



Our objective in this White Paper is to:

- Build Awareness of Mistakes Other Organizations Have Made in the Background Investigation and Drug Testing Processes
- Enable Your Organization to Avoid the These Costly Mistakes
- Present Methods and Opportunities That Can Help the Process Be More Efficient and Effective

Table of Contents

Introduction.....2

Background Investigation Mistakes4

Drug Testing Mistakes..... 15

Background Investigation Opportunities..... 21

Drug Testing Opportunities..... 26

Additional Resources 30

Randisi & Associates is an authority in the employment screening services industry and our management team has over 60 years of combined experience.

Our work in the screening business has provided us a unique repository of experiences and knowledge that you won’t find anywhere else – knowledge that allows us to provide quality and responsive service. We know how to deliver what you need quickly and efficiently

Introduction

Randisi & Associates, Inc. is not a law firm. Information in this document is not intended to constitute legal advice. Rather, this White Paper is intended to share our experiences and knowledge of these situations so that hopefully your firm will avoid these mistakes and take advantage of presented opportunities.

So before we begin with talking about reasons to perform background investigations and drug testing I have a question. When are the two times a person is perfect?

There are two times when a person is perfect. Once at birth and again during the hiring interview. At least the candidate attempts to show they are the perfect choice. But, are they that perfect? And if they are not, how do you find out?

This brings us to reasons why background investigations are important.

- Most people engage in prevarications. During the interview they hedge, fudge, fabricate, distort, misrepresent, and deceive. So how do you find out if they are telling you the truth? Simple, you must perform a background investigation to verify the veracity of alleged information on your company documents.
- We believe most people will behave for you, the prospective employer, as they have behaved in the past, for previous employers. People who have exhibited unacceptable criminal behavior in the past will most likely continue that behavior in the future <https://www.preemploymentscreen.com/using-recidivism-rates-to-make-hiring-decisions/> . And most people who use illegal drugs will most likely continue that use in the future.

Let's discuss who should be included in the background investigation and drug testing process? We believe that volunteers should also be included. Investigating and drug testing volunteers is as important as investigating and drug testing employees.

Volunteers typically interact with the more vulnerable members of our community. This can include children, the elderly and people with other types of mental and physical challenges. There is a tendency to automatically assume that an individual who wants to volunteer has totally altruistic intentions.

Well, this is not so. Some have an evil intent to abuse your organization's clients and look at volunteering as a way to get easy access to the most vulnerable. This blog post <https://www.preemploymentscreen.com/checking-volunteers/> highlights several situations where volunteers engaged in unacceptable behavior.

Another important reason for an employer to vigorously engage in background investigations and drug testing is to avoid negligent hiring lawsuits. The tort of negligent hiring occurs when someone in your employ or volunteer workforce injures a co-worker or other third party. Negligent Hiring Lawsuits average \$1million

Mistakes in Performing Background Investigations

A. Mistake is not complying with the FCRA in the area of providing proper disclosure Forms before you procure Consumer Reports.

- Pepsi - Show Me FCRA Disclosure to the Applicant or Show Me the Money - \$1.9 Million
 - <https://www.preemploymentscreen.com/show-me-the-fcra-disclosure-to-the-applicant-or-show-me-the-money/>
- Frito-Lay - No FCRA Disclosure equals a \$2.4 Million Settlement
 - <https://www.preemploymentscreen.com/no-fcra-disclosure-equals-a-2-4-million-settlement/>
- Walmart - Review Your FCRA Disclosure and Authorization Process
 - <https://www.preemploymentscreen.com/fcra-disclosure-authorization-process/>
- Costco - \$2.5 million just because there was no stand-alone disclosure
 - <https://www.preemploymentscreen.com/2-5-million-just-because-there-was-no-stand-alone-disclosure/>

Fines for non-compliance can be significant. In addition to the fines and penalties above, these following organizations incurred even larger sums of money:

- Uber – \$7.5 Million
- Amazon – \$5 Million
- Avis – \$2.7 Million
- Costco – \$2.5 Million
- Publix – \$6.8 Million
- Dollar General – \$4 Million

Think your organization is too small to be noticed? Think again. Let's say 100 people over past two years find a plaintiff attorney who discovers your Disclosure Form is not compliant with the FCRA. Fines can range from \$100 to \$1000 per person. Let's further assume your organization is fined the minimum of \$100 per violation. That means \$10K plus legal and other expenses. This isn't chump change.

Who is a consumer reporting agency? Any person or organization that provides your organization with consumer reports for any type of fee.

What are consumer reports? Consumer reports include those reports associated with making decision for employment purposes and, as we suggested earlier, for accepting volunteers.

What are examples of consumer reports? These can include but aren't limited to criminal conviction searches, motor vehicle, credit reports, prior employment verification and education verification. The FCRA says these are consumer reports because they provide information on the general character and reputation of an individual.

