



## Improve Practices for Checking Criminal Records and Credit Histories

Each department in the city of Boston conducted its own criminal background checks until 2002. Reacting to concerns about unfair practices, the city's HR professionals investigated and found little consistency among departments.

"With approval of the mayor, we embarked on a path to centralize the function for criminal background checks," says Bill Kessler, assistant director of HR. "We put through a consistent policy. We now do it for all departments with the exception of the police, who handle their own. Our office reviews the record and determines if there would be a problem to proceed with hiring."

Practices now include the following:

- ✓ The application does not ask questions about convictions.
- ✓ Hiring managers do not conduct a background check until they are ready to make an offer.
- ✓ Most, but not all, jobs require checks.
- ✓ A criminal record is found, an HR professional talks to the candidate to make sure it is accurate.
- ✓ The HR professional decides if the candidate is still fit for the job.
- ✓ The hiring manager gets a thumbs up or thumbs down and is not privy to what's in the record.

"We try to be very sensitive with the kind of checking we do," Kessler says.

Employers conduct pre-employment criminal background checks to guarantee safe workplaces and to avoid negligent hiring lawsuits. But if employers aren't careful, they can attract attention from the US Equal Employment Opportunity Commission (EEOC) and state attorneys general.

"The integrity of the process matters," explains Mary Bryan, vice president of HR field operations for OfficeMax Inc.

Procedural consistency is important throughout the organization, and criteria consistency is important within job groups. "Not all janitors are background screened the way you screen accountants, but janitors should be screened consistently with janitors," explains Lester S. Rosen, chief executive officer of ESR Inc.

HR professionals for the city of Austin, Texas, review job groups once a year to make sure they apply the right criminal check criterion. There's a higher standard for employees working with the elderly, youth, people with disabilities or finances than for employees working on a maintenance crew, says Mark Washington, HR director.

**"Employers get in trouble when they engage in automated decision-making," Rosen says. "There always should be a human review to make sure you're making the right decision."**

Many employers outsource background screening. If chosen wisely, a partner will help establish protocols and consistent practices, and help eliminate inappropriate use of results.

"By consolidating with one vendor, we got consistency in what we background checked for," says Larry Fultz, chief HR officer of V Health Systems, which has 17 hospitals and 35,000 employees.

Before acquiring a partner, be sure to know "the vendor's ability to maintain compliance with the Fair Credit Reporting Act," Bryan recommends.

The act spells out procedures for conducting credit checks and limits on information that can be reported by a screening company. Many people don't know that the act also covers criminal background checks, Rosen says. The act is specific about the procedures an employer must follow if denial of employment results from a check.

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## A SCREENING **WORST** PRACTICE

A Wall Street company was ready to hire a candidate for a high-level position but discovered an arrest record in the on-line court record database, a fact the candidate had neglected to mention. A private investigator confirmed the arrest was for breaking and entering years earlier in Atlanta, but that's all the investigator could find. So the investigator asked the candidate to explain.

When the man was transferred from Atlanta to New York City, he could not sell his house and had to rent it. Later, the tenants moved without paying the rent. He flew to Atlanta to check on his property only to find that they had changed the locks. While he was prying open a window, someone called the police, and he was arrested. Being a Friday, he spent the weekend in jail before he could get legal help. No charges were pressed, but the arrest stayed on the record.

We had to dig deeper to confirm he charges were dismissed. This shows that relying only on online data-bases is one of the worst practices.

Even the FBI database, considered the gold standard, is incomplete, he adds. Omissions in court data occurs because each state reports differently. Some only report convictions. Some report arrests and convictions. Some states expunge misdemeanors; others do not. In some, first arrests with no convictions are wiped clean; in other, they're not.

Many of the people in these databases never go to jail. If you find a record, talk to the candidate. Don't have an inquisition. Have a conversation.

## **RISING** NUMBER OF COMPLAINTS

In 2009 the US Equal Employment Opportunity Commission (EEOC) received more complaints than in previous years about job discrimination due to the use of credit histories. The commission has a mandate to investigate these allegations and can pursue legal options, usually class-action suits.

In December 2010 for example the commission announced a class-action suit against Kaplan Higher Education Corp., a nationwide provider of postsecondary education, alleging it engaged in a pattern or practice of unlawful discrimination by refusing to hire a class of black job applicants nationwide. The suit alleges Kaplan rejected job applicants based on their credit histories and that this practice has an unlawful discriminatory impact because of race and is neither job-related nor justified by business necessity.

