

A S I S I N T E R N A T I O N A L

Preemployment Background Screening

ASIS GDL PBS-2009

GUIDELINE



an ASIS Guideline for Security

PREEMPLOYMENT BACKGROUND SCREENING GUIDELINE

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Approved September 2, 2009

ASIS International

Abstract

This guideline aids employers in understanding and implementing the fundamental concepts, methodologies, and related legal issues associated with the preemployment background screening of job applicants.

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About NAPBS

Founded in 2003 as a non-profit trade association, the National Association of Professional Background Screeners (NAPBS) serves to represent the interest of companies offering employment and background screening. NAPBS offers an opportunity for qualified companies to participate in shaping the body of knowledge and regulations impacting our futures. NAPBS give the screening industry the ability to effectively demonstrate its competence, reliability and willingness to adopt standards.

ASIS and NAPBS in an effort to promote shared cooperative interests collaborated in the revision of the 2006 version of the "Preemployment Background Screening Guideline".

Suggestions for improvement of this document are welcome. They should be sent to ASIS International, 1625 Prince Street, Alexandria, VA 22314-2818, USA.

Commission Members

Jason L. Brown, Thales Australia

Steven K. Bucklin, Glenbrook Security Services, Inc.

John C. Cholewa III, CPP

Cynthia P. Conlon, CPP, Conlon Consulting Corporation

Michael A. Crane, CPP, IPC International Corporation

Eugene F. Ferraro, CPP, PCI, CFE, Business Controls Inc.

F. Mark Geraci, CPP, Purdue Pharma L.P., Chair

Robert W. Jones, Kraft Foods, Inc.

Michael E. Knoke, CPP, Express Scripts, Inc., Vice Chair

John F. Mallon, CPP

Marc H. Siegel, Ph.D., Commissioner, ASIS Global Standards Initiative

Roger D. Warwick, CPP, Pyramid International

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At the time it approved this document, the PBS Guideline Committee, which is responsible for the development of this Guideline, had the following members:

Committee Members

Committee Chairman: Michael S. Keenan, Forest Laboratories, Inc.

Commission Liaison: Michael E. Knoke, CPP, Express Scripts, Inc.

Committee Secretariat: Sue Carioti, ASIS Secretariat

Kerstin Bagus, LexisNexis Screening Solutions

G. Tim Best, PreScreen America, Inc.

Angela L. Bosworth, Esq., OPENonline

Albert Bueno, General Information Services

Robert Capwell, Employment Background Investigations

Mike Coffey, Imperative Information Group

Arthur J. Cohen, Esq., Concorde, Inc.

Steven R. Cotner, Corporate Intelligence Consultants

Russ Dempsey, JD, LLM, Background Bureau, Inc.

Frederick G. Giles, CPP, CARCO Group, Inc.

William F. Hauswirth, Intellicorp Records, Inc.

Kym Kurey, A-Check America, Inc.

Larry Lambeth, Employment Screening Services, Inc.

Angela Linville, Wachovia Corporation

Patricia McGowan, Personnel Data Research LLP

Jason B. Morris, EmployeeScreenIQ, Inc.

Barry J. Nadell, Nadell Investigations

Berndt Rif, CPP, De Nederlandsche Bank NV

Lester S. Rosen, Esq., Employment Screening Resources (ESR)

Working Groups Members

Kerstin Bagus, LexisNexis Screening Solutions

Robert Capwell, Employment Background Investigations

Mike Coffey, Imperative Information Group

Arthur J. Cohen, Esq., Concorde, Inc.

Steven R. Cotner, Corporate Intelligence Consultants

Russ Dempsey, JD, LLM, Background Bureau, Inc.

Frederick G. Giles, CPP, CARCO Group, Inc.

Kym Kurey, A-Check America, Inc.

Larry Lambeth, Employment Screening Services, Inc.

Jason B. Morris, EmployeeScreenIQ, Inc.

Barry J. Nadell, Nadell Investigations

Lester S. Rosen, Esq., Employment Screening Resources (ESR)

NAPBS Contributing Members

Kerstin Bagus, LexisNexis Screening Solutions
Robert Capwell, Employment Background Investigations
Mike Coffey, Imperative Information Group
Arthur J. Cohen, Esq., Concorde, Inc.
Steven R. Cotner, Corporate Intelligence Consultants
Frederick G. Giles, CPP, CARCO Group, Inc.
Larry Lambeth, Employment Screening Services, Inc.
Jason B. Morris, EmployeeScreenIQ, Inc.
Barry J. Nadell, Nadell Investigations
Lester S. Rosen, Esq., Employment Screening Resources (ESR)

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Preemployment Background Screening Guideline

1. SCOPE, SUMMARY, AND PURPOSE

1.1 Scope

The scope of the *Preemployment Background Screening Guideline* is to aid U.S. employers in understanding and implementing the fundamental concepts, methodologies, and related legal issues associated with the *preemployment background screening* of job applicants. This core guideline is focused on U.S. organizations employing people within the United States. (Due to the global nature of many U.S. organizations, it is recommended that the employer work with Counsel to develop a country-specific process to comply with local regulations.) Unless otherwise noted, the search types described in this document are those obtained from sources within the United States.

1.2 Summary

This guideline presents practical information concerning the value of preemployment background screening, the importance of the application form, important legal issues and considerations (such as the Fair Credit Reporting Act, privacy issues, state laws, rules, and regulations), the key elements of preemployment background screening, the types of information to utilize in verifying the key elements, the use of credit reporting agencies in preemployment background screening, and an appendix of a sample preemployment background screening flow chart. Additional preemployment background screening resources are listed in the References/Bibliography section.

1.3 Purpose

Employers, from the smallest to the largest, understand the dual benefits of hiring the best people and providing a safe and secure workplace—both physically and financially—for their employees, customers, shareholders, and the community in which they operate. A key factor is to know as much as you can about the people you want to hire and to know that before hiring them. Hiring a new employee is an important responsibility for any organization. An employer who has performed a thorough preemployment background screening on its applicants is more likely to bring into the organization a highly-skilled person who will prove to be a tremendous asset. Unfortunately, absent a sufficient preemployment background screening, that same employer runs the risk of exposing his or her organization to someone who could ultimately become the organization's greatest liability.

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The guideline should also serve as an educational and practical tool that organizations can use as a resource in understanding the reasons for preemployment background screening, understanding the legal principles surrounding the issue of preemployment background screening, and assistance in developing policies and procedures that will enhance an organization's hiring policy.

2. TERMINOLOGY

The terms defined below are for the purposes of understanding their usage within this guideline.

2.1 Adverse Action: (FCRA § 603 (15 U.S.C. § 1681a)) In the context of background checks for employment, adverse action as stated in the FCRA, is “a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.” Adverse action is more than the denial of a job to an applicant or volunteer. It can also be the denial of a promotion or a change in job duties, location, hours, or title; anything that is considered unfavorable by the employee, applicant, or volunteer.

2.2 Adverse Action Notice: (FCRA § 615a (15 U.S.C. § 1681m)) This notice—which can be delivered orally, in writing, or electronically—is required in order to inform the consumer (job applicant, employee, or volunteer) that adverse action has been taken. The notice is required when the adverse action is, in whole or in part, a result of the consumer report provided by a consumer reporting agency. A letter or other notice informing the job applicant he or she has been denied employment is necessary when using the services of a consumer reporting agency and the employer is making an adverse employment decision on the basis of the consumer report provided by the consumer reporting agency. The notice must include:

- The name, address, and phone number of the Consumer Reporting Agency (CRA) that supplied the report;
- A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

The Adverse Action Notice must be preceded by a *'Pre-Adverse Action Notice.'*

2.3 Arrest: The taking or keeping of a person in custody by legal authority, especially in response to a criminal charge; specifically, the apprehension of someone for the purpose of securing the administration of the law, especially if bringing that person before a court.

2.4 Background Screening: An inquiry into the history and behaviors of an individual under consideration for employment, credit, access to sensitive assets (such as national defense information), and other reasons.

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2.5 Bankruptcy: A statutory procedure by which a debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors.

2.6 Civil Records: Official records related to civil cases—i.e., when one party sues another.

2.7 Consumer Report: FCRA § 603(d)(15 U.S.C. § 1681a)(1) provides that the term "consumer report" means any written, oral, or other communication of any information by a Consumer Reporting Agency (CRA) 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 §1681b.

2.8 Consumer Reporting Agency (CRA): FCRA § 603(f)(15 U.S.C. § 1681a) provides that the term "consumer reporting agency" means any person which, 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 credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

2.9 Conviction: The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.

2.10 Credit Bureau: A Consumer Reporting Agency specifically involved in creating a consumer credit report. See also *Consumer Reporting Agency*.

2.11 Credit Report: A detailed report of an individual's credit history prepared by a credit bureau including: (1) personal data (current and previous addresses, Social Security Number, employment history); (2) summary of credit history (number and type of accounts that are past-due or in good standing); (3) detailed account information; (4) inquires into applicant's credit history (number and type of inquiries into applicant's credit report); (5) details of any accounts turned over to credit agency (such as information about liens or wages garnishments via federal, state, or county records); and (6) information on how to dispute any of the above information.

2.12 Credit Reporting Agency: See *Consumer Reporting Agency*.

2.13 Criminal Records: Official records related to criminal cases. A crime is an act or omission that is prosecuted in a criminal court by a government prosecutor and can be punished by confinement, fine, restitution, and/or forfeiture of certain civil rights.

2.14 DD Form 214: DD Form 214, Certificate of Release or Discharge from Active Duty. The term "DD-214" is often used generically to mean "separation papers" or "discharge papers." The DD Form 214 documents the primary occupational specialties, decorations, education, and the characterization of service. The DD Form 214 was issued to separate service members beginning in the 1950's. Prior to that time, a variety of service specific forms were issued to separating service members.

2.15 Decision-Making: The process of evaluating and judging information gathered and relating it to the specific requirements of the position for which the applicant is applying.

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2.16 Due Diligence: The attention and care that a reasonable person exercises under the circumstances to avoid foreseeable harm to other persons or their property. Failure to make this effort may be considered negligence.

2.17 Employment Verification: The process of contacting an applicant's past employers to confirm items such as dates of employment, title, salary, and eligibility for rehire.

2.18 Fair and Accurate Credit Transactions Act (FACTA): The Fair and Accurate Credit Transaction Act of 2003, Pub. L. 108-159, 111 Stat. 1952 (FACTA), added new sections to the federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., (FCRA) intended primarily to help consumers fight the growing crime of identity theft. Accuracy, privacy, limits on information sharing, and new consumer rights to disclosure are included in FACTA.

2.19 Fair Credit Reporting Act (FCRA): The FCRA (15 U.S.C. 1681 et seq.) established specific requirements and rules that apply when an employer uses a third party, such as a background screening firm, to help conduct a preemployment background screen and generate a consumer report for the employer. The FCRA addresses the rights and obligations of four groups: 1) consumer reporting agencies; 2) users of consumer information; 3) furnishers of consumer information; and 4) consumers. The FCRA does not pertain only to credit reports but to the entire *consumer report*.

2.20 Felony: A serious crime typically punishable by imprisonment for more than one year or by death. Examples include burglary, arson, rape, and murder.

2.21 Identifying Information: Also referred to as Personally Identifiable Information (PII). Any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including:

1. Name, Social Security Number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
2. Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
3. Unique electronic identification number, address, or routing code; or
4. Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

2.22 Incarceration: The act or process of confining someone; imprisonment.

2.23 Investigative Consumer Report: FCRA § 603(e)(15 U.S.C. § 1681a) provides that the term "investigative consumer report" means a *consumer report* or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a *consumer reporting agency* when such information was obtained directly from a creditor of the consumer or from the consumer.

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In other words, another official name for a special type of preemployment background screen which normally involves communicating with others that know the applicant and reporting back the details of those inquiries.

If information is obtained that is adverse to the interest of the consumer, then Section 606 of the FCRA sets forth additional requirements.

2.24 Jail: A local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined.

2.25 Judgment: A court's final determination of the rights and obligations of the parties in a case.

2.26 Lien: A legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied.

2.27 Misdemeanor: A crime that is less serious than a felony and is typically punishable by fine, penalty, forfeiture, or confinement (usually for up to one year) in a place other than prison (such as county jail).

2.28 Negligent Hiring: The failure to use reasonable care in the employee selection process, resulting in harm caused to others. Employers have a legal duty not to hire people who could pose a threat of harm to others, which can include everything from slight to fatal bodily injury, theft, arson, or property damage. The definition of "reasonable care" depends on the degree of the risk of harm to others. The greater the risk, the higher the standard of care required.