When does the term "employment purposes" apply? When used in connection with the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

We had a client contact our firm to ask if they run a report on an employee in anticipation of a promotion and use information in the consumer report to deny the promotion do they need to issue the pre-adverse and adverse action letters?

THE ANSWER IS YES

The cases in this chapter highlight the need for a stand-alone disclosure and an authorization BEFORE you procure the reports. The disclosure, in most of these situations, was not conspicuous and separate and did not state the following:

- the right of a consumer to obtain a copy of a consumer report from each consumer reporting agency
- the frequency and circumstances under which a consumer is entitled to receive a consumer report without charge
- the method by which a consumer can contact, and obtain a consumer report from, a consumer reporting agency

If Pepsi and Frito Lay and Costco are making these mistakes – and there are many more – are you sure organization is compliant?

Let's review the steps to FCRA compliance

- Disclosure – Stand Alone is recommended
- Summary of Rights – We will review that later
- Authorization from consumer should for both pre-employment AND throughout employment
 - Does Your Authorization allow procuring reports throughout employment?
- Certification of compliance to the Consumer Reporting Agency
- Pre-Adverse Action Letter if using any information, in whole or in part, to make adverse decision
- Adverse Action Letter after you have sent Pre-Adverse and received no response or have resolved any disputes about information in the report.

Your Consumer Reporting Agency should make compliance easy to accomplish with an on-line system.

B. Mistake is not issuing the pre-adverse action letter.

Disneyland forgot the pre-adverse action letter.

<https://www.preemploymentscreen.com/dont-forget-the-pre-adverse-action-letter/>

Why is pre-adverse action letter so important? There are two reasons:

1. First it is required by the FCRA if you use any information in whole or in part to make an adverse hiring decision and you received the consumer reports from a consumer reporting agency.
2. Second You give the individual an opportunity to say the information in the report is wrong.

Some background information on the method used by consumer reporting agencies to perform criminal conviction searches. Consumer reporting agencies use three identifiers when conducting criminal conviction searches i.e. name,

address and date of birth. In a country with over 250 million working adults it is quite possible that two individuals in the same jurisdiction can have the same name and the same date of birth. One has a criminal conviction and the other one doesn't have criminal conviction. It happens.

C. Mistake is not consulting legal counsel.

<https://www.preemploymentscreen.com/competent-legal-counsel-review-disclosureauthorization-forms/>

Don't make the mistake of not consulting legal counsel until after mistakes have occurred in complying with the FCRA. This consultation should include a review of your Disclosure and Authorization forms for obtaining background investigation reports from a consumer reporting agency before being used in the hiring process. Delete any wording that purports to require the prospective employee to acknowledge that your hiring decisions are based on legitimate non-discriminatory reasons.

Get rid of overly broad authorizations that permit the release of information that the FCRA doesn't allow to be included in a background investigations report.

D. Mistake is having a liability waiver in your disclosure form.

- M-I, LLC made the mistake of having a liability waiver in their Disclosure Form

<https://www.preemploymentscreen.com/disclosure-obtaining-consumer-reports/>

You CANNOT have a liability waiver requiring the consumer to waive their rights against a prospective employer. Don't include language that claims to release you from liability for conducting, obtaining, or using the background investigations report.

Example of inappropriate language: "I hereby discharge, release and indemnify prospective employer, the consumer reporting agency, their agents, servants and employees, and all parties that rely on this release and/or the information obtained with this release from any and all liability and claims arising by reason of the use of this release and dissemination of information that is false and untrue if obtained by a third party without verification."

- E. Mistake is violating the EEOC's guidelines in using criminal conviction violations.

<https://www.preemploymentscreen.com/another-non-compliant-company-pays-for-fcra-violations>

The non-compliant company highlighted in this blog post used a 28year-old conviction for a \$40 fine to deny employment.

While the company did violate the FCRA in this case, we wanted to highlight the blatant disregard for complying with EEOC regulations regarding the use of a criminal conviction. The EEOC suggests using the Green Factors in using criminal convictions to deny employment. These guidelines are the age of the conviction i.e. how long ago did it happen, the criminal conviction's relevance to the job's responsibilities and what has happened since the conviction. We have a discussion of these Green Factors at page 16.

- F. Mistake is assuming fingerprint records are the gold standard.

<https://www.preemploymentscreen.com/fingerprint-records-in-the-employment-screening-process/>

If your firm wants to obtain fingerprint records, your firm must be granted access by a federal or applicable state statute. Another option is to make an application with the appropriate state agency for permission to obtain fingerprint records.

Many mistakenly think that fingerprint records are the gold standard in determining if someone has a criminal conviction? This is not true.

A fingerprint search only reflects information received by the Federal Bureau of Investigation (FBI) from states and municipal agencies. If there are gaps or omissions in transmission of records, the fingerprint record won't be in the FBI fingerprint database.

