

Conducting an Employee Background Check

(Please Note: Any and all background check policies or procedures should be reviewed and approved by a City Attorney prior to adoption.)

This particular Background Check Article is from the May/June 2005 edition of the *Public Risk* magazine. *MMIA found this article to be of particular interest to many Montana Municipalities. It has been reprinted with permission from the Public Risk magazine, the official publication of the Public Risk Management Association (PRIMA). Following the article MMIA has included resources for Montana Municipalities to utilize when performing background checks.*

Background Check

By Bob Fever, Regional Risk Control Director for the Public Sector Services Business Unit of St. Paul Travelers.

Employee background investigations are key to public entity hiring process:

A public entity can lose up to 2.5 times an employee's salary by failing to do its homework on a potential hire. Those costs include direct expenses related to replacing and retraining an employee and indirect expenses due to issues such as employee violence, theft, and drug and alcohol abuse. That's why a pre-employment background investigation program is a critical component of a public entity's hiring process.

Skyrocketing Costs:

The average cost of hiring an employee these days is approximately \$3,500. While that may seem like a significant amount of money, it's a wise investment if the person turns out to be a "good hire." Unfortunately, many public entities don't spend enough time or money upfront to determine whether an employee meets the job requirements and the organization's policies and procedures.

In the long run, a pre-employment background investigation program will save your organization time and money. And statistics back this up. According to the Small Business Administration (SBA), for every dollar invested in personnel screening, \$5-\$16 is saved in reduced absenteeism, improved productivity, lower turnover, safer working environments, reduced insurance premiums and decreased employer liability.

Traditionally, most pre-employment screenings—and hiring decisions—have focused on a review of information provided by the job candidate: the employment application, the resume and an interview. While information a candidate may disclose on an employment application and effective questioning techniques during an interview can help identify potential problems with job applicants, it's certainly not a foolproof process.

According to a February 2002 HR News article, "Unraveling the Applicant," at least one in four job candidates is willing to falsify information to get a job—including college degrees, employment history and reasons for leaving previous jobs. That's why it's critical for public entities to validate information provided by candidates. The most common types of validation include.

Reference checks—References can be valuable in determining a potential employee’s work habits and may include information from previous employers, educational institutions or personal references.

Motor Vehicle Record (MVR) checks—Giving keys to a company car to an employee with a poor driving record can subject your entity to significant liability in the event of an accident. Negligent Entrustment occurs when the employer allows a driver to use a vehicle knowing or having reason to believe that the person creates a risk or harm to others. The good news is that all states make MVRs available to employers for employment purposes.

Criminal background checks—Hiring an employee with a criminal history can pose a danger to fellow employees and the public. Unfortunately, there isn’t a common national database employers can access for employee criminal histories. In general, arrest records cannot be used, and state and federal laws differ on the extent that an employer may consider an applicant’s criminal history in making hiring decisions.

Child abuse checks—Public entity employees who will be working with children as part of their employment such as those assigned to the Parks and Recreation programs, daycare operations, volunteers and coaches should have their records checked for child abuse incidents. The National Child Protection Act of 1993 gives “qualified entities” the ability to request fingerprint-based national criminal history checks on volunteers and employees. Qualified entities include organizations that provide services for children, the elderly and people with disabilities.

Credit checks—Credit checks, though seldom used, should be conducted on job candidates who will be working with money.

Developing a Policy:

The first step in establishing a program for pre-employment background investigations is to develop a written policy. This policy can ensure a consistent approach is taken in the hiring process in departments throughout the public entity. The policy should cover the following:

- A requirement that a background investigation be conducted on all candidates;
- A description of the types of background investigations that will be conducted for different positions;
- The kind of information needed from the candidate, including the candidate’s consent;
- How the background information will be used.

The type and depth of background investigations needed depend on the position and job duties. For example, the background investigation process for a laborer in the public works department may be less intense than that for a recreation supervisor who works with children.

Checking references and the driving record for the laborer may be sufficient for the laborer. For the recreation department candidate, checking references, the driving record, criminal history and child abuse records will probably be necessary. Employees whose day-to-day interactions with the public are many will require more scrutiny than those employees whose dealings with the public are limited.

