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*Compliant Pre-Employment Screening:*  
**Creating a Safer Workplace**



# Introduction

**W**hat if an employer fails to conduct appropriate background checks on its applicants? What if an employer examines a job candidate's background using a screening process that does not comply with federal and state laws and guidelines? What penalties might government authorities assess? What recourse does the job candidate have?

The pressure to avoid making a bad hire places a huge burden on hiring managers. Statistics show that bad hires measurably contribute to the level of risk and danger in the workplace. The U.S. Department of Labor acknowledges, "Violence in the workplace is a serious safety and health issue. In its most extreme form, homicide is the fourth-leading cause of fatal occupational injuries in the United States."<sup>1</sup> A security source adds, "In an average week in U.S. workplaces, one employee is killed and at least 25 are seriously injured in violent assaults by current or former co-workers."<sup>2</sup>

Workplace violence comes with a significant price tag. A provider of employee health solutions estimates, "The yearly cost of violence in the workplace in the United States amounts to \$35.4 billion."<sup>3</sup> Included in this number are estimated expenditures for lost work time, lost

productivity, higher workers' compensation payments, medical bills, liability exposure, and legal fees.

However, *physical violence* is *not* the only way a bad hire can harm an organization. Some can damage or destroy a business in a much less violent, albeit still very pernicious way. For example, The National Institute on Drug Abuse (NIDA) observes, "Nearly 75 percent of all adult illicit drug users are employed, as are most binge and heavy alcohol users."<sup>4</sup> What is the significance of this statistic to employers? These substance abusers, the NIDA adds, are more likely to "be less productive employees, be involved in a workplace accident, [and] file a workers' compensation claim."<sup>5</sup> Add to this the 2010 National Retail Federation's Security Survey that highlights employee theft – at 43 percent – as the leading reason for merchandise losses – even exceeding all losses incurred from customer shoplifting.<sup>6</sup>

While these statistics may rightly be a serious concern for an employer, they should never be the pretext for suspending due diligence and bypassing a compliant screening and selection solution, as an *indispensable component of the hiring process*.



## This White Paper...

1. Surveys the latest Screening and Selection Index (using aggregate data) from completed background checks performed annually by ADP<sup>7</sup>;
2. Examines how employers can place themselves – and their workplace – at greater risk by handling pre-employment screening tasks with manual or any other methods that do not meet federal and state compliance thresholds;
3. Demonstrates how outsourced pre-employment background screening solutions can help employers mitigate the risk of making a bad hire and fulfill their legal obligations under the federal Fair Credit Reporting Act (FCRA), other federal laws and regulations, as well as applicable state laws; and
4. Presents straightforward steps that contribute to a compliant background screening process.

# Latest Benchmark Screening and Selection Statistics

**ADP's Screening Index** charts hiring risks in the workplace and helps employers assess the value of their own background screening programs.

The 2010 Screening Index, based on more than **6.5 million individual background checks** completed by ADP® in the 2010 calendar year – nearly a million more than in 2009 – revealed:



**46%** of **employment, education and / or reference** checks showed a difference in information between what the applicant provided and what the source reported.



**45%** of **credit records** showed a judgment, lien, bankruptcy, or referral to a collection agency. This is an increase of 1% over 2009.



**36%** of **driving records** showed "one or more violations or convictions."



**6%** of **criminal background checks** revealed a criminal record within the last seven years – with 24% of those having two or more adverse records. This is an increase of 2% over 2009.<sup>8</sup>



**9%** of **background checks** disclosed some form of adverse record (such as a criminal history, credit or driving records, etc.)



