

All You Need to Know
To Hire Quickly & Effectively



Background Check Essentials

Michael Wenger

Three Legal Concerns with Background Checks

I met with Mike, the CEO of a wholesale electronics company in New Jersey, a short while back. Mike planned to hire a large number of new employees to cover his company's increase in sales, and he wanted to get some advice on the best mix of background checks for his application process. I'm always happy to provide what guidance I can, so we scheduled a meeting.

In the midst of our conversation, Mike produced his company's application for context. I glanced over it while responding to some question or another.

I stopped speaking mid sentence.

"What is it?" Mike asked anxiously.

"Your application," I said. "You ask your applicants about their criminal record."

Mike gave me a confused look. "So?" he asked. "It's something we want to know. If someone's got a record, that's going to influence my hiring decision."

“You may want to know,” I responded. “But you can’t legally ask it. And if you’ve been planning to make hiring decisions around that topic, it may be time to reexamine your process.”

I explained to him that New Jersey had passed a ban—the box law a few years ago that made it illegal to ask an applicant whether they had ever been convicted of a crime. The state government felt that knowing this information up front was discriminatory.

“Are you sure?” he asked. “Our lawyers reviewed these applications.”

“It seems your lawyers missed something, then. And you’re lucky I caught it now. Because if it had been an applicant instead of me who noticed, you could have been in for one serious lawsuit.”

The Risk of Ignoring the Background Check Process

With the essential menu of background check options laid out in the first two chapters, you might now feel like you know enough to move on from this topic. After all, you have a decent understanding of the major products out there. Why not simply go to your background check company, order your preferred mix, and focus on running your business?

That’s a very tempting proposition. I’m sure you’re an extremely busy person, and your work is important. You don’t have a lot of minutes to spare on any topic, let alone one aspect of your hiring process. However, there are a number of reasons you need to learn more about background checks.

To begin with, this field is constantly evolving—in technology, innovation, process, and focus—and it’s important to

keep up with the changes, as you’ll see in the next couple of chapters. Even if you ignore the changes, choosing the ideal set of checks for your business can still be more difficult than you might imagine. Don’t assume that the people you trust to run this process—within your own company and the background check company you work with—are the right fit. To avoid these types of oversights, you need a clearer idea of what you need and whom you can trust.

Guidance on all of those topics is ahead as well, but none of those concerns touch on the main reason you should keep reading this book—the potential cost of getting the background check process wrong.

Every day that you delay making a decision on your background checks exposes you to more and more significant legal risk. Lawsuits can hit you from all sides. You could potentially fail to follow compliance laws or get hit with a dreaded discrimination lawsuit, which would double as extremely poor press for your company.

Those lawsuits are far more common than you know and far more costly. And if you are going to avoid a costly lawsuit, you’ve got to pay attention to the risks now.

The Litigation Risk Is Real . . . and Expensive

If you still think this isn’t a serious issue, I have some facts to share with you. According to CBS News, in the last decade, companies have spent more than \$325 million settling lawsuits related to preemployment background checks. This isn’t just happening to small businesses either. Companies as large

1 Cerullo, M. (2019, June 28). What everyone should know about employer background checks. CBS News. Retrieved February 17, 2022, from [cbsnews.com](https://www.cbsnews.com)

as Target, Wells Fargo, and even Amazon have all had to settle cases in this area.

How can this happen? How can some of the largest and best-run businesses in the world be facing a constant stream of litigation over something as seemingly straightforward as a background check?

The truth is that background checks are far from simple or minor in the hiring process. These are complex instruments with significant regulatory systems policing their use. Because background checks can be used to determine whether someone gets employed or not, there's plenty of risk of abuse, whether intentional or not, and the government has determined the law should play a major role with their use.

To be perfectly clear, this is a serious risk. I believe it should rank as a major goal in your leadership to minimize the chance that your company is added to that list of companies above. Luckily, this effort at minimization of risk is absolutely within your power. It starts with brushing up on your knowledge of the laws and regulations surrounding background checks, as well as the motivations for the system we have in place. At that point, you can begin making some important changes in how your business uses checks and update your hiring process to reduce any chance of mistakes or discrimination occurring.

Reasonable Isn't Good Enough

The first thing you have to do if you want to protect your business from background check-related lawsuits is understand one critical fact: What you consider reasonable information

to know about an applicant is not a standard—or even a defense—against discrimination in this area.