2.29 Pre-Adverse Action Notice: FCRA § 604(b) (15 U.S.C. § 1681b) provides that anyone "using a consumer report for employment purposes, before taking any adverse action based in whole or in part on that report ..., shall provide to the consumer (i.e., the applicant) to whom the report relates: (i) a copy of the report; and (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under §1681g(c)(3) of this title.

This notice normally consists of a letter or other document informing the applicant (or employee) that the employer intends to take *Adverse Action* based upon a *Consumer Report* provided by a *Consumer Reporting Agency*. The statute requires the employer to furnish the consumer (job applicant or employee) with a description of their rights in the prescribed form entitled *A Summary of Your Rights Under the Fair Credit Reporting Act*. Before the adverse action is taken, a second and additional notice entitled the Adverse Action Notice (defined above) must be provided to the consumer within a reasonable period of time after the *Pre-Adverse Action Notice* is given. A prospective employer should determine what is a reasonable period of time based upon the facts and circumstances of each particular situation, and must consider affording the consumer the opportunity to receive and respond to the *Pre-Adverse Action Notice*. Accordingly, the time it takes to deliver the notice to the consumer must be considered. The FTC's staff counsel in a FTC Informal Staff Opinion Letter (Weisberg, June 27, 1997) responding to an inquiry regarding the amount of time that should elapse between the sending of the *Pre-Adverse Action Notice* and the subsequent Adverse Action wrote that a period of 5 days appeared reasonable.

2.30 Prison: A state or federal facility of confinement for convicted criminals, especially felons.

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2.31 Sensitive Personally Identifiable Information (SPII): A term used in information security to identify a piece or pieces of information that can be associated with a unique individual and that can result in harm to the individual if misused. This term is often used to describe information that is can be used in identity theft. Information such as a Social Security Number, National ID number, or Driver's License number is considered SPII, since it is not readily or publically available, identifies a unique individual, and can result in harm if misused. Some information can result in harm (and is thus considered SPII) when it is found in conjunction with other pieces of data (such as a financial account number) in conjunction with other identifying information (such as a name). SPII requires strict handling guidelines as a result of the risk of misuse.

2.32 Social Security Number: A nine digit number resembling "123-00-1234" that is issued to an individual by the U.S. Social Security Administration. The original purpose of this number was to administer the Social Security program, but it has come to be used as a "primary key" (a *de facto* national ID number) for individuals within the United States. The nine-digit Social Security Number is divided into three parts.

The first three digits are the area number. Prior to 1973, the area number reflected the state in which an individual applied for a Social Security Number. Since 1973, the first three digits of a Social Security Number are determined by the ZIP code of the mailing address shown on the application for a Social Security Number. The middle two digits are the group number. They have no special geographic or data significance but merely serve to break the number into conveniently sized blocks for orderly issuance. The last four digits are serial numbers. They represent a straight numerical sequence of digits from 0001-9999 within the group.

3. WHY CONDUCT PREEMPLOYMENT BACKGROUND SCREENING

There are a number of reasons why an employer should perform preemployment background screening. The most compelling reasons are:

- *Making the best hiring decision:*
 - Gaining a competitive advantage.
 - Reducing turnover.
 - Increasing productivity.
 - Increasing morale.
 - Reducing risk of business disruptions.
 - Complying with mandates created by state or federal law for certain industries (health care, child care, etc.).
 - Fulfilling other legal or contractual obligations.
- *Providing a safe work environment and protecting the public:*
 - Protecting organization's assets (people, property, and information).

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- Fostering peace of mind.
- Reducing risk of legal liabilities, including failure to perform due diligence, negligent hiring, and equitable treatment of applicant pool.

3.1 Making the Best Hiring Decision

It has been said that some applicants will only tell you what you want to hear. A good writer and storyteller can invent a good resume. The Society for Human Resource Management (SHRM) conducted two separate online surveys on resume inaccuracies. In August 2004, SHRM reported that 61% of the human resource (HR) professionals surveyed said they find inaccuracies in resumes after carrying out background checks. An April 2006 article in the *New York Times* reports that a study conducted by ResumeDoctor.com, a resume-writing service based in Burlington, Vt., found that 43% of the more than 1,100 resumes examined had one or more “significant inaccuracies,” while 13% had two or more. Michael Worthington, the co-founder of ResumeDoctor, said the most common transgressions could be found in three areas: 1) education; 2) job titles; and 3) dates of employment.

By thoroughly verifying information given during the employment process, a company can improve the chances they are hiring an individual who has portrayed his or her background, experience, and skills honestly and accurately. Using preemployment background screening to verify an applicant’s history helps employers make decisions based upon facts.

3.2 Providing a Safe Work Environment and Protecting the Public

An employer’s obligation to maintain a safe place to work also arises from the legal principles that exist in most states under common law (the body of law derived primarily from judicial decisions based on custom and precedent, rather than from statutes, codes, or constitutions). These legal principles include:

- Premises liability (the duty of a property owner to take responsible steps to guard against reasonably foreseeable violence).
- Respondent superior (an employer’s indirect liability for the wrongful acts of an employee committed within the course and scope of employment).
- Sexual and other forms of harassment prohibited under discrimination laws (when threats or violence are motivated by a victim’s protected status).
- A collection of negligence theories, including negligent hiring (the failure to properly screen job applicants, particularly for sensitive positions involving a high degree of interaction with the public), negligent supervision (the failure to supervise employees and to discipline violators of anti-violence rules), and negligent retention (the failure to terminate employees who have engaged in behavior in violation of company policies).¹

¹ See Speer, R. “Workplace Violence: A Legal Perspective.” *Clinics in Occupational and Environmental Medicine*, 3:733–749 (2003).

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In the April, 2002 edition of Occupational Health and Safety magazine, attorney-at-law and author of *The Safe Hiring Manual*, Lester S. Rosen points out that the statistics on the consequences of even one bad hire are significant. Industry statistics suggest the cost of even one bad hiring decision can exceed \$100,000, taking into account the time spent recruiting, hiring, and training, and the amount of time the job is left undone or done badly by an unqualified applicant. In addition, the financial cost from theft, violence, etc., can be enormous. Additionally, there are other costs that are hard to measure, such as the harm to employee morale or the entity's reputation.

3.3 Legal Risks and Liabilities

The value of an objective, fair, and competent preemployment background screening is that it will permit determination of facts not otherwise verifiable or known.² As such, employers should pay particular attention to the legal implications associated with the employment screening process. While employers do not have the duty to provide an impenetrable island of safety, every employer has the obligation and duty to take reasonable precautions against preventable harm to employees, customers, and anyone else visiting the workplace. Under the federal Occupational Safety and Health Act and corresponding state statutes, employers have a "general duty" to protect employees against "recognized hazards" that are likely to cause serious injury or death. Specifically:

Section 5. Duties

(a) Each employer:

- (1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;**
- (2) Shall comply with occupational safety and health standards promulgated under this Act.²**

Appropriate due diligence is necessary to ensure that the applicant hired does not pose a foreseeable risk to others with whom he or she might interact while on the job. The failure to properly screen out dangerous applicants may give rise to a negligent hiring claim, if the individual intentionally harms someone in the course of his or her employment.

Another legal risk arises from the inequitable treatment of individuals in the applicant pool. A properly crafted preemployment background screening program gives all applicants of equal qualifications equal consideration and does not impose disparate treatment on anyone or any group. Employers are encouraged to objectively evaluate each applicant. To the extent possible, objective methods should be used to determine each applicant's qualifications and suitability for the job. Such fairness not only

² OSH Act of 1970, 29 USC 654, §5 (a)(1).

provides the employer a legal defense if faced with a claim, but also helps ensure that the best applicants are consistently selected.

4. DOCUMENTED PROGRAM FOR PREEMPLOYMENT BACKGROUND SCREENING

4.1 Having a Documented Program for Preemployment Background Screening

Preemployment background screening should be an integral part of an employer's policies, practices, and procedures established for the recruiting, hiring, and training of employees. Carl R. Ernst, author of *The Uniform Commercial Code Filing Guide*, describes Policies, Practices and Procedures³ as follows:

- *Policy:* A policy is a general statement of a principle according to which an organization performs business functions. An organization does not need to maintain policies in order to operate. However, practices and procedures that exist without the underpinnings of a consistent policy are continually in jeopardy of being changed for the wrong reasons, with unintended legal consequences.
- *Practice:* A practice is a general statement of the way the organization implements a policy. Good practices support policy.
- *Procedure:* A procedure documents an established practice. Use of forms is one of the useful ways procedures are documented. For an organization that has a practice of checking past court records for criminal records, the procedures would be the documentation on how it is done, as well as the documents showing it was done.

It is important that policies, practices, and procedures be in writing. To the extent that policies, practices, and procedures are documented in writing, it is possible to independently verify from the procedure whether employees are conforming to the practice, and therefore to the policy. This kind of documentation makes it easy to perform reliable audits. Equally important, an employer needs to demonstrate with documentation that there was training, implementation, and auditing to ensure the programs were followed.

The employer needs to develop, train, and maintain committees or teams charged with the creating and updating of screening policies and procedures that are applicable to the employer's business, security, recruiting, hiring, and training needs. The committees or teams should be comprised of professionals with knowledge of those needs. A person or department charged with administration or ownership of the screening program should lead or chair the committees or teams. The program should include all of the steps identified by a committee or team that are required in the screening process. In most instances, this will include but not be limited to collection of personal information from the subject,

³ C. R. Ernst, *Uniform Commercial Code Revised Article 9 Alert, A State-by-State Guide to Searching and Filing under the New Revision*. Ernst Publishing Co., LLC.

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proper authorization to conduct the background screen, how the results of the screen are analyzed and reported, and the intended use by the employer. The key components of the practices and procedures should identify the use of employment applications and resumes, forms, and letters used including disclosure forms, waivers, a conditional job offer, and job denial. In addition, the procedures should address both internal and external alternatives, including measures used to outsource any screening to be performed by a third party.

People, committees, or teams tasked with decision-making should also be assigned. In addition and where applicable, it should be ensured that no conflicts exist between union agreements and the employer's screening policies.

The policy, practices, and procedures should be viewed as living documents to be updated as requirements change, additional programs or products become available, programs or products become unavailable or change, or laws affecting hiring are updated or amended. For employers who span multiple states or cross into various industries, the document must separately address all the issues inherent to such situations.

Finally, regular assessment of program results and metrics should be undertaken to measure the benefits of the program, opportunities to improve program outcomes, and overall benefit and value to the organization's financial performance and culture.

4.2 Who Is Typically Involved in the Preemployment Background Screening Process

Involvement in the preemployment background screening process will depend on many factors, such as the size and structure of the organization and the level and role of the position the applicant is applying for within the organization. It will also depend on the organizational culture defining how individuals are hired.

Whatever the process, the most frequent participants tend to come from the following functional groups of the organization.

4.2.1 Human Resource Personnel

Human resource personnel are often the first line of defense in the recruitment and selection of quality and risk-free applicants for the organization. In most organizations, the human resource department has the responsibility of recruiting applicants. This begins with the writing of approved position descriptions, the advertising of such positions, and the collection and initial screening of the applications. Human resource personnel may also have the responsibility for conducting initial testing as part of the application process.

During the interview stage, human resource personnel should take an active role to evaluate the applicant and gather information that will facilitate the applicant's background investigation.

4.2.2 Security Personnel

Security personnel may include a proprietary security director or an internal or external investigator charged with investigating the applicant's background. If security personnel are used, the role of the security function should include the investigation and verification of all information provided by the applicant in his or her signed application and/or resume. The results should include a documented investigation of any discrepancies that may arise during the preemployment background screen.

4.2.3 Business Owners and Managers

Business owners and managers may need to take part in the process especially if it is a small organization. In many cases, the business owner and direct manager of the applicant will make the final hiring decision. The business owner and managers may wish to be considered a part of the interview process in which they make an evaluation of the applicant and look for information which may influence the direction of the preemployment background screen.

4.2.4 Legal Personnel

Legal personnel, whether in-house or on a contract basis, play a vital role in ensuring that all position postings, application forms, and the preemployment screening practices and procedures meet union or bargaining unit requirements (where appropriate), as well as comply with local, state, and federal employment laws, rules, and regulations. They also play a key role in the approval and writing of the employer's forms and letters.

5. LEGAL ISSUES AND CONSIDERATION

Employers who decide to implement a background screening process for job applicants, or engage the services of a third party to do it for them, will immediately discover an assortment of challenging and involved statutes, laws, and regulations. In the United States, legal issues and considerations exist at the federal, state, and local levels. U.S. employers who also operate internationally must further comply with the laws of the countries in which they operate or from which they obtain information, and also the international conventions and treaties that regulate them and their activities.

