



ESR Top Ten Background Check Trends

2008-2010

Chosen by [Employment Screening Resources® \(ESR\)](#) Founder and CEO Attorney Lester Rosen.

ESR Top Ten Background Check Trends for 2010

- **Increased focus on whether credit reports and criminal records are discriminatory:** When the EEOC filed a lawsuit against a national employer in October 2009 alleging that credit reports and criminal records were being used to discriminate against members of protected groups, it did not come as much of a surprise to industry watchers. There has been a steady drumbeat of concern about credit reports and criminal records. Credit reports have come under increasing criticism as reported in the media for being inherently unfair and potentially discriminatory. California, for example, has twice passed laws that would have severely limited credit reports (although both were vetoed by the governor). A bill has been introduced in Congress to amend the federal Fair Credit Reporting Act (FCRA) to outright prohibit the use of credit reports for employment, and it has 46 co-sponsors in the House of Representatives. The use of criminal records is also getting scrutinized. New York in 2009 passed new laws to ensure that employers were not automatically rejecting applicants with criminal records without considering the individual on his/her merits. In recent years, the Conference of Mayors has addressed the issue of criminal records barring ex-offenders from getting a second chance, and the State of Minnesota joined a number of large cities in adopting a “ban the box” approach to governmental employment, meaning that questions about a past criminal record are not requested initially on an employment application in order not to deter ex-offenders from even applying. On one hand, without exercising due diligence, firms can be sued for negligent hiring, suffer financial loss, and/or put public safety at risk if “red flags” are not located. On the other hand, critics are concerned that with undue emphasis on credit reports or criminal records, people are being shut out of the workforce. For instance, unless ex-offenders can get a job, there is a high likelihood of recidivism which means more taxpayer dollars are being spent on prisons instead of schools or hospitals. The bottom-line is that screening occurs at the intersection between concerns over security and safety on one hand, and privacy and fairness on the other – and society is constantly defining the boundaries. Of course, it is interesting to note that nearly every time a legislator objects because there is too much screening, there is often a call by some other elected official for even more screening after it is revealed that some crime or offenses occurred where an inappropriate applicant was hired without a sufficient background check. A listing of proposed legislation related to

screening shows that legislators are both calling for increased privacy and protections for consumers at the same time they are introducing bills to increase background check requirements. One area where large employers need to review their practices is on using automated scoring matrixes where a candidate is given a green, orange, or red light. That sort of automation where an individual is judged entirely by his/her membership in a particular category instead of his/her personal abilities is precisely the type of process that is likely to get some unwarranted attention in the courts.

- **2. More lawsuits including class action litigation over accuracy, privacy, and consumer rights:** News stories in 2009 blasted the screening industry for inaccurate reports, and it appears that lawsuits are on the rise and will continue in 2010. It is not surprising, since screening has become a large industry, and enough people have been the subject of screening reports that the whole area has come to the attention of plaintiff's lawyers. In addition, 2009 saw class action lawsuits for violation of the procedures under the FCRA, and there is every reason to believe that screening firms and employers can expect more of the same. The bottom line is that a Background Check is a highly legally regulated professional service, and it is important to ensure that a supplier of this service understands the legal framework and, further, approaches the screening process as a professional service, and not just as a data provider.
- **3. Increased Pressure on privacy and data protection especially as it relates to the location of the data:** Heating up even further in 2010 will be issues surrounding data protection and privacy. The issues are moving beyond data breaches and there is beginning to be an examination about where the data is actually going for processing. The two top issues — sending data offshore or to home workers. A group called ConcernedCRA now has more than 120 screening firms that have signed on to a standard that opposes sending Personally Identifiable Information (PII) offshore beyond U.S. privacy laws to be processed. See <http://www.concernedcras.com/> A bill was introduced into Congress in June 2009 that would limit the offshoring of data without notice in the financial sector. A shocking undercover investigation by the BBC in 2009 showed just how easy it was to purchase PII from a call center in India. Of course, identity theft can occur in the U.S., but once data physically goes beyond U.S. privacy laws, consumers have less resources and recourses.
Equally of concern to applicants is the use of home workers, where a consumer's PII may be spread across kitchen tables and dorms rooms throughout America and be visible to who knows who. Because of concerns over identity theft and data protection, employers will start to be more concerned with where applicant data is physically located. Part of this trend will be continued state efforts to remove or protect private information. An example in 2009: There was a new law in Utah that prohibits PII from being required too early in the hiring process.
- **4. The battle over databases will continue – latest wrinkle is the proliferation of cheap “do-it-yourself” websites and even iPhone apps:** An ongoing area of controversy in the screening industry is the use of commercially assembled national multi-jurisdictional databases. These databases are compiled from numerous sources that will sell or make data available. By no means are these databases complete and accurate, nor up-to-date. Some results do not provide any additional identifiers beyond the first and last name. As

