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DEVELOPING ILLINOIS' WORKFORCE

*Illinois Department of Commerce and Economic Opportunity*

## **Understanding Labor & Employment Law**

**APRIL 4, 2012--EMPLOYEE SCREENING & SELECTION**

**PRESENTED BY**



**HUMAN RESOURCES ATTORNEY & COUNSELOR  
LABOR & EMPLOYMENT LAW ON BEHALF OF MANAGEMENT**

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## **What's Appropriate to Ask Candidates If You're an Employer?**

There are many inquiries which might lead to the inference that the employer is discriminating against a member of a protected class. Because of the legal implications & potential liability attached to them, these same inquiries shouldn't be made via e-communication.

Always focus on the essential functions of the job. Essential job functions may be defined by a *valid* job description.

For all candidates:

- Ask the same questions;
- Use the same background checking processes;
- Use the same tests/assessments; &
- Score/assess the same way; i.e., don't adjust scoring/assessment system unless for a valid &/or legal purpose.

Concerning questions, it's generally okay to:

- Focus on questions related to the *essential job functions*. Put another way, are the questions asked intended to solicit information connected to the applicant's ability & willingness to perform the essential job functions, or are they more indicative of illegal bias?
  - It's usually not an essential function to be of a certain race, age, sex, sexual orientation, etc. Exceptions are extremely limited.
- Ask questions to determine reliability. Such questions include asking what hours & days the person can work, or specific days or times they can't work.
- Ask if the applicant is legally eligible to work in the U.S. or if they have ever worked under another name.
- Ask if they have ever been convicted of a crime. If they've been convicted, then you could also ask what, when & how the case was resolved. However, you should only be concerned with a criminal conviction if such information relates to essential job functions. Moreover, the date of conviction may be relevant depending on the magnitude of the crime.
  - Must get written permission to do a criminal background check.
- Ask behavior oriented questions. Again, ask all candidates the same questions.
- Ask what kind of education or degrees a candidate has & what schools they attended.
- Ask if an applicant meets the minimum age requirement to work.
- Relative to languages spoken, if the job requires language fluency, other than English, then you can ask if the applicant has that ability.
  - Don't ask about their native language.
- Ask if applicant has a problem with joining organizations, clubs, etc., that directly relate to ability to perform essential job functions; e.g., chambers of commerce or business groups.

Don't ask:

- About children, dependents, pregnancy or plans to start a family. If the candidate indicates that they're pregnant, then congratulate them, but don't relate pregnancy to the job unless some sort of accommodation is indicated.
- If the applicant owns or rents a car, unless the job requires having own transportation (e.g., sales or site visits).
- Questions to determine where the candidate is from; i.e., national origin.
- If the applicant has ever been arrested.
- If a candidate has any physical or mental disabilities. Also, don't ask if the applicant has any medical or behavioral problems, or if they're being treated for the same.
- If the applicant owns or rents a home
- If the candidate ever had wages garnished or if they've ever declared bankruptcy.
- About discharge from military service.
  - Can ask about the applicant's education, training & experience while in the military.
- What clubs, organizations, or societies they belong to, including fraternities or sororities.
- If they've filed for disability, worker's compensation, unemployment compensation or if they've ever sued or filed a complaint against a prior employer.
- About religious & ideological beliefs, associations or affiliations. *Possible exception:* if employer is a religious organization.
- Don't ask about gender or sexuality, including bisexuality, homosexuality or transgenderism.
- Don't ask about titles such as Mr., Mrs. & Ms.
- Previous residential addresses.
- DOB or when graduated college or high school; anything that has any bearing on age, ethnicity or socioeconomic class.

## Job Candidate Application & Selection Summary

Focus on the essential functions of the job. Essential job functions are usually defined by a valid job description. A valid job description is an accurate and simple description of the key & essential functions of the job.

For all candidates:

- Ask the same questions,
- Use the same background checking processes, use the same tests; &
- Score/assess the same way; i.e., don't adjust scoring/assessment system unless for a valid &/or legal purpose.

