

# Preemployment Background Screening

ASIS GDL PBS-2009

# GUIDELINE





an ASIS Guideline for Security

# PREEMPLOYMENT BACKGROUND SCREENING GUIDELINE

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Approved September 2, 2009

**ASIS International**

## Abstract

This guideline aids employers in understanding and implementing the fundamental concepts, methodologies, and related legal issues associated with the preemployment background screening of job applicants.

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Founded in 2003 as a non-profit trade association, the National Association of Professional Background Screeners (NAPBS) serves to represent the interest of companies offering employment and background screening. NAPBS offers an opportunity for qualified companies to participate in shaping the body of knowledge and regulations impacting our futures. NAPBS give the screening industry the ability to effectively demonstrate its competence, reliability and willingness to adopt standards.

ASIS and NAPBS in an effort to promote shared cooperative interests collaborated in the revision of the 2006 version of the "Preemployment Background Screening Guideline".

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## ***Revision History***

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# Preemployment Background Screening Guideline

## 1. SCOPE, SUMMARY, AND PURPOSE

### 1.1 Scope

The scope of the *Preemployment Background Screening Guideline* is to aid U.S. employers in understanding and implementing the fundamental concepts, methodologies, and related legal issues associated with the *preemployment background screening* of job applicants. This core guideline is focused on U.S. organizations employing people within the United States. (Due to the global nature of many U.S. organizations, it is recommended that the employer work with Counsel to develop a country-specific process to comply with local regulations.) Unless otherwise noted, the search types described in this document are those obtained from sources within the United States.

### 1.2 Summary

This guideline presents practical information concerning the value of preemployment background screening, the importance of the application form, important legal issues and considerations (such as the Fair Credit Reporting Act, privacy issues, state laws, rules, and regulations), the key elements of preemployment background screening, the types of information to utilize in verifying the key elements, the use of credit reporting agencies in preemployment background screening, and an appendix of a sample preemployment background screening flow chart. Additional preemployment background screening resources are listed in the References/Bibliography section.

### 1.3 Purpose

Employers, from the smallest to the largest, understand the dual benefits of hiring the best people and providing a safe and secure workplace—both physically and financially—for their employees, customers, shareholders, and the community in which they operate. A key factor is to know as much as you can about the people you want to hire and to know that before hiring them. Hiring a new employee is an important responsibility for any organization. An employer who has performed a thorough preemployment background screening on its applicants is more likely to bring into the organization a highly-skilled person who will prove to be a tremendous asset. Unfortunately, absent a sufficient preemployment background screening, that same employer runs the risk of exposing his or her organization to someone who could ultimately become the organization's greatest liability.

The guideline should also serve as an educational and practical tool that organizations can use as a resource in understanding the reasons for preemployment background screening, understanding the legal principles surrounding the issue of preemployment background screening, and assistance in developing policies and procedures that will enhance an organization's hiring policy.

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## **2. TERMINOLOGY**

The terms defined below are for the purposes of understanding their usage within this guideline.

**2.1 Adverse Action:** (FCRA § 603 (15 U.S.C. § 1681a)) In the context of background checks for employment, adverse action as stated in the FCRA, is “a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.” Adverse action is more than the denial of a job to an applicant or volunteer. It can also be the denial of a promotion or a change in job duties, location, hours, or title; anything that is considered unfavorable by the employee, applicant, or volunteer.

**2.2 Adverse Action Notice:** (FCRA § 615a (15 U.S.C. § 1681m)) This notice—which can be delivered orally, in writing, or electronically—is required in order to inform the consumer (job applicant, employee, or volunteer) that adverse action has been taken. The notice is required when the adverse action is, in whole or in part, a result of the consumer report provided by a consumer reporting agency. A letter or other notice informing the job applicant he or she has been denied employment is necessary when using the services of a consumer reporting agency and the employer is making an adverse employment decision on the basis of the consumer report provided by the consumer reporting agency. The notice must include:

- The name, address, and phone number of the Consumer Reporting Agency (CRA) that supplied the report;
- A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

The Adverse Action Notice must be preceded by a ‘*Pre-Adverse Action Notice*.’

**2.3 Arrest:** The taking or keeping of a person in custody by legal authority, especially in response to a criminal charge; specifically, the apprehension of someone for the purpose of securing the administration of the law, especially if bringing that person before a court.

**2.4 Background Screening:** An inquiry into the history and behaviors of an individual under consideration for employment, credit, access to sensitive assets (such as national defense information), and other reasons.