At the same time, employers should be aware that the legal landscape that affects preemployment background screening practices is constantly changing. As such, it is imperative that the employer and those they hire to assist them remain aware and knowledgeable of the evolving law in all of the jurisdictions in which they operate.

The following examines several of the significant legal concepts and U.S. statutes confronting employers conducting preemployment background screening. Please note that this material is not all-inclusive, should serve only as a guide, and does not constitute legal advice. Consult your organization's legal counsel for specific guidance.

5.1 Legal Compliance

Depending upon whether an individual employer is conducting a preemployment background screen or a third party consumer reporting agency (CRA) is engaged to do so, both federal and state laws need to be considered. The Fair Credit Reporting Act (FCRA) does not preempt any state law that regulates the use, collection, or distribution for the prevention of identity theft, as long as the state law is consistent with the FCRA (FCRA § 625; 15 U.S.C. § 1681t). Wage considerations, job descriptions, federally regulated industries, level and scope of offenses, etc., all need to be held up to the light of the law. Employers should be aware that in-house preemployment background screening may fall under the jurisdiction of the FCRA and state-specific statutes. Employers should consult with legal counsel for specific guidance.

5.2 Fair Credit Reporting Act (FCRA)

A primary legal consideration for employers is the FCRA (< <http://www.ftc.gov/os/statutes/fcrajump.htm> >). The FCRA regulates more than just credit reports. It establishes specific requirements for compilation and handling of a preemployment background report, whether designated as a Consumer Report or Investigative Consumer Report. The FCRA applies to employers that use the services of a third party in preparation of an employment screening report. If a third party prepares or provides any portion of an employment screening report (such as criminal records, employment references, or education verifications), then the FCRA will apply. The FCRA was most recently amended by the Fair and Accurate Credit Transaction Act (FACTA or FACT Act) of 2003. Strict adherence to the FCRA is required when utilizing Consumer Reports.

5.3 Employer Requirements under the FCRA

1. Prior to receiving a consumer report, an employer must certify to the CRA in writing that it will do the following:
 - Use the information for employment purposes only.
 - Not use the information in violation of any federal or state equal employment opportunity law.
 - Obtain all the necessary disclosures and consents as required by the FCRA.
 - Give the appropriate notices in the event an adverse action is taken against an applicant based in whole or in part on the contents of the Consumer Report.
 - Give the additional information required by law if an Investigative Consumer Report is needed.
2. Employers must provide a clear and conspicuous disclosure in writing to the applicant before the report is obtained. Also, employers must obtain a written authorization before obtaining a consumer report (FCRA § 604(b); 15 U.S.C. §1681b(b)). The disclosure and authorization can be combined in a single document, but should contain nothing more than the authorization and

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disclosure. (See Federal Trade Commission [FTC] Opinion letter, from Cynthia Lamb, FTC Investigator, to Richard Steer, October 21, 1997). Authorizations may contain a provision that once an employer obtains consent, consumer reports may be procured at any time during the employee's tenure without having to obtain another consent. Such an authorization is sometimes referred to as a "blanket" authorization or the language as an "evergreen clause". A sample document can be found in 11.2. However, many employment attorneys recommend obtaining written authorization each time a consumer report is requested. Some state regulations may prohibit the use of an evergreen consent and may require a written authorization for each consumer report requested.

3. Employers need a disclosure form for an Investigative Consumer Report (FCRA § 606(a); 15 U.S.C. §1681d(a)). Often times, the forms are combined. The applicant must be notified by the user of the Investigative Consumer Report (e.g. the employer), within three days, that an Investigative Consumer Report has been requested and that he or she has the right to obtain additional information as to the nature and scope of the investigation requested. See the FTC, *Notice to Users of Consumer Reports: Obligations of Users Under the FCRA* for further details. Some states may have additional requirements.
4. Additionally, the applicant must receive a copy of the FTC document, *A Summary of Your Rights Under the Fair Credit Reporting Act*.
5. The adverse action rules apply to decisions not to hire an individual *based in whole or in part on a consumer report*. If adverse action is intended and before it is taken, an employer must provide the applicant with a copy of the report and the FTC document, *A Summary of Your Rights Under the Fair Credit Reporting Act* (FCRA §604(b)(3); 15 U.S.C. §1681b(b)(3)). This is the first notice, also called the *Notice of Pre-Adverse Action*.
6. If, after sending out the first notice and related documents, the employer intends to make a final decision not to hire, then the employer must provide the applicant a second notice, also called the *Notice of Adverse Action*. This Notice will inform the applicant of the employer's final decision and will provide a copy of the FTC's form *A Summary of Your Rights Under the Fair Credit Reporting Act*. Additionally, the notice must provide the CRA's contact information (name, address, and phone number), must advise the individual that: (1) the CRA did not take the action and cannot provide specific reasons why it was taken; (2) the individual has a right to dispute the accuracy or completeness of the information; and (3) the individual has a right to another free copy of his or her consumer report within 60 days (FCRA § 615; 15 U.S.C. §1681m).

The FCRA does not indicate how long an employer must wait after sending the pre-adverse action notice before taking adverse action. However, according to the FTC, employers should, "keep in mind the clear purpose of the provision to allow consumers to discuss reports with employers or otherwise respond before adverse action is taken." (See FTC Opinion letter, from William Haynes, FTC Staff Attorney, to Harold Hawkey, December 18, 1997.) Thus, the applicant must have a meaningful opportunity to review the material and to respond.

The FTC has stated that CRAs may fulfill an employer's ministerial duties under the FCRA, and a CRA may send the adverse action letters for an employer. However, the employer remains responsible for any duty imposed by the FCRA and may be subject to liability if the duties are not performed by the

CRA. (See FTC Opinion letter, from William Haynes, FTC Staff Attorney, to Michael Rosen, June 9, 1998.)

5.4 Federal Trade Commission (FTC)

The Federal Trade Commission (< <http://www.ftc.gov> >) regulates and oversees, among other things, the Fair Credit Reporting Act (FCRA), which encompasses CRAs, employers, information sources, as well as establishing rights for consumers themselves. Preemployment background screening reports (consumer reports) must comply with all aspects of the FCRA that apply to the acquisition of information on a consumer. Previously, the FTC-published "Opinion Letters" that are not law but are very helpful when interpreting the FCRA.

5.5 FCRA Document Destruction Rules

The Federal Trade Commission has promulgated regulations effective June 1, 2005 for the proper destruction of "consumer information." The rules (FCRA § 628; 15 U.S.C. § 1681w) do not require that documents be destroyed; they merely set up parameters should a decision be made to destroy documents. Because these FTC regulations are limited to requiring the proper disposal of "consumer information," they have been referred to as "the Disposal Rule." *Consumer information* includes: (a) consumer reports; and (b) information derived from consumer reports, provided that the information is individually identifiable. As applied to the employment context, "consumer information" would include not only a report obtained from a consumer reporting agency but also, for example, notes prepared by a supervisor or human resources manager based upon information contained in the report. "Consumer information" encompasses information in both paper and electronic form.

The regulations require employers to take reasonable steps to prevent unauthorized use of, or access to, consumer information during the disposal process. While the regulations do not require any specific disposal methods, the regulations provide examples of the types of disposal processes that would be reasonable. Paper documents containing consumer information, for example, could be placed in locked trash bins while awaiting disposal and then shredded or burned. The regulations suggest that for consumer information stored on electronic media (hardware, floppy disks, CD's, etc.) it would be reasonable for an employer to develop procedures to render the information irretrievable before disposal. While not specifically required by the regulations, the FTC suggests that businesses relying on third parties for the disposal of records containing consumer information should engage in due diligence before selecting, or continuing to use, a third party.

5.6 State Consumer Reporting Statutes

Many states have laws similar to the FCRA and regulate reporting of criminal records, the disclosure and authorization process, and notices to consumers.

5.7 Regulated Industries

Both federal and state laws regulate many industries, mandating that specific preemployment background screening searches be conducted for applicants applying for positions within certain industries. If an employer is engaged in one of these industries, it must be aware of both the federal and state requirements. Industries for which there are specific requirements include, but are not limited to, transportation, securities, nuclear, banking, healthcare, and education.

5.8 State Licensing Requirements

State specific licenses and/or forms are mandated by certain states in order to obtain information. These requirements may apply to employers, researchers and/or CRA's. Check with local legal counsel to determine appropriate applicable laws.

5.9 USA PATRIOT Act

The USA PATRIOT Act (< <http://www.usdoj.gov/archive/11/highlights.htm> >), officially titled "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism," and signed into law October 26, 2001, addresses terrorist threat issues within the financial industry in the wake of the September 11, 2001, attack. Although this law does not specifically address preemployment background screening (with the exception of hazardous material drivers), the due diligence requirement imposed on financial institutions in terms of screening clients can be helpful in advising employers on steps to take to screen employees as well.

5.10 Bankruptcy Act (11 U.S.C. §525(b))

The Federal Bankruptcy Act (< <http://www4.law.cornell.edu/uscode/11/525.html> >) prohibits discrimination in employment solely on the basis of bankruptcy. (Reviewed cases indicate that the law was not violated where the employment decision involved factors other than bankruptcy. In other words, to violate the statute, bankruptcy must have been the single reason for the employment action.)

5.11 Sarbanes-Oxley Act of 2002

The Sarbanes-Oxley Act of 2002 (< <http://thomas.loc.gov/cgi-bin/query/z?c107:H.R.3763.ENR:%20> >) requires that publicly traded companies adhere to new standards for accountability in corporate governance and financial reporting. Guidelines for compliance with Sarbanes-Oxley recommend a background investigation be conducted on any individual considered for employment or for promotion in a public company to "certain positions of trust," including accounting professionals, anyone in a financial reporting oversight role, and any other individuals with direct access to corporate assets, trade secrets, and information systems. Some recommended areas for preemployment background screening include the individual's educational background, employment history, any criminal past, and interviews with independent references.

5.12 Fair Treatment and Discrimination

Much of the regulation relating to preemployment background screening encompasses fair treatment issues. These laws prohibit discrimination on the basis of religion, national origin, age, marital status, gender, medical condition or disability, or financial condition. Some of the laws that relate to fair treatment issues include:

- *Title VII of the Civil Rights Act of 1964* (< <http://www.eeoc.gov/policy/vii.html> >): Discrimination in any phase of hiring can lead to claims against employers for violations of Title VII of the Civil Rights Act and violations of the Equal Employment Opportunity Commission (EEOC) (< <http://www.eeoc.gov> >) guidelines. To ensure fairness of treatment of applicants, recruitment and hiring should be conducted in a manner that is impartial, objective, and legally defensible. Fair hiring practices include a consistent selection criteria and evaluation of candidates for similar positions. The selection criteria must be properly related to established job requirements. Finally, there must be consistent treatment of applicants in all phases of the process including preemployment screening, interviews, rating processes, and assessment techniques.
- *Americans with Disabilities Act (ADA)* (< <http://www.usdoj.gov/crt/ada> >): With respect to preemployment background screening, the ADA provides legal guidance that prevents employers from asking medical questions before a conditional offer of employment is made, and that are not considered bona fide occupational qualifications. Because “current illegal use of controlled substances” is not covered by the ADA, employers can do drug testing and screening at the applicant stage. So-called psychological, “honesty” testing, etc., is not prohibited, as long as it does not have a medical dimension. The EEOC has issued guidance on how to distinguish “psychological” testing (permitted) from “medical” testing (not permitted at the pre-hire stage).
- *Civil Rights Act of 1991* (< <http://www.eeoc.gov/policy/cra91.html> >): Caps or limits monetary damages for intentional acts of discrimination in hiring.
- *Age Discrimination in Employment Act of 1967* (< <http://www.eeoc.gov/policy/adea.html> >): Protects individuals who are 40 years of age or older from employment discrimination based on age.
- *State Employment Laws*: Many states (and even some counties and cities) have passed fair employment laws that are generally analogous to federal laws, but may contain specific differences. For example, several states regulate the use of arrest records, and some states limit the reporting of conviction records to seven years. Be sure to research state law for the states in which you operate.

5.13 Privacy

Privacy issues have always been a fundamental concern for those dealing with sensitive information. Those issues are increasing in both public visibility and impact on employment screening practices. One issue employers must consider is that of confidentiality. Whether using a CRA or not, the

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preemployment background screening process inherently allows the employer (and certain of its employees) access to personal information of a confidential nature. As such, the employer's process must contemplate the proper management of that information and under what circumstances its employees (i.e., applicant screeners and interviewers) may access and use that information. Employers need to establish policies for record storage and security. Data security and access control are key responsibilities of employers that perform background screens when such screens involve the use of personal information of a confidential nature. (See also 5.5, *FCRAA Document Destruction Rules* above.)

