

The Hire Authority

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Is It Safe To Hire Someone With A Criminal Record?

Carnegie Mellon University has conducted a study of 88,000 first time offenders in the state of New York. The purpose of the study was to determine when an ex-offender had been “clean” long enough to be considered for employment purposes.

The study estimates that after 5 years of staying clean, an applicant with a criminal record is no more likely to commit another crime than other individuals of the same age in the general population. When compared to others of the same age with no convictions, the offenders needed to stay clean a bit longer, but their risk factor for a future conviction was very close those who had no prior convictions.



Future studies in other states are planned to determine if the results from New York are consistent with other parts of the country. Eventually the information could be used to help employers reduce the impediments on applicants with earlier convictions.

Pre-employment Screening and Social Networking Sites

A social networking site (SNS) is a web-based service that (a) allows individuals to build and display public or semi-public information, (b) define a list of connected users, and (c) view and communicate with connected users.



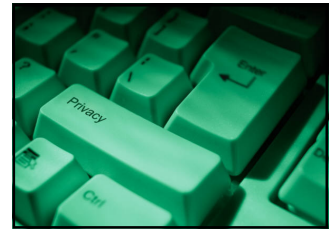
Facebook is currently the most popular SNS, especially for college and high school students, a demographic that represents a sizable number of current and future job applicants. Facebook has 200 million active users worldwide, and 100 million of those users use Facebook daily. Other popular SNSs include MySpace, YouTube, and Twitter. Twitter is quickly gaining in popularity and traffic is growing very rapidly.

Because of the increased traffic to these SNSs, employers have adapted to leverage their popularity. Many companies now utilize these sites for marketing and the posting of jobs. In addition some Human Resources departments have begun to utilize the information on these sites to gather additional information about prospective applicants.

The existence of SNSs raise a number of legal questions. (1) Who owns the content posted on an SNS? (2) What are the privacy implications of SNSs? (3) Is the information contained in a post considered protected speech?

If an employer utilizes SNS information they may be exposed to three types of claims by job applicants:

1. Invasion of Privacy
2. Violation of the Fair Credit Reporting Act
3. Discrimination



Invasion of privacy is the most common assertion by applicants, but it is also the most unlikely to succeed. In order to succeed the applicant must demonstrate an actual expectation of privacy, and society has to recognize that their expectation of privacy is reasonable. Generally the courts have found that information posted on the internet is considered public domain. The courts are also influenced by the fact that the applicant posted the information themselves, indicating a desire to make the information public. As a consequence, most courts will find that applicants did not have a reasonable expectation of privacy, and therefore no invasion of privacy can exist.

The Fair Credit Reporting Act (FCRA) governs the use of background checks performed by third parties on behalf of employers. If an employer utilizes a third party to conduct background checks they are bound to follow the notice and consent requirements of the FCRA, even if the background checks only consist of searching SNS sites.

The FCRA has specific requirements. Applicants must be notified if an investigation is to be performed, it requires the applicant's consent, and it requires a specific process if an adverse action is taken based on information found during the investigation. If however, the employer does the investigation themselves, the FCRA does not apply.

It seems logical that employers would want more information about job applicants instead of less, but there are situations where less information helps the employer defend against discrimination charges. In a normal job application process, the applicants do not reveal their race or age when completing the application. Employers decide who should be interviewed based on the information provided about their availability, job skills, education, and experience. If however, the employer reviews the applicant's information on social networking sites they may be able to determine both race and age. By having this information, the applicant may charge the employer discriminated based on race or age when deciding which applicants should be interviewed. Under the law, the employer's knowledge of race or age does constitute discrimination. Rather the applicant would have to show that race or age was a motivating factor in determining who was interviewed. It is unlikely that the applicant would prevail under this scenario, but the employer would still bear the cost of defending themselves in court.



Employers should also be concerned with several non-legal issues with information from social networking sites.

- Improper Identity
- Out of Context
- Expectation of Privacy

In the U.S. there are a lot of common names. If an employer searches Facebook for a common name they may receive dozens of profiles, and it may be difficult to determine which, if any, belong to the specific candidate. Even if the correct applicant is identified, a common scam is to create a fake profile for a person, so the profile the employer reviews may have been posted by someone other than the applicant as a joke or more malicious attempt to harm their chances at employment.

Photos and images posted on SNSs do not include contextual information or explanatory captions, so it is important for employers to avoid incorrect conclusions for a single photo.

Because most users of SNSs have a mistaken expectation of privacy, their own posts may be intentionally untrue and designed to impress a group of friends, or simply make a joke. Since the expectation of privacy exists, prospective applicants may deeply resent the use of information they considered private. As a consequence, qualified job applicants may exclude employers who search social networking sites from consideration.