Be careful when requesting credit reports on employment applicants. You may one day need to justify why it was a necessity.

## **ORCA ♦ WISDOM ♦**

Portable Computer:

A device invented to force businessmen to work at home, on vacation, and on business trips.

# MANE EVENT

April 2011

Tenant Background Investigations

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## LEGAL OPINION



### Question:

I own a 27 unit apartment building in Kent. I keep getting letters from Comcast about the cable TV. They insist that I sign a new 5 year contract and that this new agreement is required by law. They say I need to sign it to maintain service to my tenants. What is going on? How can I be required to sign a contract? Are its terms negotiable?

### Answer:

I've received dozens of inquiries regarding these letters. I have received a number of them myself (probably four or five per property that I own or manage). First, let's look at the cover letter that you likely received, then let's turn to the form Broadband Services Agreement ("BSA") that they want you to sign.

The cover letter appears to me to be intentionally misleading. While they state that the enclosed contract must be signed to "secure our continued services to your property," elsewhere in the letter they state, "without this agreement being signed, upgrades may not be available to your residents." It is reasonable to interpret these statements as meaning that Comcast may refuse to perform a particular system upgrade without the agreement being in place. Prior letters from Comcast stated that the new BSA was required because of changes in law.

To get to the bottom of this, I contacted the Seattle's Office of Cable Communications to inquire whether Comcast can compel subscribers to sign their agreement (on the internet, go to <http://www.cityofseattle.net/cable> - those in other jurisdictions will want to contact the agency handling cable TV in their city or county).

The master agreement between the city of Seattle and Comcast is posted on the internet and can be easily downloaded. Some of the protections for consumers under the agreement are helpful for both owner-occupants, as well as landlords and tenants. For example, §10.4(A)(1) states, "... [Comcast] shall establish similar rates and charges for all subscribers receiving similar services, regardless of type of Dwelling Unit..." Additionally, §10.4(A)(2) states, "[Comcast] shall not deny Cable Service or otherwise discriminate against Subscribers." Subsection 10.4(A)(3) prohibits "retaliatory action against a Subscriber because of the Subscriber's exercise of any right it may have under [law]."

Subsection 10.4(D) provides detailed regulations for cable service to rental properties. That section states, "[Comcast] shall not install any of its Facilities to any Dwelling Unit or other property without first securing the written permission of the owner or tenant of the property involved, or of such other person who has the right to approval or disapprove the attachment, except where there is an existing utility easement..." Finally, and critical to understanding the answer to this question, "Provision of Cable Service may not be conditioned on any Right of Entry Agreement other than as specified by this Franchise. However, this subsection shall not affect the right of [Comcast] to furnish additional consideration in exchange for such an agreement."

Thus, notwithstanding what Comcast has been implying in its correspondence, it cannot shut off cable service to your building and residents. Comcast cannot compel you to sign their form agreement. Comcast cannot refuse to provide upgraded services (high speed internet, HD TV, etc...) to your residents in the absence of the agreement.

In my opinion, you can safely refuse to sign Comcast's "BSA," without running the danger of losing cable TV for your residents. For the buildings I manage, I have e-mailed a response stating, "I decline to sign your agreement

- your cable wiring may remain in place - please do not write me again." I received a response via e-mail stating, "we will note this information for our files."

In a future article, I will review the Comcast BSA agreement and outline the reasons why I refused to sign their agreement.

*\*Article written by Attorney Christopher Benis, of Harrison, Benis & Spence, LTP. This column does not constitute legal advice. Specific problems require specific solutions.*

## EFFECTIVE MAY 1, 2011

### Sex Offender Data

**Sex offender records will be searched exclusively through the National Sex Offender Database.**

## Eviction Enlightenment

### Ask Eviction Swami Johnananda

**Landlord:** I found out my lease tenant is a "happy hooker". She is not bringing her clients to the unit. However, you have received complaints from other tenants that they do not want someone like this in the building. What do I do?

**Eviction Swami Johnananda:** Oh dear! This is a problem. The correct action to take is to give her a notice that you will not renew the lease.

**Landlord:** I gave my tenant a 20 day notice to terminate at the end of the month. They did not move. What is my next step?

**Eviction Swami Johnananda:** You would begin the eviction proceeding—a Summons and Complaint and have it served the tenant.



*\*\*For more wisdom from Eviction Swami Johnananda go to [www.orcainformation.com](http://www.orcainformation.com) or call 360-588-8335*