

Background Checks, Screening and Your Nonprofit



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The term “background check” means different things to different people. Some nonprofit leaders use the term loosely to refer to a variety of screening tools, such as criminal history background checks, credit checks, reference checks, or the verification of prior employment and higher education. One former client initially told me that her nonprofit was conducting “background checks” on prospective volunteers, and I later discovered that their process was limited to checking the state’s online sex offender registry.

It Takes a Toolbox

The biggest misperception about criminal history background checks is that they are the only effective way to prevent the hiring of unsuitable paid or volunteer personnel. Criminal history background checks are a single tool in a toolbox of screening tools that nonprofit leaders should consider. Certain positions in a nonprofit may warrant the use of one combination of screening tools that looks quite different from the combination used for other positions. Applications, interviews, and reference checks are examples of other invaluable tools that savvy nonprofit leaders should keep close at hand in the screening toolbox.

Designing an effective screening program involves: (1) scrutinizing open positions (what risks does each position pose to clientele and the nonprofit?), (2) choosing the most appropriate screening tools for each position or cluster of positions, and (3) using the screening tools in a consistent, informed, legally compliant and appropriate fashion.

Brave... or Frightening New World?

Like all aspects of nonprofit life, background checking and staff screening practices continue to evolve “with the times.” Important developments in the world of background checking include:

- **Growth in the number of nonprofits considering the use of background checking as a screening tool for prospective paid and volunteer staff.** Common motivations for considering background checks as a screening tool include fear of lawsuits alleging negligent hiring, changing expectations of stakeholders, and the perspective of insurance providers that background checking is a minimum risk management requirement.
- **Improved options for conducting criminal history background checks.** Nonprofit leaders may

choose to conduct records checks through state criminal history records repositories or through private screening companies. The affordability and speed of both options have improved considerably during the past decade. Some state agencies offer a quick-turnaround and free or affordable background checking options. (See inset for an example of Minnesota's free, name-based online "criminal history offender search.") Private screening companies offer a wide range of options, from package pricing for background checks, employment verification and DMV checks, to discounted pricing for volunteer background checks, bulk discounts for associations or groups, to the option of designing a screening protocol around a nonprofit's specific screening criteria, concerns and budget. Using a third-party, private screening provider may offer additional, appealing benefits. Labor and Employment attorney Pamela Devata of Seyfarth Shaw explains, "Third party background screening companies may have access to data and resources that can provide nonprofit organizations with cost effective, timely, relevant information that is also compliant with applicable law and EEOC regulations. For example, many background screening companies will not provide arrest information to employers because the use of such information could lead to disparate impact claims under Title VII."

- **Guidance from the FTC clarifies the applicability of Fair Credit Reporting Act protection to volunteers.** The Federal Trade Commission published a "staff report with summary of interpretations" in July 2011 indicating that volunteers should be treated as employees with respect to the applicability of the FCRA. The report notes that "Because the term 'employment purposes' is interpreted liberally to effectuate the broad remedial purpose of the FCRA, it may apply to situations where an entity uses individuals who are not technically employees to perform duties [including] a nonprofit organization staffed in whole or in part by volunteers."
- **The risk associated with "free" online background checking suggest that caution should be your guide.** Many leaders understandably prefer the ease of using a private background check company. Nancy Lynn Roberts, Chief Operating Officer of Trak-1 Technology adds: "By entrusting your screening to a professional background firm—one with expertise in understanding data sources and a commitment to FCRA compliance—nonprofit leaders can provide an additional layer of protection for their organizations."
- **Unprecedented scrutiny of the use of criminal history and credit records by state legislatures and growing popularity of "ban the box" laws and policies.** According to the National Employment Law Project, "30 states and more than 150 cities and counties have adopted what is widely known as 'ban the box'" laws (See www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/). These laws are intended to prevent the knee-jerk, early disqualification of applicants based on the stigma of a criminal record. Advocates believe that including a 'box' inquiring about prior criminal history on an application for employment unnecessarily limits employment opportunities and impairs the societal goal of rehabilitating ex-offenders.
- **Increasing popularity of informal "checking" up on prospective staff using familiar Internet search technology.** Many nonprofit hiring managers report checking Facebook and other social media sites to gather information on candidates. According to careerbuilder.com, 45% of employers use social networking sites as a screening tool. But as explained below, nonprofit employers should exercise caution when researching candidates on social media sites and be careful not to rely on protected categories of information.

That "Free" Search May Be Risky

Many leaders find it hard to imagine that trolling the Internet for information on an applicant could put their nonprofit at risk. Yet potentially costly risks—including claims alleging discrimination or breach of privacy— lurk in those seemingly "free" searches. An untrained manager may discover information on an applicant that cannot be used in determining an applicant's eligibility. While most nonprofit leaders are well aware of the prohibition on asking an applicant about medical conditions and family status, when similar information is discovered in an online query it may seep into the process of evaluating the applicant and expose the nonprofit to allegations of disparate treatment under Title VII and other civil rights laws.

Good News...Bad News

The good news about background checking is that nonprofit leaders today have faster, cheaper options for identifying prior criminal offenses that would render an applicant ill-suited for a key paid or volunteer position. But the bad news is that faster turnaround and more affordable pricing does not reduce the risk associated with less than careful screening. And as was true when criminal history background checking was a laborious and expensive process, it remains a single tool in a toolbox of screening options that should be considered by

leaders focused on choosing the most suitable applicants for key positions.

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