Increasing concerns about identity theft and identity fraud are causing state and federal legislators to pass more laws that regulate what personally identifiable information is available, and impose new security requirements on what holders of that information, including those who collect or use preemployment background screening reports, must do to safeguard such information against unauthorized access. Some of those laws include:

- *Driver's Privacy Protection Act* (18 U.S.C. §2721 *et seq.*): Establishes that a driver's license information needs to be protected against unauthorized disclosure, and establishes permissible purposes for authorized disclosure.
- *Financial Modernization Act of 1999*, also known as the *Gramm-Leach Bliley (GLB) Act* (< <http://www.ftc.gov/privacy/privacyinitiatives/glbact.html> >): Protects customers' nonpublic personal financial information held by financial institutions. The GLB Act gives authority to eight federal agencies and the states to administer and enforce the Financial Privacy Rule and the Safeguards Rule. The Safeguards Rule requires all financial institutions to design, implement, and maintain safeguards to protect customer information. The Safeguards Rule applies not only to financial institutions that collect information from their own customers, but also to financial institutions – such as credit reporting agencies – that receive customer information from other financial institutions.
- *Health Insurance Portability and Accountability Act (HIPAA)* (< <http://www.dol.gov/ebsa/newsroom/fshipaa.html> >): If the employer is a Covered Entity or Business Associate, as defined in HIPAA, it establishes that particular identifiable health information is "protected health information" and may not be used without permission.
- *Applicable State Laws and Compliance*: Considerable variations exist among state laws and federal laws, and among states themselves, in the areas of consumer protection, employment, workers' compensation, sealed or expunged records, juvenile records, use of arrest and conviction records, and other related laws. Practitioners must be well versed in the laws, rules, and regulations for all the geographic spheres in which they operate and in which the above issues are addressed.
- *International Privacy and Data Transfer Laws*: International privacy and data transfer laws also impact the definition, availability, and transfer of personal information used in screening. A growing list of countries have enacted Privacy Regulations and Data Transfer Laws, impacting users and processors of screening information when personal information is transferred across country borders. In addition, consideration must be given to the availability and legality of individual background screen searches in each country. In many countries, information commonly obtained in the employment background screening process in the U.S. may not be available for employment purposes or may not be transferred across country borders. The U.S.

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Department of Commerce developed a “Safe Harbor” framework to assist organizations in meeting the adequacy requirements of the EU Directive 95/46/EC. For additional information consult the European Commission Justice and Home Affairs Data Protection Page: http://ec.europa.eu/justice_home/fsj/privacy/index_en.htm or the Safe Harbor page: <http://www.export.gov/safeharbor>.

5.14 Record Retention

Because preemployment background screens disclose highly sensitive information about individuals, it is essential that the employer appropriately and strictly secure the confidentiality of the information both internally and externally. In reality, an employer may maintain multiple files on employees. The employer should retain relevant documents in a secure manner for a period that complies with applicable state and federal laws and regulations and the employer’s records’ policies.

With respect to the period of time in which to keep records, it is important to keep in mind the FCRA’s statute of limitations. An individual may bring a claim not later than the earlier of: (1) two years after the individual discovers the basis for liability; or (2) five years after the date on which the violation occurs (15 U.S.C. § 1681p.). In other words, an individual must make a claim within two years after he or she learned of the violation. If the violation is not discovered within five years of the violation date, then the statute bars an action. The following examples may be helpful:

- *Example 1.* Ms. Smith learns of a violation on 08/16/06. The violation occurred on 08/01/ 06. Ms. Smith must make a claim before 08/16/08.
- *Example 2.* A violation occurs on 08/01/06. The violation goes undetected. A claim for said violation must be brought before 08/01/11 or the statute will prevent the claim.
- *Example 3.* A violation occurs on 08/01/06. Mr. Jones learns of the violation on 07/15/10. Mr. Jones must make a claim before 08/01/11 or it will be prevented by the five-year rule in the statute. Mr. Jones cannot claim that he has two years from the date he discovered the violation, since the statute provides it is the earlier of the two-year date or five years from the violation date.

5.15 Criminal Records

The use of criminal records in the screening process raises some specific legal issues.

- *FCRA:* The FCRA, discussed in 10.2, prescribes limits on the criminal information that can be released by a CRA for use in preemployment background screening. (Keep in mind that the FCRA regulates information obtained from a consumer reporting agency, and its restrictions do not apply to employers conducting their own preemployment background screening without the assistance of a third party.) The FCRA limits the time period to seven years in which arrest information may be reported as part of an employment related background screen. The FCRA limitation of seven years does not apply to conviction records, which may be reported regardless of the time frame. In addition, the seven years limitation does not apply in the employment of an individual at a salary level of \$75,000 or more.

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- *State Laws:* In addition to the FCRA, some states have laws that restrict the use of criminal records. Some states grant exceptions for jobs at certain salary levels. In addition, some states do not allow employers to consider or use arrest information as a basis to deny employment. In some states, the rules apply to both employers and CRAs.

An employer should be familiar with and consult with legal counsel concerning state laws that limit the use of information and the applicable exemptions. For example, some state regulations may restrict the reporting of criminal records beyond seven years.

- *EEOC Considerations with Criminal Records:* The EEOC has published specific guidelines related to the use of criminal records in the preemployment screening process. However, exclusion of applicants based on criminal behavior is permissible if the employer can demonstrate business necessity. To establish business necessity, an employer must be able to show that it considered: (1) the nature and gravity of the offense or offenses; (2) the time that has passed since the offense; and (3) the nature of the job held or sought. (See EEOC Notice N-915, February 2, 1987.)

With respect to arrest records, the EEOC states that it is acceptable to consider an arrest record as evidence of conduct upon which the employer makes a decision. An arrest record may raise a suspicion that an applicant has committed a crime. However, when considering an arrest, the EEOC directs an employer to take an additional step to consider “whether the applicant is likely to have committed the alleged conduct.” To do so, employers should examine the circumstances, offer the applicant an opportunity to explain, and make follow-up inquiries if necessary. Likewise, the EEOC does not prohibit the use of misdemeanor information in the hiring process. The gravity and nature of the offense should be considered in the context of the job sought (See EEOC Notice 915.061, September 7, 1990).

- *Interpreting Criminal Dispositions:* One final consideration in the use of criminal records is determining the status of a criminal record. The increased case load in the criminal justice system has led to a host of new ways to resolve cases, such as plea bargains, probation, treatment programs, deferred adjudication, community control, diversion programs, and other state specific dispositions. Records may be sealed or expunged, and thus may be prohibited under the FCRA and state laws. A deferred adjudication or diversion program might indicate criminal behavior, but in some instances it may not be considered a conviction, and may be prohibited under state law, depending upon the jurisdiction. Users of background reports need to consider whether the information indicated on a criminal report may be used in the context of all applicable laws and guidelines.

5.16 Additional Important Considerations

While there are numerous statutes, laws, and regulations that dictate how preemployment background screens are conducted and what information is available, employers should be reasonable in how they use and collect the information that may be available to them. Some CRAs monitor their reports to ensure that information given to an employer does not violate various rules concerning what employers can and cannot use in making hiring decisions. A CRA may take the position that it is primarily a data conduit to the employer, and it is the employer’s duty to not use any information an employer should not have. It is equally important that employers not use “confidential sources” with

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access to non-public information or data brokers offering information from illegal or questionable sources.

A new trend is the use by employers of online searches on applicants. Such searches may be appropriate depending upon the job position. Searches can be conducted on search engines such as Google or Yahoo. In addition, it has been reported that some employers have begun accessing social networking sites such as Facebook or MySpace. Other online sources that could potentially be checked are Web sites, blogs, chat rooms, sales activities, trading of electronic files, sharing of computer programs, personal social listings, posted writings, media reports, school activities, interest group activities, email dissemination, digital photographs, and others.

Employers should approach the use of these tools with caution for the following reasons:

- (a) *Social networking sites, blogs, chat rooms, and other Internet information may contain information that a person did not intend for an employer to view.* Some sites may have privacy notices limiting use. Similarly, passwords may be needed to gain access, and there may be conditions on obtaining passwords. An employer needs to consider if the manner of getting such material is consistent with privacy policy and privacy laws. Although it may be argued that anything on the Internet is "public," these sites may contain commentary, pictures, or other material clearly intended for a private use only and use of the material may unduly invade privacy.
- (b) *If employers or recruiters utilize the Internet directly without engaging the services of a CRA, the federal FCRA is not involved.* That means that employers are not required to send an adverse action letter if they come across material that they find objectionable. As a result, applicants may be denied employment and not know why.
- (c) *An employer can potentially face allegations of unlawful discrimination if the online research reveals information that may not be used directly or indirectly to limit a person's employment opportunities.* This information includes, but is not limited to, information such as race, color, religion, national origin, ancestry, medical condition (including pregnancy), disability, marital status, gender, or sexual orientation.
- (d) *An employer should consider where such online content is reasonably related to the requirements for the job.* The consideration of extraneous information that is not a valid predictor of job performance can create a source of liability.
- (e) *There can also be an issue of whether the online information was in fact posted by the applicant.* In cyberspace, virtual identities can be shared. In addition, there is the possibility that an employer is looking at material that is a name match only and does not in fact belong to the applicant, material that was incorrectly attributed to the applicant, or even placed on the Internet maliciously.

6. HOW TO STRUCTURE A PREEMPLOYMENT BACKGROUND SCREENING PROGRAM

6.1 The Importance of the Employment Application

The preemployment background screening process begins with the employment application. The employment application is the “window” to information about a candidate and his or her qualifications and its use is considered a best practice. Applications help to ensure uniformity, the obtaining of all necessary information, and a place for applicants to sign certain necessary statements.

Employment applications provide the following benefits:

- *Standardization*: The format and content remain the same, making it easier for the user to compare and contrast applicants.
- *Ease of Legal Review*: The uniform series of questions and instructions aid in ensuring the applicant meets all applicable state and federal laws and industry requirements.

NOTE: Periodically review and update applications.

- *Information Useable in Hiring Process*: Unlike a resume, applications contain information that can be used in the hiring decision. The use of an application helps prevent employers from having impermissible information.
- *A signature and date line for the applicant indicating agreement to the statement that untruthfulness or omissions may be grounds for termination or grounds to not extend an offer of employment*. This area is important if information becomes known that the subject did not divulge on the application. (FDIC: FIL-46-2005: Guidance on Developing an Effective Preemployment Background Screening Program, page 2.)
- *Provides space for other necessary statements and signatures*.

Employers should consider including the following information in their applications:

1. *Applicant's Current Information*: Name, address, and contact information. The name should include first, middle, last, and suffix. Additional names should also be included if they may be part of the background scope. For example, if a criminal history search is to be conducted in Puerto Rico, the maiden name of the applicant's mother should also be required.
2. *Residence Address History*: Specified residence address history should be requested according to the organization-defined years to be searched (recommendation: seven to ten years). The address history is often used to conduct county criminal record checks and to cross check against other information provided in the application, such as the employment history.
3. *Social Security Number*: With the growing public concern over identity theft, some employers are not requesting the Social Security Number on the Employment Application and instead are asking for an applicant's Social Security Number on the FCRA Consent or Authorization Form an applicant signs permitting the employer to conduct preemployment background screening. Employers may consider eliminating Social Security Numbers from their employment

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Applications and instead require them as part of the FCRA Consent or Authorization Form. They should not be eliminated from the entire process, however, as they are one of the important identifiers necessary for an accurate applicant background screen. It is a helpful identifier and often required for many of the searches comprising a background screen, be it education, criminal, licensing, etc.

4. *Date of Birth*: Many employers have chosen to ask for an applicant's date of birth, on the consent form an applicant signs, which permits the employer to conduct preemployment background screening. A request on the part of the employer for information such as "Date of Birth" on an employment application form is not, in itself, a violation of the Age Discrimination in Employment Act of 1967. Employment application forms that request such information need to assure that the request is for a permissible purpose and not for purposes prohibited by the Act. The application form should therefore contain a reference to the statutory prohibition by means of the following example or by other means: "The Age Discrimination in Employment Act of 1967 prohibits discrimination on the basis of age with respect to individuals who are at least 40 years of age."
5. *Driver's License Number and State* (if conducting Motor Vehicle Check): If special licenses are required, list the type of license. Some companies also ask the applicant to list any recent motor vehicle violations.
6. *Employment History*: Should include name, address, and phone number of employer, position, department and job responsibilities, salary, supervisor's name and title, start and end dates, reason for leaving, room for explanation of gaps in employment, and permission to contact the employer. Employment history should be requested according to the company defined years to be searched.

