions concerning possession or use by employees



Marijuana in the Workplace

- Review substance abuse policies to ensure restrictions concerning illegal drug use include "recreational and medical marijuana." Employers can still have zero tolerance drug policies.
- Pre-employment, post-accident and reasonable suspicion drug testing, are permissible, as long as the employer is complying with all applicable federal, state and local laws concerning drug testing.
- Employers should educate their employees concerning their perception of their legal right to use marijuana versus the employer's expectations concerning marijuana use



ALASKA: THE FREEDOM STATE



ALASKA: THE FREEDOM STATE

No State Specific Restrictions -
Lucky you!

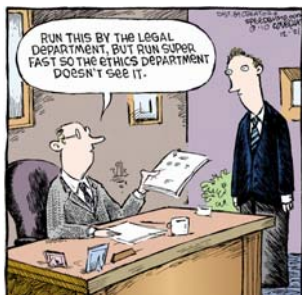
Many states see fit to further
complicate things by adding more
restrictions on top of the FCRA
regulations....but not Alaska.



**The Freedom State,
BUT:
*FCRA and EEOC
Compliance***



Compliance



THE FCRA

FCRA defined:

The Fair Credit Reporting Act (FCRA) is designed to regulate the use of consumer report information and other background information received about individuals from consumer reporting agencies (CRAs). The FCRA also puts in place procedures to guarantee that the background information reported is as accurate as possible.

CRA is any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer or other information on consumers for the purpose of furnishing consumer reports to third parties.



FCRA in the news

Background Check Firm To Pay \$18M To End FCRA Claims

Class Action Lawsuit against Background Firm Alleging Fair Credit Reporting Act Violations Demonstrates Importance of Legal Compliance

November 21, 2013
This Oregon County and first ethics background screening are subjects of FCRA class action lawsuit. Articles

Federal Jury in Oregon Awards \$18M Judgment in FCRA Lawsuit

30 October 2014

Employers Must Comply with FCRA or Risk Class Action Lawsuits



FCRA in the news

Federal Trade Commission
Protecting America's Consumers

Home | News | Complaints | Consumer Protection | Economics | General Counsel | Actions | Congressional | Policy | International

About Public Affairs | Public Events | Speeches | Statements | Reporter Resources | Videos and E-books

For Release: 05/07/2013

FTC Warns Data Broker Operations of Possible Privacy Violations

Letters Issued As Part of Global Privacy Protection Effort

The Federal Trade Commission sent letters to ten data broker companies warning that their practices could violate the Fair Credit Reporting Act (FCRA) after a test shopping operation by the FTC indicated the companies were selling to sell consumer information without abiding by FCRA requirements.

The test shopping operation was part of a worldwide privacy protection effort. FTC staff members posed as individuals or representatives of companies seeking information about consumers to make decisions related to their creditworthiness, eligibility for insurance or suitability for employment.

Data broker companies that collect, distribute or sell this information are considered consumer

FTC Warns Data Broker Operations of Possible Privacy Violations

- Warning Letter to Alliantek
- Warning Letter to Brokers Data
- Warning Letter to Case Brokers

FTC Warns Data Broker Operations of Possible Privacy Violations

If you send this link to someone else, the FTC will not collect any personal information about you or the recipient.



FCRA in the news

Whole Foods Hit With FCRA Class Action For Background Screening Process

Published on 12 February 2014 by Angela Preston in [6](#): The Way (BTW), Compliance, Legislation & Litigation

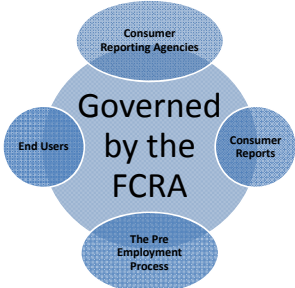




27
Tweet

Whole Foods Market was just inducted into a growing club where no one wants to be a member. The giant food retailer is the latest target of a class action law suit for alleged violations of the Fair Credit Reporting Act (FCRA). Whole Foods is in good company, joining other reluctant club "members"—national companies like Disney, Domino's Pizza, CVS, K-Mart. One of the big trends we are following in 2014 is the deluge of FCRA-related employment background screening lawsuits. This week the trend continues.





