



**IAPSC**  
International Association of  
Professional Security Consultants

Evidence-Based Security Practices

# **Criminal Background Checks: Benefits and Limitations**

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EBSP-26-02



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Karim H. Vellani, CPP, CSC  
Chair, Evidence-Based Security Practices Committee

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## INTRODUCTION

Criminal background checks are utilized for a variety of critical purposes, including employment, tenancy, litigation, and professional licensing. In the United States, employment screening is ubiquitous; recent surveys indicate that 93% of employers screen some or all applicants. To mitigate risks such as workplace violence, fraud, theft, and negligent hiring liability, 94% of organizations report utilizing criminal record checks. Similarly, within the housing sector, nearly 90% of landlords consider criminal backgrounds alongside credit scores, income, and rental history when making tenancy decisions.

In the legal field, specifically regarding litigation support and expert witness work, criminal record searches are often performed post-incident to uncover a party's history. Furthermore, the screening process itself—whether conducted internally or through a third-party Consumer Reporting Agency (CRA)—is frequently subject to legal examination to ensure the check was adequate, accurate, and compliant with relevant reporting regulations.

This paper examines the critical role of criminal background checks in employment screening, tenancy decisions, litigation support, and risk mitigation. It provides security consultants and their clients with practical guidance on best practices, legal compliance, accuracy, and research and regulatory considerations to support informed, defensible decision-making.

## TYPES OF CRIMINAL BACKGROUND RECORDS CHECKS

Methods for conducting criminal record checks vary based on the searching entity, the intended purpose, and authorization requirements. Generally, these checks fall into two primary categories: name-based and fingerprint-based inquiries.

**Name-Based Checks:** Name-based checks utilize personal identifiers—such as name, date of birth, Social Security Number, and driver’s license number—to locate records. This method is widely used; in 2014 alone, the U.S. Bureau of Justice Statistics reported that 43 states conducted over 19.4 million name-based checks for non-criminal justice purposes.<sup>1</sup> The total volume of private sector checks (e.g., for employment or tenancy) is likely in the tens of millions, supported by a background screening market of nearly 2,000 companies generating an estimated \$4.5 billion in revenue.<sup>2</sup> Consumer Reporting Agencies (CRAs) conducting these checks must adhere to strict standards, following "reasonable procedures to assure maximum possible accuracy".<sup>3</sup>

**Fingerprint-Based Checks:** Fingerprint-based checks are typically reserved for authorized non-criminal justice purposes, including government licensing, national security, immigration, and specific private employment or volunteer roles mandated by law.<sup>4</sup> While often viewed as rigorous, several studies indicate that the FBI criminal records archives used for these checks may contain inaccurate or outdated information.<sup>5</sup>

**Regulatory Framework and Authorization** The regulatory requirements for background checks depend heavily on who conducts the search and for what purpose:

- **CRA-Conducted Checks (FCRA Regulated):** Checks performed by a Consumer Reporting Agency for permissible purposes under Section 604 of the Fair Credit Reporting Act (FCRA)—such as employment or tenant screening—are classified as

<sup>1</sup> Survey of State Criminal History Information Systems, 2014. US Department of Justice, Bureau of Justice Statistics.

<sup>2</sup> IBIS World 2024 Background Check Services in the US – Market Research Report

<sup>3</sup> FCRA 607(b)

<sup>4</sup> 34 U.S. Code § 40316 - National Crime Prevention and Privacy Compact

<sup>5</sup> National Employment Law Project (NELP) July 2013. National Association of Professional Background Screeners (NAPBS)(Now Professional Background Screeners Association – PBSA) April 2013.

"Consumer Reports". These require strict compliance, including separate notice, disclosure, and written authorization from the subject.

- In-House Checks: Background checks conducted directly by an organization without the use of a CRA or CRA data are generally not subject to the FCRA.
- Open/Public Records Checks: Checks performed by entities for purposes outside the scope of the FCRA are often conducted via Open or Public Records laws. These are typically name-based searches of state repositories or court systems and generally do not require the subject's authorization.

## EFFICACY OF CRIMINAL BACKGROUND CHECKS

A review of published research regarding the efficacy of criminal background checks reveals limited empirical evidence supporting their effectiveness in reducing workplace crime, recidivism, or employer liability for negligent hiring. While the majority of available studies focus on how screening reduces employment opportunities for justice-involved individuals, research suggests that employers frequently accord disproportionate weight to criminal records. Consequently, past convictions are often overemphasized in hiring decisions, even when evidence indicates they bear limited relevance to future behavior or job performance.

