



GRAY REED

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Background Checks

Who, What, Why . . .

Who does it apply to: Any employer interested in protecting their business from the potential consequences of not doing background checks and some employers who are otherwise required to perform checks.

What kind of checks are there: At first, you might just think of the basic criminal background check and verifying references, but there are many types of checks to consider:

- *Litigation\Bankruptcy:* Does the person have a propensity to sue, and if so, for what, discrimination? Should the person be handling your money if they have filed bankruptcy before?
- *Education Verification:* How many stories are there about people who do not have the degree they claim? Universities regularly get requests of this type. For their own protection, the schools often require written consent.
- *Military History:* What kind of a soldier were they? What were the circumstances of their discharge?
- *Drivers License:* Is this person going to drive one of your vehicles? Might they ever drive for work purposes in their own car? What if they have a bad history and get into a wreck? How will that be used against your business in court?
- *Drug Tests:* Do you want to put a worker out there who takes cocaine on the weekends?
- *Licensing Boards:* If the employee is licensed, like an attorney, have there been any complaints? How were they resolved? Boards that are government affiliated usually will provide information without a written consent, but it is worthwhile to have one ready.
- *“Googling”:* I guess it is a verb now. What does the person’s internet persona look like? Are they the author of a blog that your clients might not appreciate?
- *Social Media Reviews:* What have they posted on Facebook? Twitter? What kinds of pictures do they post on Flickr?
- *Credit Check:* Can your employee handle their finances? If not, what does that say about their ability to manage your money? What distractions might money trouble bring?

Will I need consent: Under the Fair Credit Reporting Act, consent is required for criminal and credit background checks. The military will not provide service records without consent. Universities vary. Some will provide a date of graduation and

degree earned without consent, but transcripts are almost never provided without written consent. Always obtain a written consent for drug testing regardless of whether it is required because it is an invasion of privacy.

What can I do to get better responses on references: I advise employers not to give references. There is no upside and the downside may be getting sued by a former employee. So, what can you do to pull some extra information out of a tight-lipped employer? Obtain a release from the applicant for the benefit of his or her former employers. You can also pass along a copy of Texas Civil Practice and Remedies Code Chapter 103, which provides immunity to employers who provide references as long as they don’t say anything maliciously false.

Are there problems with internet searches: Finding what is said about a prospect can be helpful, but it is fraught with peril. While searching, you may find your applicant listed as a deacon for their church. Without intending to do so, you just asked the question about your applicant’s religion. There are companies that do a better job than just “googling” to gather an applicant’s internet persona and they sanitize the results of any protected class information to avoid you learning things you would rather not.

How can I access an applicant’s social media sites: Some people post their entire lives on Facebook or tweet everything that goes on. This creates a huge body of semi-public information about the person you might prefer your clients not see. For this reason, many employers are asking applicants to provide passwords so they can review what the employee has posted. To combat this, Facebook has instituted a rule that members cannot give out their password. While the rule is of no consequence to you, it does not send the right message to ask a prospective employee to violate their agreement with Facebook.

There is a way, however, for an applicant to print out everything they have posted in the last few years so you can examine it. The problem with this approach is the same as “googling,” but avoids the fuss over passwords.

Are there special rules for certain checks: Yes. If credit or criminal history is used to make a hiring decision, the employer must provide a copy of the report along with a written note to

the applicant explaining the effect. Also, there are requirements to correct erroneous addresses with the reporting credit companies. If you receive a letter from the credit reporting company regarding an incorrect address, you must confirm the address (check with your lawyer – the rules are specific on how) and report back to the credit agency.

What are the limitations on criminal background checks: In Texas, background companies are not permitted to provide criminal histories going back further than seven years unless the annual salary is expected to be over \$75,000.00. Many out-of-state companies ignore this rule. Doing so is a violation of Texas law for them, but not the employer. That said, I encourage employers not to use information over seven years to avoid the possibility of a claim they conspired with the background company. Also, be sure to review our prior EH edition on discriminatory use of criminal checks.

Common Situations:

It won't happen to me: Data Entry, Inc. hires Mary to – wait for it – enter data. The company conducted a thorough background check of Mary's criminal and credit histories and contacted all of her former employers. One Friday afternoon, the server goes down and someone from Data Entry has to run over to the IT company to pick up a part. Data Entry sends Mary and instructs her to hurry because there is a deadline looming on a project. Mary jumps in her car and promptly runs a red light trying to get there quickly. In the process, she runs down 10-year old Johnnie, turning him into a quadriplegic. During the deposition of Data Entry's president, the lawyer for young Johnnie hands over a copy of Mary's horrific driving record and asks the president to explain why they let Mary run the errand. Simply put, the cost of a driving record check would have been much less than the \$25 million a jury will award Johnnie.

No addicts on my payroll: Devin at Weed Removers, Inc. isn't going to have any druggies on his payroll. He tests all of his applicants for all possible illegal drugs. Rod applies for a job and signs a consent to be tested. The test comes back positive for prescription pain medicine. Devin rejects Rod and says he ought to get some help. Instead of going for help, Rod runs down to the nearest EEOC office to file a claim under the Americans with Disabilities Act. Has Devin done wrong? Unfortunately, yes. As it happens, Rod has a back injury and Devin's failure to meet the requirements for a post-offer of employment health screening has just violated the ADA.

It's the Delivery Man: Rick's Remodeling regularly sends crews into residential homes to handle projects. One of Rick's employees becomes upset with a customer and starts a fist fight. The customer is injured and sues for damages. Is Rick liable? Maybe not. Texas law provides a certain level of immunity for business owners who run background checks on employees who perform in-home services or residential delivery and set-up services. There are many different types of businesses where background checks are required or beneficial: banking, nursing, nursing homes, and childcare facilities just to name a few. Be sure you are compliant with the law for your type of business.

What should I do:

Good: Make at least the kind of background checks that protect you from liability to others: driving record, basic educational confirmation, criminal history, and possibly a drug test. Get written consent for the tests or you may become liable to the applicant.

Better: All of the above, plus the additional checks listed with the exception of "googling." Always get a consent for all types of tests.

Best: Good and Better, plus, invest in a background check that covers all the bases and sanitizes results for information about protected classes.



Michael Kelsheimer focuses his practice on the employment law needs of Texas businesses and executive employees. He recognizes that the cost and expense of litigation make resolving employment disputes challenging. To help avoid these concerns, he utilizes his experience in and out of the courtroom to prevent or quickly resolve employment disputes through proactive employer planning and timely advice. When a dispute cannot be avoided, Michael relies upon his prior experience as a briefing attorney for the United States District Court and his extensive experience in employment and commercial lawsuits to secure favorable resolutions for his clients.

This guide is one in a series. For more information, or to receive the entire collection contact Michael Kelsheimer by email at mkelsheimer@grayreed.com or by phone at **469.320.6063**