Criminal Background Checks for Higher Education

Background Check 101
Presentation Outline

• Overview of Crime on Campus
• Types of Checks
  – Use of Internet to Augment Check?
• Who Should be Checked
• Legal Issues:
  – Criminal Background Check (CBC) Compliance Requirements
  – Federal, State and Civil Legislation On CBCs
• Discussion
• “Best Practices”: Comprehensive University CBC Management Policy
  – Policy & Protocol Development
  – Liability Issues
  – “Positive” Results Delivery Processes
Are Universities at Risk?

- 2010: University of Alabama Huntsville: Professor kills 3 professors and injures 3 others
- 2009: University of Georgia: Professor kills 3 in off-campus theater
- 2009: Virginia Tech: PhD Student kills Another in Campus Café
- 2008 University of Washington: Staff Member Immolates Himself on Campus
- 2008 University of Iowa: Professor Commits Suicide after Accusations of Sexual Misconduct
- 2008 University of Georgia: Professor accused of sexually harassing students
- 2008 Louisiana Technical College: Student Kills Two Classmates and then Self
- 2008 Northern Illinois University: Former Graduate Student Murders 5 and then Self
- 2007 Virginia Tech University: Student murders 32 fellow Students & Faculty
- 2007 University of South Florida: Graduate Assistant Charged with terrorism after being caught with bomb making equipment in car after a traffic stop.
- 2007 University of Washington: Gunman kills staff member and then kills self.
Total Crime Statistics on University Campuses: 2006-2008*

<table>
<thead>
<tr>
<th>Crime Categories</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
</tr>
</thead>
<tbody>
<tr>
<td>Murder / Non-Negligent Manslaughter</td>
<td>25</td>
<td>66</td>
<td>55</td>
</tr>
<tr>
<td>Negligent Manslaughter</td>
<td>0</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Forcible Sex Offense</td>
<td>3,490</td>
<td>3,482</td>
<td>3,287</td>
</tr>
<tr>
<td>Non-Forcible Sex Offense</td>
<td>56</td>
<td>62</td>
<td>49</td>
</tr>
<tr>
<td>Robbery</td>
<td>4,921</td>
<td>4,985</td>
<td>4,562</td>
</tr>
<tr>
<td>Aggravated Assault</td>
<td>5,472</td>
<td>5,234</td>
<td>5,026</td>
</tr>
<tr>
<td>Burglary</td>
<td>35,124</td>
<td>33,010</td>
<td>31,851</td>
</tr>
<tr>
<td>Motor Vehicle Theft</td>
<td>9,811</td>
<td>8,744</td>
<td>7,465</td>
</tr>
<tr>
<td>Arson</td>
<td>1,086</td>
<td>915</td>
<td>825</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>59,985</strong></td>
<td><strong>56,506</strong></td>
<td><strong>53,125</strong></td>
</tr>
</tbody>
</table>

The Cost of Risk

- **Financial**:  
  - Financial Matters: $500,000 to $555 Million  
  - Breach of Contract: $33 Million  
  - Retaliation: $725,000 to $19.1 Million  
  - Negligence: $240,000 to $19 Million  
  - Child Abuse & Molestation: $175,000 to $4.6 Million  
  - Defamation: $3.5 Million  
  - Sexual Assault/Harassment: $1.1 to $2.85 Million  
  - Discrimination: $200,000 to $2 Million  
  - Tenure: $205,000 to $600,000  

- **Non-Financial**:  
  - Reputation  
  - Publicity  
  - Reduced Enrollment  
  - Reduced Donations  
  - Reduced Legislative Support  

Types of Checks

- **Consumer Report** - Includes any Information Provided by a Consumer Reporting Agency (CRA) Bearing on a Consumer’s Credit Worthiness, Credit Standing, Credit Capacity, Character, General Reputation, Personal Characteristics or Mode of Living used to Determine Eligibility for Credit, Insurance, & Employment among other Conditions.