**2.5 Bankruptcy:** A statutory procedure by which a debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtor's assets for the benefit of creditors.

**2.6 Civil Records:** Official records related to civil cases—i.e., when one party sues another.

**2.7 Consumer Report:** FCRA § 603(d)(15 U.S.C. § 1681a)(1) provides that the term "consumer report" means any written, oral, or other communication of any information by a Consumer Reporting Agency (CRA) bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for" (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under §1681b.

**2.8 Consumer Reporting Agency (CRA):** FCRA § 603(f)(15 U.S.C. § 1681a) provides that the term "consumer reporting agency" means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

**2.9 Conviction:** The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty.

**2.10 Credit Bureau:** A Consumer Reporting Agency specifically involved in creating a consumer credit report. See also *Consumer Reporting Agency*.

**2.11 Credit Report:** A detailed report of an individual's credit history prepared by a credit bureau including: (1) personal data (current and previous addresses, Social Security Number, employment history); (2) summary of credit history (number and type of accounts that are past-due or in good standing); (3) detailed account information; (4) inquires into applicant's credit history (number and type of inquiries into applicant's credit report); (5) details of any accounts turned over to credit agency (such as information about liens or wages garnishments via federal, state, or county records); and (6) information on how to dispute any of the above information.

**2.12 Credit Reporting Agency:** See *Consumer Reporting Agency*.

**2.13 Criminal Records:** Official records related to criminal cases. A crime is an act or omission that is prosecuted in a criminal court by a government prosecutor and can be punished by confinement, fine, restitution, and/or forfeiture of certain civil rights.

**2.14 DD Form 214:** DD Form 214, Certificate of Release or Discharge from Active Duty. The term "DD-214" is often used generically to mean "separation papers" or "discharge papers." The DD Form 214 documents the primary occupational specialties, decorations, education, and the characterization of service. The DD Form 214 was issued to separate service members beginning in the 1950's. Prior to that time, a variety of service specific forms were issued to separating service members.

**2.15 Decision-Making:** The process of evaluating and judging information gathered and relating it to the specific requirements of the position for which the applicant is applying.

**2.16 Due Diligence:** The attention and care that a reasonable person exercises under the circumstances to avoid foreseeable harm to other persons or their property. Failure to make this effort may be considered negligence.

**2.17 Employment Verification:** The process of contacting an applicant's past employers to confirm items such as dates of employment, title, salary, and eligibility for rehire.

**2.18 Fair and Accurate Credit Transactions Act (FACTA):** The Fair and Accurate Credit Transaction Act of 2003, Pub. L. 108-159, 111 Stat. 1952 (FACTA), added new sections to the federal Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., (FCRA) intended primarily to help consumers fight the growing crime of identity theft. Accuracy, privacy, limits on information sharing, and new consumer rights to disclosure are included in FACTA.

**2.19 Fair Credit Reporting Act (FCRA):** The FCRA (15 U.S.C. 1681 et seq.) established specific requirements and rules that apply when an employer uses a third party, such as a background screening firm, to help conduct a preemployment background screen and generate a consumer report for the employer. The FCRA addresses the rights and obligations of four groups: 1) consumer reporting agencies; 2) users of consumer information; 3) furnishers of consumer information; and 4) consumers. The FCRA does not pertain only to credit reports but to the entire *consumer report*.

**2.20 Felony:** A serious crime typically punishable by imprisonment for more than one year or by death. Examples include burglary, arson, rape, and murder.

**2.21 Identifying Information:** Also referred to as Personally Identifiable Information (PII). Any name or number that may be used, alone or in conjunction with any other information, to identify a specific person, including:

1. Name, Social Security Number, date of birth, official State or government issued driver's license or identification number, alien registration number, government passport number, employer or taxpayer identification number;
2. Unique biometric data, such as fingerprint, voice print, retina or iris image, or other unique physical representation;
3. Unique electronic identification number, address, or routing code; or
4. Telecommunication identifying information or access device (as defined in 18 U.S.C. 1029(e)).

**2.22 Incarceration:** The act or process of confining someone; imprisonment.

**2.23 Investigative Consumer Report:** FCRA § 603(e)(15 U.S.C. § 1681a) provides that the term "investigative consumer report" means a *consumer report* or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information. However, such information shall not include specific factual information on a consumer's credit record obtained directly from a creditor of the consumer or from a *consumer reporting agency* when such information was obtained directly from a creditor of the consumer or from the consumer.