a result, a great many criminals would come up as “clear.” This is called a “false negative.” These databases are practically useless in states like New York and California, two large areas. In Texas, the criminal data is also very hit and miss. Conversely, databases can result in a person being labeled a criminal when they are not. That is a “false positive.” In the hands of a professional background screening firm, these databases have significant value as an additional *but secondary* tool that can lead to further places to search. However, the downside is that some employers want the database information without doing court searches, meaning that some people will be falsely labeled as a criminal when they are not and some people will be falsely cleared as having no criminal record when they do. Under the FCRA, a screening firm has the option of reporting a database search without courthouse confirmation as long as the consumer gets a notice at the same time about the search. Over 120 background firms, however, and the State of California (by statute), have disavowed this approach. See <http://www.concernedcras.com/> Another fallout from these databases are consumer scams, where fly-by-night quick-buck artists have set up “background checking” sites that merely rehash old data at exorbitant prices. And even worse, many of these sites do not make it crystal clear to employers that they must comply with the FCRA, or that the database results can be incomplete or inaccurate. The latest twist is that these data searches are now offered over “smart phones.” Given the problems with such data, it’s hard to see how someone on a date can really get much value from these database searches. On the other hand, such applications have been labeled a “must have” for stalkers and sexual predators. One of the challenges facing the screening industry is to educate employers that these “do-it-yourself” sites are dangerous and can embroil an employer in all sorts of problems. The problems can include lawsuits from applicants whose rights were violated, to victims whose injuries could have been prevented by a real background check.

- **5. Increased need for employer vigilance:** Another impact of the recession is the likelihood of applicant fraud. Fraudulent educational claims, or worthless diplomas from degree mills, are already a familiar problem for employers, recruiters and HR professionals. However, resume fraud took on an added urgency in 2009 with the advent of services that would actually create fake employment references from fake companies. The service apparently even included a phone number that an employer could call in order to reach a service that in fact would verify the fake employment. Although statistics are not yet available, anecdotally it appears that some job applicants have been willing to resort to these extreme and dishonest measures to gain an advantage in the job market. In the long run, worthless diplomas bought over the internet or scams to create manufactured past employment will probably be unsuccessful for the most part, provided that employers exercise some due diligence. For fake education, a competent background firm will typically verify first whether a school is legitimate. If the school does not appear on accepted lists of accredited institutions, then a screening firm can review lists of known diploma mills and scams. Screening firms will also verify whether the accreditation agency is for real, since fake schools have resorted to creating fake accreditation agencies. In addition, pulling off a fake job reference is getting much more difficult. A good background firm will not simply

call the name and number provided by the applicant. Professional screeners will typically independently establish whether the past employer even existed, and locate a phone number independently of whatever number an applicant puts on his/her resume. [Employment Screening Resources](#), for example, goes through an extensive procedure to verify that each past employer is legitimate and does not accept the applicant-provided phone number. The bottom-line for employers in 2010 is taking extra caution to ensure you are hiring bona fide employees.