Recidivism and the "Redemption" Point: Recidivism research provides essential context for evaluating the utility of background checks, demonstrating that the risk of reoffending diminishes significantly as the amount of crime-free time increases.

- **Decay of Risk:** The predictive power of a prior arrest or conviction decays rapidly; while the risk differential between offenders and non-offenders is substantial immediately following an offense, it weakens dramatically over time.
- **Time-to-Redemption:** Younger offenders may require approximately 10 years without criminal activity to reach a "redemption" point where their risk approximates that of non-offenders, while older offenders often achieve this status more quickly. Conversely, individuals with extensive criminal histories may require 20 years or longer to reach comparable risk levels.

While criminal background checks remain a common risk-management tool driven by liability concerns, public safety, and reputational risk, the body of research offers scant direct support for their efficacy in broadly preventing workplace crime. Rather than relying on blanket exclusions, findings underscore the necessity of individualized assessments that weigh time-elapsed considerations and job-specific relevance.

### Liability

Liability and Negligent Hiring:

Employers frequently cite liability concerns as a primary motivation for conducting criminal background checks. According to a 2010 survey by the Society for Human Resource

Management (SHRM), 55% of respondents identified the reduction of legal liability for negligent hiring as their main reason for screening, highlighting the perceived protective value of these checks.

Research indicates that liability risks are most prevalent in specific high-risk job categories where employee misconduct could foreseeably harm people or property. These roles typically involve access to vulnerable populations, private residences, motor vehicles, firearms, or valuable assets. While background checks may offer mitigation in these contexts, successful negligent hiring claims are relatively rare, suggesting that employer apprehension regarding liability often exceeds actual legal exposure.<sup>6</sup>

**The Doctrine of Negligent Hiring:** Negligent hiring is a legal doctrine that holds employers liable for harm caused by an employee's unlawful or tortious acts—often willful or criminal—when the employer "knew or should have known" of the employee's unfitness or dangerous propensities at the time of hiring. This duty of reasonable care is particularly critical in roles where third-party harm is foreseeable, such as apartment management, delivery services, or customer-facing businesses.

Judicial Precedent and Duty of Care Case law has firmly established the employer's duty to exercise due diligence in selection and retention.

- **Early Precedent:** In *Fleming v. Bronfin* (1951), the court recognized that businesses, including those providing home delivery, may be liable for an employee's assault on a customer if the employer was negligent in hiring an unfit worker.
- **The "Knew or Should Have Known" Standard:** Modern decisions emphasize reasonable investigation. In *Williams v. Feather Sound, Inc.* (1980), the court held employers accountable for willful torts if a reasonable inquiry would have revealed the employee's threat to others.
- **Foreseeability:** *Ponticas v. K.M.S. Investments* (1983) affirmed that employers must exercise reasonable care when hiring for roles with public access, such as apartment

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<sup>6</sup> Meyers, Legal Action Center, *Second Chance Employment: Addressing Concerns About Negligent Hiring Liability*. 2023

managers with passkeys. Failure to investigate discoverable red flags in such cases can result in liability for foreseeable harm, such as sexual assault.

Reasonable Exclusions and Balancing Interests: Courts have supported reasonable hiring exclusions based on criminal history for sensitive positions. For example, *Richardson v. Hotel Corp. of America* (1971) underscored that it is prudent to require applicants with access to valuable property to be reasonably free of serious property-related convictions. More recent cases, such as *Wise v. Complete Staffing Servs., Inc.* (2001) and *Grant Morris v. JTM Materials, Inc.* (2015), reinforce the obligation to vet for safety risks to protect the public and other employees.

Ultimately, while employers have strong incentives to screen for fraud, violence, or theft, policies must be job-related, individualized, and compliant with anti-discrimination laws. Liability turns on a balance of factors: the foreseeability of harm, the adequacy of the investigation, and the nexus between the employee's known unfitness and the resulting injury.

### Complexity of Criminal Background Checks

The methodology for conducting a criminal background check varies depending on the entity conducting the search and the specific purpose of the inquiry.

### Federal Laws and Guidelines

**The Fair Credit Reporting Act (FCRA)** The primary federal statute governing background checks for employment (including independent contractors and volunteers) and tenancy is the Fair Credit Reporting Act. Although the title implies a focus on "Credit Reports," the FCRA regulates all Consumer Reports—including background checks—because it covers information regarding a consumer's character and general reputation.