- **Investigative Consumer Report** – Includes any Information on a Consumer’s Character, General Reputation, Personal Characteristics or Mode of Living Obtained through Personal Interviews with Neighbors, Friends and Associates – Information must Be Verified with Actual Source of Information not from hearsay.
Types of Checks

- **Consumer Report** - Includes the Following Possible Checks:
  - Criminal Background Check
    - Federal Criminal Database Checks
    - State Database Checks
    - County-Level Courthouse Checks
    - Sex Offender Registry Checks
    - International Criminal Background Checks
  - Civil Litigation Check
  - Credit Check
  - Motor Vehicle Check
  - Employment Check
  - Educational and Professional Credential Checks
  - Reference Checks
  - Drug Tests
  - Reputation and Personality Checks
Types of Checks

- **Investigative Consumer Report** - Includes the Following Possible Checks:
  - Interviews with Friends, Neighbors or Associates of the Consumer – Can be Conducted by Telephone or In person
  - FCRA seems to allow Information obtained through Internet (Facebook, MySpace, Google, etc.) as long as that information is verified through the source of the data. However many lawyers are encouraging employers not to use these sites because of claims of discrimination against protected groups of employees.
    - If information is used for rejecting candidate then legitimate documentation of why candidate was rejected is going to be needed that highlights reasons other than we didn’t like the “way they looked” on their Facebook/MySpace page.
    - Germany just passed law disallowing use of information on social networking sites to be used as an evaluation tool for employment purposes. May be a precursor of things to come here in US.
  - Cannot include Factual Information on a Consumer’s Credit Record Obtained Directly from Creditor of the Consumer or from the Consumer.
What is Required to Conduct Background Check for New Hires?

• According to the Fair Credit Reporting Act (FCRA), an Applicant for Employment must submit to the Background Check by Signing a Consent Form

• Employment Offer made Contingent Upon the Acceptance of the Results of a Background Check Procedure.

• Many Universities are now Requiring Candidates to Self Disclose to any Criminal History as Part of the Application Process
  – This provides possible grounds for dismissal of employee if Background Check is Performed later on and a Criminal History is Uncovered at that Point in Time

• Universities can Gather their own Information for Employment Purposes without Having Consent Forms Executed
  – Issue then becomes what Policies and Procedures does University have in Place to Handle “Positive” Results of the Investigation
Who Should be Checked? Faculty & Staff

- All States Require Criminal Background Checks (CBCs) on Certain Categories of New Hires such as Police Officers, Child Care Workers, Medical Professionals, etc.
- Many States are now Requiring CBCs on all New Hires within Higher Education Regardless of Position – Duty is to Provide Reasonable Background Checks on all New Hires
- The Term “Reasonable” is Open to Interpretation; Some Schools Engage in much more Aggressive Checks than Others
- Finally, Many Universities have Policies to Check all Existing Employees who Transfer or are Promoted to New Positions within the University.
- No Consistent Policies on how to Handle Contract Employees who Separate from University on Regular Basis (i.e. Adjunct Faculty Positions)
- Policies on Volunteer Positions are also Fairly Underdeveloped as well.
- University Vendors are Often Required to Perform CBCs on their own Employees as Part of their Contract with University
- Most Universities Do Not Have Policies to Recheck all Employees Regularly Regardless of Positions Held.
Who Should be Checked? Students

• **What About Undergraduate Students?**
  – Student Employees – Currently, Few Universities Perform Comprehensive CBCs on Student Employees but Increasingly these Policies are Changing because of Liability Concerns
  – Incoming Students – Generally, Universities are Not Conducting Checks on Incoming Students
    • Conducting CBCs on Incoming Students, of traditional college age, would reveal very little because Juvenile Records are Sealed
    • Trend is Shifting to Conducting Checks on Accuracy of Information Included on Applications such as Volunteer and Employment History, Achievements and Awards, etc.
    • Applications are Asking Students to Self-Disclose Criminal Past (i.e. Common Application)
    • Residence Hall Directors are increasingly concerned about whether checks should be conducted
    • Universities are running checks on problem students once they come to attention of campus officials due to some type of incident.
Who should be Checked? Graduate Students

- What are Universities Checking with respect to \textit{Graduate Students}?
  - Graduate Students – Generally, Universities are Not Conducting Criminal Checks on \textit{Graduate Students} whether Foreign or Domestic
    - These students are often employed by the university as Teaching Assistants so they are in the Classroom and therefore represent a liability to the University
    - Applications are now Asking Students to Self-Disclose Criminal Past
      - The University then needs a Policy for How to Handle “Positive” results
    - Foreign Students \textbf{Do Not} undergo Criminal Checks prior to arrival in United States.
      - Visa Process only checks Identification against Terrorists Lists. Does not Provide for a Check against any Possible Criminal Records that may exist in Student’s Country of Origin.
      - Visa Process Does Ask Applicant to Self-Disclose Criminal Past.
What Type of Records Should be Checked?

