

All You Need to Know  
To Hire Quickly & Effectively



# Background Check Essentials

Michael Wenger



Featured On:

The logo for Yahoo! Finance, featuring the word "yahoo!" in a bold, purple, sans-serif font with an exclamation point, and the word "finance" in a smaller, purple, sans-serif font below it.The logo for Morningstar, featuring the word "MORNINGSTAR" in a red, sans-serif font. The letter "O" is stylized as a red circle.The logo for Seeking Alpha, featuring the words "Seeking Alpha" in a black, sans-serif font, with a small orange Greek letter alpha symbol to the right of the word "Alpha".The logo for MarketWatch, featuring the word "MarketWatch" in a black, sans-serif font. The letter "W" is stylized as a green upward-pointing arrow. Below the main text, the words "THE WALL STREET JOURNAL" are written in a smaller, grey, sans-serif font.The logo for Fox News, featuring the words "FOX NEWS" in a white, sans-serif font on a blue background. The background has a white diagonal line and a white circle.

## Appendix 1

### How to Hire a Criminal

When I hired Anne, I didn't know she had a criminal record. In fact, I couldn't know. It would have been illegal to find out. Anne had been arrested, charged, and convicted of a DUI when she was twenty-one. A couple years later, when she applied for a position in my business, her responsibilities did not include driving, so I had no access to her record. I had to hire her based on her application and interview, and she aced those.

Two years into her time at my company, she confessed the truth to me without prompting. When she was pulled over, she had only recently come of age. She was out with a few friends, and they had made a bad choice. It wasn't until she saw the flashing lights that she had realized how big a mistake she'd made.

"I'm telling you all this now," she said, "because it means so much to me that you gave me this second chance. Because

of you, my life is finally heading in the right direction. I can never repay you.”

It was very kind of her to say that, but I didn't deserve so much credit. It's likely that if I'd been able to access the information of Anne's DUI, I never would have given her that chance.

But I'm glad I did. She turned out to be one of the best employees I've ever hired. By the time she left three years later for another opportunity, she had proven herself so effective and trustworthy that she was running half the business. She was capable, reliable, and highly motivated.

I couldn't ask for more from anyone—criminal record or not.

### **A Decision You'll Have to Make**

Anne's story is the noble reason behind the government's efforts to make it harder for employers to learn everything about potential hires. This is precisely the reasoning behind the ban-the-box type laws, for instance. Though we employers bristle at these limitations, the hope is that those who have a record and really deserve a second chance can get one and prove themselves. Whether you want to offer that second chance or not, the government has put policies into place that require you to do so. There are currently over two million people in jail. It is estimated that nearly 100 million Americans have some type of criminal record. As we've already covered in this book, there is a huge recidivism problem when an individual can't find employment or housing and reestablish some sort of life. Studies show that when an individual with a criminal record can't get employment there

is a huge likelihood that they will end up back in prison. In order to reduce those issues, the government has added—and will likely continue to add—restrictions on how and whom you hire.

On a very basic level, those restrictions start with the government denying you the ability to make a hiring decision based solely on a criminal record, unless that record suggests a direct concern related to the job role you are hiring for.

Even if you discover through legal background check products that an applicant has a record, if that individual meets your qualifications and their record doesn't pertain to the job role, you could be at risk of a charge of bias.

In 2022, we're living through a very tight labor market. Unemployment is low and most businesses are understaffed. This is putting massive strain on businesses across the country. In such environments, it will be exceedingly difficult to defend your company against a charge brought up by someone with a record if their résumé fits the job role—particularly if you otherwise don't fill that position.

It's likely that this especially tight market will ease over time, but we don't know by how much or how soon. But whatever the state of the economy, it's likely that the government is going to continue to pull even more levers to push businesses into hiring those with criminal records. So long as America has an incarceration problem, employers are going to feel this pressure.

This is why ban-the-box legislation is quickly becoming law across the entire country. And more restrictions and requirements are almost certainly just around the corner.

The question here isn't whether you should hire a

criminal but how to do it smartly and protect your company from legal risk—both from the government and the individual you're hiring.