The employment application can be a very effective tool for a public entity to use in the pre-employment screening process. If the employment application states that the entity plans to conduct a thorough background investigation, that may be enough to force a candidate with a questionable background to remove himself or herself from consideration for a position. The application should send a clear message to potential job candidates that the entity is serious about the hiring process.

The application should include the following to support the pre-employment background investigation process:

- A statement indicating that providing false information on the application form will be grounds for dismissal and a requirement that the applicant sign the statement. The “dismissal” wording should apply to false information provided or detected during the pre-hiring process or if false information is uncovered post-hire.
- A statement that a background check will be required of all applicants prior to a job offer.
- An area that requests an explanation of “gaps” in the candidate’s employment history other than gaps relating to pregnancy, child care, a disability or any other protected activity.

Public entities should also consider including a release form with the employment application. A release form signed by the candidate authorizes the entity (or another outside organization) to conduct various types of background investigations. While The Fair Credit Reporting Act (FCRA) only requires a signed release when an outside company—not an entity—conducts the investigation, it’s a good idea to require a signed release even if an internal investigation will be conducted.

The release authorization should apply to the pre-employment investigation and should be valid throughout employment if the candidate is hired. That way, occasional investigations such as motor vehicle record checks can be checked without the need for additional signed release forms.

Potential Obstacles

The pre-employment background investigation process can be challenging. Public entities need to determine who will conduct the investigations (internal or external), where to find the information, the quality of the information and deal with the restrictions on use of the gathered information. Here are some obstacles public entities may face during the process:

Reference checks—Many employers are hesitant to release information about former employees. Some will limit their comments to the facts, such as dates of employment, job title and duties. Employers are concerned that they may be subject to lawsuits if they divulge negative information about a former employee. However, more and more states are providing immunity based on “factual” disclosure about job performance or reason for termination (***Please note Montana does not clearly provide this type of immunity. Check with your City Attorney in regard to the type of information you should be releasing.***). Also, numerous court decisions have ruled that former employers may also be held liable if they fail to warn a prospective employer of a known problem with a candidate.

When checking references, it's a good idea to use the phone rather than writing a letter. Oftentimes, more helpful information comes from a conversation with the former employer than through written correspondence.

- Keep questions focused on specific job skills, performance and attendance.
- Check enough references to get the information you need. Ask for additional references if information is incomplete.
- Apply the hiring criteria from the gathered information consistently to all applicants.
- Maintain written documentation of all reference checks—good, bad and those who didn't respond.

Criminal Background Checks—Courts have ruled that information about prior criminal convictions are a matter of public record and can be used as a tool in the hiring process. Unfortunately, there is no nationwide repository for criminal records and the reporting of convictions varies from jurisdiction to jurisdiction. So, accuracy of information can become an issue. In order to ensure the accuracy of gathered information, research may need to be done at the local, county or regional level.

Laws vary from state to state on whether and how a criminal conviction may be used in the hiring process. For example, arrest records without a conviction generally can't be used. State laws vary on the use of misdemeanor convictions. Most states don't allow juvenile convictions to be released. Therefore, working with an attorney to better understand state requirements in using criminal information is essential.

Child Abuse Checks—Public entities that have staff members who interact with children such as those involved in recreation programs, organized sports program and child care represent a significant potential exposure. Many entities have become more aware of the importance of screening prospective workers and volunteers before they are allowed to work with children in part because of the potential high profile liability exposure of child abuse. Organizations such as Little League Baseball now require background checks on all coaches. A public entity's background investigation policy should include child abuse checks.

The National Child Protection Act of 1993 was enacted to encourage easier access to, and sharing of, information about child abuse on a nationwide basis. The Act requires states to submit child abuse crime information to the FBI. While the Act authorizes states to implement legislation to require background screening for employees and volunteers who work with youth, it does not require states to enact the legislation. However, a majority of states do have laws mandating these background checks.

Using internal or external resources to conduct investigations—Many arguments can be made to support either an internal background investigation or using an external source to do the investigation. There are a number of independent vendors who specialize in background investigations—everything from motor vehicle record checks to criminal histories and child abuse checks.

Public entities can incur cost savings and control the quantity and quality of the information if the investigation is conducted in-house. The downside of conducting the

investigation internally is that the entity bears full responsibility for the information, time and manpower constraints the process can place on the organization.

