



Search and Verify

Why criminal background checks may not be as accurate as you think.

By Dori Meinert

Samuel M. Jackson was offered a job as a live chat specialist at an Illinois company two years ago.

But the Chicago resident was shocked when a supposedly routine criminal background check reported that his name showed up on a national list of registered sex offenders.

In fact, the report provided by Infotrack Information Services included seven possible matches relating to three different individuals, according to a lawsuit he filed in U.S. District Court last year.

One “possible match” for Jackson, who is a white man in his late 20s, was a 58-year-old black Virginian convicted of rape in 1987—when the Illinois Jackson was 3 years old, according to court documents.

“It really shocks you to be tied into something like that,” Jackson recalls. “You’re nervous and upset and angry and all these different emotions.” >

The author is a senior writer for HR Magazine.

His suit against the screening company was settled late last year after Jackson accepted a \$35,000 offer from Infotrack. The company admitted no wrongdoing.

Errors in criminal background checks are a growing problem, consumer advocates claim.

Seeking to protect their workers and resources, more employers are requiring such background checks as conditions of employment. The availability of online court records encourages the trend.

With U.S. employers spending upward of \$2 billion a year on background searches, thousands of screening companies have sprung up. Some monitor for accuracy, and some don't. Some struggle to ensure accuracy under pressure from employers that want information fast and cheap.

For HR professionals, the choices can be dizzying.

"The HR responsibility is to make sure and balance the needs of the company and the rights of the individual," says Tracy McCarthy, SPHR, senior vice president for HR for Silk-Road Technology in Chicago.

With recent high-profile court settlements involving background screeners, and new guidance on the use of criminal background checks from the U.S. Equal Employment Opportunity Commission (EEOC), McCarthy says she's once again reviewing her policies—and her choice of a screening company. "I haven't always made the decision to go with the cheapest one because sometimes you get what you pay for," she notes.

Common Errors

There aren't any national statistics on how often errors in criminal background checks occur. Screeners aren't licensed or registered. No one keeps track. But consumer advocates say they are hearing from more applicants who are distraught over losing job offers because of inaccurate reports.

"I've seen an increase in errors because I've seen an increase in background checks," claims Sharon Dietrich, managing attorney with Community Legal Services in Philadelphia. Her legal staff handled 812 cases involving pre-employment criminal background checks in 2011, up from 51 cases in 2001.

According to a 2012 survey by the Society for Human Resource Management (SHRM), 87 percent of employers conduct criminal background checks for some or all job candidates. A 1998 SHRM survey found 58 percent "regularly" or "sometimes" required such checks, while 36 percent "rarely" or "never" did.

Dietrich blames mistakes on the use of automation to create reports. "The lack of human judgment is often where the train goes off the rails," she says.

Online Resources

For more information on criminal background checks, see the online version of this article at www.shrm.org/1212-criminal-background-checks.

In addition to screening companies identifying offenses for the wrong people, a National Consumer Law Center report, *Broken Records*, released in April, cites other common errors, including:

- Reporting arrests without determining if they resulted in convictions.
- Listing the same offense multiple times, making a person's record appear lengthier.
- Mischaracterizing the seriousness of offenses, such as reporting misdemeanors as felonies.
- Revealing sealed or expunged information.

For example, the report cites a June 2011 *Salt Lake City Tribune* request for reports on 30 people with expunged records from LexisNexis. The *Tribune* found that five of the 30 still had criminal records that appeared on LexisNexis.

In a 2011 study, the Center for Community Alternatives in New York reviewed the criminal files of 70 individuals whose records were sold to employers and others by the Onondaga County Sheriff's Department. Sixty-four percent contained at least one arrest that should not be disclosed under New York law. Officials with various agencies enter arrest information in the county database, but the system doesn't report whether those arrests led to convictions, advocates contend.

"There is a lot of variability in the quality of the product based on the resources the companies have and the techniques the companies use," says Persis S. Yu, staff attorney for the National Consumer Law Center and author of *Broken Records*.