Let me show you what I mean. A nanny company came to ApplicantSafe® a couple years ago. They wanted to impress the high-end clients who were hiring nannies for their kids. It was very important to prove that the nanny company had done as much digging into each nanny's background as possible. So they wanted us to run as many background checks as possible. They wanted a thorough criminal background check that included every product we had for sale.

"We want everything you can throw in there. We want your report to be a hundred pages long, so our clients know we've covered everything. We want to know their driving record. We want their credit report."

I had to stop them right there. "We can't do that."

The company's representative couldn't believe what I was saying. "Why not?" they protested. "Don't we have a right as an employer—and don't our clients have a right as parents—to know who these nannies are? Leaving us to guess whether they are responsible . . . that just seems unreasonable!"

"I can totally understand where you are coming from," I told them. "What you're saying makes a lot of sense. But that isn't how the law works."

As I explained to them, a background check can only be run if it connects to the responsibilities a new hire will take on. If the background check you want to run doesn't directly relate to an essential task in that job, you run the risk that an applicant will claim discrimination. Say the nanny company had an applicant who met all the qualifications but had bad

credit. They may have come from a household that struggled with finances—perhaps they had an impoverished background. If that credit check disqualified them, they could claim they were not judged on their skills or experience but were discriminated against.

“Far from helping you,” I said to the nanny company, “these checks could set you up for a lawsuit.”

It took some time, as it often does, for them to wrap their heads around this because it doesn’t make immediate business sense. I encounter this kind of thinking all the time. Many business owners and HR departments think only about the information they want about their applicant. They never consider whether there could be legal or ethical constraints. They aren’t purposely discriminating, so the idea that some information could be discriminatory doesn’t cross their minds.

From the government’s perspective, though, certain information can be used to discriminate against applicants, whether that discrimination is intentional or not. For instance, a business sees a driving background check as an opportunity to learn about a particular individual’s history of responsible decision-making, but the government knows that people from certain communities are more likely to have issues with their driving records. Therefore, those checks can be used to “weed out” individuals from those communities. Again, this doesn’t have to be intentional. The government is concerned about the overall affects such information can have.

The solution the government has come up with to the potential for discrimination is that you can only review

certain information if the check relates to work responsibilities. If part of the applicant’s job is to act as a driver for your company, you have every right to know about their driving record. If they will be working as an accountant for you, you may have a right to know about their credit. Otherwise, the government feels it’s more likely that information will be used for the wrong purposes than the right ones. And for that reason, they have created strict laws to punish those who seek out that information when it isn’t necessary.

This may seem like an unfair standard to you, but consider how the government must approach it. Imagine a company that doesn’t want to hire young people. They can’t legally refuse to hire young people, but they can run DMV and credit reports. Since younger people are more likely to have speeding tickets and haven’t yet built up good credit, that company could avoid hiring most young people without technically discriminating against them by refusing to hire applicants with speeding tickets or low credit scores. That’s the situation the government is trying to avoid.

Some state governments take this concern so seriously, they simply won’t let you have a credit report on an applicant at all unless you can prove that person will have significant financial responsibilities.

These legal limits go beyond credit and driving, as well. In some cases, you may not be able to access certain information in a criminal background check because the government is concerned that those who have committed minor crimes will be unable to find employment and thus risk returning to crime.

You may or may not agree with this thinking, but it is

the reasoning you are bound to. In other words, when you think about a background check, your standard has to be whether the government considers it legal, not whether you consider it reasonable.

Essential Questions to Ask Yourself before Using a Background Check

1. Does this information directly relate to potential job responsibilities or other legitimate business interests?
2. Is there a risk that this information could bias me against a group of people instead of an individual applicant?

Who Makes the Rules?

Where do all these restrictions come from? Above, I said “the government,” but who is the government in this case?

All of these rules start with a federal law called the Fair Credit Reporting Act (FCRA). This is the federal legislation that governs the background check world, and everyone and everything associated with checks and screenings must follow these rules. Interestingly, when the law was originally enacted, the FCRA imposed requirements exclusively on credit reporting agencies, such as credit bureaus, but it has since been expanded to cover every form of background check and screening.

The Federal Trade Commission (FTC) is the governing body responsible for enforcing the FCRA. If that isn't enough acronyms for you, here's another. The Equal

Employment Opportunity Commission (EEOC) places further restrictions on background checks when the FCRA hasn't kept up with necessary governing rules.

