

Background Checks and Prescreening: Making Compliant and Informed Hiring Decisions





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Author: [XpertHR Editorial Team](#)

Employers seeking to fill a role typically want to find out as much information as possible about the candidates who apply—and with good reason. While the application and interview process provide a snapshot into a prospective employee's background and professional demeanor, it is an incomplete picture at best. Applicants are unlikely to reveal information that might damage their candidacy, whether that consists of an uneven work history, a criminal record, or a departure from a previous job on less than amicable terms—but often that type of information is exactly what an employer wants to know.

In an effort to fill this gap, many employers turn to various forms of prescreening and background checks. While these efforts can aid employers in ensuring that their latest hire is likely to be an asset rather than a liability to the organization, rapidly changing laws surrounding the types of information employers are allowed to seek and how that information can be used in the hiring process open up a variety of potential pitfalls that employers must take care to avoid. In addition, the rapid growth of remote work, where an employee may never physically set foot in an employer's facility, adds an extra layer of complexity that employers must navigate as they seek to make sound hiring decisions.

Legal Considerations

Employers planning to conduct background checks or prescreening during the hiring process must comply with a variety of federal, state and local laws. Foremost among these is the federal [Fair Credit Reporting Act \(FCRA\)](#), which applies when an employer obtains and uses a background check report from a third-party vendor, otherwise known as a consumer reporting agency (CRA), for employment purposes.

The FCRA covers all types of background check reports received from a CRA, including criminal reports, credit checks, professional reference checks, employment verification and more. Employers that use CRAs in preemployment screening must follow strict [disclosure](#), authorization, certification and notification requirements. However, the FCRA does not apply when an employer conducts a background check itself. For example, if a company HR representative calls an applicant's references directly rather than using a third-party service to do so, that reference check would not fall under the FCRA.

Employers must also ensure that any preemployment screening they conduct does not violate antidiscrimination laws. Federal law prohibits [employment discrimination](#) on the basis of age (40 or older), race, disability, color, religion, sex (including sexual orientation, gender identity and pregnancy), national origin and genetic information. Discriminatory practices include both disparate treatment—treating applicants differently based on a protected characteristic—and disparate impact, where a preemployment screening practice appears neutral but has a disproportionate negative impact on a protected class.

As if the federal requirements weren't enough to keep track of, state and local laws surrounding preemployment screening are constantly evolving. Many states and municipalities have implemented laws that limit employers' ability to inquire about an applicant's criminal record, seek [salary history](#) or conduct drug

testing. In addition, states' [equal employment laws](#) often cover characteristics not included under federal law, apply to smaller organizations and include other provisions that exceed federal protections.

Amid all these intersecting legal obligations and potential liabilities, some employers may be tempted to forego the background check altogether and take their chances. But that strategy, too, can backfire. If an employer hires an individual who later causes harm—through workplace violence, harassment, theft or another means—the employer may be liable for [negligent hiring](#) if it did not conduct preemployment screening that could have uncovered the potential risk that the individual posed. Thus, it is critical for employers to implement an effective preemployment screening program that yields the insight necessary to make informed hiring decisions without crossing the line.

Best Practices for Common Prescreening Measures

Reference Verification

A professional [reference check](#) is the minimum an employer should do before bringing a new hire on board. Verifying information the candidate has included in job application materials is one key goal of this step, but the best reference checks go deeper, seeking insight into the candidate's strengths and weaknesses from individuals familiar with their work.

Questions should be targeted to the key skills the individual needs to succeed in the role, as well as qualitative factors like the individual's working style, professional relationships with coworkers and ability to accept constructive criticism. In addition, when hiring for a remote role, the employer should ask whether the candidate has the ability and discipline for successful remote work. Open-ended questions that invite a reference to provide details and context will typically yield more useful information than those that lead to yes-or-no or similarly brief responses. While this type of

information may be challenging to obtain, particularly if an applicant's former employer has a policy of verifying only limited information (such as dates of employment and job title), it often provides key insight into an applicant's suitability for a particular role.