Employers who choose to use information from social networking sites should carefully balance the benefits with the legal and non-legal pitfalls of social networking site information.

Top 10 Background Check Mistakes



1. Relying solely on an instant database search for a criminal record check.

Databases do not contain a complete and current record of convictions. In addition, most database searches are name match searches, and the records found may be for another person with the same or similar name as the actual applicant. Instant database searches are an effective part of a criminal record check, but are not adequate as a stand alone search.

2. Relying solely on a state police check for a criminal record check.

Most state police checks are not a complete record of convictions for an applicant. In most states simple or minor misdemeanor convictions are not included, these may be important indicators of future job performance. In many states, the state police check is a legislative requirement for certain types of positions. While legally required, it should not be the only criminal record search for most positions. It should also be noted that the state police check often takes a substantial amount of time, and can take as much as 6 weeks in some states.

3. Relying solely on the FBI database for a criminal record check.

The FBI database contains about 70% of the recorded convictions. It generally does not include simple or minor misdemeanors. Like the state police check, it may be inadequate for pre-employment purposes.

4. Conducting a county level criminal search, but relying on the applicant to determine which counties to search.

Applicants with conviction records understand where they are stored. As a consequence they may not reveal prior residences where criminal records are stored. A social security number trace should be utilized to determine prior addresses and names for an applicant.

5. Conducting a county level criminal search, without including nearby and adjacent counties.

Many applicants could have a conviction in a nearby county where they have never lived or worked.

6. Failing to search federal district courts for federal convictions.

Violations of federal law will lead to a federal conviction. These records are not stored at the county or state level, and can only be found with federal court search. Many embezzlement, fraud and drug crimes result in federal convictions.

7. Failing to validate education claims.

Approximately 20% of applicants falsify their education claims in order to secure better employment. Diploma mills produce authentic looking, but fake diplomas and transcripts for a fee to help applicants effectively claim credit for degrees they did not earn. If a candidate is being considered in part because of their education achievement, that achievement should be verified.

8. Failing to validate employment claims.

Approximately 40% of applicants falsify their employment history, often embellishing their responsibilities or accomplishments. To complicate matters, most employers will only validate employment dates, but will not provide qualitative performance information. Web-based reference checking is an effective tool to help employers get qualitative employment information on job applicants.

9. Failing to require background screening for contractors, vendors, and temporary personnel.

Employers should require all access personnel be screened in a consistent manner with the company standard for employees.

10. Attempting to conduct criminal record checks internally.

Employers who attempt to conduct their own criminal record checks expose their organization to additional liability associated with violation of labor laws which restrict the use of some criminal records for employment purposes. Additionally, criminal records are stored by name, and in the case of a common name, identity mistake may occur.

Arrests and Convictions that Occur after Employment



It is not unusual for an employer to learn a current employee has been arrested. Sometimes it is as early as Monday morning after a weekend incident. More often it is several weeks or months after the fact before it filters to the HR department.

The question that inevitably comes to the forefront is “What can I do?” More importantly, what shouldn’t you do? For one, you should not take immediate action. Taking action based solely on the fact that an arrest occurred could put you in violation of the Equal Employment Opportunity Commission (EEOC) policy. Under the Federal Equal Employment Opportunities Commission rules, when making employment decisions, there are strict limitations in using the fact that an employee has been arrested.

What can you do? The employer should initiate an investigation and review the facts of the matter. The employer needs to base any decision on the underlying facts of the arrest or conviction. Before making a decision, consideration should be given to the nature and gravity of the offense and the nature of the job the employee holds.

The nature of the offense relates to the type of offense. Is it theft, robbery, domestic assault or drunk driving? Does it relate to dishonesty, violence or just plain irresponsibility? The gravity refers to the seriousness of the offense or the degree of harm it causes. While always serious, passing a bad check is less grave than an incident in which someone is seriously injured or killed.

The nature of the job refers to the characteristics needed to safely and efficiently perform that job. Does the employee deal with children, the disabled or the elderly? Does the employee go into peoples homes or have access to a customer’s proprietary information? Will allowing the employee to continue to enter homes when accused of theft make you vulnerable? Evaluating their job duties is critical in determining what adverse actions you can take.

Unfortunately there is no table or resource that lists disqualifying circumstances that an employer can go to for a quick answer. Each incident must be looked at on a case-by-case basis. Because each event and employee is different, each should be given individual consideration.

Inquirehire recommends that an employer have policy in place to address this issue. The policy should direct employees to self report so that the offense is discovered and analyzed right away. It should spell out that the employer will review the underlying facts, look at incidents on a case-by-case basis and look at the totality of the circumstances. It should also state that actions can be taken that may range from no action to termination. Any policy should be written by or reviewed by legal counsel.

Any adverse action taken resulting from an arrest or conviction while employed should also be reviewed by counsel.



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