



# BACKGROUND CHECK

## Background Checks: Stay Legal, Hire Smart



# They're Tougher Than You Think

Background checks used to be so simple: you'd forward the applicant's contact information to the background check company, receive a report, and toss those resumes that come back with felony convictions.

How things have changed. New laws and an extremely vigilant EEOC have made the process of protecting your company – and making great hires – more complex and risky than ever.

So when should you perform background checks? How can you be thorough – and still stay legal? What information matters? And what should you do with background check information once you have it?

This eBook has the answers you need. In it, you'll find:

- An **overview of the challenges** of performing background checks, with “red flags” to look for in your own HR practices;
- Notes on **how to follow the law** when creating your own company's background check procedure and why; and
- Tips on using your law-compliant background check procedures to **identify top candidates**.



## To Check or Not to Check?

Criminal background checks can feel like a Catch-22. Fail to do one, and you're on the hook for any employee misbehavior that a background check would have brought to your attention. Use background checks indiscriminately, and you face legal action for illegal discrimination in hiring.

With trouble either way you turn, how can you navigate a safe middle path for your organization?



# Rising to the Background Check Challenge

Background checks pose a number of challenges. They're a "hot topic" in law right now, which means the rules are constantly changing – making background checks even more troublesome for human resources managers who only want to hire the best people possible while protecting their companies from unnecessary lawsuits.

The two biggest challenges HR departments face are:



# 1. Increasingly complicated processes.

The Equal Employment Opportunity Commission (EEOC) recently warned that it was stepping up prosecution of companies that use background checks as a basis for illegal discrimination – and then raised the stakes by expanding the factors for fair background checks from three considerations to eleven. To make matters more confusing, some courts have rejected the EEOC’s new eleven-factor approach, leaving HR departments with even less guidance than before.



**Red Flag!** One of the worst possible responses to background check complexity is to adopt a “blanket” policy that tosses out any candidate with any criminal history. While tempting, this method swings the door wide open to potential discrimination suits.

# 2. Lawsuit exposure.

Although a badly performed background check leaves the employer open to litigation, so does failing to perform a background check at all. If a background check is not performed and a candidate with a history of misbehavior slips through, the company may be held liable if the employee commits a similar criminal act that injures a client or customer.



**Red Flag!** Don’t be tempted to avoid the complexity of background check law by nixing background checks altogether. If a new hire commits a crime while on the job, the employer can easily be held responsible for negligent hiring if a background check would have revealed a propensity for such crimes.



# Staying on the Straight and Narrow

Background checks are designed to ensure employees can stay on the “straight and narrow” when it comes to avoiding criminal or other misbehavior.

The best way for HR departments to ensure they get such employees is to set the example – with a properly constructed background check policy.

A good background check policy:

- is in writing,
- uses objective criteria, and
- is applied to every candidate in the same way.

Train everyone involved in the hiring process on the rules of the background check policy – even if they are not likely to be the ones performing the background check. When everyone is on the same page, the background check policy can be applied more uniformly, adding another layer of protection against the risk of a discrimination lawsuit.





# Avoiding Discrimination Cases: The EEOC's “Big Three”




The “big three” factors employers should always consider when performing background checks are:

1. **What was the applicant convicted of, and how serious is it?** Does the applicant have a felony conviction for assault, or a misdemeanor conviction for driving on a suspended license? The type and seriousness of the conviction matter in background checks.
2. **How long has it been since the conviction or the end of the applicant's sentence?** Several years of crime-free behavior may indicate an applicant who has learned from past mistakes and dedicated him or herself to living well.
3. **What type of job is the applicant applying for?** Specifically, how does the conviction apply to the position? A driver's license violation may not have any relevance to a job as a kindergarten paraprofessional – but a conviction for child abuse certainly does.



