



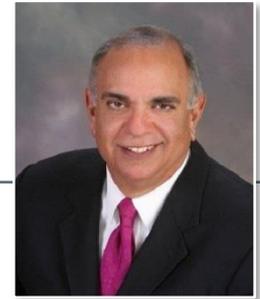
**23-27 SEPTEMBER 2018**

LAS VEGAS CONVENTION CENTER | LAS VEGAS, NV

# Background Checks: Trends, Best Practices, and Legal Compliance

Attorney Lester S. Rosen, Founder & CEO of Employment Screening Resources® (ESR)

Session Number 6311, Wednesday, September 26, 2018 / 3:45 PM - 4:45 PM



## About the Speaker

- ✓ Lester S. Rosen is an Attorney at Law and CEO of Employment Screening Resources® (ESR), a leading global background check firm accredited by the National Association of Professional Background Screeners (NAPBS®).
- ✓ He is a frequent speaker on due diligence and background screening issues.
- ✓ He is the author of “The Safe Hiring Manual,” the first comprehensive book on background screening.
- ✓ He has qualified and testified as an expert in court cases and has testified before the California Legislature.
- ✓ He was the chair of the steering committee that founded the NAPBS ([www.napbs.com](http://www.napbs.com)), and served as the first co-chair.

# Important Notice

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This webinar does NOT constitute legal advice and should not be relied upon as legal advice. It is for educational purposes only.

We will take questions at the end.

**If we do not get to all questions, or if you would like to ask a private question, please email [lsr@esrcheck.com](mailto:lsr@esrcheck.com) and reference this seminar and date.**

# Why Hiring is Critical for Risk Management

- Employees are typically a firm's greatest investment and largest cost.
- Each hire also represents a large potential risk that can create a legal and financial nightmare.
- Each hire is a leap of faith – A potential game of **Russian Roulette**.
- Every employer also has the obligation to exercise “Due Diligence” in hiring.



Employers that hire people they either knew or should have known were dangerous, unfit, or unqualified for the work **can be sued for negligent hiring.**

# The “Parade of Horribles”

Statistical certainty that a firm that does not do screening will hire someone with “unsuitable” criminal record or false credential.

## Workplace Violence

DOJ estimates 2 million incidents a year



## Time Wasted in Recruiting, Hiring, and Training



## Termination Exposure



## Lawsuits for Negligent Hiring, Retention, Promotion, or Supervision



## Fraudulent Credentials

-Up to 40% of resumes contain material lies or omissions about education, past jobs or qualifications-  
-Fake employment and degree mills



## Turnover Costs\*

\* 2 to 3 times their salary

Cost of Employee Turnover

2x

Lost Employee Annual Compensation

## Brand Destruction, Lost Customers & Workplace Disruption



# Warning:

## Litigation, Regulation & Legislation

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Employers that do not conduct due diligence can easily face a financial and legal nightmare.

If not done right, employers can also be sued – background checks are governed by litigation, regulation, and legislation:

### Litigation

Class action lawsuits at the federal level for not following the federal Fair Credit Reporting Act (FCRA) or for “negligent hiring” for failure to perform background checks. Lawsuits filed at the state level relating to special rights and/or procedures applicable to residents.

### Regulation

New Equal Employment Opportunity Commission (EEOC) Guidance for use of criminal records will change how you hire. New Statement of Rights from the Consumer Financial Protection Bureau (CFPB).

### Legislation

Laws on credit reports, social media, offshoring, etc.

# Screening vs. Investigation

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- **Screening:**

- ☑ Employment screening involves large scale verifications of supplied information by an applicant who has given express written consent.
- ☑ A typical screening done through a call center contacting past employers and schools and public record criminal checks from relevant counties.
- ☑ If more information is needed, the applicant can be asked to supply it.

- **Investigation:**

- ☑ Investigations involve a licensed PI \ Security Professional doing **focused** in-depth research and analysis on a target.
- ☑ May have limited "supplied" information" – looking for the unknown
- ☑ Investigation is typically more expensive and time consuming than a screening and cannot always be done from the office.

# Disconnect between Screening and Security

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- Security professionals: More information always better:
  - ☑ Security professionals want to know everything.
- Background Screening can require blinders where by law you **MUST IGNORE** information that would seem relevant:
  - ☑ Numerous state and federal laws and regulations that prohibit employers from considering certain information such as certain criminal records or arrests.
  - ☑ REASON: Screening impacts employment and as a matter of social policy, limits have been placed on what can be reported and how far back.
- Policies and Procedures: Need clear policies and procedures
  - ☑ Firm needs to have an understanding of how it will deal with information it receives.
  - ☑ Cannot have open ended screening that deviates from process.
  - ☑ Discrimination issues as well.

