



IS YOUR
BACKGROUND CHECK
PROVIDER

PUTTING YOUR COMPANY AT RISK?





SUMMARY

Background checks can help you mitigate risk, but not without some inherent risks of their own. This guide helps you understand a background check provider's role in helping you maintain compliance when conducting background checks, and using background check results to make hiring decisions. We'll provide guidance on how to research and assess compliance-focused background check providers, and help you learn how to mitigate the risk of lawsuits.

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INTRODUCTION

Background checks are an important part of the candidate evaluation process. They help improve the quality of hire, ensure customer safety, and protect company assets, among other benefits.

Background checks also come with inherent risk. Various federal, state, and local laws and regulations govern when and how background checks may be used. Non-compliance is costly—both in monetary fines and settlements, as well as softer costs like a poor candidate experience and damage to your company's reputation.

A strong background check provider will stay on top of new laws and rulings that could affect your company's screening policy and process, and guide you toward compliance.



MAIN REASONS COMPANIES RUN BACKGROUND CHECKS ON EMPLOYEES

Most employers (95 percent) use employment background screening as part of their hiring process, but the reasons vary based on the nature of work and the positions they're filling.¹ These include:

Assess Candidate Trustworthiness

Background checks may include criminal record checks, education and employment verification, and identity verification, among others. These can be coupled with other information from the evaluation process to help employers assess whether a candidate is honest and trustworthy, or if they may pose a threat to others.

Help Ensure Safety

Safety is a major consideration at many companies, especially those that hire employees who would interact with vulnerable populations, go into customers' homes, or operate heavy machinery. Background check services can alert employers to a person's past behaviors that could indicate future safety concerns for customers, employees, and others.

Reduce Criminal Activity

Many organizations check criminal records for misdemeanors or felonies in a candidate's background, including theft, assault, and embezzlement. Identifying candidates who have prior criminal convictions may help companies better protect company assets and customers.

Confirm Candidate Qualifications

Education and employment history verification helps to ensure candidates have the skills, experience, education, training, or certification required for the role. This can mitigate the risk of hiring a candidate with false credentials, and protect your organization against liability claims.

Improve the Quality of Hire

Background checks help employers make more informed hiring decisions so they can build a strong team of qualified, trustworthy employees.

Protect Company Reputation

Your employees represent your brand, and their actions can affect your company's reputation—for better or for worse. Background checks can help you hire the caliber of talent you want to represent your brand.

Adhere to Legal Requirements

Using pre-employment screening helps companies comply with federal, state, local, and industry regulations. For instance, there are federal regulations in place that require screening for candidates in many healthcare, education, and financial services roles.

Mitigate Risk

Ensuring safety, reducing criminal activity, and confirming candidate qualifications protect your company against liability claims, including negligent hiring lawsuits.



WHY IT'S IMPORTANT TO USE A COMPLIANT BACKGROUND CHECK PROVIDER

1. Fair Credit Reporting Act (FCRA) Lawsuits Are On The Rise

The FCRA requires employers to comply with certain regulations to ensure that the background check process is done fairly. This includes notifying applicants and employees that background check results may be used in employment decisions, and obtaining written consent to conduct background checks. It also includes a requirement to send adverse action notices when background check reports lead to decisions against hiring, retaining, or promoting a candidate.

CRA complaints reached a record 4,531 in 2018, and penalties for knowing violations of the Act can be up to \$3,993 per violation.

Employers are responsible for their own compliance with the FCRA, but background check providers can lead them astray. For instance, background check providers may be providing employers with outdated consent forms. This can be a costly mistake. The number of lawsuits filed over alleged FCRA violations has increased steadily each year since 2010.² FCRA complaints reached a record 4,531 in 2018,³ and the FTC may bring civil penalties for knowing violations of the Act up to \$3,993 per violation.⁴



2. Equal Employment Opportunity Commission (EEOC) Is Successfully Resolving Workplace Discrimination Charges

The EEOC enforces federal laws that make it illegal to discriminate against a job applicant or an employee. Hiring policies that disproportionately screen out minorities, including people with criminal records, may be considered a violation. But few background check providers go beyond FCRA requirements, leaving you at risk for EEOC non-compliance.