Don't discriminate in the hiring process on the basis of any protected class (see below), unless:

- mandated pursuant to a legally binding order or agreement, or
- you're doing so based on a "bona fide occupational qualification."

Can ask if candidate can perform the essential job functions with or without a reasonable accommodation.

- Reasonableness is generally contingent upon why needed, cost & feasibility.

Don't ask questions intended to elicit, or which unintentionally elicit, information regarding:

- race
- gender
- religious beliefs
- age
- sexual orientation
- disability
- military status
- socioeconomic status-own home, rent home, how will pay for home, education, etc.
- national origin.

Currently, it's popular to ask behavioral questions. These questions might be useful as they're generally nondiscriminatory, & they elicit performance & conduct related information.

Examples of such questions include:

- Describe a situation in which you & another coworker conflicted. What happened? How did you deal with the situation? How was the situation resolved?
- Describe a situation where your employer asked you to do something which you believe may have been unethical or unprofitable for the business? How did you handle this? What was the outcome?

Background Checking—Compliance with federal laws like the Fair Credit Reporting Act, Consumer Credit Protection Act & state law like the Illinois Uniform Conviction Information Act is contingent upon:

- disclosure of the background check;
- disclosure of the reason for background check;
- procurement of candidate or employee's written release(s)—could be more than 1 release depending on the checks conducted.

Also:

- subsequent to the selection process, if a candidate or employee is rejected as a result of the screen, then provide that person with the relevant part of the report & summary of rights/ recourse options.

Per the Illinois Criminal Identification Act you can't ask job applicants to disclose criminal convictions which have been expunged or sealed, & you can't ask if applicant has any expunged or sealed convictions & records.

Employment Testing:

- Make sure that the test is valid, reliable & used for the purpose(s) intended.

## **Employee Screening & Risk Assessment**

*Co-Authored by Tony Ramos & Charles Krugel*

Recent headlines of workplace violence have raised serious questions regarding employee screening programs.

- What is negligent hiring?
- Should all companies be expected to have a screening policy?
- Does every employee need to be screened?
- What is considered an acceptable screening program?
- How much should a company expect to pay for screening?
- What can it cost a company should they chose not to have a screening program?
- Are all screening companies alike?

*According to attorney Charles Krugel:*

Negligent hiring & negligent retention lawsuits are increasing, & so are employer expense & liability as a result of these suits. "According to a 2001 report by Public Personnel Management, employers have lost more than 79% of negligent hiring cases." Moreover, "average settlement of a negligent hiring lawsuit is nearly \$1 million." (Human Resources Management study; both above stats cited from ISO Review, Negligent Hiring: Employer Risk, <http://www.iso.com/Research-and-Analyses/ISO-Review/Negligent-Hiring-Employer-Risk.html>).

Underlying the idea of negligent hiring & retention is an employer's legal responsibility to provide employees, customers & the public a reasonably safe environment, & the liability imputed to employers when they fail to exercise reasonable care in providing such an environment. It's when this failure occurs that as an employer, your business, could be held liable for negligent hiring or retention.

Consequently, from a cost containment & legal liability perspective, it's increasingly crucial that businesses conduct criminal background checks, conduct such checks in a competent manner & take reasonable action as a result of these inquiries. This means that if an employer undertakes criminal background checking, in order to avoid legal liability, it should carefully choose who does the screening as well as what's searched.

Although, Illinois doesn't require many businesses to screen job candidates (most education & social service organizations are required to screen candidates), & the Illinois Human Rights Act mandates that an employer cannot use a candidate's "arrest record" as the basis for denial of employment (narrow exceptions exist), the possible liability resulting from a business' failure to screen can cripple that business. According to a 2001 report by the Society of Human Resources Management & American Background Information Services, Inc., the average settlement for negligent hiring lawsuits exceeds \$1.6 million.