Another reason fingerprints are not a gold standard is that the FBI database contain arrests but there is usually no conviction information. That means you might see an arrest but have no idea if the individual was convicted of the crime.

In fact, a 2015 Government Accountability Office (GAO) Report found significant gaps in the FBI fingerprint database as many state and local jurisdictions fail to report arrest records or a court disposition to the FBI.

The GAO report corroborated a similar report by the National Employment Law Project in July 2013 that reported almost one-half of records in the FBI database are inaccurate. The big reason is that there are no criminal conviction dispositions in the fingerprint records – just the arrest.

Anyone can be arrested for almost anything. But an arrest doesn't mean you are guilty. You are innocent till proven guilty in our Country.

This reliance on a single fingerprint record-database, premised upon a passive collection system, with no accountability for disposition can lead to a large number of incomplete or even inaccurate files.

Contrary to popular thinking, there is no super-duper single database on the internet containing comprehensive records regarding a person's criminal history.

Many are surprised to hear that the criminal justice system does not use social security numbers in identifying individuals. That leads us to a discussion of the method used to research criminal convictions in our Country.

G. Mistake is assuming a Name/Address/Date of Birth search is inferior to a fingerprint record search.

<https://www.preemploymentscreen.com/fingerprint-namesocial-security-number-criminal-record-search/>

Mistake is assuming that a Name/Address/ Date of Birth search is inferior to a fingerprint record search.

To enforce a fingerprint record or allow a name/date of birth/address criminal record search was a question faced by the Public Service Commission of Maryland in late 2016.

Rasier and Lyft both filed with the Public Service Commission of Maryland a Petition to waive applicable fingerprint-based background check requirements in lieu of their current investigation process.

Their decision – “the Commission approves an alternative process to fingerprint records for Rasier and Lyft i.e. a name/address/date of birth.”

Name/Address/Date of Birth is used to research criminal convictions at the primary source i.e. county criminal records. This is where criminal conviction records are the most accurate and up-to-date. Private databases contain hundreds of millions of conviction records from thousands of jurisdictions and hundreds of government databases.

A comprehensive screen should use a combination of both private databases and primary source data. Why? Because Primary Source Data will include disposition.

Private Databases can be used to cast a wide but shallow net which identifies jurisdictions where records may exist and therefore should be verified directly at the jurisdictional level. Private databases should never be used as a substitute to local searches but should be used as a supplemental search. This is due to the method used by many jurisdictions to report information into the private database. For example, many jurisdictions just report Department of Correction information i.e. only if the individual served time in prison. There are tens of thousands of criminal convictions where the guilty party does not serve prison time. But, the individual is nonetheless found guilty.

H. Mistake is not to confirm an unresolved arrest received on a fingerprint record.

<https://www.preemploymentscreen.com/employees-fbi-fingerprint-record-comes-back-hit-now/>

Your applicant or employee’s FBI fingerprint record comes back with a hit. Now what do you do? Frequently organizations who receive fingerprint records see an arrest but there is no conviction. And, frequently there is no indication on the Fingerprint where the individual was arrested.

Upon arrest police are of course very proficient at taking fingerprints and sending up the reporting chain. The individual was arrested and a fingerprint record exists. But, there was no disposition of the case. The only way to find out is to do a name/addresses/ date of birth search of public records and private databases.

A conviction is proof beyond a reasonable doubt that the individual committed the violation. But, as mentioned earlier, anyone can be arrested for almost anything without an indication of an ultimate disposition i.e. a criminal conviction.

Hits on fingerprint records should be used judiciously particularly if you have no indication of a conviction. An employer normally should not be able to use arrests in a hiring decision unless they perform additional investigative procedures that comply with EEOC regulations. Consider applicable state law in using arrest records.

Using arrest records to make an adverse hiring decision can potentially put the employer in violation of EEOC rules and regulations.

- I. Mistake is assuming information on the Internet is accurate.

<https://www.preemploymentscreen.com/information-internet-not-report/>

If it is on the internet it must be true, right? NOT!

We had a client who wanted to know why information on the internet was not in the report we provided. The client researched the applicant on the web on their own. The client found, on the internet, an indication that the individual had some prior arrests and wanted to know why that information was not included in our reports on the individual.

Two questions to ask before using information from a web site on the internet for employment, volunteer or tenant background investigations:

1- Does the company comply with the Fair Credit Reporting Act in providing information on consumers? For example, look at the disclaimer at the bottom or <https://www.policearrests.com/>

2- Does the disclaimer on the web site state it should not be used for employment or tenant background investigations? E.G.:

Statement from the web site for "PoliceArrests <https://www.policearrests.com/> is that it is not a consumer reporting agency under the Fair Credit Reporting Act ("FCRA"), and does not supply consumer reports. Under no circumstances may

you use PoliceArrests for any purpose covered by the FCRA, including but not limited to tenant or employee background investigations. So Why Use It?

