



Screening and
Selection Services

Inside Criminal Background Checks: Sources, Availability and Quality

*A white paper about the types of criminal
court records used for applicant and employee screening.*

Inside Criminal Background Checks: Sources, Availability and Quality

In the last 25 years, pre-employment screening has become a standard hiring practice. The majority of employers view it as an essential part of providing a safe workplace and reducing negligent hiring liability. In addition, all states require employers to complete criminal background checks for certain jobs, which may include teaching, childcare and healthcare professions that involve contact with vulnerable segments of our society.

Criminal court record searches are the most popular type of background check. However, there are many different types to choose from and hundreds, if not thousands, of vendors to order from. How do you know which criminal court record is right for your organization? What are the differences between county, statewide and federal criminal records? Are database searches accurate? This white paper takes you inside the intricacies of criminal court records to help you determine which background searches are the best fit for your organization to select the right people. You will also gain valuable tips to ensure your organization uses criminal background screening results in compliance with law.

Types of Crimes

Most people are familiar with various types of crimes based on movie, television and other media interpretations. In reality, the criminal justice system is more complex. A crime is broadly defined as conduct that is dangerous to citizens, damaging to society and is punishable with fines, confinement and/or a general loss of certain civil rights. Crimes are usually classified into three categories: felonies, misdemeanors and infractions.

2007 ADP Screening Index Statistic

5%

of applicants had a criminal record in the last seven years

Felonies

Felonies are the most serious types of crimes and usually result in the most severe punishments, such as state imprisonment for more than one year. Examples of felonies include murder, grand theft, burglary, robbery, kidnapping and some drug offenses.

Misdemeanors

On the other hand, misdemeanors may be lesser offenses punishable by probation, imprisonment at the county level and/or fines. Misdemeanor crimes generally result in a maximum of one-year imprisonment and/or fines of up to \$1,000. Crimes such as assault, disorderly conduct, disorderly intoxication, petty theft and prostitution are usually classified as misdemeanor offenses.

Clearly, misdemeanor crimes, such as assault, can be just as severe as felony crimes. According to The Safe Hiring Manual by Lester S. Rosen, one of the biggest mistakes employers make is not searching an applicant's misdemeanor criminal court record. Consequently, the nature and gravity of both felony and misdemeanor crimes should be carefully considered.

Infractions

Infractions, the third criminal classification, consist of public offenses that are typically only punished with fines. For example, noise violations, walking a dog without a leash and traffic violations such as parking tickets are considered infractions. With the exception of driving record checks, most employers do not typically use infraction information in the hiring process because it usually does not pertain to the essential functions of a job.



Screening and
Selection Services

Criminal Law Basics

Criminal court records are the end result of a long sequence of events in the judicial process. They are the historical account retained after someone has been prosecuted through the justice system.

It is also important to note that a “criminal” may not necessarily have an existing court record on file with law enforcement agencies. If the individual was never arrested and/or convicted for an illegal act, there may not be a record of his/her violation.

Throughout the United States’ judicial process, accused citizens are entitled to fundamental rights according to the U.S. Constitution, including the right to remain silent, the right to an attorney, the right to a timely trial, etc. The underlying premise is suspects are innocent until proven guilty. The criminal justice process may consist of twelve or more steps (see right).

Arrests vs. Convictions

A discussion about criminal court records is not complete without mentioning the differences between arrests and convictions. An arrest simply means that an individual was taken into police custody for a period of time because there was probable cause that s/he committed a crime. It does not prove whether the suspect actually committed the crime or spent time in jail. However, convictions indicate there was a “factual adjudication” of guilt. In other words, it can be inferred that an individual actually committed a crime because a court found him/her guilty beyond a reasonable doubt.

