



Screening and  
Selection Services

## **Retailer's Guide to Background Screening**

*A white paper on how to use arrest, conviction and  
misdemeanor information in the hiring process*

# Retailer's Guide to Background Screening

## Introduction

With today's high turnover and demand to reduce employee theft, it is crucial to hire the right employees from the start. In addition, applicant dishonesty and workplace violence are among retailers' top hiring concerns. As a result, more retailers are completing background checks, such as criminal court records and reference verifications, on applicants before hiring them.

Indeed, pre-employment background screening can help enhance retailers' overall security efforts and reduce liability. However, retailers will negate these benefits if they overlook background screening compliance requirements. Federal and state laws regulate the use of arrest, conviction and misdemeanor information for employment purposes. How can you uphold applicants' rights and still hire safe, honest employees? Are retail theft databases reliable?

This white paper provides you with essential information on how to properly use background checks in your hiring process. Best practice guidance on how to evaluate screening results, a sample screening policy and easy-to-implement compliance tips are also included.

## Background screening results: One part of the selection process

The Equal Employment Opportunity Commission (EEOC) stipulates that employers can use arrest information, convictions and misdemeanor offenses in the selection process if a business necessity exists, but they cannot be the only criteria used to make a hiring decision. Rather, employers need to consider the whole picture about applicants

when making selection decisions. An applicant's interview performance, education, experience, job fit assessment results, and other qualifications need to be considered, as well as, his/her background screening results.

## Proper Use of Arrest and Misdemeanor Information

EEOC policy states, *"An arrest record may be used as evidence of conduct upon which an employer makes an employment decision. An employer may deny employment opportunities to persons based on any prior conduct which indicates that they would be unfit for the position in question, whether that conduct is evidenced by an arrest, conviction or other information provided to the employer. It is the conduct, not the arrest per se, which the employer may consider in relation to the position being sought."* (EEOC Policy Statement, N-915.061, II.B.2., September 7, 1990)

The EEOC also cautions employers when asking applicants to disclose arrest information on job applications that did not result in convictions because it may have a disparate, negative impact on the hiring of minorities. In addition, some states prohibit this practice altogether.

Arrest information involves more analysis than convictions, but may play an important role in your selection process. Be sure to consider whether or not the applicant committed the offense and document your hiring practices to help combat possible discrimination charges.



Screening and  
Selection Services

## EEOC Screening Criteria

The EEOC has developed four criteria to use when reviewing applicant background screening results.

### **1. Determine whether the applicant is likely to have committed the alleged conduct.**

This requirement is critical when considering arrest records, but is the most difficult of the four EEOC criteria to determine. Many variables factor into deciding whether an applicant committed a crime. Factors such as status of the charge(s), plea agreement(s), sentence, and/or disposition all play a part in the decision.

Employers need to allow applicants a meaningful opportunity to explain circumstances surrounding their arrests. However, you are not required to conduct an extensive investigation into the charges. In addition, employers should make a reasonable effort to determine whether an applicant's explanation is credible before using that information to help make a hiring decision.

When an arrest results in a conviction, this EEOC criterion is not as critical. It can be inferred that an applicant actually committed the crime because a court of law convicted him/her of the crime.

### **2. Consider the nature and gravity of the offense(s).**

Did you know that in some states bouncing a check and assault are both considered misdemeanor offenses? Yet, other misdemeanor crimes can be just as severe, if not more severe than felonies.

As a result, retailers must consider the nature and gravity of the offense in addition to whether the applicant likely committed the alleged conduct. Depending on the type of crime the applicant committed, it may not be relevant to the position being sought.

### **3. Consider the amount of time that has passed since the conviction and/or completion of sentence.**

The EEOC does not specify how much time must go by before convictions are no longer relevant. It is up to the discretion of employers. For example, a one-time parking violation that happened six years ago is unlikely to pose a significant threat to your company. However, other crimes, such as assault, will carry more weight regardless of how much time has passed since they were committed.

In most cases, standard background screening reports cover the most recent seven years. As you make your selection decisions, carefully consider the whole picture about your applicants as well as how people may change for the better as time passes.

### **4. Consider how the offense(s) relates to the nature of the job.**

Background screening results revealing an arrest or conviction must be relevant to the position the applicant applied for. If an individual has a driving offense, it does not necessarily disqualify him/her from being hired for a non-driving position.

It may be discriminatory to ask applicants about a conviction or court record which is not substantially related to his/her ability to perform job duties. A best practice is to only ask applicants about convictions that are related to the essential functions of the job and/or general workplace safety. Essential job functions are defined as the core tasks, duties and responsibilities that an individual must complete in order to be successful in a position. In addition, when making inquiries about convictions, you should ask every applicant the same questions to help you abide by Equal Employment Opportunity (EEO) laws.



Screening and  
Selection Services

## Sample screening policy

One proactive approach retailers can take to use background screening results correctly is to develop and implement a compliant background screening policy that establishes guidelines for reasonable background screening standards for a given position.

Keep in mind that the EEOC forbids blanket policies that bar employment to individuals who were arrested or convicted of a crime. Screening policies help your employees and hiring managers understand your company's selection process. The sample policy below addresses EEOC regulations.

## Sample Background Screening Policy

As part of the process of weighing applicant qualifications and determining his/her suitability for open positions, <Company Name> requires background checks for all finalists for a position. These background checks are conducted by <Consumer Reporting Agency Name>.

All applicants for employment with <Company Name> are asked to sign a release form authorizing the appropriate background checks. Any applicant who refuses to sign a release form is no longer considered eligible for employment.