We re-verified what our client read on the web site, at no additional cost to our client, and found no arrests in the jurisdiction that supposedly contained the convictions.

- J. Mistake is assuming convictions older than 7 years old CAN NOT be reported.

<https://www.preemploymentscreen.com/criminal-convictions-older-7-years/>

In typical legalese the FCRA states that you cannot report adverse information which antedates the report by more than seven years, other than records of convictions of crimes. You and your firm should be aware of state laws governing the reporting of various types of criminal convictions and arrest records.

“Requirements relating to information contained in consumer reports [15 U.S.C. § 1681c]

(a) Information excluded from consumer reports. Except as authorized under subsection (b) of this section, no consumer reporting agency may make any consumer report containing any of the following items of information:

- Any other adverse item of information, other than records of convictions of crimes which antedates the report by more than seven years.”

- K. Mistake is not complying with the FCRA in a timely manner.

<https://www.preemploymentscreen.com/faulty-background-checks-costly/>

Faulty background checks can include doing the right things but not doing the right things in a timely manner.

In a class action lawsuit against Starbucks, the plaintiff alleges that Starbucks was negligent in its timely execution of adverse action steps under the Fair Credit Reporting Act (FCRA)

Employers should address the length of time that transpires between sending a consumer a pre-adverse action letter and when a disputed consumer report is resolved in the consumer's favor.

The FCRA does not require that jobs be kept open during a dispute.

However, no one can predict what a judge or jury might decide.

At any moment, a jury may decide the employer was negligent in the process of waiting for a consumer's report to get resolved.

This is particularly so if the original consumer report contained adverse information that was later corrected.

And even if Starbucks is found not culpable, it will be extremely costly for them to defend their actions in this case. If this case is decided in plaintiff's favor, all employers will need to address their dispute waiting policy.

- L. Mistake is not following EEOC Guidelines when it comes to handling criminal conviction history.

<https://www.preemploymentscreen.com/eec-complaint-result-not-following-guidelines/>

Everyone heard of Macy's? Big operation should know how to follow EEOC guidelines right? The Mistake was that Macy's denied job opportunities because of criminal histories of individuals. Criminal convictions in the criminal history was not job-related and consistent with business necessity. Macy's did not perform an individualized assessment.

Individualized Assessments are discussed in more detail at page 24.

In this particular case Macy's didn't consider the Green Factors:

- Consider the elapsed time between the date of the conviction and the date of application
- Consider the applicant's history of work since the date of the conviction

- Consider the job-relatedness and business necessity of the criminal behavior as it relates to the job's duties

An employer should provide an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

- Consider the elapsed time since the conviction – In this case Macy's ignored the length of time since the conviction i.e. 15 years.
- Should consider history since the conviction – In this case the individual had stellar record since the conviction.
- Should do an individualized assessment i.e. provide an opportunity to individual to determine if exclusion is due to conviction being job related and consistent with business necessity.

Mistakes in Drug Testing

A. Mistake is assuming all drug tests are the same.

<https://www.preemploymentscreen.com/always-check-the-source/>

https://www.eeoc.gov/policy/docs/guidance-inquiries.html#N_32

I recently attended a webinar where the presenter said, quite emphatically, drug tests can only be given post-offer anywhere in the country.

And, recently we had a client return from a seminar in California where they were told the same thing i.e. only give drug tests post offer. I checked with drug testing experts about California in particular and was told California has no general laws pertaining to workplace drug testing, although there is an abundance of case law for employers in the state.

There are two cases in California *Pilkington v. Superior Court* and *Loder v. City of Glendale* that ruled pre-employment testing is permitted and an employer does not need individualized suspicion to do so. There is no case law (currently) that would make it so pre-employment testing must be performed post-offer.

What is the source of some of the confusion about drug testing?

First, let's see what is allowed and not allowed by the Americans with Disabilities Act (ADA). Under the ADA, a covered entity shall not require a medical examination pre-offer.

Second, there are two types of drug tests.

1. There is a drug test that tests for the illegal drug panels.
2. And, there is a drug test for panels that include both illegal AND legal drug panels.

The former is allowed on a pre-employment basis. The latter is not allowed on a pre-employment basis because it qualifies as a medical examination and, as such, should only be given post conditional job offer.

B. Mistake is not knowing how to deal with a challenge to a positive drug test.

<https://www.preemploymentscreen.com/drug-test-comes-back-positive-now/>

An individual challenges the results of the positive drug test. A couple of things come into play.

The re-test cannot occur at the same laboratory that did the original analysis. That means a complicated process of transferring the original specimen to a different laboratory for re-testing.

You should be aware of your state's law regarding notification of the positive results to your donor and your Policy Manual requirements about notifications and action.

