

**APPLICANT “A” V. APPLICANT “B”
&
THE \$7-\$10 BACKGROUND CHECK**

By
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In today’s litigious society it has become more apparent that during the hiring or retention process a background check, at any level, is not only a necessity but a cost saving insurance tool. Today’s HR professionals are faced with a multitude of job applicants from all facets of society all looking for that “dream” job and in the present economy, “a” job. Given the burden placed on HR professionals to meet the hiring demands of their internal clients and understand the complexities of the various employment laws with which they must be knowledgeable and compliant, most resist the added burden of having to become equally knowledgeable and compliant with the variety of inquiry components that are inherent to background screening. It is for many a low priority, given all else on their schedules. After all, that is why the services of a background screening professional are secured. It is *their* obligation to know these things and besides, “we haven’t had any problems, yet.”

If you recognize yourself or a colleague in the preceding statement, you should understand that the need to properly vet a background screening company is as important, if not more, than the background check results itself. Choosing the right background screening company can make or break a successful employee screening program and save untold millions in legal awards due to adverse actions or civil rights violations at the federal or state level. This observation does not only apply to the HR professional or within the context of employment. Rather, it extends to the association or organization that is looking to screen individuals who will be providing a service (voluntary or otherwise) such as working with children (coach, instructor, counselor, etc.) or vulnerable adults (elderly, infirmed, etc.). The same legal obligations that apply to the HR professional apply to the organization or association administrator when screening individuals through third-party services, such as a screening company.

There is a plethora of companies in today’s background screening industry. A quick Google search of the term “background check” generates over 48 million hits. These results range from honest reliable companies to so called “consumer rights” or “consumer advocacy” groups claiming that what everyone else is doing is a fraud and for a fee **we** can show you how to get all the information online. There are still others that will charge anywhere from \$20-\$50 dollars for an “instant national criminal search”. Their claim is that they will search *billions* of records, all instantly returned to you in an easy to read and understand format right to your web browser. What they do not tell you is where this information comes from, how old it is, how often the information is updated or the legality of its use. The fact is that searching *billions* of records is the equivalent of searching to find your share of the US Government bail-out.

To expand upon this by demonstration, let’s take the fictitious scenario of Applicant “A” and Applicant “B”. Both applicants are applying for the same position with the same firm somewhere in the U.S. For purposes of clarity we need to offer a little expository background on each applicant. Applicant “A” is age 35, comes from a poor working class family has worked full time since he was age 16. He paid for his own education at a small college and has since worked two jobs to pay off his student loans and support his family. He makes a decent appearance though clearly wears “experienced” clothing that is no longer the current fashion. Applicant “B” is the son of a wealthy and prominent area businessman. His parents graduated from the finest universities and have paid for all of his expenses, including his

Business Administration degree from NYU. Throughout high school and college you could find him socializing only with the Who's Who of the socially elite at all the best functions and he is fashionably attired.

Do you have an idea whom you may hire at this point? Let's continue.

Assuming all else is equal, both applicants have made it through the second or third stage of the interview process and the background check process begins. In an effort to save money your company performs the \$7-\$10 background check offered by some "cyber" background screening company and is told this is a "national criminal history" search. The following results appear:

Applicant "A": A misdemeanor marijuana conviction 5 years ago in California. A Disorderly Conduct charge 3 years ago in New York. A felony assault arrest 2 years ago in Connecticut.

Applicant "B": Search results come back clear – No Record.

Well, this appears to be a clear cut no brainer, correct? And all for \$7-\$10 dollars? That was easy! Just looking at applicant "B" is a better choice. He has a better degree, he is well dressed, comes from a wealthy background he knows everyone who matters he has to be better...right?

At this point has your hiring decision been made? Ok, let's continue.

Applicant "B" has no criminal record and you take action by hiring applicant "B". You send applicant "A" an adverse action letter telling him that due to his criminal record and company policy you are rescinding his job offer or in the alternative (if an offer had not yet been made) will not be considering him for employment or association. Since the search scenario represented above is a common occurrence, here is where we separate the companies that sold you the \$7-\$10 dollar background check from those that conduct direct source inquiries using "best practice" methodology which in turn provides for greater legal compliance.

Let's take Applicant "A" – The person you didn't hire because of the \$7-\$10 "instant national background check" results. This record **should** have been reported to you as clear – **No Record** and here is why:

- 1) Certain marijuana convictions in the State of California (such as the one reported) are not reportable after two years and thereby are not actionable for employment/association decisions per California State Law (*Cal. Labor Code Section 432.8*).
- 2) In New York State, a charge of Disorderly Conduct is classified in the criminal code as an "infraction". As such, guilty pleas or findings on infractions are not considered to be a criminal conviction in the State of New York and cannot be held actionable for employment/association purposes.
- 3) The Connecticut assault was a **name only** match (as these databases generally are), and was not your applicant but another person with the same or similar name. Further the record returned lacks dispositional data (conviction, dismissal/no conviction, pending adjudication) and

only actions that resulted in conviction or are pending adjudication may be reported and are actionable for purposes of employment/association.