A spokesman for the National Association of Professional Background Screeners (NAPBS) says the report exaggerates the accuracy problem.

"Despite the assertion that this happens frequently in the industry, it's simply not true," says Fred Giles, chairman of the association's board and senior vice president of Carco Group Inc.'s research division, based in Holtsville, N.Y.

Who's Responsible for Accuracy?

The Fair Credit Reporting Act (FCRA) places responsibility for accuracy on the screening companies—not employers. But it's in an employer's best interest to obtain accurate reports.

"You don't want to exclude a prospective employee simply because of inaccurate information," says Anthony Rodriguez, staff attorney with the Federal Trade Commission's (FTC) division of privacy and identity protection. "Both the business and the prospective employee would lose."

He adds, "It's just a question of fairness."

Federal law requires screeners to follow "reasonable" procedures to ensure "maximum accuracy." But when criminal background reports are used for employment screening, the

law gives screeners a choice. They can send raw, unanalyzed database search results containing negative information about an applicant to employers—as long as they notify the applicant at the same time—or they can maintain strict procedures designed to ensure that the criminal record information they send to employers is complete and up-to-date.

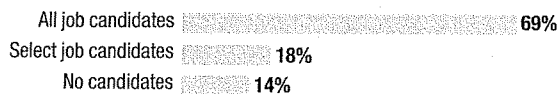
The “instant” checks often cause screeners to run afoul of the FCRA. For example, HireRight Solutions Inc. of Tulsa, Okla., agreed to pay \$28.4 million last December to settle a class-action suit and another \$2.6 million in August to settle FTC allegations that it failed to ensure accuracy in criminal reports created by a system for instant checks. The vendor stopped offering instant checks in 2010.

In February, FTC officials warned three instant-check app marketers that they must comply with the act.

Employers can't be sued for an inaccurate report provided by a screener, says Craig E. Bertschi, a partner with Kilpatrick Townsend in Atlanta. But employers find themselves in legal trouble when they don't properly notify applicants about neg-

Who Checks Criminal Records?

Does your organization, or an agency hired by your organization, conduct criminal background checks for any job candidates?



Source: SHRM Survey Findings: Background Checking—The Use of Criminal Background Checks in Hiring Decisions, July.

ative results from background checks, he says. The process is designed to allow individuals to correct inaccurate reports. The penalties for not complying with the FCRA are substantial: either actual damages or up to \$1,000 per occurrence, with no cap.

In Illinois last year, First Student Bus Co. and First Transit agreed to pay \$5.9 million to settle charges that they obtained background checks about drivers and applicants without their consent and in some cases denied them copies of their reports prior to denying them jobs.

In 2009, Wal-Mart Stores Inc. agreed to pay \$4 million to settle a class-action suit alleging that its screener, ChoicePoint, on Wal-Mart's behalf, failed to provide enough time for applicants to respond to the results of background reports before denying them jobs.

Give Careful Consideration

Employers' use of criminal background searches are subject to other federal, state and local laws.

Under EEOC guidelines issued in April, employers may no longer institute blanket bans on hiring anyone with a criminal record without opening themselves up to discrimination claims. The guidelines urge employers to conduct an individual assessment after a criminal conviction turns up. Employers should ask whether the conviction is relevant for the job opening, advises Stephen J. Roppolo, managing partner in the Houston office of Fisher & Phillips.

If a conviction shows up in a report, employers should seek an explanation from the applicant before making a hiring decision, Roppolo says. “Maybe you make the same decision, but at least you demonstrate that you didn't make a knee-jerk decision,” he explains.

He acknowledges that this approach takes time.

The EEOC guidelines are another reason HR professionals should be wary of screeners that produce numerous pages of unanalyzed data, Dietrich says.

“Often, vendors feel the imperative to sell as much information as they can,” she says. “The more information they give, the more it looks like their product has value—when in fact they might be putting the employer in harm's way, especially if they're reporting arrests that did not lead to convictions.”