Under the FCRA, Consumer Reporting Agencies (CRAs) face specific reporting restrictions:

- **Bankruptcies** may not be reported if they predate the report by more than 10 years.
- **Adverse Information** (such as civil suits, arrest records, paid tax liens, and collection accounts) is generally restricted to a seven-year reporting period.

- **Convictions**, however, are not subject to a federal time limitation and may be reported indefinitely under the FCRA.

**EEOC Enforcement Guidance** In 2012, the Equal Employment Opportunity Commission (EEOC) issued guidance regarding the use of arrest and conviction records in employment decisions. The EEOC posits that criminal record exclusions may violate Title VII of the Civil Rights Act if they result in disparate treatment or have a disparate impact based on race or national origin.<sup>7</sup>

To ensure compliance, the EEOC recommends that employers validate exclusions through data or conduct a "targeted screen" (individualized assessment). This assessment typically considers the "Green Factors" established in *Green v. Missouri Pacific Railroad*:

1. The nature and gravity of the offense or conduct.
2. The time that has passed since the offense or completion of the sentence.
3. The nature of the job held or sought.

**Driver's Privacy Protection Act (DPPA)** The DPPA prohibits the release and use of personal information derived from state motor vehicle records without the individual's express consent, subject to specific legal exemptions.

**Federal Housing (HUD) Standards** The Department of Housing and Urban Development (HUD) Handbook 4350.3 outlines mandatory and permissive screening standards for federally assisted housing.

- **Mandatory Denials:** Housing providers must prohibit admission if any household member is subject to a lifetime sex offender registration requirement.
- **Permissive Denials:** Providers may prohibit admission for drug-related or violent criminal activity, or patterns of alcohol abuse that threaten the health, safety, or peaceful enjoyment of the premises by other residents.

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<sup>7</sup> <https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>

## State and Local Laws

### "Ban the Box" Legislation

Numerous states and municipalities have enacted "Ban the Box" laws, which generally prohibit employers from inquiring about criminal history until after a conditional offer of employment has been extended.

- **States:** Jurisdictions with such laws include California, Colorado, Connecticut, Illinois, Massachusetts, New Jersey, Washington, and others.
- **Local Jurisdictions:** Many cities and counties have implemented similar "fair chance" restrictions, including Austin, Chicago, Los Angeles, New York City, Philadelphia, and Seattle.
- **Federal Policy:** The federal government has also adopted "ban the box" policies for federal hiring.

**State Reporting Restrictions** While federal law (FCRA) permits the reporting of convictions indefinitely, several states have enacted statutes that limit the reporting of criminal convictions to seven years. These states include California, Colorado, Kansas, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Texas, and Washington. Additionally, court records that have been sealed or expunged are strictly non-reportable.

## CONCLUSION

Criminal background checks are conducted millions of times annually across the United States for employment, independent contracting, volunteer screening, tenant selection, and other purposes. Despite their widespread use, rigorous research evaluating the effectiveness of criminal record checks in preventing crime, reducing workplace or residential incidents, or limiting organizational liability remains limited. Scholars and practitioners highlight the challenges of such studies, including the variety of screening contexts, variations in record accessibility, legal restrictions on the use of criminal history information, and the difficulty of obtaining reliable outcome data on screened individuals.

Nevertheless, the legal landscape clearly imposes affirmative duties on employers, landlords, and other entities. Established case law continues to hold organizations liable under negligent hiring, negligent retention, or premises liability theories when they “knew or should have known” of an individual’s criminal history that was reasonably related to foreseeable harm. This duty of care is particularly pronounced when the position or tenancy involves interaction with vulnerable populations or when prior offenses bear a direct relationship to the responsibilities or risks involved.

Moreover, the regulatory framework governing criminal background checks is highly complex. Federal laws (most notably the Fair Credit Reporting Act), along with an ever-changing matrix of state, county, and municipal statutes, impose strict requirements on the access, use, and disclosure of criminal history information. Failure to comply with these requirements—whether through inaccurate reports, improper adverse action procedures, or unauthorized dissemination—exposes organizations to enforcement actions by government agencies and private litigation.

Paradoxically, organizations that neglect to conduct legally compliant background checks when a reasonable duty exists may face substantial civil liability if harm subsequently occurs and a relevant criminal history is later discovered. Thus, decision-makers confront a delicate balance: conducting checks carries compliance risks and potential discrimination claims, while forgoing them can invite negligence-based liability.

## NOTICE

This information is for general informational and educational purposes only and does not constitute legal advice. It is not a substitute for professional advice tailored to your specific situation and location.