# No PI or Security Exception to Federal or State Law for Private Security

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- Any investigator that regularly performs background checks for pre-employment screening is also a Consumer Reporting Agency (CRA) by definition under federal Fair Credit Reporting Act (FCRA).
- No Private Investigator exceptions.
- In 2011, Federal Trade Commission (FTC) issued summary of the FCRA '40 Years of Experience with the Fair Credit Reporting Act': <https://www.ftc.gov/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations>.

**40 YEARS** OF EXPERIENCE  
WITH THE **FAIR CREDIT  
REPORTING ACT**  
AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS

# In-House Screening May Trip the FCRA

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- Urban myth that internal background checks by employers complexly avoids FCRA.
- Unless EVERYTHING is done in-house, FCRA may apply.
  - ☑ In-House security hires an investigator to retrieve records or interview remotely.
  - ☑ In-House security utilizes a non-public database.
- Best protection if performing in-house is to apply the FCRA rules.
- However, there is an FCRA exception where there is a third party **investigation** based upon workplace misconduct or wrongdoing.
  - ☑ Cannot alert target or witnesses to investigation or get a consent.
  - ☑ Still need to follow adverse action rules if adverse action taken

# No Such Thing as a “National” Criminal Search

Contrary to popular belief, there is no national database available to private employers to check criminal records or false credentials, such as education or employment.



- Databases can have both “false positives” and “false negatives.”
- No mechanism to update commercial database with subsequent history, such as an expungement or deferred adjudication.
- Fingerprint checks from FBI only available when mandated by law (e.g. teachers/child care workers/banks, etc.).
- Even the FBI database is NOT perfect since it relies upon state data.



**Beware of using cheap databases as substitute for due diligence.**

# Numerous Ways to Cut Corners with Criminal Record Searches

- Using incomplete statewide system.
  - ☑ Most states have a disclaimer that the statewide criminal case database has errors.
  - ☑ Only 13 States have a REAL statewide system that is the equivalent of courthouse searches, such as the New York State OCA.
- Screen scrapping and B2B automaton when data not complete and up to date.
- Claiming seven year search and ignoring convictions older then seven years that are reportable.
- Using database in counties that are known to be incomplete.
- Ignoring highly related ALIAS names.
- Using substandard past address information to get less potential places to search.

**Beware of shortcuts**



*Numerous ways to cut corners in doing criminal searches*

**STANDARD:** If automation, is it the functional equivalent of the data at the courthouse?

# Background Checks and Due Diligence Post-Hire and Insider Threats

Employers are becoming more concerned with due diligence post-hire to protect against insider threats.

- There are numerous types of post-hire insider threats ranging from embezzlement, fraud, and theft to child molesters and active shooters and everything in between.
- These inside threats come from anyone with access to workplaces including employees, contractors, temporary workers, and even ex-spouses.



The exposure of government secrets by Edward Snowden and the Naval Yard shootings in Washington D.C. have put increased emphasis on post-hire insider threats.

# Types of Risk

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- Employee problems that can arise during employment include:
  - ☑ **Predictable risks** such as when an employee may have access to cash or assets and the need for internal controls well known.
  - ☑ **Unpredictable risks** such as when an employee develops financial issues, undergoes life stresses, gambles, or uses alcohol or drugs.
  - ☑ **Institutional Risks** such as supervisors may suggest, encourage, imply, or order employees to perform acts of questionable honesty.
  - ☑ **Secret Risks** such as when a person with a political agenda obtains job secretly to advance a goal detrimental to the employer's interest.
  - ☑ **Acquired Risks** from Mergers and Acquisitions.



# Numerous Additional Tools

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Background checks useful but not the answer. Identification and prevention of insider threat requires an inter-disciplinary approach that can include:



Mental health assessments



Identification of risk factors



Psychological testing



Culture of safety, reporting and integrity



Physical security



Sharing and analyzing information between agencies/sources



Supervisor and co-worker training to recognize danger signals



Internal Controls and Continuous Evaluation (CE)

# Missed Information

**In addition, an employer may discover post-employment that critical information was missed during the hiring process.**

An employer may discover post-hire that a person is a registered sex offender, a criminal matter was missed or that a credential was faked.

**Employers should have in place policies, practices, and procedures to carefully select employees and a well thought out pre-employment screening program commensurate with the risk involved.**

- Hint: Application forms should make it clear that any material falsehood or omission can result in termination **NO MATTER WHEN DISCOVERED** and have language in the employee manual that deals with discovered falsehoods or omissions post-hire.
- Background check releases can have “**Evergreen**” clause to allow future screening if needed (although there are limits). Some firms include a policy that employees must self-report any arrest since that can impact their ability to perform jobs.