- **Criminal Background Check** – Should be Checked for all Categories of Employees
  - FBI Check is most comprehensive because it covers both 50 state level and federal crimes databases but is often time consuming in nature
  - National Databases are fast & inexpensive but are often not considered comprehensive
  - County Courthouse Check is Considered most Accurate for state charges but is also more expensive than national databases and can be time consuming due to access issues at county courthouses
  - Federal Checks - Checks for Federal records (such as kidnapping) that would not be available through county or state level checks.
  - Sex Offender Registry Checks – Should be included in all Criminal Checks Conducted because Sex Offender Data is often separated out from regular Criminal History because of Concerns due to Privacy Issues of Minors Contained in the Reports
  - International Criminal Background Checks – Rarely Performed because Most Universities Assume that Department of State (DOS) and Immigration & Naturalization Service (INS) have done the Background Checks Prior to Arrival
What Type of Records Should be Checked?

- Civil Litigation Check - Rarely performed except for High Level Hires
- Credit Check – Often Done on Positions Involving the Handling of Cash and Personal Data
- Motor Vehicle Check – Typically only done for Employees who regularly will Operate a University Vehicle during Conduct of Job Responsibilities (I.e. Coach, Groundskeepers, Maintenance Personnel, Police Officers)
- Employment, Educational and Professional Credential Checks – Rarely Performed for any Category of Employee
- Professional Reference Checks – Rarely Performed
  - Personal Reputation Checks – Rarely Performed
- Drug Tests – Rarely Performed for any Employee but Suggested for all Employees Responsible for Operating University Vehicles
- “Character” Checks – Rarely Performed
Okay….Now What Do We Do?

- Checks Generate “Positive” Results so what Can Universities Do?
  - FCRA Mandates Types of Records that *Cannot* be used to Deny Employment such as Arrests, Expunged or Sealed Records.
  - Usually, Only *Convictions* can be used to Deny Employment and then not all Convictions are Created Equal
  - Extra Considerations are Often Given to Include Expected Job Duties of Potential Applicant, Dates of Offense, Nature of the Offense and the Accuracy of Employment Application
Okay….Now What Do We Do?

• Checks Generate “Positive” Results so what Can Universities Do?
  – Develop a Consistent Policy for How to Handle these Results
  – As long as Self-Disclosed, Allow Applicant to Explain Details of the Record(s) Found Rather than Engage in Automatic Termination
  – Convene a Standing Committee of Representative University Personnel to review all “Positive” CBC Results to Ensure Consistency and Fairness in Handling of Individual Cases
“Watch List” Alert

• There is Little a University can do to “watch list” a Candidate after a CBC has Been Conducted because then the University has to Adhere to the Mandate of FCRA and other Legal Precedents for Managing Results.

• Having a **Self-Disclosure** Form is Often the Best Initial Line of Defense and Allows Universities to Disentangle from Candidate Outside of Federal Guidelines

• Consumer Reporting Agencies (CRAs) are Limited in terms of what they can Report Back to Client Regarding a Candidate’s Past History (For example, CRAs are restricted from reporting Arrests [even those within a 7 year timeframe] because they May Violate State and Federal Discrimination Laws and so Patterns of Behavior that Might be of Concern to Universities likely will Never be Reported because of these Restrictions)
Federal-Level Legislation Governing Background Checks

- Fair Credit Reporting Act (FCRA) – Mandated Procedures for Performing CBCs for purposes of obtaining credit, insurance, employment or other purposes authorized under Section 604 [1681b]
- Family Educational Rights and Privacy Act (FERPA) - A federal law that protects the privacy of student education records and comes into play in terms of how Employers Handle the Data Involved in Conducting and Evaluating Results from Student CBCs.
Legal Issues at State Level

- Record Retention-How long can we or should we maintain criminal record checks.
  - How should we maintain those records?
- Use of Conviction vs. Arrest Information in Employment Decisions
- Privacy Considerations
- Potential Defamation Claims (Discrimination Claims)
  - Need Clear Policies and Procedures
  - Need to Educate and Follow
- Potential Tort Claims-”Foreseeability”: “Knew or should have known”
- How to use Information in the Criminal Complaint or Records-Misuse could lead to Criminal Action
Civil Liability Concerns Surrounding CBCs

- **Respondeat Superior** – An Employer may be Held Liable for any harm Caused to a Third party by an Employee acting within the Scope of their Employment.