**6%** of background checks revealed a **previous worker's compensation claim**.

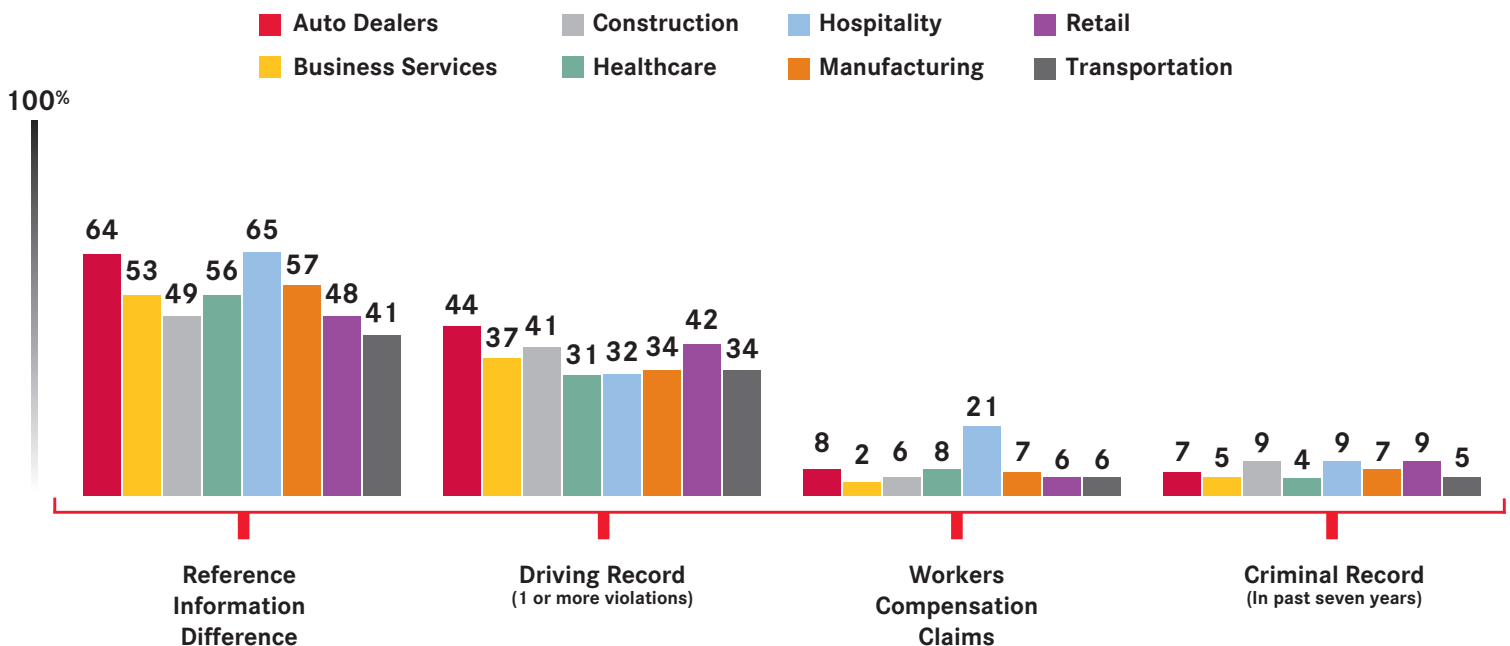
**A** review of background checks across eight industries – automotive, business services, construction, healthcare, hospitality, manufacturing, retail, and transportation – provides a number of significant vertical observations.

- Business Services industry screened records had the lowest number of previous workers' compensation claims (2%) and negative reference responses (1%).
- Automotive dealers continued to have the highest percentage of driver records showing one or more violations (44%) and four or more violations (9%), year over year.
- Hospitality (65%) and Automotive dealer (64%) records had the highest percentage of reference checks reflecting variances between what an applicant provided and what a source reported.
- Transportation industry records continued to reflect the most accurate reference data.

- Construction, Hospitality, and Retail had the highest percentage of records that reflected a criminal record in the last seven years (each 9%, respectively), while the Healthcare industry had the lowest rate at 4%, and Business Services and Transportation records, each 5%, respectively. All of these were unchanged from the 2009 Index.

