

Managing

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Checking from a Distance

Companies should ensure that contract employees undergo background checks, but they must not control the process as an employer would.

SUE WEAVER contracted with a major department store, Burdines, to have her home air ducts cleaned. The store did not directly employ the people it sent out on these jobs but hired them from Adler Services, Inc. Neither Adler nor Burdines conducted background checks on the workers it sent into customers' homes. One of the workers returned to Weaver's house and raped and murdered her. It was later learned that he had two prior convictions for sex offenses.

The case shows how background checks can help companies avoid hiring contract workers who might later commit crimes that hurt not only the victims but also the company. Most companies understand the need. However, when it comes to contract workers, how the programs or contracts are structured can make all the difference. Unfortunately, businesses often fall short with regard to designing and implementing sound contractor employee screening programs. It helps if you understand what to avoid and what to include in any program.

Requirements

Working with their legal and procurement departments, companies should develop language to attach to all contracts, letters of engagement, or purchase orders stipulating that for any contractor or vendor employee to have unescorted access privileges to any company facility or customer home, he or she must pass an access authorization background screening. The language should also require that the screening be conducted by a third party that the hiring company approves as qualified.

The contract should be clear that the objective is "access authorization" screening and not employment screening. The hiring company does not care who the contractor hires, only who is allowed access to its property. The hiring company should specify the approved background provider or reserve the right to approve or decline a background provider.

The client company should not include a requirement that all employees get preemployment screening or ask how employees are screened for employment. This is because there is a difference between the purpose of employment and access authorization screening. It is probable that the contractor has positions within its company that do not require the employee to access the hiring company's property or that of its customers, and the screening for those positions will be different and of absolutely no concern to the client company.

The contract should specify the scope of the access authorization background screening—including what is to be checked and the number of years to be covered. The scope of the background check will, of course, vary with position, as elements such as work experience, driving record, or professional license status may be important to some positions and not to others. However, a basic background check should include a complete seven-year criminal history and sex-offender registry review.

The contract should also explain what could prevent a candidate from being approved for access to the company's facilities. Specifics can be laid out in a decision matrix that shows what offenses

within which time frames would disqualify a candidate.

The background screening company may be able to offer guidance in this regard. In fact, the screening company may already have a vendor-screening program that can be used. Accepting an existing program has the advantage of further distancing the company from liability, because there is not then the question of whether the company imposed those guidelines on the vendor.

The contract should require that the company be able to verify directly with the background provider that clearance was or was not obtained; it should also afford a means by which the process could be audited without disclosing specific background details of candidates.

It is a recommended best practice to require an annual recertification of clearance. The annual recertification is not as comprehensive as the original check. It must verify the past year of residence for criminal history along with other elements required for the position, such as driving record. Details should be agreed to and noted in the contract. The policy should be reviewed by legal counsel.

Verification

The next step to ensuring a successful program is to establish a reporting mechanism that insulates the company from the background results details. "Good conduct" letters or certificates of completion are sometimes used in the industry, and that's fine as long as the letter is coming from the independent third party conducting the background

check and not from the contractor itself; that protocol ensures that the contractor cannot provide false results.

That type of subterfuge occurred in one case with a company that employs subcontractors to provide service in customers' homes. One of the subcontractors used a computer to scan and remove negative information from one employee's background report. The subcontractor submitted the false report to the company in lieu of the actual certificate from the third-party background screening provider.

Fortunately, the company questioned the independent third-party background screener directly when it received a report from the subcontractor rather than a certificate from the background screener. The fraud was discovered, access was denied, and the subcontracting company lost its contract.

While it is legal and advisable for the company that will use the contract workers to obtain confirmation from the screening company that each worker's clearance was obtained, the hiring/client company should never ask the background screener to reveal the specifics of the background check.

Distance

A major trap to avoid is creating a co-employment relationship, such that your business could end up being considered liable for a contract worker as if that worker were a direct hire. Apart from the fact that a finding of co-employment by a court can expose a company to liability for wages, benefits, and worker's compensation, it can more directly expose the company to liability if that employee causes harm.

It is important to note that court cases have held that merely requiring background checks does not create a co-employment relationship. However, meddling in hiring decisions could.

In determining whether a co-employment relationship exists, courts look at several factors including whether the company provides training, tools, or materials for the employee. The courts also consider who pays the employee and any employment agreements among the

company, the vendor, and the employee. But by far the most important factor is supervision and control. Court cases frequently turn on the extent to which a company controls the details of the vendor employee's work.

Because background screening information can be considered a detail of the employee's work, companies should be careful not to control that information. By leaving the details to a contract background screening company, a company improves the chances that a court will find that there is no co-employment relationship.

Appeals

Some contract workers who were not granted clearance will raise questions. These questions should be directed to their employer—the contractor or subcontractor. However, an employee often appeals to all parties involved. The first reaction for the take-charge professional at the client company might be to request the report and then make a case-by-case decision on access. This is the wrong approach because it raises the risk of co-employment.

There should only be two possible grounds for appeal. The first is a factual dispute regarding the report itself. In this instance the background screening company is obligated to investigate those disputes under the Fair Credit Reporting Act (FCRA). That occurs without client company involvement.

The second possible basis for appeal is that the background screening company improperly applied the decision matrix when denying clearance. There are two possible approaches when dealing with this kind of appeal, and it is strongly recommended that legal counsel be consulted when choosing the best approach for your company. The best route is to require that the background company or other third party set up its own appeals panel, and keep your company completely out of the decision process.

However, another approach is to have a designated appeals authority within the contracting company. But if it is used, the background company can be asked to

prepare a copy of the report in question with all names or other identifying information removed so that only the facts that resulted in the denial of clearance are shown. The redacted report and the grounds for appeal can then be forwarded for review.

Audits

Because of co-employment concerns, a company should not audit the details of vendor or contractor employee background reports. This is why due diligence in selecting the background screening company is so important.

The client company can ensure that all of the vendor employees who will have unescorted access privileges to the client's property have been screened. It is also reasonable to ask the background screener for a summary report that details the total number of individuals screened for clearance as well as the number and percentage of those who were granted clearance and those who were not. The screening company should prepare a listing or count of offenses that resulted in the denial of clearance. This type of information can be critical in helping those responsible for contract, procurement, or enforcement justify the program.

Screening contract workers is as important as screening direct hires. But the challenges of doing so without creating a co-employment situation must be carefully addressed. ■

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