



Employment Screening Resources

Background Checks & Nursing Home/Home Health Care: A Toolbox for Due Diligence

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Quick Introduction to Background Checks for Nursing Home/ Home Health Care Workers

- **It does not matter how good you are at interviewing, “gut instincts” are not enough:** There is a growing body of scientific evidence that suggests that human beings are not nearly as good at detecting liars as we think. The old phrase, “Trust but Verify,” applies when hiring for a sensitive position.
- **The higher the risk, the more due diligence is needed:** Where hiring someone to work with vulnerable people, a higher degree of due diligence is needed. For example, infirmed individuals in a home are vulnerable, requiring a higher duty of care in selecting workers.
- **Don’t let the term “background check” give you a false sense of security:** The word “background check” is meaningless. It can mean anything from a near worthless online database search all the way to an in-depth private investigation. You need to know what type of background check was done, and the qualifications of the firm that performed it. Look for firms that are accredited by the National Association of Professional Background Screeners (NAPBS).
- **Background checks are not perfect:** Even the FBI and the CIA do not always get background checks right. Although mistakes are uncommon, there are technical reasons why a person can come up “Clear” when in fact they have a criminal record. The crime may have been committed in a county not searched, or the applicant switched around their last names. Also, keep in mind that a person that has never been convicted before may commit a crime or abuse a vulnerable person.
- **Whatever you do, stay away from cheap online databases:** There are numerous web sites that purport to give online background checks. You are better off putting your money on red in Las Vegas. These “online” sites have practically no value in California, and other states. They are only useful to background check firms as another research tool. Most of these online sites do not even bother to inform employers of their legal obligations under the Fair Credit Reporting Act (FCRA).
- **If doing a background check, the gold standard is county by court, supplemented by other searches:** Unless you are authorized by law to use LiveScan for fingerprints, the only in way in California to check a criminal report

is to search at the county court level for each county where a person has lived or worked. Period! Anything short of that may be useless.

- **Don't forge the legal stuff:** If you are an employer doing a background check, you must sign a certification with the background screening firm and have your applicant sign a Release and Disclosure form. A background screening firm will provide those documents. This is taken very seriously, especially in California. An alternative is to have a person obtain their own background check report form a website such as <http://www.MyESRcheck.com>.
- **A background check, no matter how good it is, is not enough all by itself:** The best things in life are free, and the most effective tools to keep your home and business safe are free. It really revolves around the employment application, job interview, and past employment verification process. If you do those things well, the chances of hiring a bad employee are greatly reduced. Use the attached material to help.

Ten Safe Hiring Tools for Employers

Without taking some measure to ensure safe hiring, it is a statistical certainty that a firm will make costly hiring mistakes. Just one bad hiring decision can create a legal and financial nightmare, including lawsuits, victims being harmed, theft, embezzlement, and workplace violence. It is estimated that 10% of job applicants have criminal convictions, and up to one-third of resumes contain serious falsehoods or omissions.

Fortunately for small businesses, there are ten due diligence tools that can be used immediately and only the final one, the background check, carries any cost. These techniques protect your business or home, yet do not discourage good applicants, who also are anxious to work with qualified co-workers in a safe and profitable environment.

Here are the tools:

1. Use an application form, not just resumes. Use of an employment application form is considered a best practice. Since resumes are just marketing tools that are not always complete or clear. Applications ensure both uniformity and that all needed information is obtained, prevents employers from having impermissible information, and provides employers with a place for applicants to sign certain necessary statements.
2. Make sure the application form contains all necessary language.
 - a. Use the broadest possible language for felony and misdemeanor convictions and pending cases. One of the biggest mistakes employers make is to only ask about felonies on an application form since misdemeanors can be serious. Employers should inquire about misdemeanors to the extent allowed in their state.
 - b. A statement that criminal records do not automatically disqualify an applicant is important for EEOC compliance. It is critical for employers to understand that the background screening is conducted to determine whether a person is fit for a particular job. Society has a vested interest in

giving ex-offenders a chance. However, an employer is under a due diligence obligation to make efforts to determine if a person is a reasonable fit for a particular position. For example, a person just out of custody for a violent crime may not be a good candidate for a job that requires them to go into private homes, but may perform very well on a supervised work crew. If a criminal record is found, an employer must determine if there is a business reason not to hire the person, based upon the nature and gravity of the offense, the nature of the job, and when the crime occurred. There are also limitations to the use of arrests not resulting in a conviction, and a number of states also have rules about criminal records.