The ADP Screening Index also examined records by employer head count. This revealed that screened records for companies with head counts of 1,000+ employees are among the highest for personal reference information variances (46%). However, the under 50-employee segment recorded twice the number of previous workers' compensation claims than records in the 1,000+ tier. The highest percentage of prior criminal records (7%) was in the 50-999 employee segment, while the under-50 employee grouping had lowest (4%).

## Background Checks Across Industries



**As in the two previous years, 2008 and 2009, one of the most significant sets of statistics in the 2010 Index applies to criminal background checks. Since ADP began publishing its annual screening index in 1997, the average number of screens that have shown a past criminal background has remained comparatively constant over the years at about 6%.**

While the screening index does not examine *why* this statistic has remained relatively constant, the percentage provides a message of significant relevance for employers and hiring managers. The threat of making a bad hire is chronic. However, not staying abreast of current screening laws and regulations can mean serious trouble that simply arrives from a different direction.

### ***The Role of the Fair Credit Reporting Act (FCRA)***

The Fair Credit Reporting Act (which went into effect April 25, 1971) was a key component of the federal Consumer Credit Protection Act. The FCRA regulates the activities of consumer reporting agencies, employers, and others who utilize consumer reports. The FCRA also guarantees specified rights to individuals concerning background screening and other forms of consumer reports.



# Federal and State Laws Govern the Screening Process

**P**re-employment screening is a highly regulated practice that is governed by laws that restrict the information that a Consumer Reporting Agency (CRA) can report *and* what information an employer can use in a hiring decision. In fact, a number of laws restrict the use of certain information at the federal *and* state levels.

Enacted over 40 years ago, the Fair Credit Reporting Act (FCRA) – enforced by the Federal Trade Commission – is the primary federal law that protects privacy and promotes fairness and accuracy concerning personal information collected and reported by CRAs. Significant amendments to the FCRA, passed into law in 1996 and 2003, added to the rights of job candidates while increasing the legal burden of employers that utilize consumer reports for pre-employment screening.

The various amendments ensured, among other things, that individuals had to consent in writing before consumer reports could be used as a pre-employment screening tool; would receive prompt notification if

consumer report information might result in an adverse employment decision by a prospective employer; and could request free copies of their reports. In addition, there is a thirty-day deadline on a consumer reporting agency's reinvestigation of information disputed by a consumer.

Over the years, twenty states have enacted their own forms of FCRA legislation, in many cases, broadening and deepening individual consumer protections – and expanding the footprint of new employer compliance requirements. For instance, “The California law is broader in scope than the federal FCRA. It covers third-party employment screeners, as does the FCRA. But it also covers employers who conduct background checks themselves, something the FCRA omits.”<sup>9</sup> For example, under California's law, individuals have the right to request a copy of the public record information obtained by the prospective employer, even when that employer conducts the background search in-house.

## *State Versions of FCRA*

Twenty states have laws on their books that arguably place more restrictions than the FCRA on reporting requirements: Arizona, California, Colorado, Georgia, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Rhode Island, Texas, and Washington.

# Noncompliance Comes With Risk – and Costs That Could Have Been Avoided

**Inadequate or nonexistent screening procedures** can lead to costly problems for an employer. First, there is the prospect of fines and penalties from the government. An employer opens the door to significant liability by failing to obtain a job applicant's permission prior to requesting a consumer report, or not following regulations that govern adverse action disclosures, such as notices to job applicants who do not receive a job offer based on the consumer report.

While the maximum civil penalty (Section 15 U.S.C. § 1681s of the FCRA) for a knowing violation of the FCRA is \$2,500 per violation, the impact of noncompliance affecting multiple employees can quickly add up. Among other successful FTC actions, in 2009 two freight service companies agreed to pay a combined \$77,000 in fines for firing workers and rejecting job applicants based on background checks without informing them of their rights under the FCRA.<sup>10</sup> State consumer protection agencies have also successfully sued employers for civil penalties due to noncompliance.

In addition to costly adverse actions from federal and state consumer protection agencies for regulatory noncompliance, employers can also face the legal peril of financially damaging lawsuits brought by job candidates, hired workers, and their families.