NOTE: A growing number of individuals are employed by temporary agencies. Applicants often list either the temporary agency name or the company where they were placed. It is recommended that instructions be given to indicate that the temporary agency employment be listed.
7. *Prior criminal history*: Provide enough space for the subject to explain complete information on the incident(s) and the disposition(s).
8. *Educational History*: Should include name, address, and phone numbers of the educational institutions, start and end dates, major or course of study, and completion status. It is recommended that the applicant provide his or her name used while attending the institution. This practice will aid in the retrieval of records.
9. *License, Certification, or Registration Information*: Include state of issue, license number, and status.
10. *International Search Requests*: May require additional information, defined by each country.
11. *Inquiry as to whether applicant has legal right to work in the United States* (include that verification will be required). Example: "Are you legally authorized to work in the United States? Verification will be required".) Yes No

Additional documents to supplement the application:

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- *Waivers or Authorizations for Information:* These forms should be regularly reviewed by legal staff. Federal, state, and local laws, rules, and regulations may require changes to waivers or authorizations.
- *Disclosure and written authorization* (if the preemployment background screen is to be processed by a Consumer Reporting Agency).

Sample applications, waivers, and authorizations can be obtained from a variety of sources, such as attorneys specializing in employment law and the Privacy and Personnel Information Management Council of ASIS International.

6.2 *Critical Items Every Application Form Should Contain*

When asking a question about prior criminal history, use the broadest possible language for felony and misdemeanor convictions and pending cases. Employers should avoid the following common mistakes:

- *“Have you ever been convicted of a felony?”:* Since misdemeanors often can be serious, a mistake an employer may make is to only ask about felonies on an employment application. Employers should inquire about misdemeanors to the extent allowed in their state, listing any exceptions that may apply.
- *“Have you ever been convicted of a serious crime?”:* Use of this question asks an applicant to offer an opinion as to what is serious. If an applicant indicated he or she was not convicted of a serious crime, but he or she does have a criminal conviction, then the employer would have a difficult time showing the applicant intentionally lied.

1. Application forms should contain a clear statement that a background screen will be conducted.
2. Application forms may include the question, “have you ever been convicted of a crime? If yes, please explain.” The form should also indicate, however, that a criminal conviction is not automatic grounds for rejection. A state may have particular requirements regarding time lines and convictions. An employer should verify that this question is permitted in the state where a candidate applies for employment.

It is also permissible to ask such questions as, “would any conditions of current probation or parole prohibit you from completing the tasks of the job for which you are applying?” Some court-issued conditions may be a violation for the applicant (i.e., operating a motor vehicle, working in an unsupervised capacity with minors, accessing on-line content via the internet).

3. Application forms should include a statement that untruthfulness or material omissions are grounds to terminate the hiring process or employment, no matter when discovered.
4. Applications forms should indicate the applicant consents to preemployment background screening, including verifying educational and personal credentials, past employment, and court records. If an employer uses an outside service to perform a preemployment screening, the federal Fair Credit Reporting Act requires there must be a disclosure and written consent

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form separate from the application form. Make sure the applicant has signed the authorization form.

5. It is suggested that the consent portion of any release form used for a background screen should indicate the release is valid for future screening for retention, promotion, or reassignment (unless revoked in writing).
6. At a minimum, the application form should indicate that *all* employment for the past seven to ten years be listed. Such a listing will make it easier to spot unexplained gaps in employment. Ideally, criminal checks should be conducted in each county where the applicant has lived, worked, or gone to school.
7. The application form should ask about addresses for the past seven to ten years. This is important to determine the scope of any criminal record search.
8. The application form should allow the applicant to indicate whether the current employer may be contacted for a reference.
9. The application form may cover other standard matters. Examples include an employment at-will policy and the requirement for an applicant to provide original documents to verify identity and right to work in the United States, etc.

7. APPLICATION REVIEW

Simply filling out an application should not be the end of the application process. The next step is for an interviewer to review the application.

The first area of review should be for completeness. At the very least, a cursory review for missing information should be conducted in the presence of the applicant. This would allow the interviewer to point out the missing information to the applicant, with a request to complete the application.

NOTE: This section may not be applicable to online applications. Online applications typically will not allow the applicant to submit an application without fully entering information into each required section. However, the information entered may not be valid information, as the subject may have entered erroneous information in an effort to continue the process.

The next step should be a review of the minimum requirements of the position and information from the application in support of the applicant's ability to meet these minimum requirements.

NOTE: An employer may conduct a minimum requirement review at the very beginning of the application process, even before the subject fills out an application form. Such a process, when done uniformly and consistently, can save time and effort on the part of the applicant and the employer.

8. INTERVIEWS

The interview is usually the first opportunity for an employer to meet face to face with applicants. A well-planned and executed interview can accomplish three goals:

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1. Convey critical information to the applicant in order to discourage inappropriate applicants and to encourage honesty.
2. Allow for the transfer of missing information from the applicant to the employer. The interview is when an employer has an opportunity to fill in any gaps in an applicant's employment history and to make sure the employer has all the needed information to begin the screening process. Also, the employer has the opportunity to ask additional specific questions if the employer suspects the candidate has attempted to omit or lie about unfavorable information.
3. Permit an assessment of the candidate. The interview provides the employer a chance to assess the skills, qualifications, and credentials of the applicant in person. In so doing, the employer should try to use a consistent set of questions to allow for a uniform process.

9. APPLICANT SCREENING PROCESS

The goal of this section is to identify and define key elements of the preemployment background screening process for all employers in all industries.

Prior to beginning any preemployment background screening process, it is important to have already established company policies on the scope of the preemployment background screens and the handling of results. As with any part of the hiring process, consistency and relevance to the position are vital. Policies should be defined for the following:

- *Depth of background verifications*: Depth refers to how far back in time to check information provided and generally affects criminal record history, employment, and education verifications.
- *“Other” or alias names*: Companies should set a standard for checking additional names, such as maiden names. Identification of such names is very important when conducting criminal record searches and educational verifications. Criminal record searches should be conducted for both felonies and misdemeanors under all names used by the applicant.
- *Levels of background verifications*: Levels of background verification refer to the specific checks to be conducted on each position. An employer may maintain a single level of preemployment background screening, while others conduct more intensive preemployment background screening according to the sensitivity of the position.
- *Decision making process*: The decision making process refers to how the results will be judged.
- *Exception handling*: Exception handling refers to how results outside the norm will be managed. An employer may have procedures in place to allow an appeal process of a background result.

9.1 Scope of the Preemployment Background Screen

The scope of the preemployment background screen typically addresses the following three key elements:

1. Identity Verification

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2. Personal History Verification
3. Credentialing

A preemployment screening process should consist of background searches to determine if the applicant meets the employer's requirements in *each* of the three elements. The employer needs to determine which searches in each element constitute the best method to conduct the search. Business factors to consider are:

- Business necessity
- Nature of the position
- Industry specific requirements
- Cost
- Time sensitive hiring needs

9.2 Description of the Elements

9.2.1 Identity Verification

Every preemployment background screening process should include a verification of the "real" or "personal" identity. *Real identity* means that the employment history, education, credentials, court records, and other data associated with a person does, in fact, belong to the person who is physically applying for the position. In other words, a person's real identity is based on the notion that the personal history being presented belongs to the person who is physically present. All other preemployment background screening efforts are dependent on that certainty.

A number of different products are available to help verify identity information provided by the subject:

- *Social Security Number Validation*: This search identifies if the Social Security Number has been validly issued and/or if the number appears on the Social Security Administration's (SSA) Death Master list. The Death Master is a list of numbers reported to SSA as belonging to a deceased individual. The SSN Validation will not tie the Social Security Number to the subject nor will it provide a name or address history. It only provides an indication that the number is valid and not retired.

Similar information can be obtained on the Social Security Administration's Web site at <<http://www.ssa.gov>>.

To obtain information about Social Security Numbers that are currently assigned, go to <<http://www.ssa.gov/employer/ssnvhighgroup.htm>>.

To obtain information about the Social Security Death Master list, go to <<http://www.ntis.gov/products/ssa-dmf.aspx>>.

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- *Social Security Number Check*: Also known as a SSN Trace, Credit Header, or Name / Address Verification.

Although the name may suggest the search is a verification of the subject's name and address with the Social Security Administration, the Social Security Number Check is not an official validation of the SSN. The results are obtained from one of the three credit bureaus, from a CRA's proprietary databases, or from a CRA's proprietary database in conjunction with credit bureau data. The Social Security Number check provides a history of the subject's name, address, and/or Social Security Numbers. The results may also provide a full or partial date of birth and some employment history information. The results are used to determine if the information provided by the subject is accurate and complete. In some cases, the address and/or history derived from the Social Security Number Check is used to order the criminal records or to confirm a possible criminal record belongs to the subject.

This search type is a good tool for locating addresses linked to the applicant that he or she may have omitted from the application in order to cover up a negative history. The identification of names and addresses used by the subject is crucial in order to conduct a thorough criminal record search of the subject.

9.2.1.1 Government Programs

- *Consent Based Social Security Number Verification Service (CBSV)*: A service offered by the Social Security Administration (SSA) and through some CRAs to verify if the Social Security Number (SSN) and name of an individual match the SSA records. A match in the Death Master File is returned, if applicable. This search can be conducted prior to the job offer. It requires a specific type of consent be signed by the subject. The search may not be used to confirm proof of identity. This search is not the same as the "E-Verify" program.

For additional information see: < <http://www.ssa.gov/cbsv/index.html> >.

- *E-Verify*: The current and only government program available to employers to verify an individual's identity *and* right to work status is through E-Verify. E-Verify, formerly the *Basic Pilot Program*, also called the *Employment Eligibility Verification Program*, is administered jointly by the U.S. Department of Homeland Security's (DHS) Citizenship and Immigration Services (USCIS) division and the Social Security Administration (SSA). Using matching technology, it matches eight data elements used on the Form I-9 with information within the SSA and DHS databases to confirm identity and right to work status.

The earliest an employer may initiate a query is *after* an individual accepts an offer of employment and *after* the employee and employer complete the Form I-9. This allows an employer to initiate the query before a new hire's actual start date; however, the employer must initiate the query no later than three business days after the new hire's actual start date.

Additional information can be found on the DHS E-Verify page at: <http://www.dhs.gov/files/programs/gc_1185221678150.shtm>.

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- *The Designated Agent Program*: The DHS established the Designated Agent program whereby independent companies can become approved in advance to help employers sign up and run E-Verify. There are several well qualified companies who can assist employers through the process and in addition can offer other services like electronic paperless Form I-9's, storage of such forms, electronic signature, and many more services for a nominal fee. Many of these firms may be found by searching the internet.
- *Social Security Number Verification Service (SSNVS)*: This is a government program which will verify Social Security Numbers of *current and former employees* for wage reporting (Form W-2) purposes, through the SSA's Social Security Number Verification Service. An employer may input such numbers in bulk and receive confirmation that there is a "match" or "no match" in the E-Verify database. Additional information regarding SSNVS can be obtained on the SSA's web site at < <http://www.ssa.gov/employer/ssnv.htm> >.

Note: SSNVS and E-Verify may not be used for preemployment screening purposes.

9.2.2 Personal History Verification

Personal history searches provide insight and information regarding, but are not limited to such areas as:

- A. Home addresses
- B. Criminal court record history
- C. Sexual offender indices
- D. Motor vehicle records
- E. Credit reports
- F. Regulatory sanctions and terrorist lists
- G. Industry specific record history
- H. Civil court record history

9.2.2.1 Home Addresses

Such searches are often initially based upon the applicant's address history. The address history is typically obtained from the application; however, this information has not been validated, and may be falsified by the applicant. For this reason, many employers validate the address history from a Social Security Number check.

9.2.2.2 Criminal Court Record History

There are a number of sources to obtain criminal records. There are multiple separate court systems in the United States – federal courts and the state/lower courts – and a search of one system does not include a search of the other system. Each system operates under its own sets of rules and has its own courthouses, clerks' offices, indexes, and judges, requiring separate searches. When searching for criminal records, a researcher typically starts with a name search in order to determine if that applicant's name appears in whatever source is being searched. If the name is not in the system, then the search comes back as a "clear."