## REFERENCE MATERIAL

Fair Credit Reporting Act:

<https://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0111-fair-credit-reporting-act.pdf>

EEOC Guidelines:

<https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions>

DPPA

<https://www.govinfo.gov/app/details/USCODE-2011-title18/USCODE-2011-title18-partI-chap123-sec2721>

FTC What employers need to know

<https://www.ftc.gov/business-guidance/resources/background-checks-what-employers-need-know>

FTC Using Consumer Reports, What landlords need to know

<https://www.ftc.gov/business-guidance/resources/using-consumer-reports-what-landlords-need-know>

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## APPENDIX: DEFINITIONS

**Adverse Action:** Adverse action is relevant to pre-tenancy and pre-employment screening. If an employer issues a background check for an applicant, and that background check impacts the employer's decision to hire the candidate, the company has the right to take adverse action, which may mean refusing to hire the candidate.

**Arrest:** The act of taking a person into custody, based upon probable cause, which is not the same as a conviction.

**Background Check/Background Screening:** Generally, used interchangeably.

**Consumer Financial Protection Bureau (CFPB).** A United States government agency charged with overseeing consumer protection, specifically in the financial sector. The CFPB oversees background screening.

**Civil Infraction:** Typically, a lesser offence, such as some municipal code violations or minor traffic infractions. These are typically not reported in a criminal record check as they are not considered criminal offenses by state statute.

**Consumer:** The consumer is the individual who will be background-checked or screened as a potential employee.

**Consumer Reporting Agency (CRA):** This is a bureau that collects and issues information about individuals to employers, creditors, and landlords.

**Deferred Adjudication / Judgment:** This is a non-conviction. It happens when the case is dismissed as long as the defendant complies with the actions provided by the court.

**Dismissed:** When a case is dismissed, it means that the court has chosen to dismiss the lawsuit without finding evidence of guilt and without issuing a conviction for the defendant. Dismissed cases remain on a person's criminal record.

**Disposition:** The disposition is the court's final decision in a case.

**Dispute:** If a pre-employment background check reveals data that is false or inaccurate, the consumer has the right to dispute that information.

**Equal Employment Opportunity Commission (EEOC):** The federal agency that establishes statutes designed to eliminate discrimination in hiring.

**Expungement:** A court-ordered process that legally seals or erases an individual's legal record.

**Fair Credit Reporting Act (FCRA):** Federal Law, 15 U.S.C. § 1681, that protects employees and candidates, as well as companies. The FCRA governs all CRAs that conduct pre-employment screens, and background checks for tenancy, as well as employers or landlords/property managers that utilize the background-screening services of a CRA.

**Felony:** A serious crime, often defined as a crime where the punishment can include incarceration for more than one year.

**Indictment.** An indictment is a formal accusation, which generally begins the hearings for a criminal case. Indictments are issued by a grand jury and are commonly associated with serious crimes such as felonies.

**Investigative Consumer Report:** A type of background check that includes some opinions in addition to factual information, such as person or professional reference statements, regulated under the FCRA.

**Misdemeanor:** A less serious crime, often defined as a crime where the punishment can include incarceration for less than one year.

**Nolle Prose:** This is Latin for “not prosecuted” and is a non-conviction that takes place when there is not enough evidence to convict a defendant.

**Nolo Contendere:** A plea issued by a defendant, which accepts conviction as though they had issued a guilty plea without admitting guilt.

**No Bill:** A No Bill occurs when a Grand Jury is unable to find enough evidence of a crime to pursue the case further.

**Permissible Purpose:** A legally valid reason for a CRA to provide a consumer report to an end-user, such as for employment purposes.

**Pre-Adverse Action:** Pre-adverse action notifications must be sent to an applicant by a company before the company decides to take adverse action. The pre-adverse action notice informs the applicant that the company is taking adverse action, such as denying employment or promotion.

**Pre-trial Intervention / Diversion:** A non-conviction program made available to a defendant before he or she goes to trial. The defendant is given a program to follow before the trial. If the defendant adheres to the program, the trial is canceled, and the defendant is not convicted.

**True Bill:** The True Bill is the written decision of a Grand Jury. It is signed personally by the Grand Jury foreperson. It states that the Grand Jury has heard enough evidence that it believes the accused person likely committed the crime and should be indicted accordingly. The indictment is then sent to the court.