In January, Pepsi Beverages, formerly known as Pepsi Bottling Group, agreed to pay \$3.13 million and provide job offers and training to resolve charges of race discrimination by the EEOC. Under Pepsi's former policy, applicants with prior arrests were not hired, even if they were never convicted, according to the commission.

However, Bertschi notes that there are times when employ-

Fair Credit Reporting Act Requirements

When using a third party to conduct a background check, the federal Fair Credit Reporting Act requires employers to:

- Notify the applicant and obtain written consent.
- Provide a “pre-adverse action” notice before rejecting a candidate based on negative information in the report. That notice should include a copy of the report and a summary of the individual's rights. New forms are required by the federal Consumer Financial Protection Bureau as of Jan. 1, 2013. The bureau recently joined the Federal Trade Commission in enforcing the act and now has primary rulemaking authority.
- Send an “adverse action” notice, but only after waiting at least five business days from the pre-adverse action notice, to allow the individual time to dispute inaccurate or incomplete information. The adverse action notice should state that the decision not to hire was based on the report and should provide information on how to dispute the accuracy of the report with the screening company.

The High Cost of Errors

In August, HireRight Solutions Inc., based in Tulsa, Okla., agreed to pay \$2.6 million to settle Federal Trade Commission (FTC) charges that it failed to take reasonable steps to ensure maximum possible accuracy of the criminal background reports it provided.

It was the second largest civil penalty that the FTC has obtained for violations of the Fair Credit Reporting Act, which sets requirements for screening companies and employers requesting criminal background checks and other consumer reports.

Eight months earlier, HireRight Solutions, formerly USIS Commercial Services Inc., paid \$28.4 million to settle a class-action suit involving background checks it conducted on almost 700,000 individuals from 2004 to 2010. The suit alleged that the company didn't notify individuals before reporting negative information to prospective employers and didn't respond to complaints about inaccurate information.

In the FTC case, the government alleged that the company had failed to prevent "obviously inaccurate" information from being given to employers and "in numerous cases even included the records of the wrong person," according to an FTC press release.

ers may want to consider arrest records. For example, if a check on an applicant for a child care center reveals an arrest for child abuse, the employer may be obligated to check further, he says.

The EEOC guidelines say arrest records can't be the sole criteria to reject the applicant, he says. As long as the employer follows up with the candidate to determine how the case was resolved, the employer would be in compliance.

When Disputes Arise

While working for a previous employer, McCarthy recalls situations when background checks reported inaccurate information.

One woman applied for a finance position. A check turned up a misdemeanor conviction, which she disputed. By contacting credit bureaus, she discovered someone had opened credit card accounts in her name. She was the victim of identity theft.

In another case, a male applicant's background check indicated he was on a list of sex offenders. The photo on the state website even resembled him. "I talked to the person. I was very transparent," McCarthy says. "The person was completely shocked."

In addition, federal officials alleged that the company failed to ensure that the reports contained updates, such as the expungement of criminal records.

The FTC further alleged that the company didn't:

- Notify individuals, as required by law, when reports containing negative information were provided to employers.
- Provide individuals with copies of the reports.
- Investigate when individuals disputed the reports' contents.

In agreeing to settle the two cases, HireRight Solutions admitted no wrongdoing.

In early 2010, HireRight Solutions stopped offering "instant" checks, a focus of the class-action suit and the FTC investigation, company officials say. "We take risk management and compliance very seriously. We've made substantial investments in our quality assurance and the compliance we build into products," says President Mike Petrullo, hired in September 2009 to oversee HireRight companies.

The company sends investigators to courthouses to verify current and complete record matches, Petrullo says, adding that "We perfect that information before it's reported to customers."

He went to the courthouse to investigate; McCarthy consulted with police. It took about three weeks to clear his name. "We ended up hiring him, and he was great."

In such cases, she advises, "Look a little bit further."

