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Criminal Background Checks – *Not a Silver Bullet!*

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Where criminal background checks are concerned, many organizational leaders are not good consumers, looking for ‘cheap and fast’ rather than intrinsically effective. Organizational leaders have much to learn related to criminal background checks. As a starting point, leaders must learn what this element in the screening process accomplishes, and what it lacks.

Given @MeToo and ongoing media headlines, many organizational leaders have awakened to the risk of child sexual abuse and are seeking guidance about *what to do*. Many other organizations are not ‘awakened’, but are taking this opportunity to evaluate existing safety efforts to measure preparedness. The criminal background check is quickly identified as the first line of defense. For many organizations, the background check is the *only* line of defense.

The value of the criminal background check, however, must be measured in light of actual reality. Take, for example, this fact: less than 10% of sexual abusers will encounter the criminal justice system *ever*. As a result, more than 90% of child sexual abusers have no criminal record to find ... *and they know it*.

Criminal background checks have become a standard of care and must be performed, but cannot be relied upon as a *silver bullet*: an organization’s sole preventative protocol meant to prevent child sexual abuse. If an organization allows an applicant with a past known (or knowable) criminal history of harming children into one of its programs, that organization is placing children in harm’s way, as well as exposing the organization to civil liability and public censure. Why? The best predictor of future behavior is *past behavior*; if an applicant acts upon his *known* (or knowable) past behavior, the children in the program are at risk.

The purpose of this article is to provide organizational leaders with a better understanding of the value and limitations of this fundamental element of an effective screening process: the criminal background check.

LEGISLATIVE LIMITS

Due to legislative limits, an applicant applying for a position may have a criminal record that *does not appear* on a criminal background report, due to laws placing guidelines and limitations on the type and age of information reported. As a result, it behooves organizational leaders to develop some familiarity with state-specific guidelines and restrictions. When a background check report comes back stating ‘no records found’, it cannot necessarily be concluded that *no records exist*.

FCRA (Federal Law)

The criminal background check industry is governed by federal legislation: the Fair Credit Reporting Act (FCRA). Any third-party vendor providing criminal background checks to an organization is a Credit Reporting Agency (CRA). One purpose of the FCRA is to provide *consumer protection*, promulgating guidelines that seek to ensure that consumers are not unfairly deprived of employment and other opportunities. The FCRA places limitations on information reported by a background check vendor (CRA) to an organization. In addition, in some jurisdictions state law further restricts criminal history reporting, placing limits on the *type* of information reported and *when* a background check can be requested by a potential employer.

Under the FCRA, criminal *convictions* can be reported regardless of when the conviction occurred, while *non-convictions* may only be reported if the matter is less than seven years from the criminal filing. (A non-conviction could involve an alternative or deferred adjudication, a dismissal or a finding of ‘not guilty’).

State Law

Though the FCRA places no limits on reporting criminal convictions, various states have passed legislation that have limited the scope of conviction reporting to seven years (California, Kansas, Massachusetts, Montana, New Hampshire, New Mexico, New York and Washington).

Though the FCRA limits the reporting of *non-convictions* past the seven-year mark, some states (California, Kentucky, New Mexico and New York) prevent CRAs from reporting non-convictions altogether.

In Massachusetts, Hawaii and Washington, employers may perform a criminal background check only *after* an offer of employment has been extended. In Hawaii and Washington, an employer may rescind the offer of employment only if a conviction has occurred within the past ten years *and* is directly related to employment responsibilities.

These examples, not exhaustive, illustrate how state legislation can impact the *type and age* of information reported, and *when* it can be requested. Year by year, these legislative limitations continue to mount.

Equal Employment Opportunity Commission (EEOC)

In addition to federal and state law, the EEOC has proposed guidelines further restricting *how* and *when* criminal histories can be requested and used for employment purposes.

PLEA DOWN OFFENSES

Criminal background checks are performed in various industries, and the ‘hit rate’ varies depending upon the type of industry. An industry ‘hit rate’ defines the likelihood that a population of applicants will have a criminal history. In the construction industry, for instance, the hit rate is much higher than the hit rate in higher education. The hit rate for industries hiring younger applicants (i.e., summer camps) is low in part because criminal activity *prior to age 18* is generally unavailable.

The hit rate for schools, camps, ministries, youth sport organizations and most non-profits is comparatively low. In those types of programs, as a result, most reports reflect ‘no records found’. As a starting premise, do NOT read this statement as an assurance that no records *exist* – notwithstanding the statistical and historical hit rates. There are situations where an applicant *may* have encountered the criminal justice system, but that encounter is not or cannot be reported by a background check vendor (see above).