Under Equal Employment Opportunity (EEO) laws, employers cannot use arrest information that did not result in a conviction (arrest only) as the sole basis for a hiring decision. The Equal Employment Opportunity Commission (EEOC) also discourages organizations from asking applicants to list arrests

Criminal Justice Process

- 1. Arrest** – an individual is taken into police custody for a suspected crime.
- 2. Booking** – the suspect is fingerprinted, searched and may be placed into a holding cell.
- 3. Bail** – depending on the seriousness of the crime, a monetary amount may be set that the suspect can pay to be temporarily released from jail.
- 4. Arraignment** – a judge formally charges the suspect of a crime and asks if the suspect pleads guilty or not guilty.
- 5. Plea Bargain** – most cases are resolved before they go to trial. The defendant may agree to plead guilty to a lesser charge in exchange for a more lenient sentence.
- 6. Preliminary Hearing** – the judge decides if there is enough evidence against the defendant to force him/her to stand trial.
- 7. Pre-Trial Motions** – the prosecution and defense teams go before the judge to set boundaries for the trial, deciding what evidence and testimony can be used during the trial.
- 8. Trial** – in a criminal trial, a jury must decide whether the defendant is guilty of the crime in question “beyond a reasonable doubt.”
- 9. Judgement** - Formal adjudication of guilt or finding of not guilty.
- 10. Sentencing** – after a person is convicted of a crime, whether through a plea bargain or trial verdict, a judge or jury determines the appropriate legal punishment during the sentencing phase. Punishment may include fines and imprisonment.
- 11. Appeals** – individuals who have been convicted of a crime can petition a higher court to review the case for errors in an attempt to reduce or void the sentence.
- 12. Expungement** – an individual’s legal record of his/her criminal conviction may be sealed and “erased” in the eyes of the law after a certain amount of time passes or s/he has met obligations of the sentence. However, expungements are granted in limited instances.



Screening and
Selection Services

that did not result in convictions on job applications. In addition, many states forbid employers from considering arrest information in the hiring process. States that have enacted legislation prohibiting the use of "arrest only" information include: California, Hawaii, Illinois, Iowa, Massachusetts, Michigan, Nevada, New York, New Hampshire, Pennsylvania, Rhode Island, Utah, Virginia, Washington and Wisconsin.

What Criminal Background Checks Tell Employers

The most effective way to reduce employers' exposure to negligent hiring and negligent retention lawsuits is to review an applicant/employee's past criminal history. A criminal background check will show crimes that an individual has been accused of committing and whether s/he was convicted.

Specifically, checking an applicant's criminal record may strengthen an employer's defense against negligent hiring claims in the event s/he harms someone while on the job and the matter is taken to court. In these cases, courts are more likely to rule in favor of the employer, asserting the employer met due diligence requirements to determine if an individual's past might negatively impact his/her ability to perform essential job functions or cause harm to others.

In most jurisdictions, criminal court records provide employers with the following:

- case/file number
- physical description or personal identifiers (i.e., date of birth, social security number)
- date of offense, arrest date and filing date
- type of offense
- disposition, if available

Employers can make many useful inferences from the above information. Human resource experts often state past behavior is the best predictor

of future behavior. Equipped with the facts about an applicant's background, employers can determine whether his/her past criminal activity is inappropriate for a particular job or may negatively impact general workplace safety.

Sources

Despite popular belief, there is no single source for employers to obtain criminal court records. Yes, the Federal Bureau of Investigation (FBI) and law enforcement agencies have access to a national criminal computer database known as the National Crime Information Center (NCIC). However, it is not possible for most private sector employers to access this database. So, what options do employers have for accessing criminal court records?

Crimes are prosecuted in county, state or federal courts. As a result, court records can be retrieved from any of these sources. However, there are more than 10,000 county, state and federal courthouses in the United States. Below are descriptions of each of the three main criminal court record sources. Understanding the differences between each of them will help you choose the best sources of criminal court record information for your organization.

County

For the most part, employers turn to county courts as their primary source for criminal court records and there are good reasons for this. First, county courts usually have the fastest turnaround times. Second, county courts are typically the most accurate and up-to-date. Third, county criminal records are known to provide the most detailed information available.