### The Legal Requirements

The EEOC guidance discourages employers from making blanket exclusions of all job seekers with criminal records and recommends that, in addition to assessing each criminal record found for job-relatedness and business necessity, employers give applicants the opportunity to explain or resolve a criminal history uncovered in a background check.

Why does the EEOC get involved with your criminal background checks? It isn't because former convicts are protected under antidiscrimination laws. Instead, this is the EEOC's reasoning: Arrests and conviction rates are higher among certain minority groups. A seemingly neutral policy (for example, refusal to hire anyone with a criminal record) will likely have an adverse impact on those minorities, who are protected under federal (and state) antidiscrimination laws. In other words, your seemingly neutral policy could have a discriminatory impact—and that is a violation of federal antidiscrimination laws. That is why the EEOC gets involved in the use of criminal background checks in the hiring process.

So how do you avoid those risks? You start with the legal concerns. The EEOC has a set of guidelines that every employer is required to follow when considering someone who has a criminal record. To begin with, the context of the record is extremely important from a legal standpoint. How long ago was the crime committed? How severe was

the crime? Was it violent or nonviolent? Was it a bunch of kids getting into trouble when they shouldn't have, or was it a premeditated act? Is the record related to something that isn't even a crime anymore—such as marijuana possession? Does the crime directly relate to the job role? Answers to these types of questions matter because they create a profile for how suitable someone might be for the position you're hiring for—and how big a risk you might be taking in hiring the applicant.

For instance, it's possible that with the current laws in place, my company could have been at risk if I had known about Anne's DUI and failed to offer her the job. She was an otherwise outstanding candidate who stood out from the others, and the nature of her record had little bearing on whether I could trust her to fulfill her job safely and effectively.

That connection back to the job is key. The company should have policy guidelines in place for each type of position, and you'll want to make sure you follow those guidelines while also considering whether the criminal record should have any place in your thinking. For instance, the EEOC provides an example of a county community center that prohibits the hiring of anyone with a conviction for theft within the last four years from working in a position where they'll be handling money. They do provide room for an application to explain why such an exclusion shouldn't apply to them. With strong, reasonable rules in place, the EEOC argues that an organization should be in a position to defend any decision not to hire an individual within those parameters.

We can game this out further. If someone has a theft

conviction, for instance, it makes sense that such a record should influence your decision-making process when hiring a supervisor for an apartment complex. After all, they'll have access to cash and the keys to your tenants' homes. However, if you're hiring a janitor or a gardener with no access to rooms where money or valuables are kept, it's harder to justify considering that record. A DUI might not affect your judgment hiring a shift manager at a fast-food restaurant—since they aren't driving or around alcohol—but it should affect your thinking if they're a forklift driver.

If the person has a criminal record for arson, you might not want to hire them for your brick-and-mortar business. But what if the job is remote? It's far harder to argue that the record has any bearing on that position.

The most powerful weapon you have in this is a strong, well-organized, and strictly followed hiring process that helps you prove a lack of discrimination when choosing who to hire.

### **You Can Give That Second Chance**

These are the types of legal restrictions that the government places on you, but there is no legal reason you can't be more open to hiring individuals with a record if you choose. In this market, it may make sense to loosen your internal guidelines a little further. Perhaps the crime was more recent but non-violent, and after an interview, you want to give that person a chance. Perhaps the crime relates to the job but it's far enough in the past that you feel you can overlook it.

More than anything, if you want to be more open to

this possibility, you can start by sitting down with such individuals and hearing their side of the story.

That person with the arson charge might have accidentally started a fire by setting off fireworks inside with friends when they were eighteen. They might now be a reasonable twenty-five-year-old with a desire to prove they deserve that second chance.

That desire to prove themselves can make a seemingly risky hire into one of the best decisions you make. Anne was one of the best workers I ever hired because she wanted to show she deserved that second chance at getting life right—and my company benefited because I was the one who let her prove it.

Beyond the potential high levels of motivation you might bring into the business, there's also something immensely rewarding about being the person who helps get someone's life back on track.

