
Best Practices for Criminal Record Screening

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Introduction

Pinkerton's Global Screening Solutions is a trusted and leading, pre-employment background screening and drug testing firm. At the core of Pinkerton is its' employees. Pinkerton employees have decades of experience in Human Capital, Legal Compliance, and Technology. Thousands of companies leverage Pinkerton's core capabilities on a daily basis to assist in developing best-hiring practices.

Pinkerton conducts an extensive audit of each client's hiring practices at the outset of each relationship. The review often uncovers areas that need improvement to limit catastrophic hiring mistakes. Exposures to catastrophic hiring are rarely deliberate or done purposefully. These hazards exist because there is no universal best-practice screening explanation that can be applied to an entity that is dynamic, fluid, and ever changing.

One of the most dynamic aspects of a hiring process is the applicant. The applicant has a life history that you, the hiring manager, must authenticate. In particular, the applicant's criminal history must be verified. Another dynamic aspect of a hiring process is the job position. Different job responsibilities require different skill sets. In turn, these skill sets can be screened with various types of background checks. Thus, the problem begins. The following document breaks down the who, what, where, when, and hows of criminal records.

Problem Statement

Several issues are presented when determining which criminal record search is the best for you to apply as a hiring manager. The first issue centers on the time to hire. This requires asking yourself whether the types of criminal searches requested are enabling you to receive information back in a time frame that affords the opportunity to hire an applicant before he or she goes to another employer.

The second issue centers on the amount allocated to spend per applicant. We have yet to come across an HR department that was given unlimited access to funds. Even if an HR department is given carte blanche, spending more does not necessarily mean you are conducting the right type of search.

The third issue centers on compliance. We frequently see hiring managers accessing criminal records that are ineligible for use with hiring decisions. For example, using arrest records, outdated, or simply discriminatory information, all present significant legal liability exposures.

So how do you determine what the best practice for your personnel is? Before jumping into that question, you must have a general understanding of where criminal records come from. Yes, they come from people doing bad things in the eyes of the law, but the outcome of those cases are just as important as from where and how an employer obtains those records.

Criminal Records Overview

When determining the best criminal search to screen applicants for hire, one must first have a general understanding of how the legal system works. Armed with that knowledge, one or many types of criminal searches should become evident to meet a best practices criminal screening process. The following is the overview.

Law enforcement is a function of the state, local officers and agencies. General police powers are reserved to the states. Federal offenses are crimes against the government and its employees, or that involve intrastate activities. Thus, there are 52 separate criminal jurisdictions in the United States: 1 for each state, 1 for the District of Columbia, and one for federal jurisdiction.

While most are similar among the states, there are substantial differences in the penalties for like offenses. The easiest way to understand the criminal legal system is to walk through a crime scenario. The first step is the investigation of crimes and the arrest of persons suspected of a crime. The second step is the prosecution of those charged with a crime. The last step is the punishment or treatment of persons convicted of a crime.

State Department of Law Enforcement Records The first step that we, as hiring managers, may be concerned with is the arrest. The arrest is typically made by a sheriff's office.

After a person is arrested and charged with a crime, they will be booked. The person will be finger printed. The name and the crime that the person is charged with will be entered into the official police record. Depending on the charge and the circumstances of the case, the person may be released and ordered to appear for a hearing in court. The person may be released on their own recognizance or may have to put up a certain amount of bail to secure release. In other instances, the person may remain in police custody until there is a court hearing on their release.

The sheriff's office maintains the arrest records in their local repositories. All the sheriff's offices in the state are linked to a central State repository. The central repository is referred to as a State Department of Law Enforcement or "SDLE" search. Also, it may be called a Statewide Criminal search in the background screening industry.

Each State's SDLE is different and there are limitations and advantages to the search. The SDLE limitations are the quality of the records that are housed in the repository. While the records in the SDLE are not wrong, they are not necessarily complete for the purposes a hiring manager needs to conduct a best-practice screening process.

SDLE criminal records come from the arresting State agency. The SDLE records are primarily going to contain arrest records. Depending on what jurisdiction a company is located in and where the actual arrest was made, the records may not be usable to make a hiring decision.

Although not every state has specific employment laws regarding the type of information being used to screen applicants, using arrest records may: 1) be illegal under some State Statutes and; 2) at the very least, discriminatory from a Federal and State perspective. For example, if the ultimate outcome of an arrest for murder is acquittal, then the applicant should not have the arrest record held against them, since they are not guilty of a crime.