There are a total of 3,187 U.S. county court houses, which can make it challenging to conduct criminal background searches in all the areas where applicants formerly lived. Completing an address



Screening and
Selection Services

verification before ordering a criminal court record will help narrow down your choices, but there is still a chance you may miss an applicant's criminal court record if you have not selected the county where s/he was arrested or convicted. To help prevent this oversight, some vendors offer metropolitan county criminal court records, which provide available misdemeanor and felony records for several counties associated with a major metropolitan area.

State

Statewide criminal court record searches are convenient in the sense they may pull all available misdemeanor and felony information from counties within the state. However, there is no guarantee statewide repositories will contain records for all counties or the information will be current. Certain states provide extensive criminal court record information, while others are more limited in their reporting capabilities. It all depends on how rigidly the state maintains this information. Reputable vendors should know which states provide information that is comparable to county criminal court records in terms of accuracy and quality.

Employers should be aware it may take longer to receive statewide criminal court record results, but the wait may be worth it in the sense they may gain more information about their applicants than a single county search would yield. In addition, statewide searches may reveal additional locations where the applicant has had encounters with authorities, making it easier to know where to order more detailed county criminal searches.

Federal

The federal court system is completely separate from the county/state system. A search at the federal level will not uncover information at the state level. Moreover, federal searches are based on name matches only, so the process may be more lengthy in confirming whether a federal criminal court record actually belongs to an applicant. In addition, only certain types of crimes are prosecuted at the federal level. The majority of cases in federal

courts involve serious drug violations, such as interstate drug trafficking. Other crimes reported at this level include immigration law violations, financial fraud, bank robbery and crimes against the government.

Many employers decide not to complete federal background checks on applicants. Yet, it is important to carefully evaluate the essential functions of a job, especially upper level management positions, to determine if a federal search is warranted. Eliminating federal criminal background checks from the screening process could prevent employers from obtaining valuable information about their applicants.

Databases

Over the years, databases have evolved to become dynamic resources for criminal court records, improving turnaround times and significantly reducing screening expenses. However, databases have a reputation for being outdated, inaccurate and incomplete. So, are database searches as good as live, on-site courthouse inquiries?

The answer is: it depends on who manages the database and how often the information is updated. In this age of modern technology, most municipal, county, state and federal courts use computerized database systems to store criminal court records information. Credible criminal database searches originate from legitimate government agencies that update files frequently and allow ongoing access to their databases. Nevertheless, court processing and data entry delays inherently make database information somewhat outdated.

Likewise, buying access to static criminal databases containing unofficial compilations of criminal court records is never a good idea even if it is a bargain. Employers who knowingly rely on searches from static criminal databases may have difficulty



Screening and
Selection Services

convincing a jury they met due diligence screening requirements.

Criminal database searches can be used as one component of a robust criminal background screening program. In this regard, employers complete nationwide criminal database searches to gain a broad overview of their applicant's past criminal activity. Based on the criminal database results, along with address verification results, employers should then conduct secondary "live" county or state criminal court record searches in order to obtain the most complete information available about applicants.

Availability

Criminal court records are widely available in the United States. While some employers choose to conduct background screening in-house, the majority outsource background screening because of added compliance protection and consistency. According to the Society for Human Resource Management's (SHRM) Human Resource Outsourcing report, 73% of organizations completely or partially outsource background checks.

Time Limits on Criminal Records

Before 1998, federal law prohibited criminal record investigations from going back more than seven years unless the applicant was expected to earn \$75,000 or more a year. Based on amendments to the federal Fair Credit Reporting Act (FCRA), which regulate screening for employment purposes, there is no longer a time limit as to how far back employers can go when searching criminal conviction records.

Nevertheless, many state laws still prohibit employers from retrieving criminal court records covering more than the most recent seven years. Plus, due to financial constraints and time considerations, most employers continue to obtain seven-year criminal court records.

County Record Availability

Many counties still require in-person visits in order to obtain criminal court records. For employers who conduct investigations in-house, this option is only viable if the courthouse is nearby. This is a non-issue for consumer reporting agencies or outside vendors who typically have an extensive network of court researchers who can easily obtain this information and pass it along to you. Top vendors should be able to provide reports from all 3,187 counties.