- **6. Lawsuits for use of Social Networking Sites:** In the past, ESR has labeled the use of the internet and social networking sites as a hot topic. In 2010 and onwards, it appears very likely that litigation over the use of these sites will be *the* hot topic. One big issue of course is discrimination. Applicants can bring a “failure to hire” lawsuit if the employer utilized information from a social networking site about their race, ethnicity, nationality, marital status, religious preference, age, etc. Another issue yet to be decided is privacy. Even though the information is on the internet, strong arguments can be made that consumers have a reasonable expectation of privacy on websites where only friends are supposed to visit and the terms of use prohibit commercial exploitation. In addition, employers need to be careful about the use of legal off-duty conduct. There are also issues as to authenticity and whether a site really refers to or belongs to an applicant. Recruiters are also not immune from potential liability just because they are searching for “passive” candidates who may not know they are the victims of discrimination. As ESR has described in past articles, discrimination rules apply equally to recruiters. And firms that use social network sites in a discriminatory fashion could find themselves in hot water if a recruiter spills the beans, or the recruiting practices result in a workforce that is statistically imbalanced.
- **7. Increased technology — the end of paper and faxing for employment screening:** With advances in database technology, and the general acceptance of the HR-xml standardization for database integrations, it appears that the use of paper and faxes is coming to an end. Not that “Going Paperless” is exactly a new development. ESR, for instance, has offered a totally paperless solution to its clients since 2006. However, integrations between background screening and other applications, such as Applicant Tracking Systems (ATS), or Human Resources Information Systems (HRIS) have reached a tipping point, so that the adoption will be at a faster rate. It can also help solve issues concerning date of birth. Because of laws that prohibit discrimination on the basis of age, some employers are hesitant to ask for date of birth. That creates a potential issue since background screening generally requires an applicant’s date of birth in order to establish identity during criminal searches. However, the EEOC has made it clear that asking for date of birth is not prohibited, but should be approached carefully and requested in such a way that does not deter older applicants. With online systems sensitive information such as a date of birth or Social Security Number can be obtained directly from the applicant so that an employer is never in possession of that information pre-hire.
- **8. I-9 and other government requirements will grow:** The government’s efforts to require employers to verify eligibility for employment gathered additional steam when the rules for the use of E-verify for federal contractors finally went into effect in 2009 after a

number of false starts. The E-verify system utilizes databases administered by the Department of Homeland Security and Social Security Administration to verify a person's eligibility for work in the United States. Private employers can still utilize the Form I-9 without using the federal E-verify program. Yet it seems certain that with the ongoing discussions about the legal right to work in the U.S., it will only become a more important topic in the future. Individual states as well are involved in requiring employers to utilize the E-verify system. In addition, there continues to be efforts at various levels of government to require fingerprinting – particularly after an event hits the headlines where someone did something and a background check was not done. Of course, fingerprinting is far from 100 percent accurate and it raises discrimination issues as well since the FBI records are unfiltered and may well contain data that cannot be used for employment purposes.

- **9. Screening will expand beyond new employees to vendors and others on premises:** This is another ongoing area that will heat up due to the recession. In a recovery period, employers typically turn to temporary employees before committing themselves to full-time hires. However, under the legal doctrine of co-employment, an employer has exposure regardless of whether the worker is on the company payroll or being paid by a staffing firm. With lawsuits for negligent hiring on the rise, employers can still find themselves the target of negligent hiring by failing to supervise the hiring practices of their staffing vendors. Temporary workers and vendors coming on the premises have access to company property and can still create a risk of workplace violence, theft, or embezzlement. New and additional resources are coming online in 2010 to help employers manage the screening of their vendors. Another area where screening will expand is the availability of applicants to run their own background checks. Applicants will have the ability to screen themselves as part of the job-hunting process in order to find out ahead of time whether there is anything in the public records about them that is negative, and as a tool to get an employer's attention. Of course, an employer must still exercise its own due diligence so that all applicants are treated in a similar fashion, but pre-screening may help applicants get noticed faster. An area that has yet to establish itself is the continual screening of current workers. As ESR has noted in previous articles, there are still issues to be worked out before such a practice gains wide acceptance.
- **10. International screening will be more prevalent:** Given the mobility of workers across international borders, international background checks have presented challenges for employers. There are 192 countries in the world (using the United Nations membership list). That means that there is a great deal to keep track of. Every country of course has its own system and rules. Added to that are international data and privacy protection issues. In the past, some employers have avoided international background checks due to the perceived difficulty. Due to the number of resources now readily available, an employer that fails to include an international dimension to their screening could well find that they are not exercising due diligence in hiring when it come to applicants that have spent time outside of the United States. However, international screening is more complicated than domestic U.S. screening. The complications are compounded by the fact that different screening organizations are

giving information to employers that appears to be contradictory. Some firms say certain countries do not have criminal records available, while another firm may disagree. Some firms say that a special release is needed whereas other firms indicate that for a number of countries that no additional releases are needed beyond what the applicants normally signs. In this age of information, it is odd that there is still uncertainty as to exactly what criminal records are available from each country, and the nature and coverage of the records, such as whether the record is just for a particular court, city or state (or province), or nationwide. This coming year could well see the emergence of generally agreed upon best practices for international criminal checks.