A survey published by BRB analyzed the quality of information contained in each States' SDLE repository. (See State Criminal Records Survey, BRB Publications, 11/2004). The results were fairly shocking. The majority of State SDLE repositories do not contain final disposition information. Disposition information is essentially the final outcome from the court system. The court records are the second step where we would look to find criminal records. This will be discussed in detail in the County Court Search section below.

For example, in many states, including Alabama, Arizona, Colorado, DC, Indiana, and Kansas, less than 50% of the SDLE records contain final dispositions. Furthermore, almost all State's SDLE repositories do not contain a complete list of arrests made in the last 5 years. What does all this mean? All in all, you are dealing with a source of information that is extremely incomplete and unreliable.

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Not every State's SDLE search is bad however. Several SDLE repositories do contain a high percentage of disposition information and records within the last seven years. For those states, the SDLE search may be a good alternative in putting together a best practices screening program.

The next issues that SDLE records present are turnaround times and cost. Some SDLE records require additional paperwork to be filled out in order to process the requests through the State's repository system. Other SDLE's may take several weeks or months to process the requests. Then there is the problem in

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a few states, like California, where the SDLE is not available to the public. Lastly, almost all SDLE's charge a significant fee to process the records.

In sum, SDLE records prove to be inconsistent when developing a best practices program. In developing a best practices screening program you want it to be uniformly applied across your company to all applicants. SDLE searches are inconsistent with respect to time, cost, and uniformity of records. In employment law terms and EEOC compliance, hiring managers are potentially creating a disparate practice if they only use the SDLE as a source for criminal records searches. If you have an applicant that has lived in a state that does not enable you to do a SDLE search, then you may have to defer to not doing the search or using another source of information not uniform to your screening program.

The risk of liability for discrimination arising from systemic employment practices is perhaps one of the most significant HR compliance-related challenges facing large companies today. With both the OFCCP and the EEOC increasingly applying sophisticated statistical and analytical models to company data to look for statistical evidence of discrimination in company hiring, promoting, and discharging practices, using arrest records (SDLE) from one state you do business in and the final disposition (county criminal search) of records in another state you do business in, may lead you into trouble. Processing SDLE on some of your applicants, but not all because of availability, time restraints in getting records, or internal cost control measures, may also be creating a disparity on the type and quality of search you are performing throughout your overall criminal screening program.

County Courthouse Records At this time you are probably asking, "what source does a hiring manager use to keep a uniform criminal search program?" The answer is the next step in the criminal process example we started with.

After being arrested, the person will be asked to enter a plea. The person can enter a plea of "not guilty", "no contest", or "guilty". If the person enters a not guilty plea the judge will decide on the terms of their release or if they will be released pending their trial.

If the person enters a plea of either no contest or guilty, there will not be a trial. In this situation, the person will either be sentenced immediately or sentenced at a later time. If the person is to be sentenced at some point in the future, the judge will determine whether they should be held in custody until sentencing or whether they should be released and ordered to appear for sentencing.

If the person entered a not guilty plea they will have a trial. At the end of their trial, if they are found not

guilty, they will be free to go, and, for that person, the criminal process will end at that point. If they are found guilty, they will go through the sentencing process as described above.

A trial will take place typically at a County Courthouse. There are more than 3,300 jurisdictions each with their own unique County Courthouse. The County Criminal Courts are part of the State's court system. Most of the States' trial courts are courts of general jurisdiction, which means they have the authority to hear all kinds of civil and criminal cases.

Criminal cases are those in which a defendant is accused of a serious crime, such as robbery, theft, drug possession or murder. Not every criminal case is decided by a trial. Many cases are resolved through a plea bargain.

In a plea bargain, the defendant agrees to plead guilty by admitting that he or she committed a crime. In return, the prosecutor asks the judge to impose a sentence that is less severe than if the defendant had gone to trial and been convicted. The judge, however, is not required to agree to the recommendation and may choose to ignore it. A plea bargain ensures that a guilty defendant is punished. Plea bargains can be entered either before or even during the trial.

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About 91% of the people charged with a crime or who enter a plea bargain are adjudicated via a state court. The County Courthouse has both the arresting information that a SDLE search would contain and, more importantly, the disposition of the charges. This is where you want to be receiving your criminal records. The disposition is the critical piece of information that you need to uniformly and efficiently make hiring decisions.