Your drug test policy is where you should have statement in your policy manual of who is to pay for the re-test. Most times a company's policy manual does not mention this option. It is important that it does mention who pays and the amount. We would suggest at least three times the cost of a drug test.

C. Mistake is over-estimating how long illegal drugs stay in the system.

<https://www.preemploymentscreen.com/long-illegal-drugs-stay-system/>
<https://blog.employersolutions.com/by-the-numbers-drug-detection-windows-by-specimen-type/>

Many want to know how long illegal drugs stay in the system. I recently attended a seminar on illegal drugs in the workplace. The speaker mentioned that marijuana stays in the system for 30 days. Well that may be true. He explained that this is so because marijuana is a fat-soluble substance that stays in the fat cells of the body.

But, most of the attendees assumed that a drug test for marijuana would likewise return a positive if tested within that 30-day period. Unfortunately, that just is not an accurate assumption.

A positive drug test depends on many factors. It depends on:

- the specific drug i.e. each drug has a different life span in the body,

- the detection window i.e. each drug has a different time frame in which the test can identify its presence in the body,
- the dosage i.e. a person consuming more concentrated amounts of the substance will be positive for a longer period of time than a person whose consumption concentration is not as high
- the frequency of use i.e. a person consuming an illegal substance once per day versus a person who consumes the illegal substance once per month
- cut-off levels i.e. the government has established cut-off levels for each type of drug. That means that if a drug test indicates the existence of an illegal drug in the system but it is below the cut-off level, the drug test is negative.

Quest Diagnostics has listed in a blog post the average detection windows for three different types of specimens.

<https://blog.employersolutions.com/by-the-numbers-drug-detection-windows-by-specimen-type/>

In the blog post they report that urine specimen drug testing, the most commonly used testing method, detects drug use in the previous one to three days. Oral fluid specimen drug testing can detect recent drug use in the previous one to two days.

D. Mistake is not having an MRO and not listening to the MRO if you have one.

<https://www.preemploymentscreen.com/eoc-says-drug-tests-violated-ada/>
<https://www.preemploymentscreen.com/what-is-a-medical-review-officer/>
<https://www.preemploymentscreen.com/not-consulting-medical-review-officer-contributes-trouble-employer/> \$1.8 Million Mistake
<https://www.preemploymentscreen.com/two-good-reasons-to-have-a-medical-review-officer/>

EEOC filed suit against a car dealership alleging that its drug testing policy did not contain exceptions for qualified persons with disabilities. The EEOC alleges the employer made a job offer to an applicant contingent upon a successful drug test.

When the applicant tested positive for a prohibited substance, the employer rescinded the offer. The EEOC alleges that the positive test was the result of the applicant's use of a prescription drug in accordance with her doctor's orders, but the employer refused to consider her medical evidence.

My point in talking about this case in this blog

<https://www.preemploymentscreen.com/eoc-says-drug-tests-violated-ada/> is that there was no indication there was an MRO involved in the employer's drug testing program. IF the employer had an MRO and if the drug test was a NON NEGATIVE and IF there was a legal prescription from a licensed physician, the MRO would have reported a negative.

It is crucial that you have a Medical Review Officer play a major role in determining whether a "non-negative" drug test from the lab is in fact a positive drug test. Having an MRO is a business best practice. An MRO is your best line of defense in an action. An MRO is described in this blog

<https://www.preemploymentscreen.com/what-is-a-medical-review-officer/>

A specimen is tested at the lab. It can come back negative, and that is fine, or non-negative. That means that the specimen contains the presence of a drug in excess of acceptable cut-off levels.

Why is a Medical Review Officer (MRO) important? An MRO is an independent, licensed physician who is responsible for receiving and reviewing laboratory results and evaluating medical explanations for certain drug test results.

E. The mistake is not consulting with your MRO.

<https://www.preemploymentscreen.com/not-consulting-medical-review-officer-contributes-trouble-employer/>

1. This \$1.8 Million Mistake is where the MRO issued his final evaluation of the employee's drug test. The test showed the presence of hydromorphone in her system. The MRO further noted a "safety sensitive warning for potentially sedating medication."

No one at the employer contacted the MRO as to how the results should be interpreted. The court found it important enough to highlight this failure to consult with the MRO in two separate statements in the case.

2. Finally, there are many states that require the use of an MRO Maryland being one of them.

<https://www.preemploymentscreen.com/two-good-reasons-to-have-a-medical-review-officer/>

- F. Mistake is assuming marijuana impairment doesn't exist.

<https://www.preemploymentscreen.com/marijuana-impairment/>

The survey highlighted in this blog post reviewed the empirical research published in the past decade (from January 2004 to February 2015) on acute and chronic effects of cannabis and cannabinoids.