The FCRA allows individuals to sue employers for damages in federal court to recover actual damages, court costs and reasonable legal fees, and seek punitive damages for willful violations.

Also on the rise are *class action lawsuits*. Unlike single-plaintiff litigation, "Class actions are litigation by proxy, in which an individual plaintiff brings a lawsuit on behalf of a group or 'class' of people who have all suffered the same injury...If the plaintiff prevails, then the defendant is liable for the damages suffered by the entire class, not just the individual bringing the lawsuit. Thus, the larger the class the larger the defendant's exposure."<sup>11</sup>

In March 2011, a federal court gave preliminary approval to a \$5.9 million class settlement in *Hunter, et al v. First Transit*, where plaintiffs alleged their prospective employer failed to notify them of job applicant disclosures before performing a background check and did not take the two-step process for adverse action after denying employment based upon the screening results. Preliminary approval covers more than 143,000 class members.<sup>12</sup>

Noncompliant – or nonexistent – pre-employment screening practices can also result in *negligent hiring* lawsuits. "In one negligent hiring case filed against a non-profit corporation, the plaintiff rejected a settlement offer of \$500,000. The jury verdict was \$5 million."<sup>13</sup>



# In-House Screening May Pose Risks

## **Is any type of pre-employment screening better than no process at all?**

While in-house screening methods that rely heavily on human activities could help uncover some information on job candidates, such methods could be just as damaging as having no screening solution in place, if the screeners do not follow a consistent screening policy or do not comply with all applicable laws. The result of an inconsistent, non-compliant approach can be that bad hires enter the workplace and regulatory compliance remains an open liability.

Handling background screening internally can prove challenging for many employers. Access to data can be limited and slow. Tasks can be missed. Consistent application of rules is almost impossible. Every piece of paper, every manual file stacked on a desk or stored in a filing cabinet is a potential compromise of data security that is waiting to happen. Moreover, in-house screeners may not have the training or expertise to consistently manage screening assignments that are accurate, complete, and legal. The tasks and challenges can be daunting:

- Most candidate background information is not available from national databases but from state and county records.
- Much of the information from court records is not automated. This increases the possibility that vital negative information can be overlooked.
- Background screening requirements vary from state to state, opening the door to unintentional mishandling of a candidate's personal data and compliance problems.
- Laws and regulations relating to the collection, storage, security, and management of personal data are subject to change.
- Inconsistent internal screening policies may not sufficiently protect employers from negligent hiring lawsuits and potential bias charges, because policy application varies from individual to individual.

# Outsourced, Compliant Background Checks Help Reduce Hiring Risks

**T**ypically, background screening providers offer automated background check solutions designed for speed, accuracy, and heightened compliance. Auto-populated forms, electronic tracking of applications, and file sharing can help lower the administrative costs associated with the hiring process. Proper screening of candidates can also help mitigate future liabilities such as workplace violence and employee theft.

These solutions often interface with multiple databases to help perform a thorough background check, enabling employers to acquire pertinent information about a candidate, including, for example, screens of the following:

<b>Social Security Number (SSN) Validation</b>	Validates the accuracy of the information that an applicant has supplied.
<b>Address Verification</b>	Provides current and past residence information associated with a candidate to help determine which state or county criminal court records should be searched.
<b>Criminal Court Record</b>	Searches criminal records in requested jurisdictions, such as states and counties where the candidate has lived.
<b>Reference Check</b>	Verifies the information on a candidate's written or posted résumé or application, such as education, employment, or personal references.
<b>Driving Record</b>	Highlights traffic violations and convictions associated with the candidate's driver's license – vital information if a new hire will be driving a company vehicle as part of his/her job.
<b>Workers' Compensation Claims</b>	Reports a candidate's past claims as permitted by law.