Scope of Search: A County Criminal Court Search will include a minimum of seven years for both felony and misdemeanor court convictions; where available, charges may also be included. In comparison, the SDLE search varies state by state and may only contain a portion of criminal records dating back between 3 - 7 years. Furthermore, SDLE's are not available in all states, whereas, county criminal searches are available in all jurisdictions.

Turn-around Time: The County Criminal Court Searches are conducted on-site at the local courthouse or records locations. Despite this labor intensive process, efficient research networks complete 97% of county searches within 2 days. In comparison, the SDLE search can take several days to weeks.

Search Result: In the event that a criminal conviction or “hit” is found, the report will contain the case number, full case name, date of birth, file date, disposition date and number of years searched for each criminal case that is found. Also, detail of the method(s) used to match the applicant to the defendant, such as Name and Date of Birth; or Name, Date of Birth and SSN. County Searches also provide details for each charge included in the case, including description of each count, disposition, type of crime, any fines assessed by the court, any court fees assessed, and probation or prison time ordered. In comparison, the SDLE may only contain arrest information with no final disposition and limited or no detail on the methods used to match the applicant to the person listed in the records.

Federal Court Records Federal courts disproportionately handle white collar crimes, immigration related crimes and drug offenses (these crimes make up about 70% of the federal docket, but just 19% of the state court criminal docket). Often times the criminal records will start at the State Court level and be removed to the Federal Court level. Therefore, there is a good chance that the county criminal search would pick up on the initial records filed at the state level before being removed to the Federal court level. In that situation, you can follow up a county criminal search revealing trials removed to a Federal court by appending that particular search to a Federal Court search.

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Notwithstanding, Federal Court searches are a good criminal search to incorporate into your best practices hiring program. The Federal Court Search is performed through a national repository called PACER. The PACER system can be ordered on a national basis and review possible criminal and bankruptcy proceedings. The most common downside to a Federal criminal search is the lack of identifiers the PACER system contains to match your applicant to the defendant listed in a case. Therefore, you should expect some rate of false-positive records or a need for additional information from your applicants to positively identify them when performing a Federal Criminal Search.

Criminal Database Products

County criminal searches go “a mile deep but an inch wide” to reveal the most current and detailed data in specific counties where an applicant has lived and worked. Expanding the scope of a background check to include multi-jurisdictional databases (often called multi-state criminal databases or a national criminal file) benefits employers with another layer of due diligence in the screening process. Database products are used to uncover additional criminal convictions in locations not covered by past address information.

You have to choose wisely when being offered a criminal database product. Many background screening companies have compiled their own records and conduct the criminal database search differently. The result is that not all criminal database products are the same.

In fact, many of the criminal database products offered in the market can expose your company to additional risks. Some criminal database products do not update their records on a consistent basis. Relying on records that are several months or years old can lead to you receiving records that have recently been cleared, unadjudicated, or expunged.

Additionally, many criminal databases use phonetic search technology in their database products that can create information overload due to unconfirmed results of common names. Other companies do not incorporate a quality assurance process to carefully review the content of each positively matched record before reporting it to the employer. By not following the aforementioned protocols, the final background check is, legally speaking, not fully compliant with Section 613 of the Fair Credit Reporting Act (FCRA). Thus, hiring managers can not use the information with confidence to make well-informed hiring decisions.

§ 613. Public record information for employment purposes [15 U.S.C. § 1681k]

(a) In general. A consumer reporting agency which furnishes a consumer report for employment purposes and which for that purpose compiles and reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer’s ability to obtain employment shall

1. at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or
2. maintain strict procedures designed to insure that whenever public record information which is likely to

have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported.

The bottom line with criminal records database products is to choose the product and company offering it wisely. Confirm the data integrity, and when and how the records are updated. Also, confirm how the records are matched to the applicant's identifiers.

Moreover, you should use a database product that only produces records when there are at least two identifiers, instead of products that only use one identifier or a phonetic matching of names. Lastly, make sure the company you are working with has all records reviewed prior to being sent to you. This puts the onus on the background screening company to insure they are providing you with the correct information. Otherwise, you are going to have to do your own follow up to insure records are valid.