Memory function has been the most consistently impaired cognitive domain affected by cannabis. There are significant associations between poorer performance in regular users. Chronic cannabis use was shown to impair working memory in young adults on immediate recall, verbal reasoning, and verbal working memory tasks.

- G. Mistake is trying to use drug testing results as a substitute for managing poor performance.

<https://www.preemploymentscreen.com/dont-use-drug-tests-manage-anticipated-poor-performance/>

Dura Automotive Systems tried to use a drug test result to manage anticipated poor performance instead of using the actual employee's performance.

How many of you have had an employee who was performing poorly on the job, showing up late, making mistakes, near miss accidents and you think "we are going to send him for a drug test and hope he tests positive." So many times we get calls from companies who have an employee performing poorly on the job. The company wants our firm to do a drug test suspecting and hoping that the

employee may be using drugs. The point is that the company is avoiding managing the employee's performance in hopes of a positive drug test result.

Opportunities in Employment Screening

- A. Don't miss a criminal conviction because you are not looking in all the right places.

<https://www.preemploymentscreen.com/looking-right-places-criminal-convictions-two-lessons-learned/>

Are you missing criminal convictions when you perform a background investigation? Criminal convictions are located in two separate places.

A criminal conviction in one location WILL NOT be discoverable in the other location. Those locations are county criminal courts and federal district courts. Local criminal convictions are violations of local laws. Federal district court criminal convictions are violations of federal law.

The latter usually involves a crime that crosses state lines.

There is one example at the indicated blog post. The elementary school missed the man's prior FEDERAL criminal convictions because they failed to search federal district courts. He had a criminal history including two federal convictions for possession of a pipe bomb and a felony larceny conviction in 2013.

And since we posted this blog we had incident where client submitted individual to us for criminal conviction search. We reported no records. Client was informed individual had a sex offense. We reviewed federal district records and sure enough he was guilty of sexual offense crime. It was in federal district court because he transported the victim across state lines.

- B. Mistake is not taking advantage of performing a statewide criminal conviction search, when appropriate.

<https://www.preemploymentscreen.com/statewide-criminal-conviction-search-county-criminal-conviction-search-better/>

Should you conduct a statewide criminal conviction search or just do a county criminal search when performing background investigations on applicants, employees or volunteers?

The answer is IT DEPENDS. All LOCAL criminal conviction actions and results are maintained at the county level. The county is where the records are the most current and accurate.

But, in many states the counties report criminal conviction activity into a statewide repository. If the statewide repository contains timely and accurate criminal conviction results from all the counties in the state, why not just do a criminal conviction search at the statewide repository level?

Doesn't it make sense to get the increased geographic coverage of a statewide criminal conviction search versus a background investigation at just one county?

There are three key reasons why the completeness, consistency, and accuracy of state criminal record repositories could be suspect.

- 1- Timeliness of Receiving Arrest and Disposition Data
- 2- Timeliness of Entering Arrest and Disposition Data into the Repository
- 3 -Inability to Match Dispositions with Existing Arrest Records

Your consumer reporting agency should be able to know which states have acceptable statewide repositories and deliver criminal investigations at a statewide level for the same cost as doing just one county criminal searches you get maximum geographic coverage in a jurisdiction at acceptable risk?

C. Mistake is not complying with EEOC Requirements the easier way

<https://www.preemploymentscreen.com/eoc-requirements-criminal-record-searches-comply-hard-way-easier-way/>

EEOC requirements mandate that employers keep records that will disclose the impact its employee selection procedures have on equal employment opportunities.

The harder way is to use the "four-fifths rule." You ready for this? And, if you can explain how this works, let me know.

A selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact.

The easier way is to use the individualized assessment. In an April 7 2016, the EEOC Office of Legal Counsel staff members wrote a letter in response to a request for public comment from a federal agency or department. This letter is an informal discussion of the noted issue and does not constitute an official opinion of the Commission.

However, it does present an efficient method of complying with EEOC requirements. The employer must show that its policy operates to effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position.

An employer will consistently meet the “job related and consistent with business necessity” defense in one of two circumstances:

1. First, the employer may demonstrate that it validated the criminal conduct screen for the position at issue, per the UGESP (Uniform Guidelines on Employee Selection Procedures) standards (if data about criminal conduct as related to subsequent work performance is available and such validation is possible). This is the 4/5 rule mentioned above.

OR

2. Second, the employer develops a targeted criminal record screen that is narrowly tailored to identify criminal conduct with a demonstrably tight nexus to the position in question by taking into account, at least, the following factors:

- (1) The nature and gravity of the offense or conduct;
- (2) The time that has passed since the offense or conduct and/or completion of the sentence; and
- (3) The nature of the specific job held or sought.

The employer should then provide an opportunity for an individualized assessment for people excluded by the screen to determine whether the policy as applied is job related and consistent with business necessity.