However, it is possible that records can be missed. An applicant may have been arrested under a different name, or if the applicant has two last names, that can lead to confusion. It is also possible that a court clerk may make a clerical mistake, or that a researcher can commit human error.

If a criminal record is found by a name-match search, the researcher must then take further steps. First, an effort must be made to determine if the record in question in fact belongs to the applicant. That requires obtaining identifiers from the applicant in order to compare to identifiers in the court records. Example of identifiers can be date of birth and Social Security Number. Even if the researcher determines that the case belongs to the applicant, it is necessary to obtain the details of the case in order to determine if it can legally be utilized in an employment decision. An employer must also make a decision as to the scope of the search, as to how deep and how wide. By deep, the employer needs to determine the amount of coverage of a person's history to research; for example, the number of years of a person's residence history, the number of aliases a person might have used, and the number of jurisdictions to search. By wide, the employer needs to determine the number of sources to search, such as the use of county criminal records in conjunction with multi-jurisdictional, statewide, or federal. As with all aspects of preemployment background screening, the decision of which sources to use for criminal history information should be considered in the context of an employer's complete preemployment background screening program and the advice of counsel. See section 5.15, *Criminal Records*, for additional information.

Adding to the difficulties in obtaining records is the fact that there are concerns about identity theft. Such concerns have led to the redaction or truncation of personal identifiers such as Social Security Number, date of birth, and addresses. In these cases, issues arise when attempting to confirm that the record found belongs to the subject being searched. If a screening firm cannot locate sufficient identifiers then the result reported to the employer may be name-match only, which requires cautionary measures by the employer. Alternatively, some firms will not report the record if sufficient identifiers cannot be matched to the record.

Sources for criminal history records are:

- *Local/County Court*: Also known as a *court record search*, this search requires a direct search of the records of a county courthouse to determine if the applicant has a record at that court. If searching on the local/county level, there are nearly 3200 jurisdictions in the US, and employers cannot, as a practical matter, search all of them. An employer must take steps to determine which counties have the most relevance to their candidate. Many employers choose to search all counties that are associated with an applicant through the Social Security trace and where the applicant has been previously employed. Means of accessing

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local/county court records is determined by each individual court. Many courts will have a computer terminal or some other electronic index that will list names of criminal defendants. Some courts are “clerk searches,” which means a researcher does not have access to an electronic index but must request that the court clerk review the court’s computer. Where the applicant’s name does not appear, then the court researchers will generally indicate that individual is “clear.” If there is a name match, then it is normally important to obtain the actual court file. That is because an electronic index may give insufficient information as to the charges or disposition of the case, and may not give enough identifiers to determine if that case belongs to the applicant in question. Where there is a potential hit, a court record search typically requires physical access to obtain copies of dispositions and court documents for review. Although most courts contain both felony and misdemeanor records in the same courthouse building, some jurisdictions maintain records or information in different locations within the courthouse or even in separate buildings.

- *Statewide Criminal History Information:* There are two varieties of statewide information. The first is a state repository managed by a division of state law enforcement. The second is actual court data from a statewide case management system provided under the auspices of the state’s administrative office of the courts. Not all states make these means of access publicly available. Both types of sources have limitations and advantages. The advantages are a single point of access for an entire state with one search. If that state has many courts with statutory access fees, a single access fee may be less expensive than a search of indicated counties separately. Another advantage to a state repository search is that an employer may identify potential criminal records that were missed as part of a search of criminal records. *Where the statewide search is done by means of a case management system,* it is possible that not all counties may have become activated on the system at the same time and there may be inconsistencies in how the system is used from county to county. Therefore, statewide criminal history information is only as accurate and up-to-date as the information provided to them by the individual courts. Many law enforcement repositories have been shown to lack current case updates or dispositions. Both types, the law enforcement database and the court case management database, may suffer from delays in entering information, high access fees, or very long turnaround times for results. Additionally, it may not be clear what data is included and what is not. The source may provide conviction records only or may provide non-conviction records as well. In response to increased use and heightened privacy concerns, many records will not be publicly available if mandated internal documentation is missing, and if useful identifiers,⁴ such as a date of birth, a driver’s license number, and a Social Security Number, are redacted. The most accurate, current, and reliable criminal history information is found at the court of origin, not in any repository. The most accurate, current, and reliable criminal history information is found at the court of origin, not in any repository. Nevertheless, statewide criminal history information may have a place in an employer’s background program. (Florida, for example, provides an employer a measure of

⁴ Identifiers are identity tags that researchers use to link a named applicant to a found record. Some examples of identifiers are correctly spelled name, middle initial, date of birth, Social Security Number, former addresses, and residential time lines. The number of identifiers available to researchers improves the accuracy of the research.

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protection against negligent hiring lawsuits if that employer specifically included a check of the state repository as one element of a background screen.)

- *Federal Court (District, Nationwide):* This is a search for a record of a federal offense in one or more of 94 U.S. federal district courts.⁵ Federal offenses include crimes committed on federal property (government office, national park, etc.) and violations of the US Federal Criminal Statutes.

Usually, a search is conducted through the Public Access to Court Electronic Records (PACER) system. PACER is run by the Administrative Office of the United States Courts (< <http://www.pacer.psc.uscourts.gov> >).

NOTE: Every federal court is not included in PACER.

Through PACER, a user accesses the "U.S. Party/Case Index." This index contains certain information from the court files, such as case numbers, and the names of those involved in the case. For an employer trying to determine if an applicant has a federal criminal record, the system is beneficial since it allows one to search by name. PACER shows all federal cases, including convictions and dismissals, pending cases, and even cases with incomplete docket information. This database does not typically have any identifiers except for a name. It is imperative the user obtain additional identifiers on the result prior to making any decision.

Certain types of criminal history searches are not available to all employers in all states and jurisdictions. They may lend themselves to only certain types of businesses and caution should be used when reviewing them for employment purposes:

- *International Criminal History Searches:* To the extent available and legal within a country, this search involves a check of local or national criminal records. This search may not be available in all countries; therefore, an employer is urged to seek legal guidance before seeking criminal history records from other countries. Employers should make sure they understand if their vendor is utilizing a reputational media review of criminal records rather than an actual search of criminal records.
- *Fingerprinting:* The submission of fingerprints to an agency for comparison against federal, state, and/or local criminal fingerprint records. Fingerprinting is not available for all employers or all industries, nor is it always uniformly available in all states for a particular industry. Additional information can be found on the FBI's Web site at < <http://www.fbi.gov/hq/cjisd/fprequest.htm> >.

There is a growing requirement by some state licensing agencies to require fingerprints during the license and registration process. These are often seen in professions such as health care, elder care, childcare, education, and security officers. Fingerprinting may also be required for some volunteer positions. It should be noted that state licensing requirements may be less stringent than individual organizational requirements and

⁵ There are 89 district courts in the 50 states. District courts also exist in the District of Columbia, Guam, the Northern Mariana Islands, Puerto Rico, and the Virgin Islands.

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additional criminal history screening may still be recommended in order to perform proper due diligence.

- *Propriety databases*: This is a general term that describes several different types of databases that are assembled by private firms. It can include databases where the information is proprietary and comes from private sources—such as the retail and mortgage industries databases that report specific behaviors, such as internal theft, shoplifting, or industry sanctions and violations. Examples of publically available databases are those that aggregate information on financial sanctions, debarment lists, healthcare related sanctions, or terrorists databases. Another example is described in section 9.2.1, *Identity Verification* of a Social Security Number check that is supplemented by other databases with information.
- *Incarceration records*: A check of all types of incarceration records, which may include but not be limited to, Federal Bureau of Prisons, state incarceration records, Department of Correction records, municipal jails, and various Departments of Probation records. These records typically contain information on individuals who are or have been incarcerated or supervised by a governing body of incarceration. Information may include current inmates, released inmates, and parolees and probationers. Records primarily contain felony convictions, but depending on the state, they may contain deferrals, adjudication withheld, first offender probation, pretrial intervention, and serious misdemeanors. An incarceration record search is ultimately used to enhance other types of criminal searches.
- *Multi-Jurisdictional Database Search* (or databased “national” criminal history search): These are searches offered by some background screening companies, and contain proprietary databased criminal records. Although they may be marketed under the name “National Criminal History”, they do not contain every available criminal record, nationwide. It should be noted that these databases are *not* FBI database searches. (FBI records are only available to certain employers or industries where Congress or a state has granted access.) The multi-jurisdictional database searches offered by background firms are drawn from government data that is commercially available or has been made public by various governmental entities, such as counties, state repositories or correctional systems. Employers can benefit from utilizing multi-jurisdictional databases since they contain millions of records, have a large coverage area, can provide instant results on “clears” (no records) and are relatively inexpensive. It can even be argued that the lack of a multi-jurisdictional search is evidence of a less than complete background check, since they are readily available and relatively inexpensive.

Some drawbacks of the multi-jurisdictional databases should be noted. Since the data is gathered from different sources, there can be variations as to its coverage, completeness, or the frequency that the data is updated. Accuracy can also be impacted by the search parameters in that parameters that are stricter will eliminate records that are not relevant. Such parameters may also eliminate a relevant record. In some states, there is no or limited date of birth information. For these reasons, multi-jurisdictional databases can be subject to both “false positives” and “false negatives.” A “false positive” means a person is identified as having a record that does not have one. A “false negative” means that a person is identified as not having record but in fact they do have one.

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Under FCRA section 613, where a database is utilized to locate a criminal record that is reported to an employer by a CRA, the CRA has two options. The CRA can either notify the applicant that a criminal record has been forward to the employer at the same time the employer is provided with a copy of the report, or the CRA can verify that the record is complete and up-to-date at the time it was reported, which normally means going to the courthouse to verify the record. The notification option is not available in all states (for example California). If the notification option is used, it is important for the CRA to ensure that the applicant is notified at the same time as the employer.

In conclusion, an approach is to use the multi-jurisdictional database search as a preliminary search tool or as a tool that supplements other criminal history type searches.

The following subclauses list additional types of Personal History Verifications that should be considered based upon the applicant's position and security sensitivity.

9.2.2.3 Sexual Offender Indices

State listing of sexual offender registries. (Not available in all states.) Individuals who are listed in these registries have typically been convicted of a felony or misdemeanor sexual offense, and are required to register in the state in which they reside. Many states have created web access for their Sex Offender Indices and employers can easily access the information. The sites may not have complete identifiers and caution should be taken to verify the match with the applicant to be screened.

A National Sex Offender Public Registry also exists. The Registry, available on the Internet at < <http://www.nsopr.gov> >, is coordinated by the U.S. Department of Justice and is a cooperative effort between the state agencies hosting public sexual offender registries and the federal government. This Web site is not a database of national sex offender records. It is a search tool allowing a user to submit a single query to obtain information about sex offenders across a number of states through a number of search options,⁶ and provides access to participating states' Web sites' public information regarding the presence or location of sexual offenders.

Because the criteria for searching are limited to what each individual state may provide, employers need to be aware that many states categorize offenders into different risk levels: *Level 1* representing low, *Level 2* representing moderate, and *Level 3* representing high. Some states consider only certain levels of sexual offenses to be public record. Consequently, that may mean that in some states the names of sexual offenders only within Levels 2 and 3 may be searchable within the state's sexual offender registry. Employers in industries requiring a search against all levels of sexual offenses must go to the local police or state police for non-public sexual offender registry searches. This option is generally only available to certain regulated industries. Employers should also note that a sexual

⁶ One of the search options is by name. If a common name is searched, potentially many results will be returned. The party doing the search will need to go into each returned record to verify the identifiers against the subject's information.

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offender registry may be available to the public but through a different format, such as a telephone hotline. State sexual offender sites on the Internet often explain the access options.

9.2.2.4 Motor Vehicle Record (MVR) Search

These searches are normally conducted on applicants in which driving is a component of employment. Driving for work, however, is broadly defined in most jurisdictions and may not be limited to positions that specifically involve operating a vehicle. For example, an employee who drives to different facilities as part of his or her employment may be considered a “driver” as well. MVR search data is maintained by each state. There is no national MVR search, with the exception of some specialized databases related to commercial drivers licenses (CDL) and these are not databases containing a driver’s history. An MVR search will cover any driving records from the state searched. Information provided includes personally identifying information (which can be used in Identity Verification), the license type and status, and the presence of fines, violations, and/or convictions related to the use of motor vehicles. Additionally, an MVR search may reveal a conviction that may not be present in a criminal history search, such as the use of alcohol or illegal drugs in a Driving Under the Influence (DUI) conviction. Some states limit the information available for use in employment background screening. Other states may have additional consent requirements or contractual requirements. An employer may need to determine the specific requirements for the states being searched.