Summary

Employers have in recent years become increasingly concerned about knowing whether an applicant has a criminal record. Part of this concern stems from large jury verdicts rendered against employers in which the employer is held responsible for negligently hiring a person with a criminal record who ultimately harms others. As a result, some companies conduct pre-employment background checks for criminal records and choose not to hire former convicts.

Employers have a legal duty to exercise due diligence in the hiring process, and that duty is breached if an employer hires someone that it knows or should have known was dangerous. On the other hand, society has a vested interest in helping people with a past criminal record obtain meaningful employment. Nonetheless, nearly every employment application asks if the applicant has a criminal record. If the applicant lies, he or she is at risk of being terminated if the falsity is uncovered. On the other hand, unfortunately, if the applicant tells the truth, he or she risks not getting the job at all.

There are, however, legal limits on the employers' conduct. Courts have found that a policy of automatically denying employment can result in discrimination against certain groups. To avoid potential discrimination, employers must examine whether there is a sound business reason not to hire an individual with a criminal record, taking into account the nature of the offense, whether it is job-related, when it occurred, and what the person has done with his or her life since the time of the conviction. Employers should also take

into context the law enforcement principles for specific jurisdictions as well.

To assess criminality and law enforcement responses from jurisdiction to jurisdiction, one must consider many variables, some of which, while having a significant impact on crime, are not readily measurable or applicable pervasively among all locales. Geographic and demographic factors specific to each jurisdiction must be considered and applied if one is going to make an accurate and complete assessment of crime in that jurisdiction. Several sources of information are available that may assist you in exploring the variables that affect crime in a particular locale.

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For example, the transience of the population, its racial and ethnic makeup, its composition by age, gender, educational levels, and prevalent family structures are all key factors in assessing and comprehending the rate of crime in an applicant pool. Additionally, understanding a jurisdiction's industrial/economic base; its dependence upon neighboring jurisdictions; its transportation system; its economic dependence on nonresidents (such as tourists and convention attendees); and its proximity to military installations, and correctional facilities, etc., all contribute to accurately gauging and interpreting the crime known to and reported by law enforcement. Local chambers of commerce, planning offices, or similar entities provide information regarding the economic and cultural makeup of cities and counties.

In some circumstances, an applicant may not have to reveal all potentially damaging information, such as arrests not resulting in a conviction or that are not currently pending. There are also limitations on reporting pre-trial adjudications where the conduct by statute is not considered a criminal offense, and there may be restrictions relating to minor drug offenses. Some states also have procedures to judicially “erase” a criminal offense.

The average award in a workplace violence lawsuit exceeds \$1 million per case, according to the Workplace Violence Research Institute. So what is the best screening solution to avoid that million dollar law suit? The answer is not, as we have discussed, fixed. Given this author's experiences, however, we will provide what we believe to be a flexible foundation from which to work from.

The Pinkerton Solution

Given the lack of reliability with the SDLE and Federal criminal searches, it is our opinion that most best practice criminal screening solutions should incorporate a combination of both a reputable national criminal and records locator and a historic residential county criminal search. The county criminal search should be run at the most recent county of the applicant's residence and, if financially amenable to the company, run for the last seven years.

Pinkerton offers a National Criminal and Records Locator that matches applicant identifiers by name and date of birth. This substantially avoids the possibility of a false positive records being provided in the end report. Additionally, Pinkerton's National Criminal and Records Locator incorporates proprietary technology that searches the name given by the applicant and any aliases associated with the applicant's social security number. Searching criminal records under aliases is particularly important. Public records are subject to the same human and technological errors as any other system. People change names, misspell names, and courts do not always record the name your applicant gives you on your application.

In conjunction with the National Criminal and Records Locator, we recommend searching the criminal records in the county courthouses for the counties of residence where the applicant has lived. Although no convincing data exists that applicants commit crimes where they live or work, it is commonly accepted as a norm in society and many criminal justice agencies. If possible, we recommend searching the last seven years as to cover as much of the applicants possible history.

The combination of the National Criminal and Records Locator and multiple County Criminal Searches' aim to search an applicant's possible records both "deep and wide." The county criminal search for the last several years of residence, while narrow in geographic scope, statistically provides a high rate of return, finding criminal records with the most determinable hiring information available. The National Criminal and Records Locator essentially fills in the gaps of the other possible criminal activity that may have occurred outside of the applicants county of residences. Although further follow up may be required on some records in the National Criminal and Records Locator, the foundation of these two types of searches provides the best solution for developing a best-practicing criminal search.



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