The EEOC received 76,418 charges of workplace discrimination in fiscal year 2018. The agency resolved 90,558 charges of discrimination, and secured \$505 million for victims in private sector, state and local government, and federal workplaces. EEOC legal staff filed 199 merits lawsuits alleging discrimination, and achieved a successful outcome in 95.7 percent of all district court resolutions.⁵ Working with a background check provider that overlooks EEOC regulations can put you at risk for EEOC discrimination claims, and hurt your company's reputation.

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3. State & Local Laws Complicate Compliance

There are more than 180 state, county, and local ban-the-box laws that govern when and how employers can ask about criminal records. Further, new drug laws and marijuana legalization efforts are popping up frequently. And, there are also some state laws that have restrictions around employment credit checks. Depending on your and your candidates' locations, you may need to comply with three, four, or more sets of laws in addition to the FCRA.

**A background check provider
that fails to guide you through
this complex legal landscape is
leaving you exposed.**

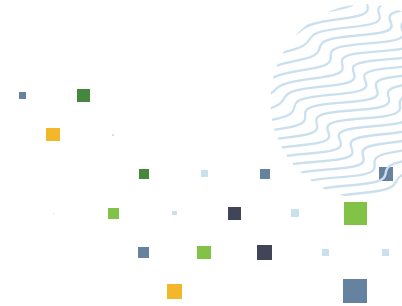
This myriad of laws and regulations can be confusing and time consuming to understand and apply. Employers who fail to comply may be subject to civil penalties ranging from hundreds to thousands of dollars per incident. A background check provider that fails to guide you through this complex legal landscape is leaving you exposed.

5 WAYS BACKGROUND CHECKS CAN PUT YOUR COMPANY AT RISK

Conducting background checks can help mitigate the risk of a bad hire, but expose your company to federal, state, and local compliance risks, and scrutiny by the EEOC.



- 1. Receiving Information Not Allowed in Your Jurisdiction**
- 2. Illegal Drug Screening**
- 3. Outdated Consent Forms**
- 4. “One & Done” Background Checks**
- 5. Inability to Filter Results Based on Your Company’s Background Check Policy**



1.

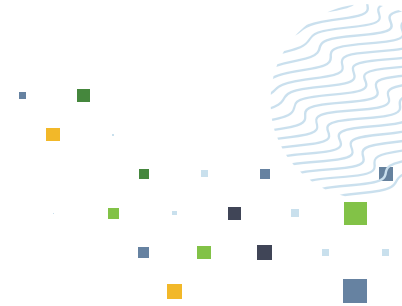
Receiving Information Not Allowed in Your Jurisdiction

Fair hiring laws are becoming more robust, and employers may only use specific kinds of data to inform hiring decisions. For example, some jurisdictions limit the reporting of criminal records to those within the past seven or 10 years. Other jurisdictions prohibit employers from considering any offense information other than convictions or pending cases. A background check partner that provides information you're not allowed to use in your jurisdiction opens you up to potential EEOC violations and class-action lawsuits. If you have access to the information, the assumption is that you used it.

2.

Illegal Drug Screening

Drug screening has the potential to put employers at risk for discrimination lawsuits and non-compliance with state laws. Some states limit how pre-employment drug screening results can be used, and some locations don't allow screening for marijuana except in very narrow circumstances. For example, California allows a drug test only after the applicant has received an offer of employment conditioned on passing the test. These laws are changing frequently, and it's easy to overlook them if you don't have a robust legal department or compliant background check provider to help you stay on top of them.