- c. Statements that lack of truthfulness or material omissions are grounds to terminate the hiring process or employment no matter when they are discovered. This is particularly important if a criminal record is found. Although a criminal record may not be used automatically to disqualify an applicant, the fact an applicant lied about a criminal matter can be the basis for an adverse decision.
 - d. Include other standard statements such as employment is at-will.
3. Require a release for a background check in the application process. Have each job applicant sign a consent form for a background check, including a check for criminal records, past employment, and education. Announcing that your firm checks backgrounds may discourage applicants with something to hide, and encourage applicants to be truthful and honest about mistakes they have made in the past. If a firm outsources to a third party vendor, then under the federal Fair Credit Reporting Act (FCRA), there must be a disclosure on a separate standalone document. Many states such as California have additional laws.
 4. Review the application carefully. In most instances, when there is an employee problem or lawsuit, a careful review of the application would have alerted the employer in advance that they were hiring a lawsuit waiting to happen. Look for the following red flags:
 - a. Applicant does not sign application.
 - b. Applicant does not sign consent for background screening.
 - c. Applicant leaves criminal questions blank (the honest criminal syndrome - does not want to lie about a criminal past).
 - d. Applicant self-reports a criminal violation (applicants can self-report matters incorrectly).
 - e. Applicant fails to explain why he or she left past jobs.
 - f. Applicant fails to explain gaps in employment history.
 - g. Applicant gives an explanation for an employment gap or the reason for leaving previous job that does not make sense.
 - h. Excessive cross-outs and changes (as though making it up as they go along).
 - i. Applicant fails to give complete information (i.e. insufficient information to identify a past employer, leaves out salary, etc).
 - j. Applicant failed to indicate or cannot recall the name of a former supervisor.

5. Always ask these five questions (during housekeeping stage of interview). Since they have signed a consent form and believe you are doing background checks, applicants have a powerful incentive to be truthful. These questions are the equivalent of a New Age Lie detector test. Good applicants will shrug it off and applicants with something to hide may reveal vital information.
 - a. We do background checks on everyone we make an offer to. Do you any concerns about that you would like to discuss?
 - b. We also check for criminal convictions for all finalists. Any concerns about that? (Make sure the wording of the question reflects what an employer may legally ask in that state.)
 - c. We contact all past employers. What do think they will say?
 - d. Will past employer tell us? (e.g. you were tardy, did not perform well)
 - e. Use interview to ask questions about any unexplained employment gaps.
6. Check past employment and look for Unexplained Employment Gaps: Verifying past employment is one of the single most important tools for an employer. It can be as important as doing criminal checks. Past job performance can also be an important predictor of future success. Some employers make a costly mistake by not checking past employment because they believe past employers may not give detailed information. However, even verification of dates of employment and job titles are critical because an employer must be concerned about unexplained gaps in the employment history. In addition, documenting the fact that an effort was made will demonstrate due diligence. Although there can be many reasons for a gap in employment, if an applicant cannot account for the past seven to ten years, that can be a red flag. It is also critical to know where a person has been because of the way criminal records are maintained in the United States. As mentioned earlier, there are over 10,000 courthouses in America, if an employer knows where an applicant has been as a result of past employment checks, it increases the accuracy of a criminal search, and decreases the possibility that an applicant has served time for a serious offense.
7. Check with “developed” references: When calling the references that are supplied by the applicant, ask the reference for names of other people that may know the applicant. You may develop names of people with additional and important knowledge about your applicant that may be willing to talk with you. Remember that, as a general rule, a person will perform for you in a similar fashion to how they performed for past employers.
8. State employment is conditional upon “satisfactory” background check report: If employment begins before a background check is completed, state in writing that employment is conditioned upon a background check report that is “satisfactory” to the employer.
9. Include future screenings in the consent language. This becomes important if a future investigation is required for some form of workplace misconduct.
10. Perform a background check: This is the only step that costs money, and the amount is insignificant compared to the harm that can be done. However, do not rely on cheap online databases. At a minimum, an employer should do a county court check in addition to a database search and should also consider a sexual offender search and even search online.

To Be Completed for Every New Applicant Before Being Hired:

Applicant: _____

Position: _____

Hiring Manager: _____

Application Process

Did applicant sign consent for background investigation?

Is application complete?

Did applicant sign and date application?

Did applicant leave criminal questions blank?

Did applicant indicate a criminal record?

Did applicant explain why left past jobs?

Did applicant explain gaps in job history?

Were there any excessive cross-outs or changes?

Interview

Did applicant explain any excessive cross-outs/changes?

Leaving past jobs: Did applicant explain satisfactory?