Criminal Background Checks

High on the list of information many employers want to know about a prospective employee is whether that individual has a criminal record. However, over a dozen states and many localities have some form of "[ban-the-box](#)" law that prohibits employers from asking about an applicant's criminal record at the application stage, with limited exceptions for certain industries or occupations. Most of these laws do allow employers to ask about criminal convictions after extending a conditional employment offer, but here, too, there may be limitations on the time period an employer is permitted to consider and how the employer can use the information it receives.

Given this challenging legal landscape, an employer considering a criminal background check must have a clear rationale for doing so and follow a consistent policy for handling the information it uncovers. Because using criminal background information in the hiring process can disproportionately impact certain protected classes, an employer must be able to articulate a legitimate, nondiscriminatory business reason for declining to hire an applicant with a criminal history—even if the employer is not located in a jurisdiction with a ban-the-box law. While a recent felony conviction for theft might be a valid job-related reason to decline to hire an individual whose role would require handling money, a ten-year-old misdemeanor charge related to marijuana possession may be less relevant for many positions. A history of violent crime, of course, warrants extra scrutiny, both to guard against negligent hiring liability and to ensure the safety of employees, customers and others.

Credit Checks

A [credit check](#) may provide relevant insight for certain roles, but as with criminal background checks, an

employer must identify its rationale for seeking this information and develop a clear policy for handling it. According to the Equal Employment Opportunity Commission (EEOC), inquiries into an applicant's assets, liabilities or credit rating may have a disparate impact on certain protected groups. Therefore, any inquiry should be job-related and justified by business necessity. Employers may consider limiting the use of credit histories to positions that include access to money or sensitive data and should distinguish between debts incurred due to a medical issue, period of employment, or divorce from other debts such as those related to gambling.

Before conducting a credit check, the FCRA requires an employer to make a clear and conspicuous written disclosure to the applicant and obtain the applicant's written consent. If the employer intends to take any adverse action against an applicant (such as withdrawing a conditional employment offer) based on a credit report, it must first notify the applicant and provide the name, address and telephone number of the consumer reporting agency; and copies of, among other things, the credit report and a summary of FCRA rights with information on how to dispute the contents of the report.

Medical Exams and Physical Ability Testing

Under the Americans with Disabilities Act (ADA), employers must not require an applicant to undergo a [medical examination](#) or ask medical questions before extending a conditional employment offer. Some tests are allowed pre-offer because they are not considered medical exams, such as physical fitness and agility tests that do not measure physiological or biological responses. But even here, employers must ensure that such pre-offer testing is not discriminatory. In a recent case, the use of physical ability testing for applicants at grocery distribution centers was found to disproportionately exclude female candidates. The employer settled the case with the EEOC for \$20 million—illustrating the high price of a misstep in this area.

After a conditional offer of employment has been made, certain job-related medical examinations are allowed if they are conducted for all applicants entering a particular job category, but again, employers must ensure that they do not unlawfully discriminate against individuals who have or are perceived to have a disability. In general, a medical exam should be the last step in the preemployment screening process, meaning the applicant has satisfied all other job prerequisites such as reference verification and background checks.

Drug Testing

Some employers—such as those in certain safety-sensitive industries—are required to conduct preemployment [drug testing](#). However, many employers choose to voluntarily drug test applicants. This is generally allowed under federal law, as long as the employer administers the tests in a nondiscriminatory manner and confirms the accuracy of its testing program. However, state and local laws often complicate the equation. Some states require an employer to provide applicants with the employer's drug testing policy before testing is permitted, and some permit drug testing only after a conditional employment offer.

The legalization of [marijuana](#) in many states has added an extra twist. Because it remains illegal under federal law, certain employers are still required to perform pre-hire testing for marijuana and must refuse to hire applicants who test positive. But while most states that allow marijuana use have not extended job protections to employees who partake, there are exceptions. An employer that plans to test applicants for marijuana should consult applicable state and local laws and ensure that it can articulate a business-related reason for its testing program—such as safety concerns or a workers' compensation incentive.