# Post-Hire Screening Problematic

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- “Continuous Screening” problematic if it relies on databases instead of actual courthouse checks.
  - ☑ Database checks for example are almost worthless in large states such as California, Texas and New York.
- Not clear that post-hire screening would prevent insider issues/workplace violence.
- Credit Reports are legally restricted in at least 11 states and give limited information.
- No good national system to track, analyze or utilize mental health, financial or domestic violence issues.

# Social Media Contains Landmines

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- As part of a process of Continuous Evaluation (CE), the use of **social media** is often mentioned.
- Problems:
  - ☑ Legal risks such as TMI (discrimination), privacy, legal off-duty conduct and accuracy.
  - ☑ State laws protecting passwords.
  - ☑ How do you know its your person unless they use their own name and email ( the “dumb insider”).
  - ☑ Hard to identify, obtain and use actionable information much information on social media – it is like “**drinking from a firehouse.**”

# Ten Things You Need to Know about Background Checks

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- 1** Ban the Box has reached a tipping point but has it gone too far?
- 2** The EEOC has changed the way America hires.
- 3** FCRA class action lawsuits are on the rise!
- 4** Credit reports — Approach with caution.
- 5** The world is awash with fake college credentials and fake resumes.
- 6** Accreditation — Not all background screening firms are created equally.
- 7** Offshoring of data beyond U.S. privacy laws is rampant.
- 8** Social media? A lawsuit waiting to happen!
- 9** It's the things you do before the background check that really matter.
- 10** Bans on employers asking questions about salary history.

# Has “Ban the Box” Reached Tipping Point?

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“Ban the Box” refers to the question on an application about past criminal record and a box for “Yes” or “No.”

Application will typically include EEOC disclaimers about no automatic disqualifications.



Do not “Chill” or “Deter” applicants from applying in the first place before there is even an opportunity to qualify for the job.

Per the National Employment Law Project (NELP), more than 150 cities and counties as well as 32 states have some form of “Ban the Box” laws. NELP updates are at <https://www.nelp.org/campaign/ensuring-fair-chance-to-work/>.

# “Ban the Box” Movement Spreads

2011 study by National Employment Law Project (NELP) found nearly 65 million people in the U.S. – more than one in four adults – are estimated to have criminal records. *However, this can include every misdemeanor such as DUI.*

- People who have made mistakes, but have repaid society, need jobs in order to be law-abiding & tax-paying citizens.
- Can cost over \$40,000 a year to keep a person in custody – society does not want to create a permanent criminal class of the unemployable.
- Cannot spend more on prisons/jails than schools and hospitals.
- However, due diligence requires right person in the right job.



# Can Ban the Box Laws Go Too Far?

By over regulating the use of criminal records, second chance, worker rights and civil rights organizations will arguably make the situation for ex-offenders worse by encouraging employers to **rely increasingly on a solid and uninterrupted job history.**

## **Prediction:**

Employers will use a solid employment history as a substitute for criminal records to lower RISK.

## **Unintended consequence:**

Ex-offenders are worse off, people with employment gaps are prejudiced, and the public is at risk!

There is very little that can be done if employment history becomes the surrogate way to keep people with criminal records out of the workforce.

# Additional Ban the Box Issues

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- Some studies suggest Ban the Box does not help since employers may assume a criminal record.
- Second chance lobby disputes this since Ban the Box not intended as a complete solution.
- Also issue with growth of number our local laws:
  - ☑ Indiana first state to prohibit local ban the box laws.
  - ☑ Argument: better to have state wide law since only state legislatures can give employers immunity and protections if Ban the Box followed and a lawsuit occurs.
- Addition issues: Problems with ex-offenders can not all be solved by employers – need criminal and prison justice reform, job training, social programs, etc.
- Another argument is that Ban the Box does not actually create additional jobs – if an ex-offender gets a job, someone else did not.

# EEOC Changed the Way America Hires

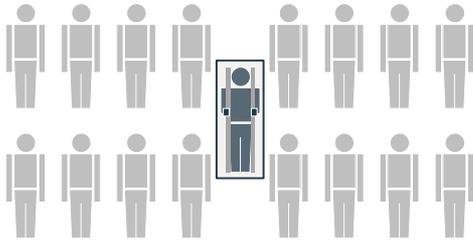
- EEOC: **Enforcement Guidance** on the Consideration of Arrest and Conviction Records in Employment Decisions – April 25, 2012.
- **Per EEOC, the updated guidance “builds on longstanding court decisions and guidance documents that the EEOC issued over 20 years ago” and “focuses on employment discrimination based on race and national origin.”**
- NO automatic disqualification for criminal conviction without a business justification, considering the Green factors:
  - ☑ Nature and gravity of the offense,
  - ☑ Nature of the job, and
  - ☑ Time elapsed.