Statewide Record Availability

Approximately 42 states allow public access to statewide criminal court record repositories. Nonetheless, some states require employers to go through an authorization process or submit special applicant signed release forms before accessing statewide criminal court records.

Federal Record Availability

With the help of a vendor who has been approved to access electronic federal court record databases, employers can obtain U.S. Bankruptcy court records as well as most open U.S. District Court files from any of the 94 federal courts.

Quality

While checking an applicant's criminal history is an essential and often mandatory part of safeguarding the workplace, criminal court records are not without their flaws. Human error, court delays, processing lags and staffing shortages all impact the quality of criminal court records. It is possible there will be factual errors, missing information and other mistakes within a criminal court record. Consequently, it is important that a quality assurance process is in place to identify and correct errors – regardless of whether an employer conducts background checks internally or uses an outside vendor. However, for employers who



Screening and
Selection Services

conduct screening in-house, it may be difficult to detect problems with report results due to a lack of familiarity with such documents or limited personnel.

Experienced screening providers usually have entire departments devoted to quality assurance. Before completed background checks are delivered to customers, reputable vendors review all reports containing "a hit" (i.e., showing a criminal conviction) to verify the information seems accurate. Knowledgeable vendors can quickly pick out inconsistencies and contact courthouse personnel to clarify details.

Best Practice Tips for Using Criminal Background Checks

Employers must take pre-employment screening seriously and do all they can to ensure a consistent, compliant process is followed. Not only do state and federal laws require this, but people's quality of life and company reputations also depend on legitimate hiring practices. Read the tips below for best practice guidance on how to properly use criminal background checks in the hiring process.

1. Develop legally sound employment screening policies.

Policies are the foundation of a successful pre-employment screening program. In general, employers may not: 1) have a blanket policy denying employment to all individuals who have a criminal court record; 2) institute a scoring policy where criminal convictions automatically eliminate applicants; 3) inconsistently screen applicants applying for the same position.

2. Train hiring managers about your policies.

The next step is to train all hiring managers as well as upper management on how to use background screening results in compliance with law. Policies will not do much good if they are not followed and

Sample Criminal Background Screening Policy

All applicants are required to disclose on <Company Name's> employment application if they have been convicted of or served time for a felony. If they have, they may be required to describe the situation on the application. The application states that this information will be reviewed for job relatedness and time since convictions.

Employment is contingent on the satisfactory result of <Company Name's> screening process. Applicants will not be disqualified based on their criminal results alone.

Felony convictions in the last seven (7) years - Exceptions may be considered in cases where the conviction does not have a direct impact on the applicant's suitability for employment.

Arrested, but not convicted in the last seven (7) years - The manager will make a reasonable effort to determine if the applicant actually committed the offense and if the crime would affect the applicant's suitability for employment.

enforced.

Above is a sample criminal background screening policy provided for illustration purposes. As such, a qualified attorney should review your employment policies.

3. Consistently screen all applicants applying for the same position using a variety of background checks. It is a recommended best practice for employers to complete the same number and type of background checks on all applicants applying for a particular position. This practice helps ward off discrimination lawsuits because it establishes consistency and may help show that race, age, gender and other protected EEO categories were not hiring factors.

In addition to completing specialized background



Screening and
Selection Services

checks that are appropriate for a particular position, such as doing driving record checks on applicants applying for a company driving position, it is important to complete a variety of criminal investigations. Cross checking more than one criminal court record source helps ensure employers receive the most accurate, thorough and current information available. For example, an employer may complete a national database search as an initial cost effective screen and then perform additional county and/or statewide searches as well as assessment tests and reference verifications. This type of diverse approach helps employers gain a well-rounded view of applicants in order to objectively determine whether applicants are suitable for a particular job.

4. Carefully review all background screening results.

All too often employers view criminal court record results, see a conviction and immediately decide not to hire an applicant. Not only is this illegal, but it also could eliminate a candidate who might be a good fit for a certain position. For example, someone who had a shoplifting conviction may not be well suited for an accounting position, but could be a great match for a company driving position.