Obviously, much of the burden falls on employers, with the guidance of competent legal counsel & screening professionals, to determine what constitutes a competent background search. Generally, this search is based upon the essential requirements of the position & the industry's particular circumstances.

Usually, courts don't examine why screening is done. The courts look at why the essential duties of the job, & the particulars of the business' industry, necessitate the need to screen out convicted criminals, & which types of crimes prevent a candidate from being hired. Therefore, just knowing that a job candidate has been convicted of a crime may not be enough to insulate your business from liability.

You'll probably need to know the exact nature of the conviction & connect it to the job.

In short, if you undertake criminal record checking, then choose a competent screener & screening method, check all candidates & employees, conduct the search in a good faith & reasonable manner, & use the results appropriately. As with all human resources related matters, in order to minimize expense & legal exposure, focus on prevention & proaction--research your screener & work with them to best determine what you need & why you need it.

### **Vendor Selection - Tony Ramos**

Selecting the wrong screening vendor can be equal to or more devastating than hiring the wrong employee. The wrong vendor can provide you with nothing more than a false sense of security.

Select a knowledgeable vendor who can clearly explain your screening options & their limitations. Typical choices include state, county court, national criminal databases & fingerprint searches. There are also choices of supplemental screening options which include driving record, credit reports, workers compensation, employment history, educational history & civil records as well. Your vendor can assist you in developing the right plan to match your needs.

### **Basic Program**

- **Vendor Selection**
  - Select a vendor who can demonstrate a **national hit rate of at least 10%**. Hit rate is the **most** effective way to determine the quality of the service. In short, for every 100 applicants screened, the vendor should be finding at least 10 with a criminal record. Don't be surprised if a vendor is hesitant or actually refuses to provide this information. Many operate with only a 6% or less hit-rate.
- **Social Security Trace**
  - This will help validate the number & provide up to 10 years of past residential history & names or aliases used.
- **County-court Record Search**
  - Counties to be searched should be selected based on the results of the trace & never from the job application. This will also provide you with the most accurate & current information available.
- **National Criminal Database Search**
  - For a more comprehensive program, include a national criminal database search. **Important note**, database findings must be verified by court records before acting upon them. Also, databases searches should only be used to supplement an actual court record search & not in place of.
- **FCRA (Fair Credit Reporting Act) Compliant**
  - Ensure your vendor is fully FCRA compliant, this will provide you with additional protective immunity against some civil lawsuits.
- **Cost**
  - While there are many factors such as volume & types of screening options selected which determine the actual cost, one can expect to pay \$20 to \$35 per person.

Co-Author: Tony Ramos, [tramos@integrasecurity.org](mailto:tramos@integrasecurity.org), has also authored "The Guide to Background Checks" which he developed for the Illinois Association of Chiefs of Police & is available for download from his web-site at [www.integrasecurity.org](http://www.integrasecurity.org)