# Would Your Company Benefit From An Outsourced, Compliant Screening Process?

**C**an you improve workplace safety, and make policies and processes more compliant, by utilizing a third party to manage background screening? If after reading this white paper you still are not sure, consider these questions:

- 1** Do we have a background screening process – and is it compliant?
- 2** Do we have the expertise and resources to ensure our screening process remains in compliance with federal and state laws?
- 3** Am I fully confident that our screening process maximizes our ability to identify a potentially bad hire?
- 4** Do our existing background screening procedures put our organization at risk with either government authorities or a rejected job candidate?

If you responded “no” to just one of these questions, your organization might well be a candidate for an outsourced background screening solution that helps you focus on compliance at both the federal and state levels. Responding “no” to more than one question increases the possibility that you can benefit from an outsourced solution.

# Screening Involves Significant Tasks

**B**efore comparing the benefits of in-house ownership versus outsourcing screening options, first examine the crucial tasks that need to be accomplished in an accurate and consistent manner. Here are key questions to consider:

- What background data sources should you select?
- Is there a fee for accessing each data source?
- How much time will it take to access the data?
- Who on your internal staff will handle the information?
- Should they have a special security clearance?
- How will they be trained on proper access and handling procedures?
- Who will do the training?
- Should the trainer have a special security clearance?
- Is there a need for dedicated hardware and software to manage pre-employment screening data?
- Who maintains the system and software?
- Who is responsible for system security?
- Who monitors applicable laws regulatory changes concerning access to job seeker / job candidate information and use of background checks in hiring decisions?
- What safeguards must you put in place to secure candidate data?



# In-House vs. Outsourced Screening

## In-House

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Some employers prefer total control and ownership of business functions; however, exclusive ownership presents significant risks. For one thing, if you utilize manual or semi-manual processes, they rely too heavily on human touch points. This invites inconsistency, unintended bias, and any consequential regulatory compliance issues.

Even if your organization's approach to pre-employment screening is automated, can you afford to commit head count to developing, managing, maintaining, and upgrading internal systems that support a non-core business need?

## Outsourced

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If your organization prefers *minimal investment in hardware, software, and staffing* to support non-core business functions, you are more likely to favor an outsourced screening solution. Purchasing a service that manages the screening process for you helps you avoid the complete burden of system maintenance, upgrading, and overhead costs.

In many service arrangements, the burden of system ownership – handling system operation and security, making technology changes, and keeping abreast of compliance updates – belongs to the service provider. Each service user typically pays a monthly subscription or a per-candidate fee.

Some service providers host outsourced applications for clients. The hosted model enables clients to access data from the service provider's secure data facility. Hosting mitigates or eliminates the need for client IT resources to support the service provider's applications.

# A Handy Checklist for a Compliant Screening Process

**B**y choosing to utilize the expertise of a third-party background screening company, you can easily implement the following best practices to facilitate your FCRA compliance:

## **BEFORE ORDERING BACKGROUND CHECKS ON A CANDIDATE:**

### **Background Check Disclosure and Authorization Form**

- Provide the candidate with a written notice that you will be obtaining a consumer report (background check report) on him or her for employment purposes;
- Have the candidate sign and date a written authorization form in which the candidate consents to the background check;
- Keep the originals of the disclosure and signed authorization form in a secure file separate from your personnel files for a minimum of five (5), even if you do not hire the candidate; and
- Provide the candidate with a copy of the disclosure and signed authorization form.

### **Summary of Applicant Rights**

- Provide the candidate with a copy of the Federal Trade Commission ("FTC") document called "A Summary of Your Rights Under the Fair Credit Reporting Act" at the time that you provide the Background Check Disclosure and Authorization Form.
- New York: Employers considering candidates who reside in or will work in New York should provide candidates with a copy of New York Correction Law Article 23-A.
- California: Employers considering candidates who reside in or will work in California should provide candidates with a copy of California's Summary of Rights.