For instance, one of the newer restrictions from the EEOC has brought criminal background checks more inline with the standard I addressed above. Now a criminal record must relate to the job role. If you find a criminal record, you have to consider whether that crime has any bearing on the job you are hiring for, as well as when the crime occurred.

On top of these federal laws and enforcement agencies, each state and municipality can place further restrictions on the process. Some states—in particular, New York and California—impose significantly more aggressive restrictions. Since these states have large populations and large economies, their laws often become the de facto policies for large companies across the country.

For instance, the specific ban-the-box law that caught Mike and his wholesale electronics company off guard is now in thirty-seven states, the District of Columbia, and over 150 cities and counties. They have all adopted a ban-the-box (“fair chance”) policy. However, many large companies have removed criminal history questions from their applications nationwide to avoid any future legal trouble regardless of the state.

With federal, state, and local laws in place, this is obviously an extensive and complex process to navigate. Laws can cover everything, including personal data such as what you can review on someone's social media without risking discrimination or violation of privacy lawsuits, and these laws can differ from one location to another.

And it's a danger to your company any time you assume things are as simple as deciding to buy a background check product.

Five Essential Hiring Questions Answered by the EEOC

1. Can employers disqualify a prospective employee because he or she has a criminal record?

Federal civil rights laws prevent employers from denying employment on the basis of a past conviction unless the offense is viewed as job related. This rule permits employers to consider convictions to the extent that they are relevant to the work the employee would undertake and allows employers to ensure safety on the job. But the EEOC takes the position that federal civil rights laws prohibit employers from adopting policies that categorically reject prospective employees with past convictions. The reasoning behind the EEOC's position is that "National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin." Therefore, since a blanket exclusion of all candidates with a criminal history adversely impacts a disproportionate number of otherwise qualified minority candidates, it has a discriminatory impact and consequently is a violation of federal civil rights laws.

2. Can employers ask employees about past convictions?

Employers may conduct background checks and may ask prospective employees about their criminal history.

However, the EEOC requires employers to consider all the facts. The new guidelines require that a prospective employee must be given a chance to explain a past arrest or conviction before the employer can reject an applicant.

3. To what extent can employers consider past arrests?

The EEOC discourages employers from denying employment on the basis that a prospective employee has been arrested, because an arrest does not indicate that criminal conduct has occurred. That said, employers may nonetheless ask about and consider the conduct underlying the arrest to the extent that it has bearing on the individual's capacity to perform a job.

4. Can employers screen applicants on the basis of convictions?

To the extent an employer wishes to develop a policy to screen out applicants with criminal backgrounds, the EEOC requires that the policy must be carefully tailored. Employers are cautioned to take a holistic view when considering past infractions. The EEOC requires employers to consider all available facts on the nature of the conviction or arrest, the specific job duties, and the amount of time that has passed since the conviction. The EEOC further recommends that employers should give prospective employees, who will otherwise be denied a position on the basis of their past criminal conduct, the opportunity to submit information explaining why they should not be rejected.

5. What else should employers keep in mind?

Employers should ensure that all information about applicants' and employees' criminal records is kept confidential. It is also prudent to consult an attorney before establishing a policy or procedure for screening out prospective employees with criminal backgrounds.

Cleaning Up Your Process

Now that you have a general understanding of how the system works, it's time to start looking for ways to protect yourself. The first and easiest thing you can do is check whether you've followed the ban-the-box laws and removed questions about criminal history from your application—whether you live in a state that's changed that law yet or not. Removing that question is certain to immediately reduce your risk of legal headaches.

But that is only the beginning. Once you've plucked the low-hanging ban-the-box fruit, you have to start doing the harder work of digging into your process. The hiring and background check process is often where companies leave themselves most exposed to lawsuits.

One of the main ways to protect yourself against such lawsuits in this complex world is to make any job offer contingent on a clean background check. For some employers this is an intuitive choice, but I've encountered plenty of companies that either run background checks before making a contingent offer (going against some state or local laws) or wait to run their background checks until after they've already hired someone. And that can be a huge mistake.

Background checks on existing employees require

additional steps. You can either, at the time you first offer the employee a job, get them to sign an authorization consenting to continual background checks or get their consent each time you run one. Even if you do get continual consent at the beginning, you will need to check the laws in the state(s) in which your employees work to see whether any of those states' laws impose additional requirements. Once you run the background checks, both the EEOC guidelines and many state laws limit how much you

may use or rely on the information you obtain to make any employment-related decisions.