- **BONUS TREND: Increased Professionalism in the Screening industry:** A big positive development for employers, and human resources and security professionals is that the national nonprofit trade organization for the screening industry has firmly established itself as the voice of the screening industry, and is fostering higher levels of professionalism. The National Association of Professional Background Screeners (www.NAPBS.com), was established in 2003 “to promote ethical business practices, promote compliance with the Fair Credit Reporting Act and foster awareness of issues related to consumer protection and privacy rights within the background screening industry.” One of the big frustrations for employers is how to choose a Background Screening firm. After exhaustive efforts on the part of a great many dedicated screening professionals, NAPBS has asked its members to approve an accreditation program that would give employers much more confidence in selecting a background screening firm. An accreditation program provides a baseline of professional competency that employers can rely upon. Assuming accreditation comes into being, employers will still need to find a screening firm that fits their needs, but at least such a program will help an employer determine whether a firm meets a certain level of professionalism.

ESR Top Ten Background Check Trends for 2009

- **1. More Government Regulation:** Likely to increase in 2009 are the requirements by federal and state governments for more background checks in sensitive industries – such as child care workers and certain health workers. Another area where the government requires checks is verification of the eligibility of a new hire to work by using the E-verify program. Although litigation has been filed, the announced rules require employers with certain federal government contracts to utilize the E-verify program starting in 2009. Along with the federal government, the states are becoming increasingly involved in regulating screening.
- **2. Privacy and Accuracy:** The subjects of privacy, accuracy, and fairness will also be major issues for 2009. Privacy Times newsletter, for example, led off its December 2008 issue with an article criticizing the screening industry. The letter noted that a coalition of legal aid groups has called on the Federal Trade Commission to take enforcement actions against background screening companies for “widespread noncompliance with the Fair Credit Reporting Act’s requirements for accuracy and dispute investigations.” The report was especially critical of the use of criminal databases that can falsely accuse

an innocent person of being a criminal, and the failure of some screening firms “to take into account the fact that criminal identity theft is unfairly tarring thousands of job applicants.” A leading cause of inaccuracies is matching innocent job applicants to criminal records based upon the same or similar name in a database, without re-verification of the record at the courthouse. A new organization called [Concerned CRA's](#) has taken a stance against utilizing such databases without taking proper measures to ensure accuracy of criminal records.

- **3. Second chance for ex-offenders:** Unless as a society, we want to build more prisons than schools or hospitals, something must be done to reduce recidivism and find employment for applicants with criminal records. At the same time, placing the wrong person in the wrong job can be a disaster and cause untold grief. As a result of Title VII and notice from the EEOC, employers are well advised to review their hiring practices to ensure that they are not discriminating against members of protected classes by automatically denying employment without considering whether there is a business justification for disqualification based upon the crime and the job. This will continue to be a developing area in 2009. One example are the new laws passed by the State of New York that become effective this year that place a greater emphasis on employers analyzing a past criminal record to determine whether there is a business justification not to hire a person. The New York law also requires that notice of various rights be provided to job applicants.
- **4. Consumer Protection Litigation:** As the screening industry matures, and applicants and their lawyers become much more informed about their consumer rights, it is likely that there will be an increase in litigation. This may include class action lawsuits against screening firms, particularly when it comes to various notices required under the federal Fair Credit Reporting Act, and accuracy requirements in the federal law. Since database searches can result in false negatives (meaning a criminal is missed) as well as false positives (meaning an innocent person is labeled a criminal), it is probable that employers and screening firms that rely upon databases may be the subject of litigation where a database search failed to locate a dangerous person.
- **5. Impact of the recession:** As a result of the recession and higher unemployment, it is likely that employers will need to scrutinize applications even more carefully, to be on the watch for fraudulent credentials, such as inflated or fictional employment history or educational degrees. Another recession related trend may be the increase in applicants who are willing to perform their own background checks in order to present to employers a self-certification that their credentials are for real. Since more temporary employees and Independent Contractors are hired during a recession, the issue of screening non-employees will continue to be important.
- **6. Data security and data breaches and Offshoring Data:** Since identity theft continues to be a national and international problem, expect even more emphasis in 2009 on data security and protection. Closely related is the continuing issue of employers and screening firms offshoring consumer data to India or other similar places for cost savings. Once data leaves the United States., it is beyond U.S. privacy protections. A new organization called [Concerned CRA's](#) has taken a stance against offshoring such data without notification to consumers. The use of home-operator networks also presents an

unnecessary risk to privacy as well. There is no justification for personal information to be spread across kitchen tables and dorm rooms across America.