Many of us have made mistakes in our lives that are not so dissimilar from those with criminal records, only we got lucky and didn't get caught—or else we were let go with a warning even though someone else wasn't. The majority of young Americans have smoked marijuana in the past, even though most of them didn't face any consequences. Many teenagers engage in questionable behavior that could, in theory, lead to such a record. For those who were unlucky, you can be the one to help get them back on their feet.

You aren't required to do that by law, but the opportunity is absolutely there if you choose to seize it—and you may gain a valuable employee in the process.

Further, keep in mind that should you for some reason get pulled into a lawsuit related to a preemployment background check, there's no doubt your company will be looked at more favorably in the eyes of the law by adopting some of the policies we discussed above that afford a more lenient hiring process.

### **Closely Monitor Performance**

Many employers would be willing to help people like Anne. The problem isn't the desire; it's the fear of the consequences if they judge a candidate incorrectly.

After all, not every person with a criminal record is ready to put in hard work and choose to follow policy and the law. What if the person you hire isn't like Anne? What if they have a record because they regularly drive drunk or continue to steal, commit assault, or commit some other crime?

How can you safely hire a criminal when you are responsible for so many other people? You have to protect your employees, your customers, yourself, and the finances of your business. How can you justify giving someone that second chance when so much is at stake?

The good news is that with the current background check products available, you can now more safely take the chance of giving a second chance. With the latest monitoring tools, you can run regular criminal record and DMV checks to catch any new charges your employees might have picked up. You can run regular drug screenings to make sure no one is using illegal substances. And you can monitor social media usage to see if anyone has been harassing others online or bragging about illegal behavior.

If monitoring isn't an option, we also have automated searches that can automatically run a new background check or DMV search at intervals your company is comfortable with.

When you put these sorts of products in place in your business, you can afford to be generous and help someone who deserves the opportunity to prove themselves without exposing your company to any further risk.

It massively decreases any potential negative consequences for doing the right thing.

And with that freedom to make the best choice, even if the person has a record, you open your company up to hiring the next Anne. And hiring someone like Anne is always a great business decision.



**Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act - Equal Employment Opportunity Commission (EEOC)**



**Background Checks: What Employers Need to Know**



**Using Consumer Reports: What Employers Need to Know**



**Background Checks on Prospective Employees: Keep Required Disclosures Simple**



**The Fair Credit Reporting Act and Social Media: What Businesses Should Know**

## About the Author



**Michael Wenger** is the CEO of ApplicantSafe® and one of the leading experts in the background screening industry. He is an original member of the Professional Background Screening Association (PBSA), the voice of the screening industry.

Before working in background checks, Michael built a very successful real estate business, managing and investing in multifamily residential properties throughout the state of New Jersey.

He transitioned into screenings with a small, local resident screening company that he founded in 2001, which was soon rebranded as ApplicantSafe® when he added pre-employment services shortly thereafter. Under Michael's guidance, the company has grown into a national resident and preemployment company, boasting thousands of

midsize to big-name brand clients and becoming a prominent member of the PBSA.

Michael has since added numerous businesses that provide additional services for recruiting managers in many major industries. Most recently, he created a new company called Exclugo, which provides a proprietary software that uses AI to streamline the compliance process for companies in the health-care space.

In June 2021, Michael and his team were featured on the cover of HR Tech Outlook magazine in an article titled, "Changing the Way Background Checks Are Done."

A deeply religious individual, Michael lives in New Jersey with his wife and children and takes pride in his devoutly religious beliefs and community relationships. He enjoys spending time with his family and routinely volunteers to help others less fortunate than himself. In particular, he takes pride in the communal outreach study program he created that has blossomed into a multi-state program with over forty communities across the nation.

He believes his religious background and community focus are what provide him with the insights to understand the intricate world of hiring and the justice system that creates the legislation governing that space.

Never one to rest on his laurels, Michael continually strives to make the world a better place to live and do business by incorporating his knack for entrepreneurship, the latest technological advancements, and his ethical convictions into everything he has accomplished.