Central thrust:  
Unlimited use of criminal records can result in a “disparate Impact.”

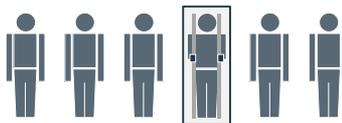
# The Statistics behind Disparate Impact

Per EEOC, arrest and conviction data support a finding “that criminal record exclusions have a disparate impact based on race and national origin.”

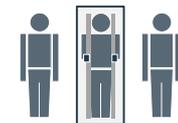
1 in 17 White males face custody in lifetime



For Hispanic males, it is 1 in 6



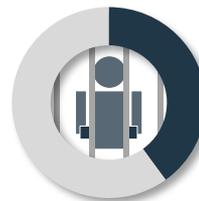
For Black males, it is 1 in 3!



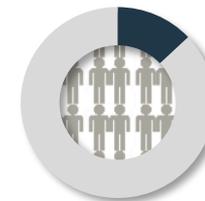
In 2010, African Americans were ...



...**28%**  
of those  
arrested



...**40%**  
of those  
incarcerated



...but only  
**13%** of the  
overall  
population

“Nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population ... African Americans and Hispanics also are incarcerated at rates disproportionate to their numbers in the general population.”

# EEOC 2012 Guidance: The Good, The Probably Good and the Challenging

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## The Good

- Background Checks are perfectly legal.
- **EEOC gave more clarity to the three part “Green” test:**
  - Nature of the Crime – Harm caused, legal elements of crime, level.
  - Time since the offense – Includes evaluation of recidivism.
  - Nature of the job – Job title, job duties, essential functions, circumstances (degree of supervision) and environment (e.g. private home vs. factory).

## The Probably Good

- Recommended Ban the Box.
- Wait to ask about criminal record at or after interview.
- Recommend Individualized Assessment Process.

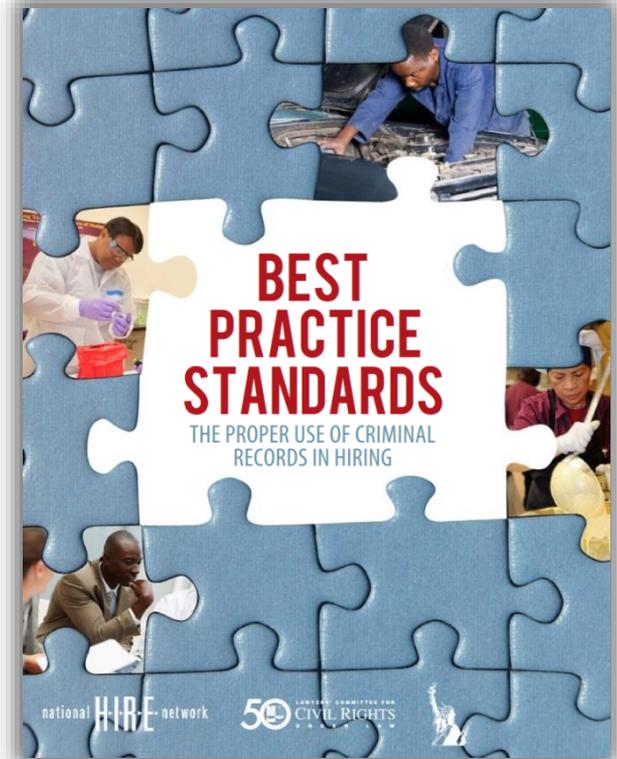
## The Challenging

- Suggested that employers only ask criminal questions relevant to job.
- Use studies to determine recidivism and relevance of older crimes.
- Not a defense following state or local laws.

