



# Navigating the Evolving Background Screening Industry in 2011

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This paper will examine eight trends that will continue to evolve the business of background screening in 2011. These trends include pending legislation, the role of social media in screening, the impact that the increase in international applicants has had on background screening, and the value of using a NAPBS accredited screening company. It is advisable that employers, not just background screening firms, be versed in these changing trends, as the penalties for violating some regulations can be costly to both a firm's reputation and bottom line.

The economy is slowly making a turnaround from where it was in the last couple of years. Corporations – big and small – are not laying as many employees off and are, in fact, starting to hire again. The opportunity for new employment is a sign of what will hopefully be optimistic times. And yet when it comes to hiring new employees, corporations should be aware of certain pitfalls. For instance, running a credit check on a potential hire seems like a reasonable practice, but is it always justified by the position? Can hiring policies and practices be applied nationally – or are there specific state laws that need to be considered? These are but two of the many questions highlighting the importance of a corporation being well-versed in both state and federal law and all applicable regulations when it comes to hiring. Failure to have this awareness may lead to costly lawsuits, and even loss of goodwill and reputation. Corporations planning to hire should not let the burgeoning economic optimism lull them into a false sense of security. When it comes to navigating the ever changing myriad of state and federal requirements governing hiring, security can only be found by partnering with a firm that specializes in background screening.

This paper examines important trends that will continue to evolve the business of background screening in 2011. These topics include pending legislation, the role of social media in screening, the impact the increase in international applicants has on background screening, the on-boarding convergence, and the value of working with an accredited background screening company.

## **TREND 1: CONTROVERSY OVER USING CREDIT CHECKS IN THE HIRING PROCESS**

There has long been debate about whether it is fair to equate a potential employee's financial standing with expected job performance. However, the debate has heated to nuclear levels in the past few years, due to the toll that the economic downturn has had on the average American. Not since the Great Depression were so many hard-working, financially responsible people forced out of work for extended periods of time. Many who were never late paying a bill in their lives were forced to exhaust every avenue to stay afloat—maxing out credit cards and home equity lines, taking loans from friends and family, and, in severe cases, ceasing payment on their homes, cars and other bills. For many of these people, their only solution to righting their ship is to find other employment. And yet, the use of credit checks in the hiring process, it has been argued, will work to prevent that, thus disabling those who have fallen on hard times from correcting their course.

In states where it is legal, employers may run a credit report on any applicant. The rationale behind this is that a history of how responsible the individual is when it comes handling their own finances provides insight into the level of responsibility the employee will exert in the workplace, and that further, it is argued, a desperate need for money is often the root cause of theft. Those against the practice, including the Equal Employment Opportunity Commission (EEOC), argue against these points, and also argue that the use of credit history could potentially violate the law because it has a disparate impact on minorities, who tend to have higher foreclosure and unemployment

rates. Further complicating this debate, many opposed to the use of credit mistakenly believe that a credit score is part of an employment credit report, when it is not.

Despite this fact, several states have restricted the use of credit information in employment screening, including Hawaii, Illinois, Oregon, and Washington, with 20 other states introducing similar bills. At the federal level, the Equal Opportunity for All Act was introduced in the House of Representatives. Most of these laws, while generally restricting the use of credit information, do have some narrow exceptions, such as allowing credit checks when hiring for positions that require a fiduciary responsibility, including those in banking, insurance, national security, and trade secrets.

For employers in states where using credit in employment screening is still legal, what is the right approach? First, credit reports should not be used indiscriminately for any position. The employer must be able to justify the use of credit reports with the requirements of the position. Does the position have access to uncontrolled cash? Can the position sign contracts on the company's behalf? Does the position have access to trade secrets or personally identifiable information of other employees or customers? Does the position have access to program business systems? These are just a few considerations. It is further suggested that employers be aware of the sentiment that state and federal legislators have toward the issue. What is not prohibited today may be under fire tomorrow. It is critical to stay up to date on the legal trends and how laws could change in your states of operation.

## **TREND 2: "BAN THE BOX" MOVEMENT IN SUPPORT OF EMPLOYEES WITH CRIMINAL HISTORIES**

Just as there is a concern regarding the possibility that the use of credit checks could keep good people out of jobs, there is a concern that society will create a perpetual underclass of criminals if we keep rehabilitated ex-cons out of every job. Out of that concern was born the "ban the box" movement. This movement doesn't mandate that employers must hire every person with a record, but does seek to ban the question about previous convictions from the application to at least allow that rehabilitated person a chance for an interview. Employers still have a responsibility to their employees, customers and other stakeholders to provide a safe and secure workplace, and therein lies the potential for conflict. Savvy employers, with the help of their background screening partners, however, recognize that while not every position is appropriate for everyone, there is an appropriate position for everyone! Currently, laws in Massachusetts, Connecticut and New Mexico prohibit employers from asking about criminal history on initial written applications, but allow employers, in most cases, to ask about convictions after a conditional offer of employment has been extended.