This is the case even if you read an article about a crime committed in your town by someone with the same name as your employee. Even with the most reasonable concerns, you have to follow the process and get signed consent. If an employee refuses a background check, you may have the option of terminating their position—although this depends on state and local laws.

This is why it's far better to make any offer of a job contingent on that clean background check. However, there is still a process you have to follow. For instance, running preemployment background checks requires that you provide every applicant with standalone disclosure and authorization forms. The applicant must then sign the forms and give consent.

With drug testing, policies must be written down, accessible to employees, and applied equally and consistently to all current or potential workers. Potential employees can refuse a drug test as part of a background check. In some states, however, they can be denied employment for

that refusal. Current employees can also refuse drug tests, and they can be fired for that refusal if testing requirements are spelled out in the employer's written policies.

This is only the beginning. The FCRA has rules for how you present the disclosure and authorization forms, as well. The forms must be on their own piece of paper, and background checks have to be the only topic covered on those pages. The information can't be stuffed in the back of a 400-page company manual or at the bottom of another document. It has to be separate so that anyone who signs it knows what they are agreeing to.

Once you have permission, you are allowed to run your Background check. However, this is not the end of your legal considerations. If you discover something on that background check—whether before or after the hiring decision—you can't simply act on it. You can't deny the applicant the job or fire them outright as soon as you have that check in hand. Instead, you have to follow another process. Because background checks can never be 100 percent accurate, you aren't allowed to immediately dismiss an applicant or throw away an application.

In that situation, you have to send out what is called a pre-adverse action letter. This letter notifies the candidate that information contained in their background report may negatively affect a decision about their employment. The letter must also include an FCRA summary of rights, a consumer copy, and the company that ran the background check. (Some states may require additional notices.)

This information allows the applicant or employee to dispute or explain the information you've found. To give

them time to make their case, the FCRA mandates that you wait a "reasonable amount of time" before following through with your adverse action. The exact amount of time that is "reasonable" isn't defined by the FCRA, but the general rule is five to seven business days.

During that time, the applicant or employee can contact the background check company and provide details for their dispute. The background check company then has to do a thorough investigation to see if the applicant's or employee's claim holds up or not. If it does, then the CRA is required to Remove the adverse findings and notify the employer and the applicant of the outcome. If the applicant or employee does not explain or refute the record within five to seven business days, the assumption is that they do not intend to do so—and you can move forward with termination of employment.

Importantly, the applicant or employee doesn't have to dispute the entirety of what showed up in the report. They may simply dispute some aspects of it. For instance, let's say you ran a criminal background check on an applicant, and the report you received said that they had been convicted of a particular crime. The applicant may dispute the report, not because the entire record was wrong but because the case was dismissed and there was no conviction or if the record included a prison sentence when the applicant was only required to do fifty hours of community service.

It's only once this process has played out, only if there is still proof that there was a conviction, only if the record complies with state and local FCRA restrictions, and only if the criminal record relates in some way to the job role they would fill that you can move forward with your adverse action notice.

According to the FCRA, this notice must:

- » Advise the applicant that employment has been denied (or whatever other adverse action is being taken) based in whole or in part on the information contained in the background screening report.
- » Contain the name, address, and phone number of the consumer reporting agency (or third-party background screening company) that provided the report.
- » Include a statement that the consumer reporting agency did not make the decision and is unable to provide the applicant the specific reasons why the action was taken.
- » Inform the applicant of the right to obtain another free copy of their background screening report any time within sixty days of receiving the notice.
- » Inform the applicant of the right to dispute the accuracy or completeness of the information contained in the background screening report with the identified consumer reporting agency.

Also, importantly, the example above relates to a criminal record with an actual conviction that the applicant disputes, but the FCRA and some states have strict guidelines as to how far back background check companies can report non-conviction and, in some cases, conviction information.

I know this process seems burdensome, particularly in circumstances in which you unearth a serious crime during a background check, but trust me, you want to follow this to

the letter of the law. I've seen many companies get sued—and end up making big payouts—for getting this wrong. You don't want to be the next one.

Ten Essential Steps to Running a Preemployment Background Check

1. Consult with a legal advisor.
2. Develop a strict policy.
3. Use a Professional Background Screening Association (PBSA)-Accredited preemployment screening company.
4. Inform the applicant.
5. Make a contingent job offer.
6. Conduct the background check.
7. Carefully review and consider the findings.
8. Be consistent.
9. Make your decision.
10. Abide by FCRA requirements throughout the entire process of rescinding the job offer.