# Criminal Records Best Practices

- A group of national civil and workers' rights organizations has released a new report titled 'Best Practice Standards: The Proper Use of Criminal Records in Hiring' that addresses the use of criminal records of job applicants by employers during employment background checks.
- See the complete report at:  
<http://www.esrcheck.com/Tools-Resources/Whitepaper-Library/Proper-use-criminal-records-hiring/>

*The next slide contains sample recommendations from report.*



# Sample Recommendations

1	CONSIDER ONLY CONVICTIONS AND PENDING PROSECUTIONS	8	CONFIRM ALL INFORMATION FROM ONLINE DATABASES WITH ORIGINAL SOURCE
2	CONSIDER ONLY CONVICTIONS THAT ARE RELEVANT TO THE JOB IN QUESTION	9	GET CURRENT DISPOSITION OF ALL RELEVANT INFORMATION
3	CONSIDER ONLY CONVICTIONS RECENT ENOUGH TO INDICATE SIGNIFICANT RISK	10	PROVIDE APPLICANT THE OPPORTUNITY TO CHALLENGE THE CRA'S REPORT
4	DO NOT ASK ABOUT CRIMINAL RECORDS ON APPLICATION FORMS	11	ALL CHARGES RELATED TO A SINGLE INCIDENT SHOULD BE REPORTED AS A SINGLE ENTRY
5	USE A QUALIFIED CONSUMER REPORTING AGENCY (CRA) TO CONDUCT RECORD CHECKS	12	CONSIDER EVIDENCE OF REHABILITATION
6	THE CRA SHOULD REPORT ONLY CONVICTIONS THAT ARE RELEVANT AND RECENT	13	MINIMIZE CONFLICT OF INTEREST BY DECISION MAKERS
7	REPORT CONVICTIONS ONLY WHEN FULL NAME AND ONE OTHER IDENTIFIER MATCH	14	TRAIN HUMAN RESOURCES STAFF
		15	HAVE A DIVERSITY PROGRAM

# FCRA Class Action Lawsuits are on the Rise

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Consumers and attorneys are filing more Fair Credit Reporting Act (FCRA) lawsuits against employers and screening firms.



## “Catch-22” situation for employers:

- On one hand, employers are being sued by victims that allege the employer failed to exercise due diligence.
- Conversely, employers and background screening firms face lawsuits from job applicants complaining about the accuracy of background reports or failure to meet FCRA guidelines.

## Class actions for basic violations of FCRA:

- Failure to use FCRA forms
- Failure to use “Standalone” form
- Using “Release” language
- Failure to give use Adverse Action notices
- Failure to ensure accuracy

# Why FCRA Lawsuits are Popular

Under FCRA, a class action lawsuit can ask for damages of \$1,000 per person—can add up quickly along with costs and attorneys' fees.

*FCRA class action lawsuits commonly ask for attorney's fees, court costs, and punitive damages.*



FCRA class action lawsuits can be based on semantics of FCRA or failure for employer or background screening firm to dot an “i” or cross a “t” even though no one harmed in any way.

**2007 US Supreme Court case (SafeCo)** allowed employer or screening firms to be sued for punitive damages since behavior that is objectively unreasonable could be sufficient to show “willful” non-compliance even if no harm intended.



# New US Supreme Court Case on Technical Violations

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- On May 16, 2016, the U.S. Supreme Court ruled on Spokeo v Robbins.
- Spokeo sells public information.
- Allegedly had significant incorrect information on Plaintiff.
- Class action alleged violation of FCRA due to inaccurate data but no actual harm.
- Supreme Court sent back to lower case, but indicated that some sort of concrete harm was needed.
- A technical violation of the statute was insufficient.
- Harm could be intangible if there was a degree of risk of harm.
- Bottom line: If a violation is only technical, the “no harm, no foul” rule can be argued.
- May limit FCRA procedural lawsuits.

# What Employers Need to Know

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- These class action lawsuits show why employers need to be sure that they follow basic FCRA requirements.
  - ☑ Resource available to assist employers with FCRA compliance is a joint publication from the U.S. Equal Employment Opportunity Commission (EEOC) and the Federal Trade Commission (FTC) titled ‘Background Checks: What Employers Need to Know.’
  - ☑ This publication explains how compliance with the FCRA and anti-discrimination laws intersect when employers use background checks. [http://www.eeoc.gov/eeoc/publications/background\\_checks\\_employers.cfm](http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm).
  - ☑ It is also critical for employers to utilize screening firms that have a demonstrated expertise in legal compliance.