Employers should carefully analyze all background screening results and be sure they understand all details in the report. If they have questions they can research the matter further or contact their screening provider for clarification. In addition, the EEOC stipulates employers consider the following before excluding an applicant on the basis of his/her background screening results:

- Did the applicant actually commit the offense for which s/he was arrested?
- What is the nature and gravity of the offense?
- How long ago was the conviction and/or completion of the sentence?
- What is the nature of the job being applied for?

5. Abide by all state and federal screening laws, including the FCRA.

In addition to state-specific laws, the federal Fair Credit Reporting Act (FCRA) governs the use of background screening for employment purposes. The FCRA rules apply to employers who use a third party provider to complete background checks and was enacted to promote confidentiality, accuracy and relevancy of consumer reports and investigative consumer reports (i.e., background checks).

Here are a few of the main provisions of the FCRA:

- **Permissible Business Purpose** - Before employers order background checks, they must certify to the screening provider they are using them for a legitimate business reason. Pre-employment screening is an acceptable reason for obtaining criminal court records.
- **Disclosure and Release Forms** – Before ordering background checks, employers must also have applicants sign and date a Notice and Disclosure Form. This form provides written proof that applicants acknowledge your company performs background screening as part of the employment process.

Applicants must also sign a Release Authorization that gives courts, schools and other government agencies the applicant's legal permission to provide background information for employment purposes.

The FCRA also requires employers to give applicants a copy of the "Summary of Your Rights Under the FCRA." This document explains what course of action applicants can take if they wish to dispute the findings of a background check or consumer report.

- **Adverse Action Notification** – Before employers decide not to hire an applicant based in whole or in part on his/her background screening results, two letters of notification must be sent to the applicant. First, a pre-adverse action letter must be sent to



Screening and
Selection Services

the applicant informing him/her that s/he may not be hired as a result of information in his/her background screening report. It also explains what the applicant can do if s/he believes the results are incorrect.

Second, if after a reasonable period of time has passed since the pre-adverse action letter was sent and an employer has officially decided to deny employment based on background screening results, an adverse action letter needs to be mailed to the applicant. The adverse action letter gives the applicant a final chance to correct or dispute his/her background screening results.

For more information on how to use arrest, misdemeanor and felony information in the selection process in compliance with law, go to <http://www.adphire.com/whitePaper.htm> and download ADP's "Background Screening Results: Hiring Decisions and Compliance Considerations" white paper.

Conclusion

Are criminal background checks worth it? Some employers might be tempted to forgo pre-employment screening altogether because it seems like there are too many rules and regulations. The truth is criminal background checks are a proven way to help organizations select the right people. Plus, experienced, reputable background screening companies are making it easier for employers to abide by regulations.

Bottom Line

According to HR Magazine, employers are increasingly being sued for negligence and injuries resulting from workplace violence - and could pay \$5 to \$6 million for settlements and verdicts. Investing a small amount of money in quality criminal background checks could possibly save an organization millions of dollars, help prevent

lawsuits and workplace violence and significantly lower employee turnover costs.



About ADP

ADP has more than 55 years of experience providing employers with business solutions such as Payroll, HR, Tax and Benefits Administration. ADP solutions focus on making businesses more productive by reducing costs, increasing productivity, and most importantly, standing ready to grow with your business. With the widest range of powerful, cost-effective solutions, only ADP can offer your business the flexibility it demands to grow and prosper – whether you have one employee or hundreds of thousands. And you can count on ADP for unparalleled compliance support and the most qualified and accessible customer service in our industry.

ADP. The business behind business.

Disclaimer

This content provides practical information concerning the subject matter covered and is provided with the understanding that neither the publisher nor the writers are rendering legal advice or other professional services. The law changes regularly, laws may be different in each state and you should consult a competent attorney when determining a course of action or preparing a form, policy, handbook, agreement or other document for use in your business.



Screening and
Selection Services