



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

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## Background Checks for Employees & Students: An Overview of Emerging Trends

Sarah H. Braughler, J.D. and Russell C. Ford, J.D., M.Ed.  
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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



2

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**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.

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**Goal #1**

**Identify Various Types of Background Checks**

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**“Background Checks” Defined:  
What do we mean?**

**“Background Checks” =**

**many different reviews and evaluations**

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## Common Types of Background Checks

### ■ Employment History

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

### ■ Personal Characteristics

- History of Places Lived
- Fingerprinting
- Social Security # Trace
- Credit History

### ■ Criminal Background

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

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## 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

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## Goal #2

### Consider Sources of Potential Liability

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**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

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**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

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**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*

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**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**

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**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**

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*"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

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**Goal #3**

**Evaluate Whether To Do  
Background Checks**

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**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*

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**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

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## Background Checks for Faculty

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

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## 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"

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## 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

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## 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

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## Goal #4:

Know About Limitations  
and Pitfalls

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Even the Best Checks Have Limitations

*"The president's flaws were well-hidden; background checks revealed no red flags."*

*--Educational Consultant for Presidential Searches*

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**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

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**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?

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**Voluntary Limits on Disclosure**

**Other Colleges and Universities  
may agree to give departing employees  
neutral job recommendations  
in exchange for resignation.**

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### 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\***

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### 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

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### QUESTION:

What should institutions do with the information they obtain through background checks, especially if it is negative?

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**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?

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**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



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**Review of Today's Goals**

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**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?

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Thank You

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**Contact Information**

**Sarah H. Braugher**

United Educators  
Two Wisconsin Circle, Fourth Floor  
Chevy Chase, MD 20815  
(301) 215-9584  
sbraugher@ue.org

**Russell C. Ford**

Strickland Brockington Lewis LLP  
Midtown Proscenium Suite 2000  
1170 Peachtree Street, NE  
Atlanta, GA 30309  
(678) 347-2207  
rct@sblaw.net

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