APPENDIX: RESEARCH SUMMARY TABLE

**Criminal Background Checks: Benefits and Limitations  
Research Summary Table**

Study Citation	Crimes / Categories	Key Finding(s)
Maltby, L., & Douglas, R. M. (2023, July). Second chance employment: Addressing concerns about negligent hiring liability. Legal Action Center & National Workrights Institute.	Employment Liability-Negligent Hiring, Etc. over hiring employees with criminal records.	Hiring liability occurs in a small number of specific jobs with obvious risks.
Hughes, S. F., Elliot, T. L., & Myers, M. (2014). Measuring the impact of student background checks on reducing crime in higher education.	Cleary Act reports, Murder, non-negligent manslaughter, sex offenses, robbery, aggravated assault, burglary, vehicle theft, arson	More research is needed. The study involved a limited number of institutions in one state. Only involved students who initially disclosed criminal records
Kuhn, K. M. (2024). Risk aversion and the impact of criminal records in hiring decisions: An integrative multilevel review. In N. C. J. Young & J. N. Griffith (Eds.), <i>Employing our returning citizens</i> (Palgrave studies in equity, diversity, inclusion, and indigenization in business). Palgrave Macmillan.	Criminal Acts	Employers primarily seek criminal history information to minimize the perceived risks of employee misconduct, reputational damage, and negligent hiring liability. Risk Perception vs. Actual Risk. Perceptions of risk are often flawed. Criminal offense records are frequently given more weight in hiring decisions than empirical data suggests they merit. Research indicates that employees with criminal records often perform on par with, or even exceed, their peers in areas like reliability and retention.
Bushway, S. D., Nieuwbeerta, P., & Blokland, A. (2011). The predictive value of criminal background checks: Do age and criminal history affect time to redemption?	Criminal Acts	We find that young novice offenders are redeemed after approximately 10 years of remaining crime free. For older offenders, the redemption period is considerably shorter. Offenders with extensive criminal histories, however, either never resemble their nonconvicted counterparts or only do so after a crime-free period of more than 20 years.

**Criminal Background Checks: Benefits and Limitations  
Research Summary Table**

Study Citation	Crimes / Categories	Key Finding(s)
<p>Kurlychek, M. C., Brame, R., &amp; Bushway, S. D. (2006). Scarlet letters and recidivism: Does an old criminal record predict future offending? <i>Criminology</i>, 44(2), 327–358. <a href="https://doi.org/10.1111/j.1745-9125.2006.00046.x">https://doi.org/10.1111/j.1745-9125.2006.00046.x</a></p>	<p>Criminal Acts</p>	<p>Abstract: Two well-documented empirical facts guide our investigation: (1) Individuals who have offended in the past are relatively more likely to offend in the future, and (2) the risk of recidivism declines as the time since the last criminal act increases. We find that immediately after an arrest, the knowledge of this prior record does significantly differentiate this population from a population of nonoffenders. However, these differences weaken dramatically and quickly over time so that the risk of new offenses among those who last offended six or seven years ago begins to approximate (but not match) the risk of new offenses among persons with no criminal record.</p>
<p>Blumstein, A., &amp; Nakamura, K. (2009). Redemption in the presence of widespread criminal background checks. <i>Criminology</i>, 47(2), 327–359. <a href="https://doi.org/10.1111/j.1745-9125.2009.00155.x">https://doi.org/10.1111/j.1745-9125.2009.00155.x</a></p>	<p>Criminal Acts</p>	<p>Abstract: Recidivism probability declines with time “clean,” so some point in time is reached when a person with a criminal record, who remained free of further contact with the criminal justice system, is of no greater risk than a counterpart of the same age—an indication of redemption from the mark of crime. Very little information exists on this measure of time until redemption and on how its value varies with the crime type and the offender's age at the time of the earlier event.</p>
<p>Hickox, S. A. (2011). Employer liability for negligent hiring of ex-offenders. <i>Saint Louis University Law Journal</i>.</p>	<p>Criminal Acts</p>	<p>An employer may be liable if the injury was foreseeable because the employee had a conviction. This raises the question of when the harm is foreseeable, which state courts approach in a variety of ways.</p>
<p>Duane, M., La Vigne, N., Lynch, M., &amp; Reimal, E. (2017, March; updated November 2017). Criminal background checks: Impact on employment and recidivism. Urban Institute.</p>	<p>Criminal Acts</p>	<p>Criminal background checks often yield inaccurate and incomplete data. For instance, some background check reports do not distinguish between arrests that resulted in conviction and those that did not. Other reports include criminal records that have been legally expunged.<sup>4</sup> As a result, employers may unnecessarily limit their candidate pool, and people who pose no risk to the public may be unnecessarily barred from employment.</p>