Applicants are also expected to provide references from their former employers as well as educational reference information that can be used to verify academic accomplishments and records. The background check will include verification of information provided on the completed application for employment, the applicant's resume or on other forms used in the hiring process. Information to be verified includes, but is not limited to, social security number and previous addresses. <Company Name> will also conduct a reference check and verification of the applicant's education and employment background as stated on the employment application or other documents listed above.

The background check may also include criminal court record searches. If a conviction is discovered, a determination will be made whether the conviction is related to the position for which the individual is applying or presents safety or security risks before an employment decision is made.

Additional checks such as a driving record or credit record may be made on applicants for particular job categories if appropriate and job-related. If an applicant is denied employment in whole or in part because of information obtained in his/her background check, the applicant will be informed of this and given the name, address and phone number of the screening provider to contact if s/he has specific questions about the result of the check or wants to dispute its accuracy.

Any applicant who provides misleading, erroneous or willfully deceptive information to <Company Name> on an employment form or resume or in a selection interview is immediately eliminated from further consideration for employment with <Company Name>.



Screening and  
Selection Services

**State compliance considerations**

Laws vary greatly from state-to-state as to how background screening results can be used in the selection process. For example, California and Colorado forbid employers from inquiring about arrests that did not result in convictions. In addition, state laws may be more rigid than EEO regulations in governing how background screening results may be used. In the cases where state laws are more strict than EEO regulations, the state laws take precedence over the more lenient EEO rules. Be sure to research your state regulations and take necessary steps to help ensure compliance with all the provisions.

**Retail Theft Databases**

More and more retailers are turning to retail theft databases as the be all, end all solution to preventing employee theft. Background screening vendors who provide these exclusive databases may fail to point out the compliance issues associated with them. First, not all retailers submit alleged employee theft cases to such databases and there are no specific reporting requirements. As a result, retail theft databases may be incomplete. Basically these searches are only as good as the collective participation and involvement of retailers who report into the databases.

Second, retail theft databases consist of claims of retail theft incidents, which may or may not have led to prosecution. As mentioned above, states may prohibit employers from using non conviction information as part of their employment process. Consequently, if retail theft databases are used, they should only be a small part of a comprehensive retail background screening program. Conducting live criminal court record searches is crucial for meeting due diligence screening requirements.

**Retail  
Screening Statistics**

- 8%** of applicants had a criminal record in the last seven years
- 9%** of applicants had a previous workers' compensation claim
- 50%** of employment, education and/or credential reference checks revealed a difference of information between what the applicant provided and the source reported.
- 50%** of applicants had credit records showing a judgment, lien or bankruptcy, or had been reported to a collection agency

Source: ADP 2007 Screening Index

**Adverse Action**

In addition to EEO laws, the federal Fair Credit Reporting Act (FCRA) also regulates background screening for employment purposes. If employers take an adverse action against applicants by denying employment based in whole or in part on their background screening results, the FCRA requires employers to meet specific applicant notification requirements.



There are several steps involved in the FCRA notification process. First, a pre-adverse action letter must be sent to an applicant. This is a preliminary notice indicating that information contained in an applicant's background screening report, if correct, may cause employment to be denied. It also explains what course of action an applicant can take if s/he believes that the background screening results are incorrect and gives him/her the opportunity to dispute and correct any inaccuracies. In addition to the pre-adverse action letter, employers must also include copies of the applicant's background screening results and a "Summary of your rights under the FCRA" document.

If, after providing the pre-adverse action letter, retailers still wish to deny employment based on an applicant's background screening results, they must send an adverse action letter. The points covered in the pre-adverse action letter need to be reiterated in the adverse action letter. To minimize confusion, employers may omit the background screening results and the "Summary of your rights under the FCRA" document citing that they were already sent with the pre-adverse action letter.

The FCRA does not specify the amount of time that must elapse between sending the pre-adverse action and adverse action letters. However, a FTC informal staff opinion letter suggests that although facts of a particular circumstance may require a different time period, adverse action letters sent five days after pre-adverse action letters appears reasonable.

Due to the complicated nature of the adverse action process, having outside compliance experts or in-house HR professionals handle FCRA required applicant correspondence is one of the best ways to meet the requirements of this law. The vendor or staff member who oversees this process should also be proficient at handling applicant disputes should they arise.

## Take Away Compliance Tips

1. Develop compliant pre-employment screening policies that abide by all state and federal laws.
2. Do not implement a blanket policy barring employment to all applicants who have been arrested or convicted of a crime.
3. When asking applicants to list arrest information or convictions on your company's application form, include a note stating your company will not automatically exclude applicants who have a criminal history from your hiring process.
4. Refer hiring decisions based in part on arrest or conviction information to qualified, senior human resource personnel who understand EEO and other federal and state regulations.



## Conclusion

Pre-employment screening is one key way retailers can reduce employment risks, such as applicant dishonesty and employee theft. However, in order to reap the full, cost-saving benefits of background screening, employers must use results compliantly. As previously outlined in this white paper, federal EEOC regulations require employers to consider four criteria when reviewing applicant background screening results: 1) In connection with arrests, whether the applicant committed the crime; 2) Nature of the offense; 3) Amount of time since conviction and/or completion of the sentence; and 4) Nature of the job.

## Bottom Line

When used in compliance with law, background screening can help retailers hire safe, honest and qualified employees in order to help reduce employee theft.

## People Selection Made Easy®

ADP understands the needs of retailers. Partnering with ADP for your background screening needs frees up your time allowing you to focus on other business matters. Our retail-specific screening packages and online technology deliver cost-savings and rapid results. Secure your business with honest employees. ADP makes people selection easy.



Call 1-800-CALL ADP extension 737 or visit [www.adphire.com/retail](http://www.adphire.com/retail) for more information.

### 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.*

©Copyright 2008, by ADP of North America, Inc.



Screening and  
Selection Services