Using an outside organization for the investigation means it is responsible for the information developed. Vendors usually have better access to information especially if the job candidate has lived outside an area and information needs to be obtained from other states. Vendors may be able to produce information more quickly. However, the quality of information gathered can be an issue so care should be taken in selecting a vendor.

Legal Issues:

Implementing a process to conduct criminal background investigations may sound simple enough. But, there are legal issues to consider before the investigation begins and throughout the process. This includes adherence to the Fair Credit Reporting Act (FCRA). Public entities need consent from the candidate for a background check—most often in the form of a release included in the employment application. In addition, the entity is required to inform the candidate if he or she is not hired based on information contained in the background investigation. The candidate has the right to contest the information.

Federal civil rights laws—In general, these laws prohibit denial of employment solely on the basis of a prior criminal record that is unrelated to job performance. Care must be taken to weigh the offense against the requirements of the position. The hiring process should include considerations of the nature and gravity of the offense, the relationship between the incident and the type of job; the amount of time that has passed since the conviction or completion of the sentence; the applicant's efforts and success at rehabilitation and factors indicating the incident may be repeated.

State laws—Laws vary from state to state regarding the types of background investigations that may be conducted. Restrictions on how the resulting information can be used also vary. It's a good idea to involve legal counsel when developing and implementing a background investigation program.

Although the costs involved in hiring the wrong employee should be an impetus for public entities to conduct pre-employment background investigations, there are several other compelling reasons.

Negligent hiring liability—Negligent hiring arises under tort law when the employer knows of a dangerous condition or propensity toward activity such as a previous criminal history or a poor driving record but hires the applicant anyway or fails to perform a reasonable background investigation.

According to an article from the Northeast Human Resources Association (NEHRA) Web site, "Best Practices in Hiring, Part 1: Looking Beyond the Resume," the Negligent Hiring Doctrine is now recognized in more than half of all states, and employers lose more than 70 percent of negligent hiring suits brought against them.

Security and safety concerns—Positions related to public safety including police and fire have always been subject to extensive pre-hire background investigations. However, since 9/11, there has been an increased focus on other positions that are "security sensitive" such as operators at wastewater treatment facilities.

Negative publicity—Negative publicity in conjunction with employee violence, child or elder abuse can impact your organization and its elected and appointed officials

in a variety of ways particularly as it pertains to the public entity's reputation in the community and beyond.

Poor hiring decisions—both inside and outside the public sector—occur almost daily in every part of the country. But, public entities don't need to contribute to this problem. Those that develop and implement a pre-employment background investigation process will be well on their way to making good hiring decisions.

The process should be consistent across all positions; ensure that investigation inquiries are job-related; and include implications and restrictions for using gathered information. Following this type of process will help protect a public entity's employees and its constituents from potential legal issues and avoid the negative publicity that could result from a bad hire. •

Article Author & Disclaimer:

Robert Fever is Regional Risk Control Director for the Public Sector Services Business Unit of St. Paul Travelers. In that capacity, he is responsible for working with Public Sector Services' clients on all risk management and safety issues. Fever has 30 years experience in the property and casualty insurance industry with a variety of carriers and has a background in numerous disciplines including premium audit, underwriting, marketing and sales and risk control. Fever also has spent the past nine years in the Public Sector insurance arena in the marketing and risk control areas. He carries the CPCU and ARM designations. Fever also is a Certified Playground Safety Inspector.

The author is not an attorney and is not providing legal advice in this article. The author encourages readers to speak to an employment law attorney in their particular jurisdiction if they face legal decisions.

Background Check Resources for Montana Municipalities

MMIA recommends working with your City Attorney to develop a formal background and reference release policies for your municipality. In addition, MMIA recommends that you consider utilizing the following resources when conducting background checks on prospective employees.

- Montana Department of Justice, Criminal Justices Information Services Bureau, (406) 444-3625
- The CONWEB service, provided by the Montana Department of Corrections, provides records information for convicted felons in the state of Montana <http://app.mt.gov/conweb/>
- Sexual and Violent Offender Registry, This link provides you with information about individuals who may be required by law, because of a prior criminal record of sexual and violent offenses, to register with law enforcement authorities. The site is searchable by multiple categories of offenders www.doj.state.mt.us/svor/
- U.S. Department of Justice National Sex Offender Website <http://www.nsopr.gov/>
- Other State Offender Registries <http://www.cor.mt.gov/resources/states.asp>