



Employment-Screening Options During the COVID-19 Pandemic

By Roy Maurer

April 30, 2020

The coronavirus crisis has upended normal HR workflows—and pre-employment screening is no exception.

"COVID-19 has caused courts and other public-records repositories and drug-testing laboratories to either close or be difficult to access," said Pamela Devata, an employment attorney and partner in the Chicago office of Seyfarth Shaw. "Criminal and civil records reviews and previous employment and education verifications are not as readily available due to closures and remote working. Some applicants may also be reluctant to visit drug-testing labs, and labs may have suspended in-person services."

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Court Records

Location matters. Not all courts are closed, and some are reporting that they are currently open for fulfilling public-record search requests, according to state courthouse websites, so an employment screen's success or failure depends on the county in question.

Some courts are open for online searches only, but Alonzo Martinez, associate counsel for compliance at background-screening firm HireRight, cautioned that being able to use a court's electronic records system during this time may not be a good solution.

"The Fair Credit Reporting Act [FCRA] places an obligation on background-check vendors to ensure the information reported is both complete and up-to-date," he said. "Some information obtained by automated or online means needs to be validated with a person at the court. If a court is closed or if clerks are unavailable, then courts' repositories may not be updated, and those verifications cannot be made, even if a court has an automated system."

Using one of several national databases to search for court records is often insufficient on its own, because records found in these online searches may be incomplete or outdated, experts said.

Work and Education Verifications

Work history and education credential verifications are likely a challenge right now as well, as some managers and school officials may be unavailable or preoccupied with other concerns. "Educational institutions have been severely affected by the pandemic," Martinez said. "Because transcripts and diplomas are easily falsified and widely cannot be authenticated due to school closures, employers should not accept any documents submitted by candidates for education verification at their face value."

Drug Tests

Most labs are still conducting drug tests as part of employment screens but may not be available for in-person visits, and some candidates may express reluctance to visit a lab due to fears of exposure to COVID-19, said Jennifer Mora, senior counsel in the Los Angeles office of Seyfarth Shaw. "It's up to employers whether to forgo the tests or not, unless you're in one of the regulated industries, in which case you have no choice," she said.

[SHRM members-only toolkit: Conducting Background Investigations and Reference Checks

(www.shrm.org/resourcesandtools/tools-and-samples/toolkits/pages/conductingbackgroundinvestigations.aspx)

Stop Screening?

Organizations seeking to hire during the pandemic have a few courses of action they can take if their normal hiring process includes pre-employment background checks and drug tests.

One option is to stop screening until things get back to normal. "The problem is that the reason companies run background checks in the first place is to protect their workers, their property and their customers," Seyfarth Shaw's Devata said. "There will be problems if you hire people and don't screen them and something comes up later, leading to negligent-hiring lawsuits."

Martinez explained that another concern with temporarily waiving background checks is the risk of undercutting their future validity. "In order to defend against discriminatory hiring practices, Title VII of the Civil Rights Act of 1964 requires, in part, that employers demonstrate that its practices are job-related for the position in question and consistent with business necessity," he continued. "If, during the pandemic, an employer chooses to suspend criminal checks and reinstates them in the future, those practices could be challenged as not being job-related nor consistent with business necessity, since the employer was able to hire without the checks for some time."

Prioritizing certain types of screens over others is an option, Devata said. "Some companies are looking at what is most important to them and may decide to eliminate certain types of background checks," she said. "Generally speaking, employment and education verifications and drug screening take longer to perform, and some companies are thinking of cutting these loose to focus on criminal-history or sex-offender checks."

Expect Delays

Organizations can also maintain the status quo and continue to run the same checks as usual, knowing there will be delays. "Employers are beginning to recognize that while background screening is still possible, [some] courts, employers and educational institutions are offline for an indefinite period," Martinez said. "As such, many employers choose to hire candidates based on the information available to them now and are reserving the right to conduct additional background checks post-hire, once courts, schools and other sources become available."

Tim Dowd, president and chief operating officer at Accurate Background, a screening firm in Irvine, Calif., said employers that take this route should develop a process with their background-check provider "to flag any open searches and provide status reports, so they can easily follow up on them later when courts and other organizations have opened back up and information searches are available again."

He added that it's as important as ever to ensure that offer letters are clear and unambiguous about the status of a background check. "We recommend that offer letters include language that specifically states that the offer of employment is contingent and conditioned upon the successful completion of a background check, which may occur after the start date."

Employers that are required to complete background checks prior to a new hire's start date because of regulation may not have any option except to delay the worker's start date.

Asking candidates to self-disclose criminal history is another option. "This request should happen after a conditional offer but before a new hire is onboarded," Dowd said.

He added that a self-disclose request should be made only in a manner that is legally compliant for a company's jurisdiction and does not conflict with any "ban-the-box" laws, which prohibit employers from asking applicants to disclose criminal-background information at certain points of the application process, usually before a job offer is made.

"Self-disclosure allows individuals to be forthcoming and allows the company to do an individual assessment before proceeding," he said.

Devata said that if new hires are not forthcoming and a later check brings up an offense, they can be terminated for falsification, and Mora advised that employers should be aware that the FCRA's pre-adverse and adverse action notice process (<https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know>) still applies.

Drug-Testing Alternatives

Employers that conduct pre-employment drug testing are finding some labs closed to in-person visits.

Bill Current, drug-testing expert and president at Current Consulting Group in Coral Springs, Fla., said that employers regulated by the Department of Transportation (DOT), such as trucking and bus companies, airlines and railroads, must continue to comply with applicable testing requirements, which presently require lab-based urine testing. "However, DOT recognizes that compliance to the letter of the law may not be possible and is encouraging employers to make *reasonable* efforts to locate testing resources," he said. That could include using certified mobile-collection services if available.

"Employers who find it impossible to comply with the regulations due to facility closures or imposed quarantine requirements must document the reasons why and be prepared to defend their decisions when the crisis ends," he said.

Current pointed out one very important caveat to relaxed compliance for regulated industries: Prospective employees are not allowed to perform safety-sensitive functions until they receive a negative pre-employment test result.

Mora added that if testing can be conducted later, employers must do so in accordance with regulations. "Deferring tests to a later date won't be an issue for most states, so you can go ahead and onboard the new hires and test them later. But some jurisdictions, like California, have strict laws related to drug testing, so check with counsel first."

Employers not regulated by the DOT have more options for testing, Current said. "Consider oral-fluid testing, where employees can swab their own mouth and the observer can remain at a safe distance. Oral-fluid collection is also being done via video using Skype, FaceTime or Zoom with a trained observer before the test is sealed and shipped to a lab."

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