On occasion, however, organizational leaders request a criminal history related to an applicant and get a ‘hit’. Remember, the criminal background check is one screening element, part of an effective *screening process* (contact [Abuse Prevention Systems](#) to learn more about a Skillful Screening process). A fundamental principle in effective screening is this: *the best predictor of future behavior is past behavior*. A ‘hit’ from an applicant’s criminal background check provides information related to an applicant’s past behavior that is criminal in nature. The next question is this: *exactly what behavior did the applicant exhibit that gave rise to the criminal charge?*

If the charge is ‘theft by check’, the applicant’s behavior is fairly clear. The appropriate analysis is this: the applicant has engaged in past criminal behavior involving money, suggesting the applicant may not be the best candidate for a position involving organizational funds. Screening analysis – predicting possible *future behavior* – is feasible with most criminal charges: DUIs, drug charges, fraud charges.

Some criminal offenses are more difficult to evaluate – especially when the charges are related to ‘plea-down offenses’. Imagine this occurrence: a sexual offender is arrested and charged with Aggravated Sexual Assault of a Child – clearly a disqualifying offense. In the course of the criminal justice process, however, the offender is allowed to ‘plea down’ to a lesser (possibly a *non-registration*) offense. Examples of common ‘plea down offenses’ correlated to child sexual abuse include: Indecency, Contributing to the Delinquency of a Minor, Criminal Mischief, Assault, and a variety of other labels, depending on the criminal codes of a particular state. For screening purposes, these are ‘red flag offenses’. The person reviewing the criminal search results must understand this concept and be sensitive to ‘red flag offenses’.

Practice Point 1: Develop a familiarity with ‘plea down’ or ‘red flag offenses’.

Practice Point 2: NEVER accept a *self-reported explanation* for a ‘red flag offense’.

In many cases, the criminal behavior underlying a charge for Indecency is simple and explicable. In some cases, however, the criminal behavior underlying a charge for Indecency is child sexual abuse. If the offender was allowed to plea down to a lesser offense, he or she will have an explanation for the charge that does not involve sexual abuse of a child, and this explanation will be well-rehearsed and persuasive. *Do NOT accept self-reported explanations for red flag offenses.* Instead, politely explain to the applicant that you must pause the process. Shift the burden to the applicant. Politely request that the applicant bring you the arrest record for the Indecency charge. The arrest record is more difficult for you to access but is available to the applicant. The arrest record will describe the behavior that gave rise to the underlying arrest. If the applicant was arrested and charged with sexual abuse of a child, the arrest record will say so. If the applicant was in fact arrested and charged with sexual abuse of a child, the applicant will simply disappear. He or she will **self-select out** of the screening process.

This concept is covered at length in Abuse Prevention System’s **Skillful Screening Training: including grooming offenses, stair-step offenses and use of releases.*

ORGANIZATIONAL BEST PRACTICES

Notwithstanding background check limitations, criminal searches must be completed. In so doing, organizations must wisely allocate limited resources. As financial resources are expended, the following principles should be considered.

Deeper Searches

Given the growing crisis of child sexual abuse, background check vendors are quick to capitalize, encouraging organizations to run deeper searches and refresh searches more frequently. These are excellent suggestions, but deeper and more frequent background checks alone do not solve the problem, because less than 10% of abusers will encounter the criminal justice system. As an example, USA Gymnastics could have undertaken an exhaustive criminal background check on Larry Nassar *weekly*, without a single ‘hit’.

Create Tiers of Staff/Volunteers

Most organizations choose a background check vendor based upon how quickly and cheaply a search can be completed. As a general rule, the ‘cheapest’ background check has the narrowest search scope. Often, it will not search aliases, it provides the shortest ‘look back’ period, and it does not confirm Social Security Number (SSN) identity. In other words, it’s relatively easy to foil.

For some roles, a cheaper and narrower search may be acceptable: roles that are highly supervised with limited (or no) time alone with a child (e.g. a face-painter at your fall carnival or VBS). For other roles, a deeper search is necessary, particularly high-trust positions where *trusted time alone* with a child or student may be contemplated (e.g. program director, school counselor). For these roles, an organization cannot afford to be wrong; consider a deeper search.

Given differing roles and a limited budget, it is recommended that an organization create two or more tiers of those who wear the organization’s nametag. The depth of search should correspond to the trust level and access to children. Be prepared to spend more for personnel about whom you cannot be wrong. These tiers should be based on *trust level* and *access*, not whether a person is a staff member or a volunteer.

In general, there is no ‘one-size-fits-all’ criminal background check.

For a more thorough treatment of the use of criminal background checks for child-serving organizations, consider this video tutorial: [Criminal Background Checks – Removing the Mystery](#).

Disclosure Requirements

Every organization should have a disclosure requirement requiring making it mandatory that staff members and volunteers disclose whether he/she has been arrested, charged or accused of criminal behavior during the time of service as a staff member or volunteer.

