Background Checks
for Employees and Students:
An Overview of Emerging Trends

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An Actual Situation at a University

- Hired as a programmer
- A very good performer
- Promoted to position of trust
- Felony conviction discovered
- University at a crossroad
Today's Goals
1) Identify Various Types of Background Checks;
2) Consider Sources of Potential Liability;
3) Evaluate Whether To Do Background Checks;
4) Know About Limitations and Pitfalls.

Goal #1
Identify Various Types of Background Checks

“Background Checks” Defined:
What do we mean?

“Background Checks” =
many different reviews and evaluations
Common Types of Background Checks

- **Employment History**
  - Educational Credentials
  - Professional Licensure
  - Prior Employment
  - Professional References

- **Personal Characteristics**
  - History of Places Lived
  - Professional References
  - Social Security # Trace
  - Credit History

- **Criminal Background**
  - Federal, State, & Local
  - Sex Offender Registries
  - Motor Vehicle Records
  - Drug & Alcohol Screenings

Criminal Background Checks

*There is no centralized system for employers.*

- Federal: kept in approximately 100 different judicial districts
- State: a compilation of records pulled from counties
- County: are the most accurate and recent
- Sex offender: some states don't participate in electronic registry

Goal #2

Consider Sources of Potential Liability
Two Types of Potential Claims

- A third party alleges harm because you did not do the appropriate background checks
  
  OR

- Even though you did the appropriate background checks, the subject challenges how or what you did

Negligent Hiring Claims
(when you did not do the appropriate checks)

1) The employer knew or should have known that the employee was dangerous or incompetent

2) It was reasonably foreseeable that the employee would harm a third party

Cases on Negligent Hiring for Failure To Do Background Checks

100 published cases in the last 15 years

1/3 of those were published in the last two years

Laws that govern negligent hiring claims vary by state

*Growing Consensus:*
*do a check if the person has a “special duty” that could cause foreseeable harm*
Other Sources of Potential Liability
(when you did the appropriate checks, but are challenged based on how and why)

Defamation

Federal Fair Credit Reporting Act

State Credit Reporting Acts

State Limitations on Background Checks

Trends Affecting Background Checks

Technology makes more checks possible

Decreased privacy expectations after 9/11

Big verdicts for negligent hiring and retention

High profile cases and scandals

“For years, I lived this clandestine life…”
“…I hid behind my credentials.”
-Former Professor at a Major East Coast University

- convicted for a 1965 triple homicide
- sentenced to life in prison
- paroled in 1979; was deemed “rehabilitated”
- earned doctorates in sociology & education
- respected by both colleagues and students
- resigned when his past was made public
Goal #3
Evaluate Whether To Do Background Checks

Reference Checks for All Employees

“Most employment suits on our campus could have been prevented if we had conducted thorough reference checks at the time of hiring.”
--Employment lawyer for a major research institution

Educational Credential Verification for All Employees

ADP found discrepancies in 42% of resumes checked. Prominent examples include:

Tenured Humanities professor at UCSD - no BA
Head of TransAmerica Reinsurance - no BA or MBA
Head of state postsecondary system - no doctorate
Bausch & Lomb CEO - no MBA
CFO of Veritas software - no MBA; BA not from school listed
Notre Dame football coach - no MA in education
Background Checks for Faculty

- No consensus on whether or what to check
- Faculty often oppose institutionalized checks
- Consistency counts: new vs. existing faculty checks

AAUP’s “Proportionality” Test for Faculty

The privacy of a candidate should be compromised only as necessary in order to secure information that may ensure that applicants are qualified to meet the particular obligations of specific positions.*

*From a November 2004 report by the AAUP’s Committee A on Academic Freedom and Tenure titled “Verification and Trust: Background Investigations Preceding Faculty Appointment”

Background Checks for Sensitive Positions

- Look at the position’s job responsibilities
- Focus checks on the most sensitive positions
- Make tough choices on resource allocation
Background Checks for Students/Volunteers

- Treat a student in a sensitive position like an employee in that position (e.g. childcare)
- Costs can be an issue – many more students than employees pass through your campus
- With interns, try to get the internship site to conduct any necessary checks
- With professional school admissions, look to the accrediting organization or let deans decide

Goal #4:
Know About Limitations and Pitfalls

Even the Best Checks Have Limitations

“The president’s flaws were well-hidden; background checks revealed no red flags.”

--Educational Consultant for Presidential Searches
How Good is Your External Background Checking Company?

- The industry is very loosely regulated
- Any PI can claim to be a “background checking firm”
- Select a large national firm
- Beware of low bidders

Is Your Campus Staff Doing Internal Background Checks Properly?

- Are reference checks centralized?
- Are those conducting reference checked trained?
- Do they have sample questions to ask?
- Are other types of checks performed as needed?

Voluntary Limits on Disclosure

Other Colleges and Universities may agree to give departing employees neutral job recommendations in exchange for resignation.
### Fair Credit Reporting Act (FCRA)
- Consumer protection statute
- Regulates how background checks are done
- Applies to all checks by outside agencies
- Does not apply to checks by law enforcement

*Does not apply to checks by the institution itself*

### State Credit Reporting Acts
- May require more than the FCRA
- May apply to checks done by the employer
- May require more extensive notification
- May require new authorization for new checks of continuing employees

### QUESTION:
What should institutions do with the information they obtain through background checks, especially if it is negative?
ANSWER:
A case by case analysis is required.

- Temporal proximity
  - how long between then and now?
- Repeat offender
  - is this behavior a recurring problem?
- Offense related to job duties
  - what does employee do?
- Probation officer’s input
  - is employee rehabilitated?
- Performance at existing job
  - how valuable is employee?

An Actual Situation at a University

- Supported by supervisor
- Gave up master key access
- Submitted to psych evaluation
- Remained employed
- No known problems to date

Review of Today’s Goals

1) Identify Various Types of Background Checks;

2) Consider Sources of Potential Liability;

3) Evaluate Whether To Do Background Checks;

4) Know About Limitations and Pitfalls.
Questions to Consider
Does your campus perform background checks?
Which populations are checked, and for what?
Who determines which checks to perform?
Who on campus is responsible for doing the checks?
Are any checks contracted out to third party vendors?
What happens when a check reveals negative info?

Thank You

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