Leaving past jobs: Was reason left consistent with app?

Employment Gaps: Did applicant explain satisfactory?

Employment Gaps: Explanations consistent with app?

Security Question 1 - "Our firm has a standard policy of background checks and drug tests on all applicants. Do you have any concerns you would like to share with me about that procedure?" ANSWER:

Security Question 2 - "If I were to contact the courthouse or police department, would we locate any criminal convictions or pending cases?" ANSWER:

Security Question 3 - "If I were to contact past employers pursuant to the release you have signed, what do you think they would tell us about you?" ANSWER:

Security Question 4 - "If I were to contact past employers pursuant to the release you have signed, would any of them tell us you were terminated or were disciplined?"

ANSWER:

Security Question 5 - "Please explain any gaps in employment." ANSWER:

Reference Checks (by employer or third party)

Have references been checked for at least last 5-10 years, regardless of whether past employers will give details?

Have efforts been documented?

Discrepancies between information located and what applicant reported in application:

a. dates/title salary/job title

b. reason for leaving

Background Check

Submitted for background check?

Check completed?

Background check reviewed for discrepancies/issues?

If not CLEAR or SATISFACTORY, action taken per policy and procedures? Describe:

Notes: (Use back if necessary. Sign and date all entries)

Description of Pre-Employment Screening Tools

Criminal Record Search (County Courts)

- What it will Tell: Felony and Misdemeanor convictions, and pending cases, usually including date and nature of offense, sentencing date, disposition and current status. Generally goes back seven years. Can also search federal court records. It is critical to search both for felonies and misdemeanors in state court, since many serious violations can be classified as misdemeanors. Federal cases can also be searched for certain positions that are particularly sensitive. However, the majority of offenses are in state court. Can also run a sexual offender search.
- Reason You need this Information: Critical information to protect your business and employees. Protects employer from negligent hiring exposure and helps reduce threat of workplace violence, theft, disruption, and other problems. Failure to honestly disclose a prior criminal conviction can also be the basis not to hire. For the maximum protection, all jurisdictions where an applicant has lived, worked, or studied in the past seven years should be checked.
- Limitations/Notes on Using this Information: Some restrictions on having certain information (such as arrests not resulting in convictions), or certain minor offenses. Employment cannot be automatically denied based upon a criminal record, but must show some sound business reason. Contrary to popular perception, criminal records are not available by computer nationwide for private employers. Background firms must check the public records at each individual county courthouse that is potentially relevant. If there is a “hit” the court file should be obtained and reviewed for identifiers and details. There can be delays when a court clerk pulls a file. Some counties charge a court fee.

Criminal Database Searches

- What it will Tell: There are assembled from available public dates by private firms. These are NOT FBI reports. Although it lists millions of records, the coverage, accuracy, completeness and amount of updating can vary widely.
- Reason You need this Information: In the hands of a professional background check firm, may give additional locations to search for criminal records.
- Limitations/Notes on Using this Information: Be very careful in using databases. They are nearly worthless in some large states such as California, New York and Texas. There can be both false positives where a person is falsely accused, and false negatives, where a criminal record is missed. If there is a “hit” the court file should be obtained and reviewed for identifiers and details.

Driver’s License Search

- What it will Tell: Driving history and verification of driving privilege.
- Reason You need this Information: Gives insight into applicant’s level of responsibility. Determine whether applicant keeps commitments to appear in court or pay fines, has a drug/alcohol problem, and license status. Also helps verify identity. “Driving for work” is very broadly defined in most jurisdictions and is not limited to driving positions.

- **Limitations/Notes on Using this Information:** This information can be accessed by an outside agency on an employer's behalf. The alternative is having applicants personally go to the DMV to obtain their own records, which is not practical and is subject to fraud. DMV also has a program for firms that would like updates. Background firms can also help interpret the DMV record.

Social Security Number (SSN) Check/Identity

- **What it will Tell:** Provides names and addresses associated with the applicant's social security number, and may indicate fraudulent use. May verify other applicant information. (However, not an official report from the Social Security Administration)
- **Reason You need this Information:** Helps verify that applicants are who they say they are. Critical to ensure employer not the victim of a fraudulent application by someone with something to hide. Helps determine where to search for criminal records.
- **Limitations/Notes on Using this Information:** Where employer does not have a sound business reason to obtain a business credit report, the social security check gives information to help confirm identity and to uncover fraud.