This is not to be confused with requesting information prior to engagement, which may be impacted by state law.

Periodically Refresh

Every two or three years, each organization should refresh or re-run criminal history searches to determine whether a staff member or volunteer has been arrested or charged with criminal conduct. Coupled with a disclosure requirement (see above), discovery of an undisclosed new criminal record provides an independent justification for dismissal; requiring disclosure is an important first step.

EFFECTIVE SCREENING

Though the principle is the same – best predictor of future behavior is past behavior – the application can vary. For most organizations, screening relates only to fitness for purpose: whether a candidate has the skills and abilities to fill a particular role. For child-serving organizations, screening must also relate to *child safety*: whether a candidate poses a risk of harm to populations served by the organization. One of the most significant risks is child sexual abuse. The child safety goal of the screening process should be to identify high-risk indicators of the preferential offender.

Skillful Screening Training

Managerial and screening personnel must receive training to recognize high-risk indicators revealed by and through an effective screening process, including those revealed by criminal records. An applicant with inappropriate sexual motives carries with him/her various indicators and life patterns that help identify him/her as one who may be a danger to children or youth. Risk indicators stemming directly from skillful evaluation of background check records, for example, include common *plea-down, stair-step, grooming* and *red-flag offenses*, as well as disqualifying offenses (mandated by state law or internal policy). To learn more about Skillful Screening Training or request an online link for access, contact [Abuse Prevention Systems](#).

Effective screening is rooted in an understanding of the offender's

grooming process. Sexual offenders come from all segments of society. Sadly, some gain access to children through ministry child-serving programs. Abusers groom both children and gatekeepers – trusted adults in a child's life – to convince them that they are helpful, trustworthy, responsible people. Validated by decades of academic studies, the grooming process of the abuser is *known* and *recognizable*. Organizations should screen child-serving personnel with a thorough understanding of the abuser's *grooming process*, common grooming behaviors and known offender characteristics.

Effective screening creates OPT OUT opportunities.

Skillful screening incorporates *opt out opportunities* for applicants with the wrong motive, *before* he or she has access to children. When an organization communicates current child protection practices and protocols, from the beginning, it communicates that *'it might be easier somewhere else'*. Written policy should clearly state that all suspicions and allegations of child abuse are immediately reported to authorities. Applicants should review and sign child protection policies describing inappropriate forms of communication and physical touch. Training should occur *before* an applicant is interacting with children. These clear policy expressions provide offenders with an opportunity to self-select out of the organization's screening process.

Effective screening gathers information about the applicant from third party sources. Many employers ask for references, but *don't check them*. Others check references but fail to include *questions meant to elicit a high-risk response*. The failure to speak with references about a prospective staff member or volunteer is one of the most common mistakes made by child-serving organizations. Beyond the initial consequence of missing helpful information about an applicant, untapped references can ultimately prove to be harmful to the organization, as employers are commonly responsible for information that *would have been* communicated by a reference, if the reference *had* been contacted.

CONCLUSION

Organizational leaders have much to learn about the criminal justice system, how criminal records are generated, how records are reported and the various obstacles to obtaining a complete criminal history. When organizational leaders become educated consumers, they are best prepared to fully utilize the criminal background check, understanding what this screening element can – and cannot – provide.

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Love and Norris teach the only graduate-level course on Preventing Sexual Abuse in Ministry as Visiting Faculty at Dallas Theological Seminary.

BACKGROUND CHECK LEVELS

	Level 1	Level 2	Level 3	Level 4	Level 5	Level 6	Level 7
Search Elements	Identity Research	✓	✓	✓	✓	✓	✓
	Multi -Jurisdictional Search	✓	✓	✓	✓	✓	✓
	Sex Offender Database	✓	✓	✓	✓	✓	✓
	MVR Report		✓		✓	✓	✓
	County of Residence			✓	✓	✓	✓+
	Federal Court Criminal Search					✓	✓+
	State Search						✓
Features	Hits verified	✓	✓	✓	✓	✓	✓
	Additional court fees	✓	✓	✓	✓	✓	✓
	Estimated Processing time (business days)	1	1	1 - 2	1 - 2	1 - 3	1 - 3

✓+ = searches all counties or districts in which an applicant has lived; lower levels search **current** county or district of residence **only**

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Don't forget! While Background Checks provide an important element of your Organization's child protection efforts, they are no 'silver bullet' or stand-alone Safety System. An effective Safety System includes Sexual Abuse Awareness Training, Skillful Screening Processes and Training, Tailored Policies & Procedures and appropriate Monitoring and Oversight. Learn more at AbusePreventionSystems.com.

****Additional court access fees may apply. List available upon request**

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