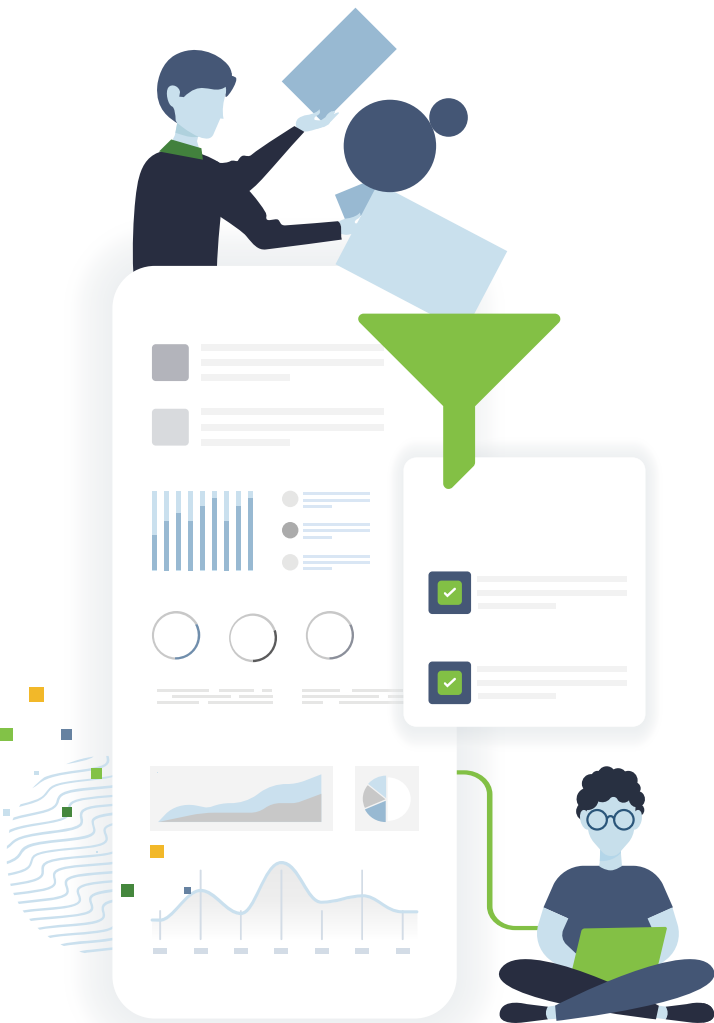


3. Outdated Consent Forms

Failure to provide compliant consent forms is one of the most common violations that lead to FCRA-related lawsuits. These forms are often provided by background check providers, but may be outdated. For example, a 2019 ruling in *Gilberg v. California Check Cashing Stores* mandated that disclosure forms cannot include state law disclosures. Background check providers that haven't updated their forms to reflect this ruling may put their customers at risk. The FCRA holds employers liable for consent form violations, and an unintentional gap in compliance awareness doesn't give you a free pass.

4. “One & Done” Background Checks

It's no longer a best practice to only screen once per year in certain industries and positions. For example, employers in industries that require home visits—including service workers or home healthcare providers—may wish to screen employees more frequently so they don't miss new offenses. The same goes for safety-sensitive positions, like drivers or heavy machinery operators. A background check provider that doesn't offer ongoing screens could cause employers to miss new offenses, potentially opening them up to negligent hiring claims.



5. Inability to Filter Results Based on Your Company's Background Check Policy

Viewing information that shouldn't be considered according to your background check policy could lead to inconsistent screening practices, biased hiring decisions, and discrimination lawsuits. Let's say your policy states you will only consider violent felonies from the past seven years. Without the ability to filter results in accordance with your policy, one candidate's background check report could show a non-violent misdemeanor offense from last year, and another might show a violent felony offense from 15 years ago. Despite your well-intentioned policy, viewing this information could lead to unconscious bias in your hiring decision, opening you up to scrutiny by the EEOC.

RESEARCH

WHAT TO LOOK FOR IN A COMPLIANT BACKGROUND CHECK COMPANY

Most major background check providers are highly accurate and FCRA compliant. But some go above and beyond to also help employers wade through EEOC regulations, as well as follow state and local laws. Reduce your risk by looking for:



Compliant Consent Forms

Consent forms should be separate from job applications, and the language should be clear and on its own form. Review consent forms with counsel, and be sure to find a compliance-minded provider as soon as possible if you think your current forms are outdated. A compliant background check company will stay on top of changes in the law, update their forms quickly, and notify customers of changes.

Law-based Record Filtering

A compliance-focused background check provider can mitigate risk for companies by filtering out results employers can't legally use to make hiring decisions. Filters should include federal, state, and local law compliance filters, and apply to both the employer's and candidate's locations.

Custom Record Filtering

Employers should also be able to filter records based on their background check policies to allow you to only see records you care about. This is an important step toward creating a more consistent screening process and reducing unconscious bias in hiring decisions. Further, if your company conducts different screening searches for different roles (a best practice), look for a provider that can customize bundles for each role.