Taking all of this into account the Fair Credit Reporting Act (FCRA), the federal legislation that regulates the background screening industry, states that possible adverse information that results in disqualifying the individual from employment or association may not be used unless the information is first verified as being true and the most up to date and available publicly held information (§ 613. *Public record information for employment purposes [15 U.S.C. § 1681k]*). As this was a database search, you (through the actions of your background screening professional) have violated provisions of the FCRA. Not only did you just violate federal law, depending upon where you are located you may have also violated state consumer reporting and/or employment laws (such as those in California and New York). Expect a civil rights lawsuit coming to you in the mail in a few weeks.

Now let's take Applicant "B" – The person you did hire because of the \$7-\$10 "instant national background check" and who now has access to sensitive proprietary corporate information (i.e. client lists, personal data, financial information, etc.). This record **should** have been reported to you as "**Record Found**". Had proper inquiry methodology been observed in the preparation of that background report the following information would have surfaced:

- 1) A misdemeanor sex offense that occurred at his family's summer home in New Hampshire.
- 2) A rape arrest currently pending adjudication in NY State.

The problem now is that Applicant "B" was just paraded in the local press and media as your new executive/employee. Had you known the above, would you still have hired him over Applicant "A", given what you now know of your obligations to Applicant "A" and his rights under the FCRA and/or state consumer reporting and employment laws? Likely, no.

So how come the "instant national background check" didn't pick up these things on Applicant B? Because there truly is no comprehensive national criminal history repository in the United States that is **publicly accessible**, period. There are however a number of proprietary databases that contain streams of data purchased from a variety of sources, State Corrections records, county court records, etc., but the data is inconsistent in scope and breadth of coverage. For example, of the records populated from State Corrections departments – not all states will allow their data to be purchased and those that do may only provide for sale certain types of information, i.e., inmate and probationer records, inmate but not probationer records, etc. Of the county court records that may exist in these proprietary systems – not all states are supported, nor are all counties within a given state and of the supported counties, one county may provide only felony records, but not misdemeanor records. In the case of Applicant B misdemeanor convictions in New Hampshire and arrests pending adjudication in New York are not supported by any currently available "cyber" proprietary databases. So why are misdemeanor records important? Because 70% more people are arrested/convicted of aggravated misdemeanor charges (assault, burglary, theft, drug possession) than are of felony level charges.

Another inherent danger of "cyber" proprietary databases, are overturned convictions. Periodically, individuals qualify to have their conviction(s) overturned and their record "sealed" or "expunged" by court order. Yet, their names still reside within these proprietary systems as a convict who did time in a state prison. Good luck to you and your organization if you disqualify from employment a person who

fits this description – as they will quite likely leave your office and head directly to their attorney to get the litigation against your concern started.

The true value of any database is its accuracy and functionality. Databases support a variety of search logic mechanisms, i.e., exact name search, fuzzy logic, Boolean, etc. Do you know the search logic of the “instant national background check” database(s)? Are they, and more importantly their content, going to support a fuzzy logic search? The likelihood is no. In this instance, there is an extremely high probability of generating a “false positive” result (a record found that is not identifiable with your subject) but moreover an even higher and potentially devastating probability of generating a “false negative” (a record of conviction that was missed because the search term was not an exact match).

So why are these database companies allowed to sell this information if the data cannot be used to make a hiring or retention decision? There are a number of reasons why. We now live in the information age and today information and data is regarded as a commodity. It’s important to understand that the companies that operate these databases are in the business of selling data. They are not in the business of ensuring that your interests as an employer or association are protected, though they will market and package their product in such a manner as to suggest just that.

Are there practical uses for these databases? Yes, and they are best served for “personal use” rather than for business use. For the individual who has entered into a personal relationship (such as dating) with someone they don’t really know and may have some suspicions. For the parent whose pre-adult child is now associating with an adult individual with whom they may have suspicions. For the individual or couple who have suspicions about a neighbor or other individual in their town. In these personal use instances, these databases may serve some benefit, but the reality is that they are far from being the comprehensive tool they are marketed to be.

A greater danger to the employer or association, that holds a legitimate need to screen its employees or associates, is the use of these databases by the “professional screening company” they’ve entrusted to protect their interests. As previously mentioned, there is a plethora of screening companies in the market place and unfortunately many do not have a firm grasp on the legislative provisions that regulate the industry nor a keen interest in protecting their client’s interests – they simply look to sell data. They too will use these databases as a means to an end and a means by which to generate a greater margin return on their retail criminal pricing to the end user (the client). The client is unfortunately none the wiser to this practice until a problem, such as a negligent hiring action, presents itself.

The other danger is from the “professional screening company” willing to sell this search to a client who only has an interest in paying for this level of service. By doing this, the screening company has in every respect, abandoned their responsibility to the client and the screening industry, solely in the interest of not letting that prospective client “get away”. The background screening provider could/should use these databases as a tool to augment their best practice inquiry methodology and to independently verify the content of any “hits” or records generated from the use of this tool. The problem is, too many background screening providers use this tool as their sole method of inquiry. This behavior is highly unethical. In some respects it may be distinguishable to the end user by the screening providers represented retail pricing for criminal history searches – \$7-\$10 should never be the range for a comprehensive criminal history search. Further, representative pricing should in one manner or other address the court access and/or statutory fees that are inherent to best practice inquiry methodology.

Given the brief, yet all too common occurrences referenced herein, has your hiring or retention decision changed? How much was that \$7-\$10 dollar background check again?

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