These are the GREEN FACTORS referenced on page 13.

D. Continuous screening should be an integral part of company policy

<https://www.preemploymentscreen.com/continuous-screening-integral-part-company-policy/>

How many of you, who do background investigation, think that once you hire someone they won't engage in unacceptable behavior, ever commit a crime and be convicted of a criminal conviction?

How about lose their driver license while in your employ and be out on the road driving for you?

Continuous background investigations are an important tool that can assure you are discovering current employees who have exhibited behavior that indicates they could potentially injure your clients, your associates, your reputation and your company's continued viability.

A recent SHRM webinar reveals that only 11% of organizations rescreen current employees (2018 HireRight survey). We believe it is a best practice that can help protect against negligent retention and negligent hiring.

In an article, shown on this slide, published by SHRM, it was highlighted that "people are dynamic and so is the risk they pose to organizations.

<https://www.shrm.org/ResourcesAndTools/hr-topics/talent-acquisition/Pages/Continuous-Screening-Posthire-Future.aspx>

One-and-done background checks don't account for the dynamic nature of risk factors." The SHRM article highlighted above, also highlights the exposure to negligent retention if an employer doesn't engage in continuous monitoring.

E. Calling prior employers can reveal a wealth of information.

<https://www.preemploymentscreen.com/call-prior-employers/>

Most people think calling prior employers is a waste of time.

At least You can verify employment at that prior employer, dates of employment. This can uncover gaps – perhaps individual trying to cover up time in jail.

There are websites that help individuals develop fake resumes and even fake companies. You can uncover fake information by verifying employment.

<https://www.careerexcuse.com/about-us>

<http://www.fakeresume.com/>

Calling prior employers can help develop jurisdictions in which to conduct background investigations if your policy includes researching residential and employment addresses. Let's say someone lives in south central PA but commits a crime against their employer in MD. Where will that criminal conviction be? It will be in Maryland not Pennsylvania.

And you can enable the tort of negligent referral. This occurs if a prior employer lied to you about the conduct of a prior employee and that employee engages in that same behavior for your firm and injures your firm's reputation, fellow associates or members of the public.

F. Be aware of the new Summary of Rights Form

<https://www.preemploymentscreen.com/a-new-summary-of-rights-form/>

A new summary of rights form is in place effective September 12, 2018. The new form, issued by the Consumer Financial Protection Bureau, updates the model Fair Credit Reporting Act notice that should be given to a consumer concerning a summary of their rights when applying for a position with your organization as that application relates to their background investigation.

Drug Testing Opportunities

A. Reduce substance abuse in your employee population by almost 50%

<https://www.preemploymentscreen.com/reduces-substance-abuse-employee-population-almost-50/>

<https://blog.employersolutions.com/data-shows-escalating-drug-use-in-the-u-s-workforce/>

1. First SHRM says one illegal drug user will cost approximately \$7,000. How does one arrive at \$7,000? The National Drug-Free Workplace Alliance reports the following statistics:

- 40% of all industrial fatalities resulted from workplace drug abuse.
- Drug users were 3.6 X more likely than non-drug users to have workplace accidents.
- Substance abusers filed health insurance 3 X more often than non-abusers.
- 80% of illegal drug abusers steal from their employers to support their habit.
- Substance abuse is the 3rd leading cause of workplace violence.

2. Second Quest Diagnostics pie chart at

<https://www.preemploymentscreen.com/reduces-substance-abuse-employee-population-almost-50/>

indicates a drug testing program brings drug use down from 13.9% to 9.5%. Assume workforce of 100. That means a drug testing will remove four people. If you don't have a drug-testing program, you are probably spending about \$28,000 more than if you did.

B. Testing Employees for Drugs is Important

<https://www.preemploymentscreen.com/testing-employees-drugs-important/>

Testing employees for drugs is important for many reasons.

But one reason is significant. Employees under the influence of drugs can injure and kill members of the public and other employees in the workforce.

We believe it is a best practice to conduct both pre-employment and random and reasonable suspicion and follow up and reasonable suspicion drug testing.

By implementing a random drug testing program, you will communicate a clear message to your workforce you will not tolerate substance abuse.

Without a random drug testing program, a plaintiff attorney could easily convince a judge or a jury that you don't care whether or not your employees are under the influence of a substance.

This blog post contains an article that highlights the deadly ramifications of employees impaired while operating in a safety sensitive capacity. The article reports "Two Amtrak maintenance workers had opioids or cocaine in their systems when they were struck and killed south of Philadelphia last year by a passenger train whose engineer had marijuana in his system, according to federal officials".

C. Implement a random drug testing program.

<https://www.preemploymentscreen.com/the-right-thing-to-do-is/>

This blog contains reference to the fact that 2% of the Toronto transit employees failed random drug tests. Random drug testing program works at finding employees under the influence of using drugs very effectively. Positivity rate are almost 50% higher than pre-employment drug testing. Why is that important?