❑ Multiple Drug Screening Panels

While marijuana use remains illegal at the federal level, some states have legalized medical and recreational marijuana use. Partner with a background check provider that is knowledgeable in the drug screening landscape and stays up to date with new drug screening laws and developments. Your provider should offer drug screening packages that omit marijuana and THC from the screening panels in order to protect employers who are subject to local marijuana regulations.

❑ Integrated Adverse Action Workflows

If the results of a background check prompts a decision to deny employment, the FCRA requires employers to follow specific adverse action steps. A background check provider with built-in, localized adverse action workflows to guide you through this process can help you comply with federal law, as well as state and local ban-the-box laws.

❑ Individualized Assessments

A background check provider with a built-in way to inform you when individualized assessments are recommended or required, and that provides an easy way for candidates to add additional context, can help reduce scrutiny by the EEOC. EEOC guidance suggests performing an individualized assessment when a background check comes back with evidence of criminal activity so that candidates may have the opportunity to explain the circumstances surrounding the offense. This can help to give people with criminal records a fair chance at securing employment.



❑ Ongoing Background Checks

Employers can help keep their workplaces and customers safe by partnering with a background check provider that makes it easy to perform ongoing post-employment screening services. These will ensure you receive an alert if a new criminal record is found, so you can stay informed and mitigate the risk of negligent hiring lawsuits.

❑ Automated Adjudication

A strong background check provider can remove human bias from the hiring process with automated adjudication, mitigating the risk for discrimination claims. Your hiring criteria can be applied across candidates to identify those who meet requirements, and those who need further review. All others should receive adverse action notices to comply with FCRA requirements.

❑ In-house Legal Team

Background screening laws and regulations change, and when they do, you and your background check provider must take steps to stay in compliance. A screening provider with an in-house legal team monitors screening laws to help you stay ahead of compliance updates.

ASSESS

QUESTIONS TO ASK A BACKGROUND CHECK PROVIDER

Partnering with the right background check provider can help you navigate issues that have the potential to put your company at risk. Here are some questions you can ask a background check provider to help you choose the right one:



❑ Are you accredited by the Professional Background Screening Association (PBSA)?

PBSA accreditation is important because the entire operation is vetted to ensure you're set up for success, transparency, and compliance. The organization looks at procedures for accuracy, and includes data security requirements and whistleblower mechanisms that encourage ethical practices.

❑ How do you ensure accurate results?

Inaccurate information puts companies at risk of making poor hiring decisions. A compliance-focused background check provider will have processes in place, such as manual reviews by a quality assurance team, to review results, cross-reference data, and verify it for accuracy. This allows a screener to identify and remove duplicate records, confirm whether the record belongs to the candidate, and review records to assess whether they can be legally reported.

❑ Do you exclude information we're not legally allowed to consider in our hiring decisions?

If you have the information, the presumption is that you've used it in your hiring decision and it's very difficult to prove otherwise. Your background check provider should know the location of the candidate and the employer, and filter background check results based on laws that apply in those jurisdictions.



❑ What is your dispute rate?

Background check providers are required to investigate disputes filed by candidates and remove records that can't be verified. The dispute rate is the number of candidate disputes that occur out of the number of background checks run, and a rate of 0.1 percent is fairly standard. A low dispute rate is a good indication that the provider is using reliable data, has a system in place to ensure accuracy, and is delivering correct and complete results.

❑ Do you give candidates a copy of the background check?

Some state laws mandate employers give candidates a copy of the background check results when requested. Employers may also be obligated to include a check box on their form for candidates to request a copy of their reports. Find out if your background check provider is sending the reports to candidates on your behalf, and when.

❑ How many lawsuits are you currently engaged in?

This is a litigious space, and nearly all background check providers will have some degree of litigation. Many will settle even if there's no valid claim because it's less expensive to settle than it is to litigate; it doesn't mean they're a bad provider. But you do want to look at the volume of litigation compared to the volume of screens. Run a federal record search for the background check provider and look for trends in the types of litigation.

❑ Have you been fined by a government body?

Government agencies don't fine unless there's been an investigation, they've looked into evidence, and a penalty is authorized by law. Ask the background check provider this question, but also do your own research. Strongly consider alternatives if you find anything, as a fine by a government body is a key indicator of gaps in compliance.

❑ Do you have features to help us follow the law?

Compliance-focused background check providers have features to help employers comply with challenging laws. These include adjudication and filtering features, a built-in consent flow, individualized assessment tools, and localized adverse action.