In other words, another official name for a special type of preemployment background screen which normally involves communicating with others that know the applicant and reporting back the details of those inquiries.

If information is obtained that is adverse to the interest of the consumer, then Section 606 of the FCRA sets forth additional requirements.

**2.24 Jail:** A local government's detention center where persons awaiting trial or those convicted of misdemeanors are confined.

**2.25 Judgment:** A court's final determination of the rights and obligations of the parties in a case.

**2.26 Lien:** A legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied.

**2.27 Misdemeanor:** A crime that is less serious than a felony and is typically punishable by fine, penalty, forfeiture, or confinement (usually for up to one year) in a place other than prison (such as county jail).

**2.28 Negligent Hiring:** The failure to use reasonable care in the employee selection process, resulting in harm caused to others. Employers have a legal duty not to hire people who could pose a threat of harm to others, which can include everything from slight to fatal bodily injury, theft, arson, or property damage. The definition of "reasonable care" depends on the degree of the risk of harm to others. The greater the risk, the higher the standard of care required.

**2.29 Pre-Adverse Action Notice:** FCRA § 604(b) (15 U.S.C. § 1681b) provides that anyone "using a consumer report for employment purposes, before taking any adverse action based in whole or in part on that report ..., shall provide to the consumer (i.e., the applicant) to whom the report relates: (i) a copy of the report; and (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under §1681g(c)(3) of this title.

This notice normally consists of a letter or other document informing the applicant (or employee) that the employer intends to take *Adverse Action* based upon a *Consumer Report* provided by a *Consumer Reporting Agency*. The statute requires the employer to furnish the consumer (job applicant or employee) with a description of their rights in the prescribed form entitled *A Summary of Your Rights Under the Fair Credit Reporting Act*. Before the adverse action is taken, a second and additional notice entitled the Adverse Action Notice (defined above) must be provided to the consumer within a reasonable period of time after the Pre-Adverse Action Notice is given. A prospective employer should determine what is a reasonable period of time based upon the facts and circumstances of each particular situation, and must consider affording the consumer the opportunity to receive and respond to the Pre-Adverse Action Notice. Accordingly, the time it takes to deliver the notice to the consumer must be considered. The FTC's staff counsel in a FTC Informal Staff Opinion Letter (Weisberg, June 27, 1997) responding to an inquiry regarding the amount of time that should elapse between the sending of the Pre-Adverse Action Notice and the subsequent Adverse Action wrote that a period of 5 days appeared reasonable.

**2.30 Prison:** A state or federal facility of confinement for convicted criminals, especially felons.

**2.31 Sensitive Personally Identifiable Information (SPII):** A term used in information security to identify a piece or pieces of information that can be associated with a unique individual and that can result in harm to the individual if misused. This term is often used to describe information that is can be used in identity theft. Information such as a Social Security Number, National ID number, or Driver's License number is considered SPII, since it is not readily or publically available, identifies a unique individual, and can result in harm if misused. Some information can result in harm (and is thus considered SPII) when it is found in conjunction with other pieces of data (such as a financial account number) in conjunction with other identifying information (such as a name). SPII requires strict handling guidelines as a result of the risk of misuse.

**2.32 Social Security Number:** A nine digit number resembling "123-00-1234" that is issued to an individual by the U.S. Social Security Administration. The original purpose of this number was to administer the Social Security program, but it has come to be used as a "primary key" (a *de facto* national ID number) for individuals within the United States. The nine-digit Social Security Number is divided into three parts.

The first three digits are the area number. Prior to 1973, the area number reflected the state in which an individual applied for a Social Security Number. Since 1973, the first three digits of a Social Security Number are determined by the ZIP code of the mailing address shown on the application for a Social Security Number. The middle two digits are the group number. They have no special geographic or data significance but merely serve to break the number into conveniently sized blocks for orderly issuance. The last four digits are serial numbers. They represent a straight numerical sequence of digits from 0001-9999 within the group.

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### **3. WHY CONDUCT PREEMPLOYMENT BACKGROUND SCREENING**

There are a number of reasons why an employer should perform preemployment background screening. The most compelling reasons are:

- *Making the best hiring decision:*
  - Gaining a competitive advantage.
  - Reducing turnover.
  - Increasing productivity.
  - Increasing morale.
  - Reducing risk of business disruptions.
  - Complying with mandates created by state or federal law for certain industries (health care, child care, etc.).
  - Fulfilling other legal or contractual obligations.
- *Providing a safe work environment and protecting the public:*
  - Protecting organization's assets (people, property, and information).