# Green Flags for Best Background Check Policies




While the EEOC's "Big Three" questions should always be at the top of your mind when evaluating an applicant's criminal history, they are not the only questions a good background check policy will address. Here's a list of "green flags" to follow when constructing your own background check policy:

-  **Give notice.** Tell the candidate that you will be requesting a background check before you send the request. Get written permission from each candidate before requesting the report. Candidates who know you are performing a background check – and who demonstrate this knowledge in writing – cannot claim surprise if their history comes up during the hiring process.
-  **Skip arrest histories and sealed or expunged records.** Stick only to criminal convictions that appear on the background check report. An arrest is not proof of wrongdoing – a conviction is. Likewise, digging into sealed or expunged records can be interpreted as an attempt to discriminate against the candidate.
-  **Use written job descriptions.** Written job descriptions clarify the essential functions of each job and the skills and experience required. Create one for each job, and use them every time you evaluate whether an applicant's criminal history is relevant to the position for which the person is applying.





# Green Flags for Best Background Check Policies

-  **Be willing to ignore the criminal background check report.** If the information in the criminal background check is irrelevant to the written job description, do not base any part of your hiring decision on the report. Instead, focus on the candidate's skills, experience, references, and interview performance.
-  **Give more notice.** Suppose the background check reveals a conviction that relates directly to the job for which the person is applying – for instance, the background check reveals a conviction for embezzlement, and the applicant is seeking a job as a bank teller. If you do decide not to hire an applicant based on the background check information, notify the applicant in writing. Provide a copy of the background check report and a written statement explaining the decision, the specific reasons, and the applicant's rights under the Fair Credit Reporting Act.
-  **Train your people.** Everyone involved in the hiring process should understand the entire background check policy and how to use it. Retrain staff from time to time to refresh their memories, especially if they are not usually involved in the background check process.



# Make Your Policy Work for You

A legal background check policy can reduce your company's discriminatory lawsuit exposure – but making your policy compliant doesn't necessarily guarantee it will produce the best possible candidates for the job.

Here's how to apply a law compliant background check policy to identify top candidates:

- **Create written job descriptions for each position.** Then, review each written description and ask:
  - How is a criminal background check relevant to this position?
  - What convictions, if any, would make a person genuinely unfit for this job?
  - What kinds of rehabilitation (criminal sentences, therapy, education, rehabilitation, job training or experience) would make a person fit for this job despite a conviction?
- **Don't jettison a candidate's application just because the criminal background check doesn't come back clean.** Blanket rejections are a “red flag” not only for legal reasons. They're also an easy way to reject an outstanding candidate without realizing what you've done. Instead of applying a blanket rejection policy, think carefully about how the criminal background check fits with the candidate's actual job responsibilities. Can this candidate do the job well, despite his or her checkered past? You may find the answer is “yes.”



# Make Your Policy Work for You

- **But don't hesitate to strike a candidate if the law requires it.** Even if a candidate offers outstanding credentials, the law may require you to say “no” if the candidate has certain types of criminal convictions. For instance, individuals who have been convicted of child abuse are barred by law from working with children in many states.
- **Learn to love the EEOC criteria.** The EEOC's eight supplemental criteria can provide a roadmap to interviewing candidates with criminal histories. The eight relevant questions are:
  - What were the facts surrounding the criminal behavior?
  - How many times has the applicant been convicted, and of what?
  - How old was the applicant when the conviction(s) occurred?
  - Has the applicant done similar work since the conviction without incident?
  - How long and how consistently has the applicant been employed, both before and after the conviction?
  - How has the applicant tried to rehabilitate him or herself?
  - What do the applicant's references say about him or her?
  - Is the applicant bonded?
- **Find out what references have to say.** References are invaluable in hiring, and never more so than when a candidate has a criminal past. Ask references how the applicant has performed at work and whether the reference would hire the candidate again.



## Conclusion:

Navigating background check law isn't easy. But with careful consideration, objective written policies, and practice, any organization can create and use a background check policy that protects the company from lawsuits while also protecting customers or clients from exposure to potentially criminal behavior.

When in doubt about your company's background check policies, contact an experienced staffing service. Staffing partners specialize in helping you stay safe and hire smart. They stay up to date on the rapidly changing world of hiring law in order to screen candidates properly, perform legal background checks and reference interviews on your behalf, and offer the best possible pool of potential hires. Whether you lack the in-house resources to do background checks well or simply feel overwhelmed by the prospect, your staffing partner has your back.

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