- **7. Accreditation by the NAPBS:** The non-profit trade organization for the screening Industry, the [National Association of Professional Background Screeners](#) has announced the introduction of an accreditation program. NAPBS has gone through an exhaustive process to develop “Best Practices” for the industry, and it is anticipated that firms will start going through the process this year.
- **8. Social network sites:** The use of social networking sites as a pre-employment screening device will continue to be a hot topic in 2009, as more recruiters and HR professionals go online to satisfy their curiosity about candidates. The problem: contrary to popular belief, just because it is online does not mean that it’s a good idea to utilize it without developing policies and procedures. Online material can be inaccurate, discriminatory, and under certain circumstances, its use can be an invasion of privacy. Stay tuned as more courts give their opinions on this issue.
- **9. Integration of services:** With the advent of “Web 2.0,” it is likely that technology will play an even bigger role in the coming years. Seamless integrations with Applicant Tracking Systems allow paperless background screening systems at the click of a mouse.
- **10. International background checks:** In 2008, we observed that, “With mobility of workers across international borders, due diligence is no longer limited to just what an applicant has done in the United States. Although there are numerous practical and legal challenges as well as data and privacy concerns, international background checks are becoming very accessible to employers.” That will continue to be the trend in 2009 as well.

ESR Top Ten Background Check Trends for 2008

- **1. Paperless Systems:** With advances in technology, there is no longer a need for job applicants to sign a physical piece of paper or for employers to enter data on a background screening website. An “Applicant Generated Report” takes advantage of the federal electronic signature laws for a valid online signature, so that applicant fills out the screening authorization form online, then that applicant data goes directly into the background screening firm’s system.
- **2. International Background Checks:** With mobility of workers across international borders, due diligence is no longer limited to just what an applicant has done in the United States. Although there are numerous practical and legal challenges as well as data and privacy concerns, international background checks are becoming very accessible to employers.
- **3. Legal Compliance:** Even though the federal Fair Credit Reporting Act (FCRA) governs background checks on the national level, there are a number of states passing their own laws. This underscores the trend that background checking requires legal compliance expertise in order to comply with complicated federal and state laws.
- **4. Privacy Concerns and the Off-shoring of Data:** Even though great strides have been made to fight identity theft and to protect personal data in the U.S., there is practically

no legal protection once personal and identifiable information (PII) leaves the U.S. Employers need to very carefully establish whether a background firm is sending data off-shore for processing and, if so, employers need to know what country is being used, what information is going off-shore and what privacy protection is in place. The concern for employers? If it gets out that you are using a screening firm that sends applicant data overseas, would applicants want to apply to your organization?

- **5. Accreditation of Screening Firms:** For many employers, it is difficult to distinguish among screening vendors. The National Association of Professional Background Screeners (NAPBS) is in the process of developing accreditation standards. In the meantime, the following website has a helpful article and link to a sample Request for Services (RFP) that may help employers determine how to select a screening service.
- **6. Rights of Ex-offenders to Get Jobs.** There is an active movement in the U.S. to help ex-offenders obtain gainful employment. Without a job, an ex-offender is likely to end up back in custody, and unless we as a society would rather build more prisons than schools and hospitals, a way is needed for ex-offenders to get back to work. In addition, there is a greater likelihood that an employer could be sued for discrimination if an ex-offender is denied employment without a business justification.
- **7. Increased Screening of Temps, Independent Contractors and Vendors:** Some employers have well-thought out screening programs for their employees, but routinely allow temporary workers, independent contractors and vendors access to their premises, clients, or computer systems with no idea of who they are. Employers need to examine their practices for screening members of their extended workforce and vendors.
- **8. The Use of Search Engines and Social Networking Sites:** Employers will increase their use of search engines and sites like Facebook and MySpace to screen applicants. However, there are a number of pitfalls, such as obtaining information that is potentially discriminatory or not authentic. In addition, the issue of whether applicants have a “reasonable expectation of privacy” in their social networking sites has yet to be determined, since there are strong arguments that not everything on the web is fair game for employers to use.
- **9. The Use of Criminal Databases.** Although large criminal databases are a valuable secondary tool with millions of records, employers are beginning to understand that those databases are not a replacement for a county criminal search but rather a supplemental search that may lead to other counties to check.
- **10. Ongoing Screening Post-hire:** New tools make it possible to screen employees periodically after they are hired. However, thought must be given to the type of screening and what to do with any negative information. Such screening also uses databases, which can have a high rate of “false positives” and “false negatives” when used as a standalone tool.

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