At McCarthy's current employer, SilkRoad, all background reports go to a specially trained HR professional and contents are never shared with managers. A hiring manager may be informed of a delay in the check, but not the issue. "If you tell them, what if you disprove it?" she asks. "I think it's prudent to keep it within HR, use your guidelines, be consistent and make good hiring decisions."

However, Dietrich says some employers won't wait for the applicant to dispute the report and clear the record. They just hire someone else. In large companies with many similar openings, the inaccurate report may just delay the hiring a few weeks. But for a candidate applying to a smaller company, it may mean more than just a delay. "If you've just identified the perfect job, and you've been disqualified and somebody else is hired, that can be heartbreaking," she says.

According to the 2012 SHRM survey released in July, 58 percent of 340 respondents said they allow candidates to explain the results of background checks before making a decision to hire.

Sixty-two percent request the check only after making a contingent job offer. By that time, HR professionals and hiring managers have invested time in interviewing the candidate, notes Rianne Rome, HR director at Academic Travel Abroad Inc. in Washington D.C.

“From a company perspective, if we’ve gotten this far with an applicant, this is someone we really want to work with us. We are hoping for the best. If there were something that would come up on a background check, we want to give them every opportunity to make it right,” Rome says.

Screening the Screeners

With thousands of screeners and search packages to choose from, HR professionals need to investigate before making choices. Costs for background reports range from a few dollars for “instant” database searches to several hundred dollars for searches conducted in person by investigators in several counties and states or foreign countries. Some, but not all, screeners have quality control departments where analysts scrub data to eliminate errors before sending reports to employers.

HR professionals shouldn’t treat background reports as commodities by turning the selection of a vendor over to the purchasing department, says Giles of the NAPBS. The association has 596 screening companies as members. “Providing background reports is a very complex business” with constantly changing laws and regulations that requires expertise, he says.

verify accuracy, says Nick Fishman, executive vice president at the Ohio-based EmployeeScreenIQ, whose company is accredited. Ask how a vendor’s dispute process works, he advises.

“The best way to get information on whether or not someone is convicted of a crime is to walk into the county courthouse,” he adds. For example, a physical search of county court records may find a conviction was expunged, and in those cases his company won’t pass that information on to the employer.

Incomplete as they often are, national databases can complement court searches. For example, the database search could turn up previously unknown addresses for an individual—information that may prompt additional county court searches, he explains.

Contrary to popular perception, there is no official, comprehensive national database of felony convictions. Some screeners create their own databases or contract with data providers. Not all state and county courthouses provide electronic access to documents. And, some states have stopped selling criminal records data because some screeners refused to purchase required updates, an investigation by The Associated Press revealed last year.

Even the FBI criminal records database—off-limits to most employers—is notoriously incomplete and out-of-date because it relies on states to submit information.

Because its members are split on how to use national databases, the NAPBS only requires screeners to adhere to “the letter of the law,” Giles says.

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Fast turnaround time and price drive most employers’ choice of a screener, says Greg Dubecky, president of Corporate Screening Services Inc. of Cleveland.

Unfortunately, “with that thirst for instant gratification, there’s got to be a compromise, and that compromise is with quality,” says Dubecky, whose company verifies all information before delivering it to employers. He and others consider verification a best practice.

Dubecky’s company is one of just 21 companies to go through the NAPBS’s accreditation process. The process determines whether screeners have procedures to ensure maximum accuracy and solve disputes, but accreditation doesn’t require verification through current court checks.

Before choosing a screener, HR professionals should ask where vendors get their information and what steps are taken to

However, Giles says his accredited employer, Carco, “will not release database records without perfecting them, without going to the source and getting up-to-date current information.”

Mike Barnhart, president of True Hire LLC, in Uniontown, Ohio, says his company periodically tests field agents who check records at courthouses to ensure that they search thoroughly.

Jackson—the Illinois man whose case of mistaken identity went to court—says employers that don’t know whether their background screener is verifying information become the losers.

“You could be missing that amazing employee that you’ve been looking for because the company you trust to run your background check isn’t doing the job,” he says. ■