



## HIRING AND RETENTION

# eLINE



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## IGNORANCE IS BLISS... UNTIL IT'S NOT: BACKGROUND CHECKS AS SCREENING TOOLS

The fight-or-flight instinct is hard-wired into all of us, and influences decisions we make in ways that we often don't notice — even when those decisions are made in settings that should be driven by a rational thought process.

Don't believe me? Studies have demonstrated that we make fundamental judgments about other people within 7 seconds of meeting them, even though we may know nothing about them. In turn, these snap judgments influence our perceptions about the other person, and thus the way we choose to interact with him or her.

In a job interview, our emotional predisposition toward the applicant influences the questions we choose to ask, as well as the way we hear the answers. Simply put: if I like you, I will listen to your answers in a way that reinforces the positive emotional feeling I have about you, and I will tend to ask less difficult questions, while using shallower follow up inquiries.

Conversely, if I don't immediately like you, I will be more critical of your responses, even though they may be nearly identical to those given by the candidate I liked, and my follow up questions will have a sharper edge and will cut more deeply.

Because of this, employers utilize a number of tricks and tools to mitigate the impact of snap judgments on the hiring and selection process. One such tool is to use background checks to gather historical information on applicants.

However, no background check is a true panacea, and each type of check has some unique legal and/or practical risks that accompany its use.

### Thieves and brigands and ne'er-do-wells, oh my!

Criminal history checks are one of the most common background checks performed by employers. We have previously [written](#) about the ways in which the Fair Credit Reporting Act and important Equal Employment Opportunity Commission (EEOC) guidance can impact the use of such results. However, an increasing number of states are also imposing restrictions that go beyond limiting the ways in which criminal background reports can be used.

For instance, Illinois (in 2014) and Minnesota (in 2013) passed "ban-the-box" style laws that prohibit employers from asking any questions (or running any actual checks) about an applicant's criminal history prior to the point at which an interview has been scheduled (or, if interviews aren't utilized, after a job offer has been made).

This is a bigger deal than one might think, as many employment application forms ask candidates to identify any crimes for which they have been convicted. In passing such laws, the various states' legislatures are trying to address the chronic unemployment rates of people with criminal convictions under the theory that if they can't get jobs, then they are likely to commit more crimes.



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The lawmakers believe that criminal history questions on application forms are used by employers to filter out applicants with convictions, and that employers who actually meet otherwise qualified candidates will be more willing to look past any convictions they might have.

Interestingly, the criminal question is often asked on application forms not as a means to screen candidates from consideration, but to test their honesty and forthrightness. For example, candidates whose criminal history reports reveal a conviction or two, but who checked “no” in the criminal history section of the application form are often eliminated from consideration due to concerns about their honesty, even if the underlying convictions would not otherwise have precluded employment.

However, as with many things legal, a violation of the law is a violation of the law, even if the intent behind the violation was reasonable.

### The workers’ compensation conundrum

True story: a client called about an employee (I’ll call her Violet) who’d filed nine work comp claims over an 18-month period. Which of the following questions do you think the client asked?

1. Violet is such a shining example of everything that we look for in an employee that we’re planning to clone her. Are there any legal or ethical issues we need to be concerned about, and can we add her clone to the health plan as a dependent?
2. We’re going to be promoting Violet into an executive position as the Director of Safety and Risk Management. Are there any limits as to how much we can pay her?
3. Violet...um...yeah. Can we fire her?

Even though employment is “at-will” in many cases, most states have laws protecting employees from retaliation for

having filed one or more work comp claims, so, no, Violet can’t be fired just because she has filed multiple claims.

What does this have to do with background checks? Well, work comp histories are one of the background checks that employers can utilize during the hiring process, although there are significant restrictions on when and how they can be used.

Amongst other things, because they are seeking a form of medical information, work comp history checks probably can’t be conducted until after a conditional offer of employment has been made. Withdrawing a job offer is much riskier than not offering a job at all, and candidates might conclude that your decision was based solely on the fact that they had one or more work comp claims, which could lead to a claim for retaliation.

But you would never withdraw a job offer simply because an applicant has a previous work comp claim, right? Maybe not intentionally, but seeing a claim can cause hiring managers to jump to all sorts of conclusions about the candidate’s abilities and likelihood of re-injury, which, in turn, can trigger an emotional response that causes managers to subtly change how favorably they remember the candidate.

On the other hand, the reports may identify the nature of the injury received. If the injury appears to be directly related to the type of work the candidate will be performing, employers might want to ask some follow up questions to confirm whether the candidate has any job-relevant restrictions. If the answer is “no,” then the hiring process should move forward, which can be difficult for managers to do.

In the end, employers with positions involving any sort of regular physical labor are probably safer and better off asking job offerees to submit to a job-specific medical exam, which is more likely to produce useful results.



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### Conclusion

Background checks can be useful tools under the right circumstances. Before using them, employers must understand what information they're hoping to get, how they might use that information, and what restrictions or requirements accompany the gathering or use of the information.

Attend our [“Employment law for non-lawyers” webinar series](#) for more information about background checks and other employment practices issues. For more information, contact us at [info@AssociatedFinancialGroup.com](mailto:info@AssociatedFinancialGroup.com) or 800-258-3190.



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