Like with the use of credit checks in employment screening, employers in states where it is not illegal to ask these questions at the wrong point in the recruiting process must tread carefully as the movement is expected to spread and gather steam in 2011.

### **TREND 3: THE CHANGING ROLE OF THE EEOC IN BACKGROUND SCREENING**

In addition to the regulations set forth by individual state governments as it relates to the use of credit and criminal background checks, 2011 will likely see the EEOC take on both of these causes with vigor.

In October 2009, the EEOC filed a case in the District of Maryland against Freeman, a national event planning company. The suit alleged ongoing practices of discriminatory hiring, noting that Freeman's practice of using an applicant's credit history in hiring decisions has had a negative impact on African-American applicants, as well as that using criminal history information in hiring decisions has a disparate impact on African-American, Hispanic and male applicants. In the suit, the EEOC is seeking injunctive relief, lost wages and benefits for applicants and deterred applicants, as well as reinstatement.

It is expected that the decision in this case will likely provide strong guidance for employers on how a court views background checks in the employment context. The EEOC is also committed in 2011 to stepping up its enforcement actions against companies who have a bright-line policy against hiring applicants with a criminal record without regard to whether the conviction is job-related, how serious and long ago it was, and if there is any evidence of rehabilitation. A proven and experienced background screening firm can help provide guidance to employers and their legal counsel as they craft a fair and legally compliant background screening policy.

What this means to employers is that every hiring decision, but especially those that are not in favor of an applicant, must be informed decisions. The services of a proven background screening firm that is well-versed in differing and changing state and federal regulations, is a "must-have", vs. a "nice-have" in the changing landscape expected in 2011.

### **TREND 4: DOES SOCIAL MEDIA ELIMINATE THE NEED FOR FORMAL BACKGROUND CHECKS?**

These days, virtually anything you want to know about a person can be learned through their individual Facebook, Twitter, YouTube, and MySpace pages. Not only can you typically find basics about an applicant's education and employment history, but you can often uncover insight into the person's personal habits and characteristics, the type of company they keep, and even their personal and professional affiliations. But is use of this information appropriate or even legal?

The use of social media in the hiring process is a hot topic that is expected to stay hot well into 2011. On one side of the argument are those who say potential employees are putting their information out for the public to see, and should be held responsible if that information and behavior results in a negative impression formed by potential employers. On the other side are privacy advocates who insist that a social media presence that is developed during off-duty hours, which is very often fantasy, may be misunderstood, may portray legal behavior which may be disapproved by some

viewers, and is easily “hacked” by “friends”. Therefore, it should have no bearing on the person’s ability to secure employment. Like the credit history argument, these advocates note that what a person does or says in their spare time is not a reflection on the type of employee he or she will be.

Despite this ongoing debate, it is no secret that many employers are using the user profiles posted on social media sites as informal, preliminary screeners when applications come across their desks. Red flags often looked for include:

- Explicit drug or excessive alcohol use
- Criminal activity
- Excessive posting during work hours
- Employees who badmouth employers, thus suggesting a poor work ethic or lack of loyalty
- Racial slurs and other offensive language

While this kind of informal screening is becoming more commonplace, employers must be careful when using what they see as part of the formal hiring process. Some information contained in the profiles identifies protected statuses, such as race, age, marital status or religious affiliation. If a candidate is rejected based on information found within a social media site, the employer may have to prove that the information was factually correct, related to the position filled, not protected by state law, and that the decision was not influenced by any knowledge of protected status gained by viewing the site.

Further complicating the issue is the fact that many states have laws protecting off-duty behavior that is not illegal. For instance, employees who use their Facebook page to disparage their employer may be protected from having their behavior considered in future employment screening if the posts were done outside of their work day. The FTC and many more states will be closely examining the use of social media sites in the employment process and we should expect more restrictions and cautions regarding their use.

## **TREND 5: INCREASING INTERNATIONAL SCREENINGS REQUIRE EXPERTS IN THE PROCESS**

Often, larger employers who have been in business for some time feel they have a handle on background screening. The in-house processes managed by human resources that have often been in place for years, are working just fine. Why fix something that is not broken?