- **Negligent Hiring {Retention}** – The Claim that an Employer’s Failure to Discover that an Employee Created an Undue Risk of Harm to Others that Should Have Been Known at the time of the Initial Hire.
  - This increases the Employer’s Liability because the Court Assumes that the Employer *Should* have known of this Risk at the Time of Hire – So, if University Fails to Conduct CBC then it can be Sued for **Negligent Hiring** and if it Does a CBC and harm comes anyway, then they can be Sued for **Negligent Retention**.
Civil Liability Concerns Surrounding CBCs

- **Disparate Treatment** – Claims that Arise from Intentional Discrimination (For Example, conducting CBCs on only Staff while allowing Faculty to go Unevaluated)

- **Disparate Impact** - Claims that Arise when an Employer’s Practices or Procedures, while not intentionally Discriminatory, Adversely Impact a Protected group of Individuals (e.g. Minorities)
Summary of Liability Issues*

• If you DO Background Checks:
  – Disparate Treatment: Disproportionately Applied to Different Campus Groups
  – Disparate Impact: Employer’s Practices Adversely Impact Certain Class of Employee More than Others
  – Mishandling of Positive Results (FCRA)
  – Privacy Violations (FERPA)
  – Defamation Claims (As a result of Interviews Conducted)

• If you DON’T use Background Checks:
  – Negligent Hiring/Negligent Retention
  – Breach of Duty to provide Safe Workplace
  – OSHA Issues
Discussion

- Universities Face Elevated Risk in Hiring Process:
  - CBCs are being performed on Staff 2X more than faculty and could lead to Claims of *Disparate Treatment* and *Disparate Impact*
  - Issue of the Application of follow-up CBCs raises concerns that the University may be liable for Claims under the Claim of *Disparate Impact*
  - Lack of a Formal Written Post Results Delivery Policy suggest Greater Exposure to Claims of FCRA and Defamation Violations.
A Suggested Best Practices Approach for Background Check Process in Higher Education

CBC Policy and Procedure

• Conduct CBCs on All Staff, Faculty and Student Employees
• Perform International Criminal Background Checks on Foreign Employee Applicants
  – If full foreign criminal checks are not done then at a minimum, may want to consider some sort of probationary status for foreign applicants and then do domestic criminal county-level checks for a period of 2-3 years after their arrival here in the states.
• Self-disclosure Form Suggested for all Incoming Students
• Follow-up CBCs on all Employees that move to a new Position
  – Development of a Written Policy for Follow-up CBCs after a Defined Period of Time
• Employment and Educational Verification Checks Should be Performed on Appropriate Staff and all Faculty Applicants
A Suggested Best Practices Approach for Background Check Process in Higher Education

CBC Policy and Procedure

- Consider Use of Third-Party Provider for at Least Some Aspect of CBC Process
- CBC Process Should be Managed by HR Department Rather than Hiring Department (Issues of Liability due to Lack of Compliance with Federal and State Laws Governing CBCs are of Concern)
- Develop a Defined Post-Results Delivery Process
  - Explicit Development of Policies to Deal with Delivery of “Positive” CBC Results
  - Consider A Committee Composed of University Community (Rather than One Single Individual) to Decide on “Go-No Go” Decision involving “Positive” Results
A Suggested Best Practices Approach for Background Check Process in Higher Education

Hiring Process

• Centralize Hiring Process through HR Department

• If available, Utilize Online Application Process for All New Hires (Regardless of Position Type)

• Require Consistent and Repetitive Training (at least yearly) for all HR Personnel Tasked with Conducting CBCs
For More Information on Implementing Risk Management Processes in your University, Please Contact:

**Lynn Schuman**  
RiskAware, LLC  
lschuman@riskaware.com  
877-552-8907 x108