**FEDERAL, STATE & LOCAL SCREENING & PRIVACY LAWS  
THAT MIGHT BE ENCOUNTERED IN THE WORKPLACE BY EMPLOYERS**

<b>Act/Law</b>	<b>Coverage</b>	<b>Basic Requirements</b>	<b>Damages/Penalties</b>
Federal Trade Commission Act	All employers; except financial services	Ancillary effect in employment due to other laws enforced by Federal Trade Commission; gives FTC & Congress authority over U.S. commerce/trade issues; establishes fair trade & commerce requirements	Nominal fines up to \$5k/violation; cease & desist orders; compliance monitoring/reporting; imprisonment for criminal acts
Fair Credit Reporting Act (FCRA; federal)	All employers who use 3 <sup>rd</sup> party background checking services (not done internally; "consumer reporting agencies"); some aspects are excepted for certain financial services	Limited use of consumer/credit reports for employment decisions; prior to employment, must make written disclosure & obtain written authorization from candidate; before adverse action taken, must provide candidate with the report & summary of their rights	Actual/compensatory damages, attorney's fees & costs, punitive damages; \$3.5k fine/violation; criminal penalties, for willful & knowing violations, including imprisonment up to 2 years
Fair & Accurate Credit Transactions Act of 2003 (FACTA; amended 2009)	All employers except certain financial services (banks, etc.)	Amendment to the FCRA; notification & transparency rules regarding use of credit reports & other background checking (except criminal)	Actual/compensatory damages; attorney's fees & costs; fines (\$3.5k/violation); compliance reporting/monitoring; criminal penalties, for willful & knowing violations; maybe imprisonment?
Federal civil rights acts such as Title VII, ADA, pregnancy, etc.	Most employers	Can't discriminate on basis of protected class such as race, gender, national origin, religion, age, disability, socio-economic status, military status, color, etc.	May include punitive damages; back pay, front pay, raises; equitable relief such as being hired or promoted; affirmative action compliance monitoring/reporting
Employee Polygraph Protection Act (federal)	Most private employers; except government & businesses handling controlled substances or security companies; other narrow exceptions for theft or mismanagement	Can't use lie detector tests for preemployment screening or during the course of employment	Hiring, reinstatement, promotion, lost pay, benefits & civil penalties up to \$10k
Health Insurance Portability and Accountability Act of 1996 (HIPPA); <i>Privacy Rule</i> ; & <i>Security Rule</i> —deals specifically with Electronic Protected Health Information (EPHI)	"Covered entities" (generally, health care clearinghouses, employer sponsored health plans, health insurers, & medical providers)	Regulates use & disclosure of information; establishes regulations for the use & disclosure of Protected Health Information (PHI); PHI is any information held by a covered entity which concerns health status, provision of health care, or payment for health care that can be linked to an individual	<i>Enforcement Rule</i> sets civil money penalties; imprisonment for fraud
Electronic Communications Privacy Act of 1986 (amends the Wiretap Act)	Everyone	Gives citizens civil cause of action for intercepted or attempts to intercept electronic communications; key EXCEPTION for "ordinary course of business" (protects employers)	Damages (including punitives), injunctive relief, attorney's fees & costs
Federal & State Labor Relations Laws	All business, entities, government, etc.	Provides protection for concerted/collective actions & activities	Civil, injunctive, equitable

Act/Law	Coverage	Basic Requirements	Damages/Penalties
Family Educational Rights & Privacy Act (federal; FERPA)	All schools that receive fed funds (Dept. of Education)	Generally, schools can only disclose non-identification related info., like grades & disciplinary records, with prior consent of student/alum. Must permit corrections to errors. Narrow exceptions exist for criminal acts, terrorism, drugs	Vague; government may cut funding to offending school/system
Privacy Act and the Freedom of Information Act (federal)	Applies to military records. Operates much like FERPA above	Prevents disclosure of military records without proper authorization	Permits lawsuit against offending agency; equitable relief, fees & costs; actual & quantified damages; criminal penalty of misdemeanor & max \$5k fine
State & local criminal identification laws (IL Criminal Identification Act)	All employers, except many law enforcement or prosecutorial agencies	Expunged or sealed criminal records can't be used; job applications must state applicant isn't obligated to disclose sealed or expunged convictions or arrests; can't ask if an applicant has expunged or sealed records	Penalties are varied & may include monetary damages, equitable relief such as promotion or hiring & injunctions against future acts
Employment records or files disclosure acts (IL Employment Record Disclosure Act)	All employers	Employer providing a job reference to a prospective employer has civil immunity if it gives truthful & only job performance information	Costs, attorneys fees, damages
Human rights acts (IL Human Rights Act, municipal human rights ordinances/acts)	All employers	It's illegal to discriminate on basis of protected class such as race, gender, national origin, religion, sexual orientation/sexuality, age, disability, socio-economic status, military status, color, arrest record, etc. Increasing no. are including sexual orientation/preference	Monetary damages, equitable relief such as being hired or promoted, injunctive relief
Criminal Conviction Information Acts (IL)	All employers	If conducting criminal background checks for employment purposes, must obtain applicant's express approval & maintain on file for a specified number of years.  Can't ask applicants to disclose criminal convictions which have been expunged or sealed. Also, can't ask if they have any expunged or sealed records.	Fines, actual & general compensatory damages, attorney's fees & costs. Criminal penalties in certain circumstances
Right to Privacy Acts (IL Right to Privacy in the Workplace Act)	All employers, except some nonprofits	Can't discriminate for lawful activities outside of work; no inquiry of employee or prior employers whether employee has previously filed a worker's compensation claim or occupational disease claim	Fines, actual damages, costs & fees awardable
Common Law, Contracts & State Communications Laws	Application, enforcement & penalties depends on state & jurisdiction		