It is likely that the growing number of foreign workers in the United States and the continued growth of global corporations may force a change to these processes. Often, HR processes work smoothly for domestic applicants. However, when the application of a foreign applicant comes across the HR desk, there are questions—many of them with legal implications—that must be answered by a professional with an understanding of international hiring laws.

2010 saw an influx of requests to screen applicants who live or have been educated and employed overseas. It is expected that the volume of these requests will grow in 2011 as US-based companies continue to move operations overseas to achieve cost-effectiveness. When hiring the resident of another country to work for an American-based firm, the required processes and ever-changing privacy regulations of the country the applicant lives in must be adhered to.

#### **TREND 6: I-9 AND E-VERIFY ARE NOT GOING AWAY**

The rules surrounding I-9 and E-Verify practice continue to evolve—as do the challenges associated with them. In 2010 alone, thousands of federal contracts were modified to better adhere to regulations, including:

- Inclusion of the E-Verify clause
- Clarification of the I-9 “three-day rule”
- Requirement of photo matching of US passports
- Updating late submission notification rules, card number submission requirements, and a final rule regarding the use of electronic I-9s

What does this mean for employers in 2011? We can expect to see an increasing frequency of audits. We know that paper I-9 audits are rife with problems relating to misplaced documents, and documents never properly completed or filed. Failure to complete the Form I-9 appropriately, failure to include a copy of supporting documents for all submissions if copies are kept for any submissions, and failure to indicate a reason for late submission or completion of the form on time, will create a compliance issue which may result in fines, civil and criminal penalties and/or debarment from state or federal contracts.

#### **TREND 7: ON-BOARDING CONVERGENCE**

One of the more exciting and positive trends we expect to see growth in 2011, is the convergence of recruiting, background screening and on-boarding. In the past, these have been separate and discrete processes, but as companies look for ways to streamline processes to avoid duplication, reduce labor costs, reduce time to hire, and to eliminate costly errors, these once separate processes are merging onto single systems. Companies are achieving these efficiencies either by building middleware bridges to tie systems together, or by enlisting the services of companies that can provide end-to-end solutions. The best provider can navigate in both environments, either as a standalone solution or as a partner to existing component solutions to build seamless systems.

As we move into the future and increasing accountability for hiring decisions, a rules-based solution designed with the assistance of subject matter experts that enforces best practices and legal compliance is a company’s best hope for success in navigating increasingly challenging legal and social issues.

## **TREND 8: USING A NAPBS ACCREDITED BACKGROUND SCREENING COMPANY**

With a plethora of background screening companies to choose from, how does one ensure that the vendor he or she works with maintains standards of excellence in the background screening industry? Forward thinking companies are relying on National Association of Professional Background Screeners (NAPBS) accredited background screening companies that are dedicated to providing their services adhering to the highest industry standards. (NAPBS is the non-profit trade association that promotes ethical business practices and compliance with the Fair Credit Reporting Acts, and fosters awareness of issues related to consumer protection and privacy rights within the background screening industry.)

The process required to earn accreditation is highly demanding and takes at least six months from submission of the initial application to completion. In order to be accredited, consumer reporting agencies must pass a rigorous onsite audit, conducted by an independent auditing firm, of its policies and procedures as they relate to six critical areas: consumer protection, legal compliance, client education, product standards, service standards and general business practices.

NAPBS Accreditation is unique in that it is the only accreditation standard specifically created for the background industry. Like similar general business accreditation programs, such as ISO9000, it requires the company seeking accreditation to show evidence that it is not only documenting conforming policies and procedures, but it must also demonstrate that it is following those. As consumers of background screening services become more sophisticated in checking out potential background providers, NAPBS accreditation will become the gold standard by which companies are evaluated.

In closing, it is advisable that employers, not just background screening firms, be versed in these changing trends, as the penalties for violating some regulations can be costly to both a firm's reputation and bottom line. As the American economy continues to recover from the recession in 2011, employment screening will continue to be a hotly discussed topic. From debates over the use of credit and criminal histories in hiring decisions, to the increased visibility of social media, the need for international screening experts, and on-boarding convergence, most businesses will be best served by employing a full-service firm like CARCO Group, Inc., with the expertise and knowledge to navigate all of the trends identified herein.

For more information on the services CARCO provides that can help businesses stay ahead of the changing trends of 2011, contact CARCO today at 866-557-5984 or visit [www.carcogroup.com](http://www.carcogroup.com).