D. An analysis of 10 million drug tests reveals this is no time to stop drug testing.

Employees under the influence can injure co-workers, members of the public and destroy a firm's business reputation.

<https://www.preemploymentscreen.com/an-analysis-of-10-million-drug-tests-reveals/>

<http://www.questdiagnostics.com/home/physicians/health-trends/drug-testing>

An analysis of 10 million drug tests by Quest Diagnostics reveals some very ominous news if you are an employer who employs people in safety sensitive positions. Now is definitely NOT the time to consider stopping drug testing and/or dropping marijuana from your list of panels in your drug testing.

Barry Sample, PhD and senior director of science and technology, at Quest Diagnostics warns about the threat to our country's workplaces:

“Driven by increases in cocaine, methamphetamine and marijuana, drug use by the American workforce remains at its highest rate in more than a decade,”

Matt Nieman, General Counsel, Institute for a Drug- Free Workplace and Principal, Jackson Lewis P.C., has a similar warning about the importance of workplace drug testing:

“Yet, the ten-year high in positivity rates—spurred by nationwide surges in cocaine and methamphetamine positivity as well as double-digit marijuana spikes in states with newly implemented recreational laws—serves as a stark warning that efforts to prevent substance abuse in the workplace are as important today as ever.”

What does the record show as far as correlation for positivity rates in states with recreational marijuana and marijuana positive rates in the workforce?

Increases in positivity rates for marijuana in the general U.S. workforce were most striking in states that have enacted recreational use statues since 2016.

Those states include: Nevada (43%), Massachusetts (14%) and California (11%). These three states also saw significant increases in marijuana positivity in federally-mandated, safety-sensitive workers: Nevada (39%), California (20%), and Massachusetts (11%).

A comparison of the results of positivity rates by specimen i.e. Urine vs. Oral Fluid clearly highlights the effectiveness of using oral fluid as the specimen. There are a couple of reasons why. Oral fluid cannot be adulterated, diluted or substituted.

E. Define safety sensitive positions when drug testing.

<https://www.preemploymentscreen.com/safety-sensitive-position-and-drug-testing/>

<https://www.ctdol.state.ct.us/wgwkstnd/highrisk.htm>

Who can suggest some safety sensitive positions? State of Connecticut has a list of almost 400 <https://www.ctdol.state.ct.us/wgwkstnd/highrisk.htm>

A safety sensitive position is one where the employee holding this position has the responsibility for his/her own safety or other people's safety. Obviously, if a person operating in this type of job is under the influence of drugs and/or alcohol, members of the workforce, the public or even themselves could be injured or even killed.

Let's assume you are an employer and one of your employees kills an innocent family in an automobile accident or a fellow co-worker.

Would you want to be in front of a plaintiff attorney asking why, since your employee killed a family in an automobile accident, your firm doesn't care enough about members of the public to conduct Drug testing, both pre-employment and random?

A person in a safety sensitive job must have a sharp mind and perform the job's tasks and responsibilities carefully. We have mentioned the importance of defining job tasks and responsibilities and the terms job-related and consistent with job relatedness and business necessity when it comes to defining what criminal convictions impact an individual's fitness for a job.

Likewise, with drug testing employers need to define the job-relatedness and business necessity for conducting drug testing.

F. Avoid donors using fake urine to pass drug tests

<https://www.preemploymentscreen.com/donors-are-using-fake-what-to-pass-drug-tests/>

<https://abcnews4.com/news/business-news/fake-urine-doesnt-live-up-to-drug-test-cheating-hype>

<https://orc.orasure.com/assets/base/training/intercept/player.html>

According to The Washington Post, Indiana and New Hampshire passed laws last year banning synthetic urine, and two additional states — Missouri and Mississippi — introduced bills this year to make the product illegal.

With drug positivity rates soaring to record highs, according the Quest Diagnostics Index it is no wonder that drug users are searching for ways to cheat the drug test.

<https://abcnews4.com/news/business-news/fake-urine-doesnt-live-up-to-drug-test-cheating-hype>

The Intercept oral fluid drug test is very effective at uncovering individuals who are under the current influence of illegal drugs.

It takes about 10 minutes, the company rep merely observes the donor administer the test, and receives a signed, sealed tube containing the oral fluid from the donor.

The Intercept oral fluid drug test is FDA-cleared and laboratory-based. It also has in place the Medical Officer Review of results that provides a best business practice. More information on Intercept is here

Oral fluid can't be diluted, adulterated or substituted. Really very effective.

Additional Resources

- Background Checks – What Employers Need to Know
 - https://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm
 - <https://www.preemploymentscreen.com/session-with-laura-rubenstein/>
- Drug Testing
 - <https://www.preemploymentscreen.com/drug-testing-seminars/>