❑ Do you keep us updated on compliance changes?

There is so much risk in this industry, you need a background check provider who will help you stay updated on new developments. Find out how they research the law, how often content is updated, and how content is delivered.



LEARN LAWSUITS THAT MAY HAVE BEEN AVOIDED WITH A COMPLIANCE-FOCUSED BACKGROUND CHECK PROVIDER

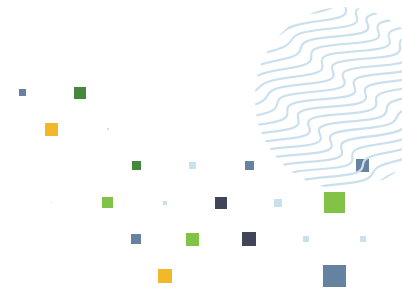
Employers are ultimately responsible for following many of the rules and regulations outlined by the FCRA, EEOC, and state and local laws. The right background check provider can help guide employers toward compliance.

SETTLED FOR **\$2.3 MILLION**

Schofield v. Delta Air Lines, Inc.

Plaintiffs allege that Delta Air Lines' consent forms were not clear and unambiguous, contained extraneous information, and did not consist solely of the disclosure. This would bring them out of compliance with the FCRA and accompanying California state laws. The case was settled for \$2.3 million in 2019.⁶

While it's the employer's responsibility to ensure that a compliant consent form is provided, a good background check partner will often provide a compliant form for customers to use.



SETTLED FOR **\$2.7 MILLION**

Angela Fuller v. Avis Budget Car Rental LLC et al.

Angela Fuller claimed Avis failed to provide a stand-alone disclosure, as well as an adverse action notice. Her background check report also contained an infraction she received 28 years prior, which shouldn't have been reported according to FCRA regulations. Avis Budget Car Rental agreed to a \$2.7 million settlement in this case.⁷

A compliance-focused background check partner will guide employers through the adverse action process, in addition to providing a compliant consent form. A good provider should also offer law-based record filtering to apply federal, state, and local law compliance filters. This mitigates the risk that background check reports contain records that employers can't legally use to make hiring decisions.

SETTLED FOR **\$583,375**

Jones v. Halstead Management Co. et al.

Jones filed a lawsuit against Halstead Management after a middle initial mismatch on a background check caused him to lose his job. He also claimed that Halstead failed to provide a stand-alone disclosure form, resulting in a class-action lawsuit that was settled for \$583,375.⁸

An inaccurate background check report led Halstead to make an unfair employment decision, and ultimately cost them a hefty settlement. A compliance-focused background check provider will have processes in place to verify data accuracy and confirm whether records belong to the candidate in question.



\$174 MILLION

Amount employers have paid to resolve class-action lawsuits related to federal violations in the last decade.



CONCLUSION

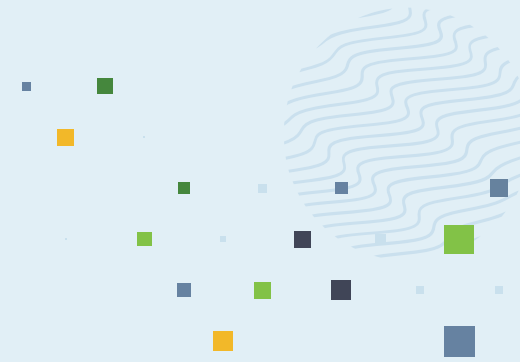
Background checks are governed by a myriad of federal, state, and local laws and regulations. Failure to comply with these laws can result in costly fines, settlements, and lawsuits that can end up costing a company thousands, and sometimes millions, of dollars. Employers have paid out \$174 million over the past decade to resolve class-action lawsuits related to federal violations alone, and many companies settle before they reach this point.⁹

A strong background check provider will help employers maintain compliance when conducting background checks and using background check results to make hiring decisions.

This is particularly important if you hire in multiple states, and if you don't have robust in-house legal counsel. An unintentional gap in compliance awareness doesn't give you a free pass, and violations for non-compliance can cost you dearly.

GoodHire's compliance expertise is unparalleled.
Our advanced platform helps your company:

- Mitigate the risk of fines and lawsuits
- Anticipate compliance updates
- Handle compliance tasks with ease



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