9.2.2.5 Credit Reports

The credit reports used in the hiring process are reports specific for employment purposes. For example, it will not contain spousal information or a credit score. Further, an employment credit report requested properly, will not add an inquiry to the file as an inquiry into one’s credit worthiness. Thus such inquiry will not affect an individual’s FICO score on his/her credit report for credit purposes. Credit reports provide name and address information similar to that provided in the Social Security Number Check, in addition to information about the applicant’s financial history. Although account numbers are not mentioned, the person’s payment history, high and low credit amounts, and any negative activities associated with that account are indicated.

Credit reports are sometimes used for positions handling cash, having contract signing authority, requiring company credit cards, or for IT positions in which the employee has access to confidential and financial records. Extra care must be taken with credit reports as they may: contain bankruptcy information that may not legally be used in an employment decision (see note below); have been determined to have an adverse impact on women and minority groups; and may be misleading when poor credit is related to catastrophic illness in the household, is the result of an employer’s inability to pay the consumer, or is the result of a divorce or separation. There is an emerging trend in some states to restrict the use of credit reports in an employment setting, and employers are cautioned to consult state law for the states in which they intend to use credit reports as a screening tool to determine if there may be restrictions. Additionally, as a consumer protection, some states allow consumers to freeze access to credit reports which will increase both the cost and the time required to retrieve those reports. Employers who choose to use credit reports as part of a background screening should ensure

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evaluation of the data contained in the report is based upon job-related, legally defensible, consistent, equitable and non-discriminatory criteria.

Note about the U.S. Bankruptcy "Fresh Start" law: Most commentators agree that the primary purpose of the consumer bankruptcy laws is to provide individual debtors with a "fresh start" by discharging or reorganizing their debts. In furtherance of that objective, the bankruptcy statute specifically prohibits discrimination by employers. The Bankruptcy Code, 11 U.S.C. § 525(b), provides that "No private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title, a debtor or bankrupt under the Bankruptcy Act, or an individual associated with such debtor or bankrupt."

9.2.2.6 Regulatory Sanctions and Terrorist Lists

This series of searches involves accessing a variety of federal, state, and industry sanctions lists or terrorist watch lists. In addition to federal lists, several states and some industries maintain lists of individuals or organizations that have been sanctioned or barred from providing services in that state or industry. Regulations may prohibit the hiring of individuals on designated sanctions or terrorist lists in certain positions or industries. Employers should ensure they have checked in all lists required for that industry, including all federal, state, and industry lists.

Below are some common lists. This list is not exhaustive of all lists available or required:

- *Office of Foreign Assets Control (OFAC):* OFAC, an arm of the U.S. Department of the Treasury, administers and enforces economic and trade sanctions based on U.S. foreign policy and national security goals, against targeted foreign countries, terrorists, international narcotics traffickers, and those engaged in activities related to the proliferation of weapons of mass destruction. OFAC maintains a Specially Designated Nationals and Blocked Persons (SDN) list that contains the names and descriptor information of those persons identified to pose a threat to the interests and security of the U.S. Individuals on this list include narcotics traffickers, terrorists, and businesses and organizations supporting threatening activities. An SDN list search may be required for positions involved in government contracts and those involved in particular industries. < <http://www.treasury.gov/offices/enforcement/ofac/> >
- *International Criminal Police Organization (Interpol):* Interpol was created to assist international criminal police cooperation. Its work centers primarily on public safety and terrorism, organized crime, illicit drug production and drug trafficking, weapons smuggling, trafficking in human beings, money laundering, child pornography, financial and high-tech crimes, and corruption. Interpol maintains a small proportion of its "Most Wanted Fugitives" list for public dissemination. < <http://www.interpol.int> >
- *GSA: The List of Parties Excluded from Federal Procurement and Non-procurement Programs* identifies those parties excluded throughout the U.S. Government (unless otherwise noted) from receiving federal contracts or certain subcontracts and from certain types of federal financial and non-financial assistance and benefits. A search of this list may be required for positions involved in government contracts. < <http://www.epls.gov> >
- *Health and Human Services Office of Inspector General (HHS OIG) (Also known as Department of Health and Human Services (DHHS) Cumulative Sanctions List.):* Provides information

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regarding individuals and entities that are excluded from participation in Medicare, Medicaid, and other federal health care programs. < <http://www.oig.hhs.gov/fraud/exclusions.asp> >

- *National Practitioner Data Bank (NPDB)*: Information on medical malpractice payments, adverse licensure, clinical privilege, and professional society membership's actions. Hospitals are required to report professional review actions that adversely affect or restrict a physician's clinical privileges for more than thirty days. NPDB is generally used when screening health care positions. < <http://www.npdb-hipdb.hrsa.gov> >
- *Federal Drug Administration (FDA) Sanctions List*: Lists names of investigators who have at one time been disqualified, restricted, or have made assurances in their use of investigational products for FDA trials. The FDA Sanctions List is generally used in health care and pharmaceutical positions. < www.fda.gov/ora/compliance_ref/bimo/dis_res_assur.htm > and < www.fda.gov/ora/compliance_ref/debar/default.htm >

9.2.2.7 Industry Specific Record History

Several industries require specific searches for licensing or for practicing within an industry. Some of these searches are covered in detail in this guideline, such as criminal record checks and sexual offender indices. Other searches are very specific to a particular industry and may not be covered in this guideline due to their limited availability. Some states require searches for specific occupations, such as child and elder care. In some cases, specific abuse or sanction database searches may be required. It is best to check with state licensing boards or industry associations to obtain the requirements by industry and by location. Some information sources are specific to industries but are not required for practicing in the field or for licensing. Generally, these sources are from private companies and are only available for a fee. Examples of these sources are negative databases containing subject information specific to an industry, such as insurance, retail, and healthcare.

9.2.2.8 Civil Court Record History

A civil case is a non-criminal action in which one party sues another for compensation for damages or monies owed. Civil cases can be initiated for torts or contracts. A *contract case* involves one party suing another party for a violation or enforcement of an agreement. A *tort case* involves one party suing another party for an injury in civil court for actions other than breach of contract. Tort cases can involve both intentional conduct and unintentional conduct. An unintentional tort is typically a negligence action, such as an automobile accident.

Some states have a separate upper and lower court. In some states the courts are combined. A civil search is traditionally conducted for high-level positions.

- *Civil Lower Court*: Involves lesser dollar amounts, typically less than \$10,000.
- *Civil Upper Court*: Involves larger dollar amounts, typically \$10,000 or more.

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- *Federal Civil Court*: Involves cases heard by the U.S. District Courts. Such cases typically involve very large dollar amounts, class action lawsuits, lawsuits initiated by the federal government, or lawsuits that cover several state jurisdictions.

While similar to obtaining criminal records, obtaining civil records is, however, more complicated. Records are located at the county courthouse level in state court. The rules for jurisdictions are somewhat broader for civil cases and the records may be more geographically diverse. Civil records also have very few identifiers.

9.2.3 Credentialing

Credentialing involves verifying the experience and qualifications that are presented by the applicant. As part of the credentialing process, employers should also review the chronological order of employment history, education, military history, and volunteer service to determine if gaps or inconsistencies exist. The employer should look for unexplained gaps in time and determine if the reason for the gap meets the minimum employment standards.

Credentialing provides insight and information on, but not limited to, such areas as:

- A. Education Verification
- B. Employment Verification
- C. Licensure/Certification/Registration Verification
- D. Personal References
- E. Supervisor/Co-Worker Interviews
- F. Military History Verification

9.2.3.1 Education Verification

Employers should be cautious in simply accepting an applicant's word regarding their educational background, especially if the position applied for is one whereby education is important. This search verifies the dates and attendance at a given facility and can also verify the degree or certificate obtained as stated by the applicant. The search can be conducted by the employer or through a Consumer Reporting Agency. An increasing number of educational facilities are contracting with outside agencies to handle education verifications, for a fee.

When conducting an Education Verification, it is necessary to have complete information about the school. The applicant should provide full name of the facility (such as X High School and Y University) and, at a minimum, the city and state of the school's address. Many educational institutions share the same name. For example, there are numerous "JFK" schools across the U.S. and even several Harvards (e.g. Harvard University, Harvard High School). A significant number of schools require a copy of the consent prior to releasing information and will not accept an electronic consent.

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Employers should be aware there are both accredited and non-accredited schools. A school with non-accredited programs does not necessarily mean the school is not a legitimate learning institution. More information about Diploma and Accreditation Mills can be found at the U.S. Department of Education < <http://www.ed.gov/students/prep/college/diplomamills/accreditation.html> > and CHEA <<http://www.chea.org/degremills/default.htm>>.

Organizations known as “diploma mills” promulgate the internet, and for very little money, an individual can purchase something that is very similar to an actual diploma from a non-accredited university or a well known university sold as a “novelty” diploma. Some of these diplomas are hard to recognize from the university’s actual diploma; and some come with trumped up transcripts showing classes attended and grades achieved.

Applicant may have attended the educational institution under a different name, such as a maiden name or a nickname. It will be important to have the additional name available when searching for records at that institution. Also, educational facilities are moving away from categorizing their records by Social Security Number. The most common identifiers used to verify education history are: (a) name used while attending, (b) dates of attendance, (c) graduation date or month and year, (d) type of degree, and (e) date of birth.

9.2.3.2 Employment Verification

This search verifies the information provided by the applicant about their employment history and may include additional reference type questions. Typical areas verified include dates of employment, position, job duties, salary, type of employment (full, part time, temporary, seasonal), reason for leaving, and rehire status. Employment verifications differ from reference checks in that the Human Resources Department or entity is typically contacted. In a reference check or supervisor interview, a person designated by the applicant is contacted. If the Employment Verification contains subjective questions, then it may be considered an Investigative Consumer Report if conducted through a Consumer Reporting Agency.

The search can be conducted by the employer or through a Consumer Reporting Agency. An increasing number of employers are contracting with outside agencies to handle education verifications, for a fee.

NOTE: The policy in some organizations may require a release form, signed by the applicant, in order to release this information. In a few organizations, electronic signatures are not accepted.

9.2.3.3 Licensure/Certification/Registration Verification

This search verifies the specifics of the applicant’s stated license, certification, or registration with the granting authority. Also included should be a review of the status (such as active/inactive) and any sanctions that may be associated with that license.

9.2.3.4 Personal References

A personal reference check is a subjective inquiry into an applicant's behaviors from sources provided by the applicant. Applicants may provide the names and contact information for friends, co-workers, former co-workers, relatives, or others whom they believe will provide positive information. These are considered primary sources. Contacting personal references may assist in the development of secondary sources of information—i.e., a personal reference could be asked to provide the name and contact information of another person who might be acquainted with the applicant's behaviors and personal history. If the reference check is conducted by a Consumer Reporting Agency, then it may be considered an Investigative Consumer Report.

9.2.3.5 Supervisor/Co-Worker Interviews

These differ from employment verifications in that the interview is of a former or current supervisor or co-worker. These interviews frequently focus more on job performance, personality, the applicant's work quality, work ethic, attitude, and previous negative behaviors, such as theft or threats. As in the use of employment verifications, some organizations may require written permission from the applicant in order for their current employers to be interviewed.

9.2.3.6 Military History Verification

This search involves verifying an applicant's military history with the National Personnel Records Center (NPRC).

< http://www.archives.gov/facilities/mo/st_louis/military_personnel_records.html >

NOTE: Turnaround time is typically very long, in excess of six weeks.

- Another method of verifying an applicant's military history is to review his or her DD Form 214 (Certificate of Release or Discharge from Active Duty) and compare it against the stated military service. Below are links to both the required release form and NPRC.
 - NPRC:
< <http://www.archives.gov/veterans/military-service-records/get-service-records.html> >
 - NPRC, Form SF 180:
< <http://www.archives.gov/research/order/standard-form-180.pdf> >
- Employers should be careful before attempting to draw conclusions from various codes on the DD Form 214 when making hiring decisions. Using the codes on the DD Form 214 to infer conduct in order to make a hiring decision could result in claims of discrimination or decisions being made based upon irrelevant or unsubstantiated criteria.
- A good practice is to use the basic DD Form 214 to confirm an applicant was in fact in the military, and then ask for the names of references from such military service to obtain job-related information that would be relevant to an employment decision.