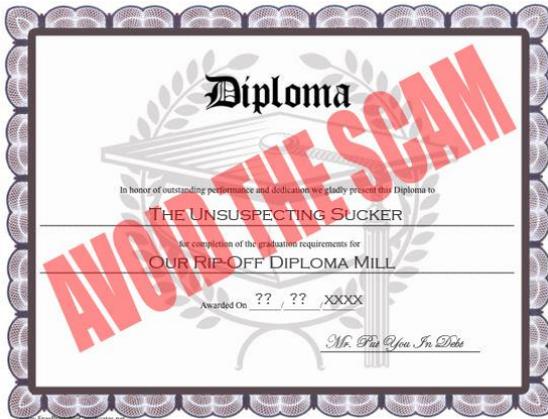
# Credit Reports – Approach with Caution

- Credit reports are a potential issue for EEOC.
- Credit reports can invade privacy and potentially be discriminatory unless measures taken to ensure their use is fair, accurate and relevant.
- Eleven states(11) states now limit use of credit reports with more expected: Need to clearly establish job-related reasons why a credit report is a valid predictor of job performance.
- Typical reasons: debt-to-income ratio and inability to handle own finances.



# The World is Awash with Fake College Credentials and Fake Resumes

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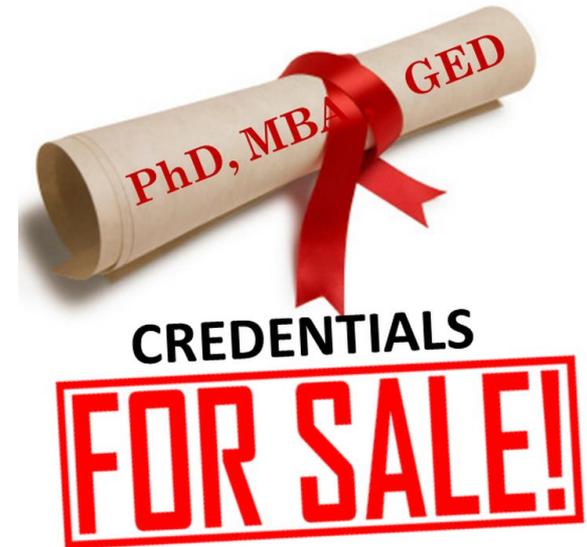


Background screening firms report high percentage of degree fraud.

Can range from claiming that a person graduated even though he or she was short credits to lying about attending the school to presenting worthless degrees from “diploma mills.”

Also, can now get very generic looking fake diplomas on the Internet for most schools in America.

Run fake schools on **LinkedIn** and see how many worthless degrees are claimed.



# It is Easy to Create Your Own Genuine Fake Resume

5



## Career

Excuse.com

RESULTS GUARANTEED **ONLY \$195**

### Why Choose CareerExcuse.com?

- \* You Choose Your Career History!
- \* You Pick Your Start and End Date!
- \* You Choose your Salary!
- \* You Choose the Company!
- \* You Choose Your Personal Reference Provider!
- \* We Provide a Address on Google Maps!
- \* We Provide a Real Website For That Company!
- \* We Provide a Local Phone Number!
- \* We Will Have our Operators Standing By!
- \* We Will E-mail you Every Time Someone Calls!

**CareerExcuse Guarantees A Job Offer Or your Money Back!**

# The Biggest Applicant Lies?

*"I was a manager."*

**(He/she was an assistant.)**

*"I worked there for several years."*

**(Hiding employment gaps)**



*"I made \$65,000 a year."*

**(He/she made less than half that amount-but be careful of new Salary secrecy Laws!)**

*"I graduated from XXXX University."*

**(Either did not graduate or the school is a worthless "diploma mill.")**

**LESSON:** If a person was DISHONEST in getting the job, likely to be DISHONEST in the job.

# Accreditation — Not All Background Screening Firms are Created Equally

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In 2010, the National Association of Professional Background Screeners (NAPBS®) instituted an intensive Background Screening Agency Accreditation Program (BSAAP).

Rigorous third party audit related to six critical areas:

1

Consumer Protection

4

Product Standards

2

Legal Compliance

5

Service Standards

3

Client Education

6

General Business Practices



**NAPBS accreditation is the only practical means of third party verification of professionalism and competency of a screening firm.**

# Offshoring of Data is Rampant

**Offshoring of data beyond the reach and protection of U.S. Privacy Laws is rampant.**

In 2010, California passed the first-in-the-nation law to regulate “offshoring” of Personally Identifiable Information (PII) collected during employment background checks and sent out of U.S. States beyond protection of U.S. privacy laws.



California requires screening disclosure document to contain a link to screening firm’s privacy policy – if this link is missing it could cost the employer \$10,000 per background check.

- Screening firms in California must have statement in their privacy policy about offshoring using a specific format and wording.
- Use of Offshore or home based workers carries risk with no benefit for employer.

# Privacy Shield, International Privacy & Offshoring Critical Concern

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- Privacy and discrimination concerns with “Big Data” and International Offshoring are growing.
- The EU-US “Safe Harbor” agreement to allow data transfers between the United States (US) and the European Union (EU) invalidated by Europe and now replaced with the “**EU-U.S. Privacy Shield**” framework.
- Starting May 2018, the **General Data Protection Regulation (GDPR)** will take effect as the primary law regulating how companies protect the personal data of citizens in the European Union (EU)—large change!