The Best Way to Protect Yourself

A close friend works for a midsize insurance company. At the company, they don't really run many background checks, but something about a particular applicant didn't sit right with my friend, so he contacted me.

"His credentials are great, and he has the right experience, but I just have a hunch there's something off. So I'd like to run one criminal background check to find out."

I was skeptical, but I let my friend describe all the circumstances. As I got a clearer picture, one particular fact stood out: The applicant in question happened to be Black.

Now, my friend is not prejudiced and has hired Black Individuals in the past. However, as I explained to him, it would be extremely hard to argue against a charge of discrimination if he ran that single background check.

“This is a classic situation in which companies that meant to act in good faith end up getting sued,” I told him.

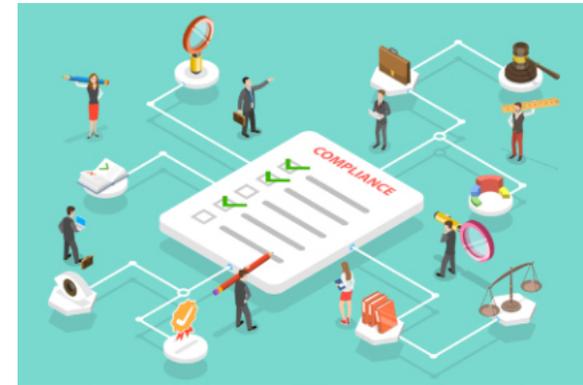
“What if I run it and don’t tell him?” he asked.

“That’s no good,” I said. “You have to get his consent. If anyone finds out you ran a background check without his written consent, you would be in serious trouble. And if you get his consent, and he puts two and two together about your background check policy, you would also be in a lot of trouble.”

As I told him, there really was no way to run this single Background check and avoid serious risk of a lawsuit.

Background checks are obviously a significant legal worry whether you run them all the time or hardly at all, and getting these essential points right isn’t going to be enough to ensure you avoid lawsuits. So what can you do to limit your risk the most?

It starts with getting the right help. Invest in a competent, experienced employment attorney. Having someone who knows the law thoroughly and who is dedicated enough to catch issues like ban-the-box mistakes on the application will end up paying for themselves. At the same time, make sure you are using an experienced, reputable background check company that is keeping up with not only the products available but the legal considerations of their use (we’ll talk about how to choose such a company in detail at the end of the book).



With the right lawyer and background check company at your side, the most crucial thing you can do is go above and beyond the process advice in the section above and put a strict set of policies and procedures in place. Mistakes are inevitable in life, but if you have a clear set of procedures you can prove the company always follows, you can prove that any mistakes were just that—mistakes that went against your company policies and not purposeful acts of discrimination or willful violations of federal or state reporting laws.

The costliest accusation that can be made against your company is discrimination. If you have a process and you follow the process, you can prove that any appearance of discrimination was accidental, thus potentially lowering the expense of a case and saving your company’s reputation.

What should these policies look like? This is something you’ll want to discuss in detail with your employment lawyer, but we can cover some of the basics here. To begin with, avoid blanket statements like, “We do not hire anyone with a criminal record,” which could be deemed discriminatory.

Instead, focus on the order of your process and what happens at each step of the process. Which background checks do you run? When do you run them? What do you do when a record comes back? Give as much detail as possible and then give it to your lawyer to make sure everything is legally defensible.

Make sure rules are clear and are strictly followed. Mistakes will happen, because no one is perfect, but if your policies are well laid out and you can prove they are always followed, you can avoid a huge amount of risk for a major lawsuit.

But once you have a set of policies, that doesn't mean you can put it in a drawer and forget about it. Background checks are constantly changing, both in the technology used and the priorities of applicants and employers. Laws and interpretation of laws also change. So you need to keep up with those changes and adapt your policy whenever necessary.

That's the only way to continue to limit your legal risk—and also to get the most from your background check process.

Six Essential Concerns to Address to Limit Your Risk of Lawsuits

1. Lack of proper policies and procedures in place
2. Failure to obtain consent
3. Failure to create a proper standalone disclosure and authorization form
4. Mistakes with the adverse action process
5. Failure to provide a copy of the background check and Summary of Rights under the FCRA
6. Lack of consideration for ban-the-box laws