Social Media and Online Searches

With the wealth of information available on social media and other online sources, many employers may be tempted to investigate their applicants' online presence. While there may be some situations in which this is

appropriate, employers should proceed with caution. [Social media](#) may reveal protected characteristics such as age, religion or sexual orientation that the employer would not have discovered until later in the hiring process, if at all. Employers must be careful to avoid the appearance (as well as the reality) that such information influenced their hiring decisions.

Social media site users generally can make information about themselves either public or private. An employer should be careful about accessing an applicant's private information and should not try to gain access to this information by contacting others who have full access to an applicant's personal page. [Many states](#) have laws restricting employers from asking job applicants for their login credentials to private social media accounts.

However, social media can sometimes provide useful information for an employer. If a candidate is applying for a role that will involve responsibility for the company's social media or online presence, the individual's personal use of social media could provide useful job-related insight. In addition, perusal of a candidate's social media presence can sometimes turn up [red flags](#)—like a history of discriminatory attitudes toward a group with which the individual would need to interact respectfully on the job. The keys to avoiding liability here are consistency and careful documentation of the business reasons for any employment decision in which an applicant's social media use played a role. In these situations, it is prudent to consult with an employment law attorney before acting.

Considerations for Remote Workers

The rapid growth of remote work poses additional challenges for preemployment screening. Namely, remote hiring can transform an organization into a multistate employer very quickly. Many employee-friendly state laws apply to applicants and employees who reside there, regardless of whether an employer has a physical presence in the state. Employers hiring remote applicants must therefore consult the relevant laws in the applicants' locations, such as those pertaining to

criminal history inquiries, antidiscrimination protections beyond federal law and more. As a best practice, employers may consider adopting [background check](#) and prescreening policies that comply with the strictest state laws and adhering to them companywide.

Some employers may be tempted to forego background checks altogether for remote employees, reasoning that an individual who may never set foot on company property poses less risk to the organization. But this approach can backfire. Remote employees still have access to an organization's systems and confidential information and have just as much potential to cause damage, whether accidentally or intentionally, as someone who works on-site. Thus, it is important to exercise [due diligence](#) in hiring all new employees, regardless of where they are located, and conduct a thorough background check for remote employees, making any necessary modifications to the process (such as reviewing materials digitally) without compromising the quality or completeness of the underlying information.

In fact, an employer hiring a remote worker may want to obtain insight into areas it does *not* assess for in-person employees. An employee who works without the direct oversight that occurs in a physical facility must be worthy of a high level of trust. Successful remote work requires not only the appropriate technology, but also the abilities to work independently, to be organized and self-

motivated, and to use communication tools effectively. As much as possible, screening for remote employees should attempt to probe into these areas in order to make a fully informed hiring decision that sets both the employee and the employer up for a successful working relationship.

Conclusion

Hiring a new employee is fraught with uncertainty. An applicant who appears ideal on paper or stands out during an interview may turn out to lack the skills required for the job, have a poor work ethic, or worse. And a bad hire costs an organization both time and money.

Done well, background checks and other prescreening measures add crucial context during the hiring process by providing information beyond what an applicant has self-reported and painting a fuller picture of a candidate's strengths and weaknesses. But done poorly or without consulting the relevant laws, an employer's attempt at a more informed hiring decision can result in legal liability. Hence, it is critical for employers to stay apprised of the wide array of constantly changing federal, state and local laws and adopt best practices that balance their need for information about prospective employees against an employee's rights to privacy, equal employment opportunity and more.

Additional Resources

[Ban the Box Laws by State and Municipality](#)

[How to Conduct a Credit Check for Employment Purposes](#)

[How to Exercise Reasonable Care in the Hiring Process](#)

[How to Use Criminal Records for Employment Purposes](#)

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