# SOC 2 Reports Help Protect Data

- **Service Organization Control (SOC) Reports®** are internal control reports provided by a service organization with information that users need to assess and address the risks associated with an outsourced service. The SOC 2® audit is conducted using criteria established by the American Institute of Certified Public Accountants (AICPA) and Canadian Institute of Chartered Accountants (CICA):
  - ☑ **Security:** The system is protected against unauthorized access (both physical and logical).
  - ☑ **Confidentiality:** Information designated as confidential is protected as committed or agreed.
  - ☑ **Privacy:** Personal information is collected, used, retained, disclosed, and destroyed in conformity with the commitments in the entity's privacy notice and with criteria set forth in Generally Accepted Privacy Principles (GAPP) issued by the AICPA and CICA.



# Social Media?

## A Lawsuit Waiting to Happen!

- “Social media background checks” help employers/recruiters discover treasure trove of information about applicants on the web.
- Failure to utilize social media can arguably be basis of a negligent hiring claim, where social media search may have raised a “red flag.”
- Conversely, social media checks can present legal risks for employer:
  - ☑ Too Much Information (TMI) - Can expose employers AND recruiters to discrimination claims **nationality, race, religion, age, sex, or medical issue.**
  - ☑ Online Photos – Appearance or **religious affiliations** revealed by photos.
  - ☑ Reasonable expectation of privacy based on generally accepted standards
  - ☑ Legal “off duty” conduct.
  - ☑ Issue of identifiers and authenticity – **is it really your applicant?**
- States have passed laws limiting employers asking for passwords or “shoulder surfing.”
- Also need post-employment policy.



# Social Media Solutions

- Utilize social media as late in the process as possible.
- Most conservative approach: Perform search AFTER there is consent and a job offer is made, contingent upon completion of a background check that is satisfactory to the employer.
- Use OBJECTIVE and DOCUMENTED standards.
- Do training on discrimination.
- Researcher should NOT be a decision maker.
- Using a background screening firm is problematic under 607(b).
- See ESR Whitepaper on topic at <http://www.esrcheck.com/Whitepapers/Social-Media-Ba>



# It's the Things You Do Before the Background Check that Really Matter

- The Application, Interview, and Reference checking Processes are critical and will be reviewed in detail in any litigation.
- Applications:
  - ☑ Get consent for background checks at the same time the application is completed – discourages people with something to hide.
  - ☑ Ask about past criminal record in a manner consistent with the latest EEOC guidance.
  - ☑ Review for failure to answer questions or omissions – nearly every time there is a problem hire, there was a “Red Flag” on the application.



# Review Application for “Red Flags”

1. Does not sign application.
2. Does not sign release.
3. Self-reports offense.
4. Fails to identify past employers.
5. Fails to identify past supervisors.
6. Fails to explain why left past jobs.
7. Doesn't explain employment gaps.
8. Makes explanations for employment gaps or leaving past jobs that do not make sense.
9. Makes excessive cross-outs and changes.



# The Six Critical Questions that Should Be Asked in Every Interview

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- 1 We do background checks on everyone we make an offer to. Do you have any concerns that you would like to discuss?
- 2 We also check for criminal convictions for all finalists. Do you have any concerns about that? (Make sure question reflects what employer may legally ask in your state)
- 3 We contact all past employers. What do you think they will say?
- 4 Will your past employer tell us that e.g. you were tardy, did not perform well, etc.?
- 5 Ask questions about any unexplained employment gaps.
- 6 Is everything in the application and everything you told us in the interview true, correct, and complete?

# Past Employment Checks as Critical as Criminal Checks

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Critical to verify employment to determine where a person has been (**even if you only get dates and job title**). Otherwise you are hiring a **STRANGER**.

Looking for unexplained gaps **AND** for locations to search for criminal records.

*If you can verify that a person was gainfully employed in the last 5-10 years, it is less likely that he/she spent long periods in custody.*



**There are over 10,000 courthouses in U.S.**

**You need to know where to search.**

*Just attempting and **documenting** effort demonstrates due diligence.*

# Bans on Employers Asking Questions about Salary History

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- States, counties, and cities have passed laws prohibiting employers from seeking salary history as part of a **growing “equal pay” movement to narrow the gender wage gap between women and men.**
- A 2013 study from the American Association of University Women found **women get paid 6.6 percent less than men in their first jobs.** When it comes to subsequent jobs, employers often inquire about a candidate’s salary history as a basis for establishing their new salary, which worsens gender pay inequality over time.
- In 2015, **women earned 80 percent of what men earned,** according to the U.S. Census Bureau. The **gender wage gap has narrowed by less than one-half a penny per year** in the United States since 1963, according to the National Committee on Pay Equity, when Congress passed the Equal Pay Act of 1963.
- Approach: If new salary is based on previous salary, and applicant was discriminated against in previous job, asking about salary can perpetuate gender wage gap.