Credit Report

- **What it will Tell:** Credit history and public records such as judgments, liens and bankruptcies. May include previous employers, addresses and other names used.
- **Reason You need this Information:** Helps determine whether an employee is suitable for a position involving handling cash or the exercise of financial discretion, as well as a possible way to gauge trustworthiness and reliability.
- **Limitations/Notes on Using this Information:** A credit report should only be requested when it is specifically relevant to a job function and the employer has appropriate policies and procedures in place to ensure that the use of credit reports are relevant and fair. An extensive procedure is required to be qualified to receive credit reports, including an onsite inspection.

Employment Verification

- **What it will Tell:** Basic verification includes dates of employment, job title and reason for leaving. Some employers will verify salary. Usually obtained from HR, Personnel or Payroll. Some employers have the information recorded on a 900 service.
- **Reason You Need this Information:** This information confirms your applicant's resume, and verifies his or her previous job history. Helps eliminate any unexplained gaps in employment, which ensures that appropriate jurisdictions have been checked for criminal records and reduces likelihood of incarceration for serious offense.
- **Limitations/Notes on Using this Information:** Employers are often hesitant to give recommendations and may limit prior employment checks to the basic information. This service can be limited if not allowed to contact current employer, employer will not return call, past employer is out of business or cannot be located, or if employee was working through an agency.

Employment Reference

- What it will Tell: This is a more in-depth reference check that seeks job duties, performance, salary, strengths and weaknesses, eligibility for rehire and other detailed information.
- Reason You need this Information: Allows an employer to have a realistic assessment of a candidate from former employers. It promotes a better fit, confirms the hiring opinion and protects the expensive hiring investment.
- Limitations/Notes on Using this Information: Although most employers would like references, few will give them due to concerns over legal liability. However, an employer should still attempt to obtain verifications and references in order to demonstrate Due Diligence.

Personal Reference Check

- What it will Tell: Contact personal references to ascertain additional information about your applicant concerning fitness for the job in question.
- Reason You need this Information: Personal references can provide valuable information as to a person's character as it relates to the job opening.
- Limitations/Notes on Using this Information: Should also inquire about the applicant's relationship to the reference and how long they have known each other in order to evaluate the information. Can also contact "developed" references for a better picture.

Education Verification

- What it will Tell: Will confirm degrees, diplomas or certificates and dates attended.
- Reason You need this Information: Confirms education and ability to do the job. Should also include verification that school is accredited and not a degree mill.
- Limitations/Notes on Using this Information: Industry sources show that 30% of all job applicants falsify information about their educational background. Some schools require a fee, or will only fax to an 800 number.

Professional Licenses

- What it will Tell: The type of license, whether currently valid, dates issued, state and licensing authority.
- Reason You need this Information: Confirms whether an applicant has the required credentials or licenses.
- Limitations/Notes on Using this Information: There is a high rate of job applicants making up or falsifying licenses or credentials.

Civil Records

- What it will Tell: Date of filing, case type, case number or file record, jurisdiction and if available, identity of parties involved.
- Reason You need this Information: Discover whether your applicant has sued former employers or has been sued for reasons that are relevant to employment.

- Limitations/Notes on Using this Information: An employer should use this information where it is relevant to job performance. It is advisable to have standard policies and procedures for use.

Workers' Comp

- What it will Tell: Information about Workers' Compensation Claims and previous injuries.
- Reason You need this Information: This information allows the employer to conduct post-job offer reviews in compliance with strict standards of the Americans with Disabilities Act.
- Limitations/Notes on Using this Information: Federal and state laws regulate the use of these records. You should have policies and procedures in place before requesting or utilizing these records.

Summary of Legal and Illegal Questions

Published by the California Department of Fair Employment and Housing, this helpful chart indicates questions that are unlawful to ask at an employment interview. As a general rule, a pre-employment background screening firm should not provide an employer any information that an employer could not ask about at a face-to-face job interview. Many states have similar rules.

NAME

- Acceptable Questions: Name, "Have you ever used another name?" /or/ "Is any additional information relative to change of name, use of an assumed name, or nickname necessary to enable a check on your work and education record? If yes, please explain."
- Unacceptable Questions: Maiden name.

RESIDENCE

- Acceptable Questions: Place of residence.
- Unacceptable Questions: Do you own or rent your home?

AGE

- Acceptable Questions: Statement that hire is subject to verification that applicant meets legal age requirements. "If hired, can you show proof of age?" "Are you over eighteen years of age?" "If under eighteen, can you, after employment, submit a work permit?"
- Unacceptable Questions: Age. Birth date. Dates of attendance or completion of elementary or high school. Questions which tend to identify applicants over age 40.