9.2.4 Preemployment Drug Screening

For workers in regulated and safety sensitive industries (such as trucking, aviation, rail, transit, maritime, pipeline, etc.), employers are legally required to screen employees for drugs and alcohol. Some employers are required to conduct drug testing as part of a government contract. Employers that are not legally required to test for drugs or alcohol sometimes choose to do so as a risk management tool to reduce workplace issues, such as lost time, absenteeism, accidents and on the job injuries, health care costs, and workers’ compensation claims. Many employers opt to screen employees in particularly safety sensitive positions, such as any employee who works with children, the elderly, or the disabled; has extensive unsupervised contact with the public; is required to operate a vehicle or heavy machinery; handles money or valuables; or has access to weapons, drugs, or dangerous substances. Preemployment drug testing is generally done with consent from the applicant. Post employment drug testing, such as random testing, post-accident testing, or testing based on reasonable suspicion of drug use has legal implications, and employers should consult their legal counsel concerning any legal issues involved with drug testing. The U.S. Department of Labor provides a helpful guide to the laws of the 50 states that is available online at < <http://said.dol.gov/StateLawList.asp> >. Other state and federal laws, such as the American with Disabilities Act (ADA), can also impact drug testing.

9.2.5 Screening Criteria Appropriate for Position Levels

An employer needs to use preemployment background screening consistently, however a single scope may not be appropriate for all positions. An employer should consider the types of positions it fills, each position’s level of authority, and any specialization that may impact screening, such as security, finance, or professional licenses. Generally, more thorough screens should be used for positions of greater authority.

Below are examples, not recommendations, of screening criteria for an employer with three position levels to illustrate how specific background screens vary by position. After a careful evaluation of a specific position and its associated requirements, modifications to these examples may be appropriate. For example, an employer may want to add education verification to all positions to ensure a minimum level of education.

| Level I Background |
|--|
| • Social Security Number Verification |
| • Address History |
| • County-wide Felony/Misdemeanor Records Search |
| • National Criminal Database Search |
| • Driving Record (if driving is a component of position) |
| • Employment Verification |

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| |
|--|
| Level II Background |
| <i>Level I Background (above) plus:</i> |
| <ul style="list-style-type: none">• Professional License/Certification Verification• Education Verification |
| Level III Background |
| <i>Level I & II Background (above) plus:</i> |
| <ul style="list-style-type: none">• Credit Check• Federal District Criminal Search |

10. DECISION-MAKING PROCESS

Decision-making is the process of judging and evaluating the information gathered and relating it to the job requirements. Federal and state laws must be considered during this process. Decision-making can be accomplished in many ways, including matrixes, guidelines, or a personal review of the results. Typically, the individual search is reviewed to determine if it meets or does not meet minimum employment standards. Then the entire applicant profile is subject to the decision making process.

The process for decision-making should be memorialized in the form of a written policy. The policy should address the topics in the paragraph above and, in particular, establish the elements and sequence of the process of reviewing the applicant's file and applying the employer's stated internal review criteria to the facts of the applicant's file in order to make an employment decision.

The policy points should include at a minimum the following:

- Statement of Policy & Purpose
- Definitions
- Statement of Confidentiality
- Menu of searches for different jobs (see discussion at 9.2.5)
- Review process & procedures which must ensure consistency; a sample procedure is set forth below; it should be modified and adapted as appropriate.

10.1 Procedures

1. *Preemployment background checks are required for all candidates.* See the attached list for each position in the company and the required checks which has been prepared by the Human Resources department (HR) in consultation with the Legal Department (Legal). The right to perform additional preemployment background checks is reserved to HR, which shall consult Legal if deemed necessary.

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2. *All candidates will be required to sign appropriate authorizations and consents prior to the performing of any preemployment background checks.*
3. *Candidates that provide false or misleading information in their application and/or authorization may be eliminated from any further consideration. Candidates are expected to provide accurate and complete information and not to omit material information needed to make a decision.*
4. *Preemployment background checks should normally be completed before a candidate is offered a position. All job offers should be conditioned upon satisfactory completion of the preemployment background checks.*
5. *Prior to taking any adverse action, appropriate pre-adverse and adverse action notices will be sent to the candidate pursuant to federal and any state FCRA laws together with a copy of the report.*
6. *All candidates shall be individually reviewed and decisions made with respect to employment based upon the totality of the candidate's qualifications and the results of the preemployment background checks.*
7. *In general, the relevance of a particular preemployment background check to a candidate's eligibility for employment is based upon the following factors:*
 - The nature of the job for which the applicant is being considered.
 - The nature of any adverse or negative information; in the case of a criminal matter, the facts surrounding the matter are particularly relevant.
 - The age of any adverse or negative information; the age of the applicant at the time of the adverse incident in relation to the present may also be relevant.
8. *Having adverse information, including a criminal history or conviction does not automatically preclude a candidate's eligibility for employment. To assist managers and HR personnel in reviewing criminal records, attached is a Criminal Background Checking Matrix. This matrix indicates those criminal convictions which require review by a regional HR member prior to the candidate receiving an offer of employment.*
9. *Local HR shall review the results of all other preemployment background checks and make the appropriate determination. Local HR may always contact regional HR for assistance and guidance.*

Some areas to consider with respect to the decision making process:

- *Consistency:* When subjecting a result or applicant profile to a decision, it is imperative that the employer be consistent in the hiring practices. For example, with respect to criminal record searches, it is not acceptable to indicate a "person with a criminal record history will not be hired." The standard of "criminal record history" should be defined before using the results obtained from a criminal record search in the hiring process.
- *Outsourcing does not absolve a company of responsibility:* Some employers who use third parties, such as a consumer reporting agency or an employment service such as a Recruiting Service, may provide the third party with the employer's decision-making guidelines. The third party's judgment of the background verification results should be considered preliminary.

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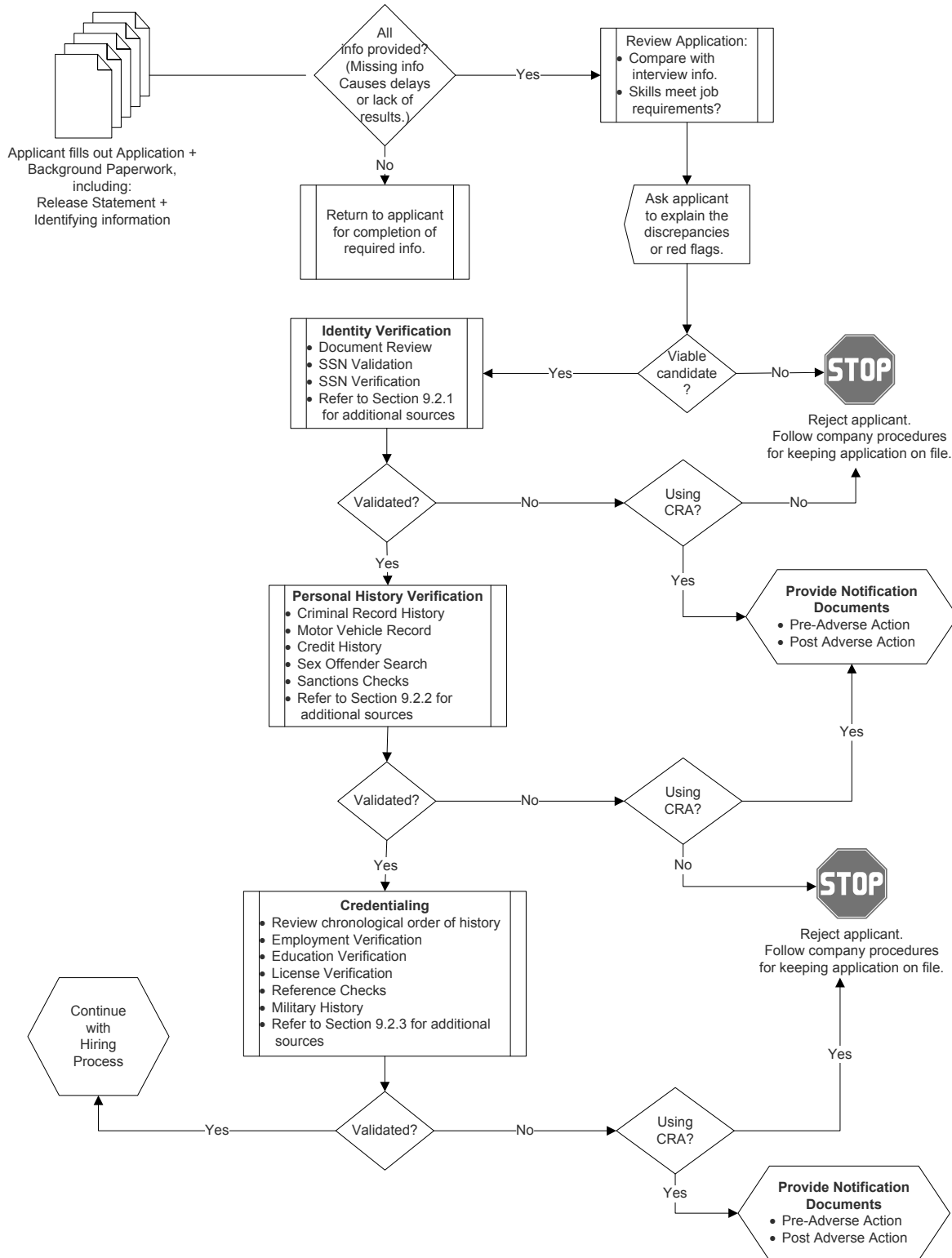
The accountability for the final evaluation of the background search remains with the employer.

10.2 Audits and Business Reviews

Employers should conduct auditing in order to ensure proper procedures and security measures are being followed. This would include audits of CRAs if utilized. Third-party providers should also be auditing clients, as well as their own internal processes. The purpose of the audits is to demonstrate compliance with stated procedures and laws and accuracy of information.

11. APPENDIX

11.1 Sample Preemployment Background Screening Flow Chart



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11.2 Sample Background Screening Disclosure and Written Authorization

**Background Screening Disclosure
And Written Authorization**

(Please read this form carefully)

DISCLOSURE

I have been notified that (NAME OF EMPLOYER) may request that a background screening be conducted to verify any information I have provided in connection with my employment or to determine my suitability for employment, retention, promotion, or reassignment.

(NAME OF EMPLOYER) may request a consumer report and/or an investigative consumer report in connection with my application for employment or at any time during my employment in accordance with all applicable laws. These reports may include information about my background, including but not limited to character, mode of living, criminal history records, sex offender registry records, Social Security records, educational records, employment records, credit reports, driving records and license/certification records.

Upon written request to (NAME OF EMPLOYER) and proper identification, I have the right to be informed when a consumer report or investigative consumer report is conducted, and the right to make a request to (NAME OF VENDOR), the consumer reporting agency vendor, within a reasonable period of time, as to the nature and substance of all information in its files on me at the time of my request, including the sources of information and the recipients of any reports on me that (NAME OF VENDOR) has previously furnished. Communications with (NAME OF VENDOR) should be directed to (ADDRESS & TOLL-FREE NUMBER FOR VENDOR).

AUTHORIZATION

My signature below authorizes the procurement of a consumer report and/or investigative consumer report upon (NAME OF EMPLOYER)'s request in conjunction with my application for employment or during the course of my employment.

I have read this Disclosure and Written Authorization; I understand it, and I agree to its terms.

Print Name First, Middle Initial, Last

Social Security Number*

Signature

Driver's License #, State of Issuance and Expiration Date*

____/____/____
Date

____/____/____
Date of Birth*

CA, MN and OK Applicants:** *By checking this box, I request a free copy of any consumer report from the consumer reporting agency at the time the report is provided to (NAME OF EMPLOYER).*

*** Under section 1786.22 of the California Civil Code, you may view the file maintained on you by (NAME OF VENDOR) during normal business hours. You may also obtain a copy of this file upon submitting proper identification and paying the costs of duplication services, by appearing at (NAME OF VENDOR) in person or by mail or by telephone. The agency is required to have personnel available to explain your file to you and the agency must explain to you any coded information appearing in your file. If you appear in person, a person of your choice may accompany you, provided that this person furnishes proper identification.*

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12.2 Web Sites

Annual Credit Report < <http://www.annualcreditreport.com> >

ASIS International < <http://www.asisonline.org> >

Federal Judicial Center < <http://earth.fjc.gov/federal/courts.nsf> >

National Association of Professional Background Screeners (NAPBS) < <http://www.napbs.com> >

Federal Motor Carrier Safety Administration < <http://www.fmcsa.gov> >

Social Security Administration < <http://www.ssa.gov> >

US Federal Court System Primer < <http://usgovinfo.about.com/blfedcourts.htm> >

U.S. Courts < <http://www.uscourts.gov/about.html> >



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1625 Prince Street
Alexandria, Virginia 22314-2818
USA

+1.703.519.6200
Fax: +1.703.519.6299
www.asisonline.org