# Key Concepts on Salary History

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- Pay History, Pay Inquiry or Pay Privacy laws where past pay is kept secret, so that new employer may not ask about, or discover pay, which presumably includes total compensation
  - ☑ (Not to be confused with Pay Secrecy laws where employers are prohibited from requiring employees to keep their salary secret.)
- Pay Transparency – means employees can share salary, presumably in a situation where an employer has a salary schedule that is published
- Pay Reliance-where an employer tries to set a new salary relying on the applicant's old salary, in order to negotiate each position separately instead of a fixed compensation plan.

# Examples of Salary History Laws

- **Philadelphia Bill No. 160840** prohibits employers from inquiring about salary history of job applicants. (Took effect on October 24, 2017.)
  - ☑ However, bill was partially ruled unconstitutional on April 30, 2018 in a federal district court since a wage history inquiry was protected commercial speech and the City failed to provide any empirical evidence that pay inquiry impacted the wage gap and was justified using intermediate scrutiny test. Court upheld “Reliance” provision that prohibits relying on past salary to set new salary.
- **New York City Introduction 1253-2016** prohibits employers from asking about salary history during the hiring process and from relying on salary history to determine salary. (Took effect on October 31, 2017.)
- **Massachusetts S.2119, An Act to Establish Pay Equity** prevents wage discrimination on the basis of gender. (Took effect on July 1, 2018.)
- **Oregon Equal Pay Act of 2017 (HB 2005)** prohibits employers from screening applicants based on past or current salary history or seeking information about salary history. (Will take effect on January 1, 2019.)

# Additional Salary History Laws

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- **California Assembly Bill 168 (AB 168)** prohibits employers from seeking salary history. An employer must, upon reasonable request, provide an applicant with the pay scale assigned to the position sought. (Took effect on January 1, 2018.)
  - ☑ California law amended July 18, 2018 to add clarifications.
- **San Francisco “Parity in Pay Ordinance”** prohibits employers in the city from asking applicants about their salary history or from considering earnings information (Tok Effect July 1, 2018.)
  - ☑ **Ongoing California issue – Local laws that may conflict with state laws.**

# What to Do about Salary History

- When employers have a background screening firm perform past employment verifications, it is critical the screening firm know what states and cities prohibit such questions and have software to help compliance.
- This is another example where background screening is morphing into a legal compliance services, as opposed to merely gathering data.
- Employers should revise **job application** forms to delete questions asking for salary or wage history
- Train recruiters and hiring managers not to ask for such information in interviews.
- Employers in states or cities with laws restricting questions about salary history should consult their labor attorneys.



# Other Background Check Trends and Issues

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- Ongoing checks of current employees (“re-screening”).
- Checks for temporary workers (“temps”), vendors, and independent contractors.
- E-Verify confusing patchwork of state laws.
- Accuracy of background check reports under scrutiny.
- Government increases action against screening firms.
- International Background checks growing.



# Additional Screening Industry Issues

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- **Screening industry Mergers and Acquisitions:**

- ☑ Employers are being “bought and sold” as part of transactions meaning you may be working with strangers.
- ☑ If an employer views background screening as a professional service instead of a commodity, the trend towards consolidation may not be to an employer’s advantage.
- ☑ Bigger NOT always better.

- **Employers Being Bombarded by “Disruptive” Marketing Buzz**

Although some amazing new technology being developed, HR needs to be alert for “disruption” that is really just marketing buzz that does not do anything.

- ☑ In the screening world, firms are now saying they have invented new “disruptive” technology, which is merely a new marketing gloss over processes and techniques that many firms have been using for years.



# Thank You

For more information on employment background screening services, please visit:

- ESR website: <http://www.esrcheck.com>.
- ESR News blog: <http://www.esrcheck.com/wordpress/>.
- 'The Safe Hiring Manual' by Attorney Lester Rosen: <http://www.esrcheck.com/Tools-Resources/Safe-Hiring-Manual/>.
- Email ESR founder and CEO Les Rosen at [lrs@esrcheck.com](mailto:lrs@esrcheck.com).

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