BIRTHPLACE, CITIZENSHIP

- Acceptable Questions: "Can you, after employment, submit verification of your legal right to work in the United States?" /or/ Statement that such proof may be required after a decision is made to hire the candidate.
- Unacceptable Questions: Birthplace of applicant, applicant's parents, spouse, or other relatives. "Are you a U.S. citizen?" /or/ Citizenship of applicant, applicant's parents, spouse, or other relatives. Requirements that applicant produce naturalization, first papers, or alien card prior to a decision to hire.

NATIONAL ORIGIN

- Acceptable Questions: Languages applicant reads, speaks, or writes, if use of a language other than English is relevant to the job for which applicant is applying.
- Unacceptable Questions: Questions as to nationality, lineage, ancestry, national origin, descent, or parentage of applicant, applicant's parents, or spouse. "What is your mother tongue?" /or/ Language commonly used by applicant. How applicant acquired ability to read, write, or speak a foreign language.

SEX, MARITAL STATUS, FAMILY

- Acceptable Questions: Name and address of parent or guardian if applicant is a minor. Statement of company policy regarding work assignment of employees who are related.
- Unacceptable Questions: Questions which indicate applicant's sex. Questions which indicate applicant's marital status. Number and/or ages of children or dependents. Provisions for child care. Questions regarding pregnancy, child bearing, or birth control.
- Name and address of relative, spouse, or children of adult applicant. "With whom do you reside?" /or/ "Do you live with your parents?"

RACE, COLOR

- Acceptable Questions: None.
- Unacceptable Questions: Questions as to applicant's race or color. Questions regarding applicant's complexion or color of skin, eyes, hair.

CREDIT REPORT

- Acceptable Questions: None.
- Unacceptable Questions: Any report which would indicate information which is otherwise illegal to ask, e.g., marital status, age, residency, etc.

PHYSICAL DESCRIPTION, PHOTOGRAPH

- Acceptable Questions: Statement that photograph may be required after employment.
- Unacceptable Questions: Questions as to applicant's height and weight. Require applicant to affix a photograph to application. Request applicant, at his or her option, to submit a photograph. Require a photograph after interview but before employment. Videotaping interviews.

PHYSICAL OR MENTAL DISABILITY

- Acceptable Questions: Statement by employer that job offer may be made contingent on applicant passing on job-related physical examination. "Can you perform (specific task)?"
- Unacceptable Questions: Questions regarding applicant's general medical condition, state of health, or illnesses. Questions regarding receipt of Workers' Compensation. "Do you have any physical disabilities or handicaps?"

RELIGION

- Acceptable Questions: Statement by employer of regular days, hours, or shifts to be worked.
- Unacceptable Questions: Questions regarding applicant's religion. Religious days observed /or/ "Does your religion prevent you from working weekends or holidays?"

ARREST, CRIMINAL RECORD

- Acceptable Questions: Job-related questions about convictions, except those convictions which have been sealed, expunged, or statutorily eradicated.
- Unacceptable Questions: Arrest record /or/ "Have you ever been arrested?" (This is a violation of California Labor Code Section 432.7, which is enforced by the Labor Commissioner.)

MILITARY SERVICE

- Acceptable Questions: Questions regarding relevant skills acquired during applicant's U.S. military service.
- Unacceptable Questions: General questions regarding military services such as dates and types of discharge. Questions regarding service in a foreign military.

ORGANIZATIONS, ACTIVITIES

- Acceptable Questions: "Please list job-related organizations, clubs, professional societies, or other associations to which you belong - you may omit those which indicate your race, religious creed, color, disability, marital status, national origin, ancestry, sex, or age."
- Unacceptable Questions: "List all organizations, clubs, societies, and lodges to which you belong."

REFERENCES

- Acceptable Questions: "By whom were you referred for a position here?" Names of persons willing to provide professional and/or character references for applicant.
- Unacceptable Questions: Questions of applicant's former employers or acquaintances which elicit information specifying the applicant's race, color, religious creed, national origin, ancestry, physical or mental disability, medical condition, marital status, age, or sex.

NOTICE IN CASE OF EMERGENCY

- Acceptable Questions: Name and address of person to be notified in case of accident or emergency.
- Unacceptable Questions: Name, address and relationship of relative to be notified in case of accident or emergency.

NOTE: Any inquiry, even though neutral on its face, which has an adverse impact upon persons on a basis enumerated in the Fair Employment and Housing Act (race, sex, national origin, etc.), is permissible only if it is sufficiently related to an essential job function to warrant its use.