THE FCRA






THE FCRA



Employer = End User



Background Investigator = CRA

THE FCRA

There are 2 types of reports defined by the FCRA:

Consumer reports: are written, oral or other communications of a consumer reporting agency which bear upon a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which are used (or expected to be used) as a factor in establishing eligibility for employment purposes or for obtaining credit or a loan. These reports include items such as credit history, driving record, criminal record, etc.

Investigative consumer reports: include information on a consumer's character, general reputation, personal characteristics or mode of living obtained through personal interviews with neighbors, friends or associates of the consumer or acquaintances of the consumer.



THE FCRA

Employers are defined as 'end users' by the FCRA

End-users

End-users are the individuals or entities that buy consumer reports to use for business or employment purposes. For example, a department store that buys credit reports about customers who apply for store credit cards is an end-user, as is a company that orders background checks about job applicants.

Reports provided to an end-user from the CRA must have a 'permissible purpose' (i.e. part of a background check for pre employment purposes)



THE FCRA & Credit Checks

The use of credit checks for employment purposes also falls under the FCRA.

There have recently been more restrictions put on the use of credit checks in the pre-employment process. Several states have greater restrictions on the use of credit reports than the Federal FCRA defines.

The following is required for an employer to run credit checks:

- On-site inspection
- Permissible purpose



FCRA & State Laws

State Laws work in conjunction and sometimes in addition to the FCRA requirements.

Laws can vary from State to State and even in certain cities and municipalities

- Ban the Box
- Industry requirements
 - DSHS
 - DOT
 - DOE



EEOC Guidance's Impact on Background Checks



The EEOC

U.S. Equal Employment Opportunity Commission (EEOC) –

Responsible for enforcing Federal laws dealing with discrimination.



The EEOC

Has the authority to investigate charges of discrimination against employers who are covered by the law.

If they find that discrimination has occurred, they will try to settle the charge. If not successful, they have the authority to file a lawsuit to protect the rights of individuals and the interests of the public. The EEOC does not, however, file lawsuits in all cases where they find discrimination.



EEOC- BAN THE BOX

The "Ban the Box" Movement has been gaining traction across the country



BAN THE BOX

Cities and counties that have "banned the box":

- | | | | |
|--------------------|----------------------|-----------------------|---------------------|
| Alameda County, CA | Memphis, TN | Atlantic City, NJ | Minneapolis, MN |
| Austin, TX | Multnomah County, OR | Baltimore, MD | Muskegon County, MI |
| Berkeley, CA | New Haven, CT | Boston, MA | New York, NY |
| Bridgeport, CT | Norwich, CT | Cambridge, MA | Oakland, CA |
| Chicago, IL | Philadelphia, PA | Cincinnati, OH | Providence, RI |
| Cleveland, OH | San Francisco, CA | Cumberland County, NC | Seattle, WA |
| Detroit, MI | St. Paul, MN | Hartford, CT | Travis County, TX |
| Jacksonville, FL | Washington, DC | Kalamazoo, MI | Worcester, MA |

Legislation is pending in many areas and organizations are lobbying for further government action to remove arrest and conviction questions from the initial employment application. [Stay informed of the trends in your area.](#)



EEOC-BAN THE BOX

The EEOC has weighed in on Ban the Box also

The Guidance issued in April, 2012 takes a cue from these state laws and recommends that employers do not ask about convictions on an application. If and when they are made, they should be limited to those that are job related.

According to the EEOC, the consideration of criminal convictions should come later in the hiring process, not during the pre-interview process.



JEOPARDY!

The answer is...

EEOC

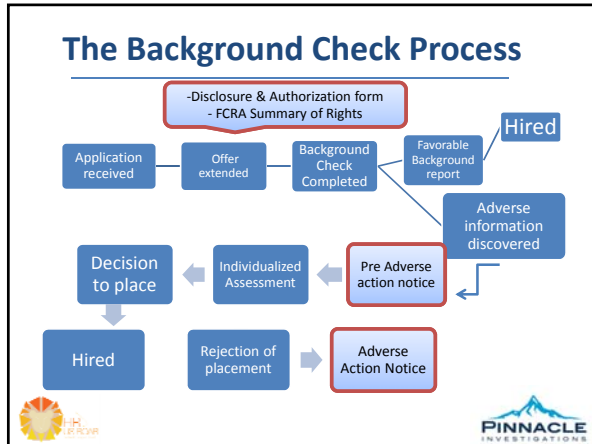


Question:
What is???

JEOPARDY!

The Government Agency
That Made Your Job Harder!





Questions & Answers

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