## **A PERSONAL STATEMENT FROM CHARLES KRUGEL**

### **Practice & Background Summary): [www.charlesakrugel.com](http://www.charlesakrugel.com)**

As a management side labor & employment attorney & human resources (HR) counselor, I have more than 17 years of experience in the field & have been running my own practice for 10-plus years; [www.charlesakrugel.com](http://www.charlesakrugel.com).

My clients are small to medium sized companies in a variety of industries. Besides providing traditional



labor & employment law services, I represent companies desiring to institute preventive & proactive HR functions. These functions include policies & procedures, which help to efficiently & discreetly resolve issues in-house & prevent lawsuits & complaints; they also help to reduce costs & act as catalysts for increasing productivity & profits.

Regarding results, I have negotiated more than 100 labor & employment agreements & contracts, including noncompete & severance/separation agreements, collective bargaining & related labor agreements. Also, I have argued more than 11 arbitrations, 13 mediations & 39 agency cases/complaints & have resolved 100-plus labor grievances & similar in-house complaints & completed over 100 in-house investigations.

My career choice is the result of a long running fascination with workplace behavior, management styles, & how & why people pursue particular vocations. While in college, I advanced my interest by majoring in psychology. After college, I pursued graduate study in industrial/organizational (I/O) psychology with the thought of being an I/O consultant. During my first year of graduate school, I realized that the practice of I/O psychology was too "touchy feely" for me. Consequently, I decided that once I earned my masters degree in I/O psychology, I would attend law school.

I earned my law degree (Juris Doctorate) from Ohio Northern University. My MA degree in I/O psychology is from the University of North Carolina at Charlotte. My BS degree in psychology is from Bradley University. During law & graduate schools, I was a graduate student representative for each school's university senate. During college, I was a rush chairman & executive board member for my fraternity.

Regarding civic & association involvement, I'm on the following boards of directors:

- Member of the Young Professionals Board of the Chicago Bar Foundation, the charitable arm of the Chicago Bar Association;
- 2010-2012 Vice Chair of the Board of Directors for the GOA;
- Board Chairman for the YMCA Alliance, the workforce development arm of the YMCA's of Metropolitan Chicago;
- Member of the Board of Directors for ChildServ, a 100-plus year old child & family advocacy, housing & adoption organization.
- Member of the Board of Directors for The Lakeside Community Committee, a 45 year old child & family advocacy, housing & adoption agency; &
- Member of the Board of Directors for Youth Outreach Services, a 50+ year old teen advocacy, housing & direct service organization in Chicago.
- Member of the Board of Directors for the Small Business Advocacy Council

Finally, some personal background information. I'm a native Chicagoan. Born & raised in West Rogers Park. I graduated from Rogers Public School. For high school, I graduated from Nilus North in Skokie. It was during childhood that I was indoctrinated into the ways of business, self-employment & entrepreneurship. My father owned & ran his own chain of pharmacies in Chicago for 35 years. My grandfather was an immigrant businessman who owned his own grocery stores in Chicago. Family taught me the value of hard work & how to compete & succeed in business.