

# WHITE PAPER

## Understanding and Using Criminal Records Checks to Avoid Hiring Problem Employees

By: David Nolan, Vice President/COO [KlinkCheck™ background services](#)  
March 31, 2009

One of the best ways to avoid hiring problem employees is to perform a thorough criminal records check on each new hire. Hiring a candidate with recent violent or other serious negative behavior can expose your company to theft and violence as well as a multi-million dollar negligent hiring law suit. Although the majority of businesses perform some form of criminal records check during the application process, these checks typically have many holes and do not offer companies proper protection. To help businesses better understand criminal records checks and how to best plug the holes associated with them, this White Paper discusses:

- the complexity of criminal checks
- an approach to risk-based criminal records checks
- the practical steps to improve your criminal records check, and
- the criminal records checks that are primarily available to businesses in the United States

### The Complexity of Criminal Checks

Due to the complex nature of the U.S. federal, state, county and local criminal justice systems, there is no simplified way to conduct a thorough criminal records check. There are thousands of federal, state, and local law enforcement agencies along with thousands of federal and state courts that all maintain and report criminal records in different ways. Contrary to what you may have read on the Internet, there is no one search that provides a “comprehensive” nationwide criminal records check.

While over the past ten (10) years access to criminal records has been simplified through technology and better databases, matching the right records to the applicants has never been more difficult. Due to security and privacy concerns, many court systems are removing identifiers (e.g. social security numbers, dates of birth, and addresses) from records, making it a challenge to match criminal records with the correct applicant. However, there are many criminal checks available to businesses that help employers avoid hiring a rogue employee.

### Risk-Based Criminal Records Checks

Best practices for conducting criminal records checks dictate that the kinds of searches performed on an applicant correspond directly to the risks associated with hiring that applicant. For example, if you are hiring an entry level employee

who will have no contact with the public and no access to company assets, then a countywide search may be adequate. In other cases where an employee may have regular contact with the public, greater exposure to the company's assets, such as financial data, inventory, etc., it may be advantageous to require additional checks including searches of federal criminal records, statewide records, or multiple county courts to protect your organization.

Before implementing a criminal check procedure that fits your organization, the first step must be evaluating the specific risks that a new employee will pose to the organization and co-workers. Second, it is essential that business owners and HR professionals know and understand the practical steps to performing a check and the type of criminal checks available before establishing best practice protocol.

### **Practical Steps to Improve Your Criminal Records Check**

- *Job Application – Recommended Language* – “Have you ever been convicted of a crime (not including minor traffic violations) and/or do you have a pending criminal action against you?” The answer to this question may not preclude the applicant from employment, but it is a good test of the applicant's character. If the applicant is not honest on the application, the applicant could be dismissed for falsifying the application. *Please consult with your legal counsel before making any changes to your job application.*
- *Applicant Identifiers* – You must get specific information from the applicant in order to perform a valid criminal check. Identifiers include full name, known aliases/maiden names, date of birth, social security number, and current address. Most criminal records are only searchable by having the applicant's name and data of birth and/or social security number. If the identifying information is not accurate, then the criminal search will not be accurate.
- *Aliases/Maiden Name Searches* – To obtain accurate information, it is important to search both the applicant's current name and any prior aliases or maiden names, especially if the applicant has changed his name within the past seven (7) years.
- *Seven Year vs. Ten Year Search* – In accordance with the Fair Credit Reporting Act, arrests without a conviction may not be reported after seven (7) years. Convictions after seven (7) years may be reported and, therefore, searches may be conducted post seven (7) years. The FCRA also allows for a ten (10) year research scope for those candidates who are reasonably expected to make \$75,000 a year. However, be aware that some state FCRA laws have additional restrictions for employers using criminal records older than seven (7) years to make hiring decisions.

- *Jurisdiction Search* – Since there is no comprehensive nationwide criminal search available, employers must rely on searching for criminal records in the jurisdictions an applicant has lived and/or worked. A common best practice procedure for criminal checks is to search criminal records for all or most of the jurisdictions (*county, state, and/or federal level searches*) where the applicant has resided in the past seven (7) or ten (10) years. However, if the new hire has lived in multiple jurisdictions during the past seven (7) to ten (10) years, it is not always feasible and may be cost prohibitive to search all of the jurisdictions. Therefore, businesses look to design a cost-effective program that will provide the best protection by conducting criminal checks in the most pertinent jurisdictions in which a new hire has resided. The various types of criminal searches that are available are discussed in more detail below.