- Fostering peace of mind.
- Reducing risk of legal liabilities, including failure to perform due diligence, negligent hiring, and equitable treatment of applicant pool.

### ***3.1 Making the Best Hiring Decision***

It has been said that some applicants will only tell you what you want to hear. A good writer and storyteller can invent a good resume. The Society for Human Resource Management (SHRM) conducted two separate online surveys on resume inaccuracies. In August 2004, SHRM reported that 61% of the human resource (HR) professionals surveyed said they find inaccuracies in resumes after carrying out background checks. An April 2006 article in the *New York Times* reports that a study conducted by ResumeDoctor.com, a resume-writing service based in Burlington, Vt., found that 43% of the more than 1,100 resumes examined had one or more “significant inaccuracies,” while 13% had two or more. Michael Worthington, the co-founder of ResumeDoctor, said the most common transgressions could be found in three areas: 1) education; 2) job titles; and 3) dates of employment.

By thoroughly verifying information given during the employment process, a company can improve the chances they are hiring an individual who has portrayed his or her background, experience, and skills honestly and accurately. Using preemployment background screening to verify an applicant’s history helps employers make decisions based upon facts.

### ***3.2 Providing a Safe Work Environment and Protecting the Public***

An employer’s obligation to maintain a safe place to work also arises from the legal principles that exist in most states under common law (the body of law derived primarily from judicial decisions based on custom and precedent, rather than from statutes, codes, or constitutions). These legal principles include:

- Premises liability (the duty of a property owner to take responsible steps to guard against reasonably foreseeable violence).
- Respondent superior (an employer’s indirect liability for the wrongful acts of an employee committed within the course and scope of employment).
- Sexual and other forms of harassment prohibited under discrimination laws (when threats or violence are motivated by a victim’s protected status).
- A collection of negligence theories, including negligent hiring (the failure to properly screen job applicants, particularly for sensitive positions involving a high degree of interaction with the public), negligent supervision (the failure to supervise employees and to discipline violators of anti-violence rules), and negligent retention (the failure to terminate employees who have engaged in behavior in violation of company policies).<sup>1</sup>

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<sup>1</sup> See Speer, R. “Workplace Violence: A Legal Perspective.” *Clinics in Occupational and Environmental Medicine*, 3:733–749 (2003).

In the April, 2002 edition of Occupational Health and Safety magazine, attorney-at-law and author of *The Safe Hiring Manual*, Lester S. Rosen points out that the statistics on the consequences of even one bad hire are significant. Industry statistics suggest the cost of even one bad hiring decision can exceed \$100,000, taking into account the time spent recruiting, hiring, and training, and the amount of time the job is left undone or done badly by an unqualified applicant. In addition, the financial cost from theft, violence, etc., can be enormous. Additionally, there are other costs that are hard to measure, such as the harm to employee morale or the entity's reputation.

### **3.3 Legal Risks and Liabilities**

The value of an objective, fair, and competent preemployment background screening is that it will permit determination of facts not otherwise verifiable or known.<sup>2</sup> As such, employers should pay particular attention to the legal implications associated with the employment screening process. While employers do not have the duty to provide an impenetrable island of safety, every employer has the obligation and duty to take reasonable precautions against preventable harm to employees, customers, and anyone else visiting the workplace. Under the federal Occupational Safety and Health Act and corresponding state statutes, employers have a "general duty" to protect employees against "recognized hazards" that are likely to cause serious injury or death. Specifically:

#### **Section 5. Duties**

##### **(a) Each employer:**

- (1) Shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees;**
- (2) Shall comply with occupational safety and health standards promulgated under this Act.<sup>2</sup>**

Appropriate due diligence is necessary to ensure that the applicant hired does not pose a foreseeable risk to others with whom he or she might interact while on the job. The failure to properly screen out dangerous applicants may give rise to a negligent hiring claim, if the individual intentionally harms someone in the course of his or her employment.

Another legal risk arises from the inequitable treatment of individuals in the applicant pool. A properly crafted preemployment background screening program gives all applicants of equal qualifications equal consideration and does not impose disparate treatment on anyone or any group. Employers are encouraged to objectively evaluate each applicant. To the extent possible, objective methods should be used to determine each applicant's qualifications and suitability for the job. Such fairness not only

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<sup>2</sup> OSH Act of 1970, 29 USC 654, §5 (a)(1).