## **BEFORE REJECTING A CANDIDATE:**

### **Adverse Action**

If you are considering denying employment based in whole or in part on the content of a background check report, the FCRA requires the following:

### **Pre-adverse action notice:**

- Send the candidate a pre-adverse action letter notifying him or her that you intend to take adverse action based on the information in his or her background check report;
- Include a copy of the background check report with the pre-adverse action letter;
- Include the FTC's "A Summary of Your Rights Under the FCRA" with the pre-adverse action notice (California employers must include a copy of California's Summary of Rights form and New York employers must provide a copy of New York Correction Law Article 23-A); and
- Provide the candidate with a reasonable period of time to explain the information in the report or to dispute the accuracy of the reported information.

### **Adverse action notice:**

- If, after a reasonable period of time, you still wish to deny employment based on a candidate's background check results, you must send him or her an adverse action letter.

To simplify this process, ADP Screening and Selection Services offers an adverse action service whereby ADP service experts will send the necessary applicant letters, background check results, and summaries of rights to your candidates on your behalf, when you place an adverse action order.

# Conclusion and Take-Home Points

**H**ere is a brief recap of key points that you should take away from reading this white paper:

- Based upon background screening that ADP does for its clients each year, nearly one out of ten background checks ordered contained some form of adverse information.
- Approximately 6% of criminal background checks revealed a criminal record within the last seven years – with 24% of those having two or more adverse records.
- Federal and state laws govern the pre-employment screening process in the United States.
- Pre-employment screening compliance helps employers avoid unnecessary risk and associated expenses.
- Many employers do not know, or do not follow, compliant screening requirements.
- Negligent hiring, wrongful death, class actions, and other plaintiff lawsuits stemming from inadequate pre-employment screening involve significant costs in judgments, legal fees and, and a negative effect on a company's reputation.
- Outsourced pre-employment background screening solutions can help employers mitigate the risk of making a bad hire and fulfill their legal obligations under the federal Fair Credit Reporting Act (FCRA), other federal laws and regulations, as well as applicable state laws.
- The essential steps to achieve pre-employment screening compliance are straightforward, but require timely and accurate execution, consistency, and the required expertise to remain current with applicable laws and regulations.

## References

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- <sup>3</sup> *"Workplace Violence Costs: Hidden and Actual," Occupational & Environmental Health Network, [www.oehh.net/Email%20Newsletters/Email%20Autumn2010.htm](http://www.oehh.net/Email%20Newsletters/Email%20Autumn2010.htm), Autumn 2010.*
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- <sup>9</sup> *"Employment Background Checks in California: New Focus on Accuracy," Private Rights Clearinghouse, [www.privacyrights.org/fs/fs16a-califbck.htm](http://www.privacyrights.org/fs/fs16a-califbck.htm), 2010.*
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- <sup>11</sup> *"FCRA Class Action Lawsuits: The Sharks Are Circling," Craig Bertschi, NAPBS® Journal, January-February 2011.*
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### ***About ADP Screening and Selection***

ADP is a provider of business services to employers and one of the market's major resources for hosted, outsourced pre-employment services, including solutions for candidate background checks.

Candidate background screening may include validation of Social Security numbers, criminal and civil court searches, driving records, credit reports (where permitted by law), government registries, workers' compensation claims reports, and reference verifications. Should a client choose to not hire a candidate based upon background screening results, ADP can assist a client with adverse action correspondence with the job candidate as specified by the Fair Credit Reporting Act.

### ***About ADP***

Automatic Data Processing, Inc. (NASDAQ: ADP), with about \$10 billion in revenues and approximately 570,000 clients, is one of the world's largest providers of business outsourcing solutions. Leveraging over 60 years of experience, ADP offers a wide range of human resource, payroll, tax and benefits administration solutions from a single source.

ADP's easy-to-use solutions for employers provide superior value to companies of all types and sizes. ADP is also a leading provider of integrated computing solutions to auto, truck, motorcycle, marine, recreational vehicle, and heavy equipment dealers throughout the world. For more information about ADP or to contact a local ADP sales office, reach us at 1.800.225.5237 or visit our website at [www.ADP.com](http://www.ADP.com).

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