### **Primary Criminal Searches Available**

- *County Criminal Records* – There are 3,141 counties and county equivalents in the 50 United States and the District of Columbia. All of these counties maintain their records differently. As technology becomes a viable option, some states and counties have made criminal records available online. However, even in the age of technology, it is still necessary for a researcher to visit the local court house armed with as many identifiers as possible on the applicant. This is a valuable and crucial criminal history search tool since the majority of crimes are processed through county courts. Be aware, however, that this search has geographical limitations since the applicant could have been arrested or convicted in a county or state in which he has not resided. It takes time, experience, and knowledge to sift through the sometimes hundreds of records found and match potential records to the correct subject. In most cases, it is recommended that a county criminal search be combined with a statewide search and/or a nationwide data file search.
- *Statewide Criminal Records* – Many states have a statewide criminal search available through central repositories that are typically maintained by the state police or state court administrator. This is a very valuable search because, in most states, records are available from all or most of the counties within the state. Not all statewide searches are alike and not all statewide searches are available on-line. Some may require a field researcher to conduct the search. Another aspect to consider is that the frequency of which records are reported to the state repository can vary by county. Also, records at the state level are usually *convictions only*. By only conducting a statewide criminal records search, you would not know if your applicant is awaiting trial or sentencing on an active charge. Statewide records also vary on the type of records being reported. One state may only report felonies, while another may include felonies and

misdemeanors. It is recommended that statewide searches be combined with a county and/or nationwide criminal data file search.

- *Federal Criminal Records* – Understand that the American judicial system is made up of two (2) primary separate court systems: the federal district court system and the state court system. Therefore, records in the federal system and state court system are kept separately. Federal criminal cases usually deal with more severe charges such as drug trafficking, tax evasion, bank fraud, kidnapping, counterfeiting, damaging or destroying mailboxes, art theft, arson, assault, immigration offenses, and mail fraud. The majority of crimes committed by people are not prosecuted through the federal district court system but rather through state courts. A federal criminal search is typically recommended for new hires who have access to company assets or are considered management level employees. In most instances, federal criminal district court records can only be searched using an applicant's name. The fact that federal criminal searches do not allow for other identifiers compounds the problem of matching the right record to the right person.
- *Nationwide Criminal Data File ("NCDF")* – The NCDF is a valuable tool provided by many criminal data service providers that offers a bigger net in screening applicants for criminal records. However, it is not recommended that this search be used exclusively. As mentioned above, there is no such thing as a nationwide comprehensive (100% coverage) criminal records check. The NCDF search offered by many data vendors typically includes the search of state sex offender registries, state department of corrections records, and some state and county criminal court repositories. The search is limited in scope for many states and numerous county criminal court records are missing or not regularly updated. Two (2) major benefits in running this search are that it can be done in most cases instantly and does cover the nationwide sex offender registries. In most cases, it is recommended that the NCDF search be combined with county and/or statewide searches.
- *Department of Corrections (DOC)* – This is a good statewide source to identify convicted felons and state level misdemeanors that have been placed under the supervision of the DOC. The severity of the offenses included in the DOC check varies by state; however, serious felonies such as murder, sex crimes, and armed robbery are always reported. This check will not identify convicted felons who have received probation and were not placed under the supervision of the DOC. Excluded felonies are usually of a non-violent nature and may not warrant state supervision. The DOC check is a valuable search tool that will help keep serious felons out of your business.

## **Summary**

Although the U.S. criminal justice system is complex, businesses have many criminal check options available for screening new hires. Each type of criminal check detailed above has strengths and limitations, but one thing is sure, conducting one or more of the searches is always better than not doing any at all. Businesses need to first analyze their workforce risks to understand what criminal check resources are available in order to best meet those risks. Establishing best practice protocol will enable you to implement criminal check policies and procedures that will plug as many holes as possible in a both cost-effective and efficient manner.