



**HR Education Seminar: Background Checks**  
**What you must know to protect Employees,  
Members & Club Assets**



**Presented by:**

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## Overview

Background checks continue to be an important tool aimed at uncovering facts that may help avoid a “bad hire” and to protect the safety of employees, members and guests. In addition to safety concerns, a “bad hire” can lower your Club team’s morale, hinder productivity and even impact member relations. With technology advances over the past decade, employers conducting background checks have an ever increasing wealth of information available to them.

Use of available background information in your Club’s hiring and employment decisions is critical to the Club’s success. However and very importantly, there is an ever-evolving minefield of legal risk associated with background information such that its access and use is no easy task. Now more than ever, all employers who seek or use background information face an increasing number of potential claims:

- The Fair Credit Reporting Act requires not only notice to and consent from applicants/employees before doing a background check, but also requires notice to the applicant/employee who is rejected based on the results of such a check, both before and immediately after the rejection decision is made.
- The EEOC and federal government, under a belief that criminal background and credit checks have a discriminatory impact on certain protected groups, are now actively and aggressively challenging the manner in which employer’s use background information in hiring and termination decisions.

The information presented in this paper is by HR and Legal experts and is designed to develop awareness of what a Club can and cannot do with respect to background checks and background information, and to provide practical guidance for avoiding legal claims associated with background checks.

## Objectives

- Understand the importance of conducting background checks for certain jobs
- Recognize the legal limits on background checks
- Avoid a “bad hire”
- Protect the safety of employees, members and guests
- Develop awareness of what a Club can and cannot do with respect to background checks and background information
- Balance an applicant’s right to privacy with the Club’s need to know

## What is the Purpose of a Background Check?

- To determine suitability for employment and/or any incompatibility with the activities and interactions required by the job.
- To prevent negligent hiring claims
- To ensure timely identification of any history, criminal or otherwise that could adversely affect the person's job performance or safety.

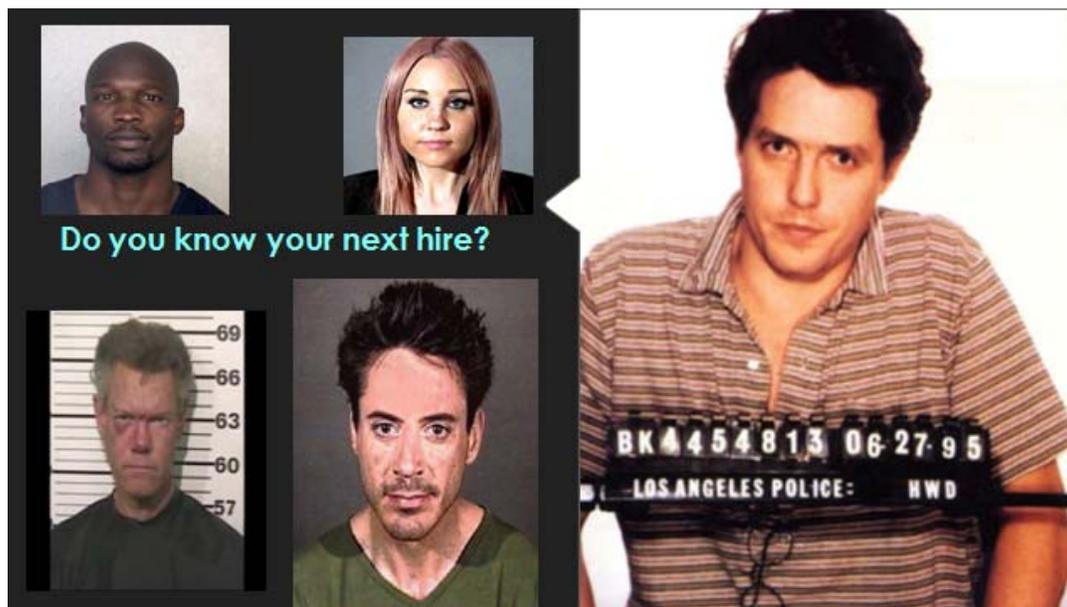
## What Types of Background Check Information is Available...

- Criminal History
- Credit History
- Driving Record
- Education
- Employment History References



## Who Needs a Background Check?

- All New Hires/Rehires
- Temporary/Seasonal/Volunteers
- Student/Intern Workers



## Employers' Use of Criminal History Information

- According to the EEOC in one survey, a total of 92% of responding employers stated that they subjected all or some of their job candidates to criminal background checks. Employers have reported that their use of criminal history information is related to ongoing efforts to combat theft and fraud, as well as heightened concerns about workplace violence and potential liability for negligent hiring. Employers also cite federal laws as well as state and local laws as reasons for using criminal background checks.



### THE EEOC...

- The EEOC enforces Title VII of the Civil Rights Act of 1964 (Title VII) which prohibits employment discrimination based on race, color, religion, sex, or national origin. This Enforcement Guidance is issued as part of the Commission's efforts to eliminate unlawful discrimination in employment screening, for hiring or retention, by entities covered by Title VII, including private employers as well as federal, state, and local governments.
- On April 25, 2012, the Equal Employment Opportunity Commission (EEOC) issued an "Enforcement Guidance" (Guidance) that is designed to limit Employer use of criminal background checks and information.

## Why is the EEOC interested in Employer use of Criminal Background Information?

### Disparate Treatment

- Typical Discrimination Claim
- Similarly situated employees/applicants must be treated consistently
- SAME JOB + SAME CRIMINAL RECORD = SAME TREATMENT
- For example, there is Title VII disparate treatment liability where the evidence shows that a covered employer rejected an African American applicant based on his criminal record but hired a similarly situated White applicant with a comparable criminal record.



### \*\*\*\*Disparate Impact\*\*\*\*

- Disparate Impact is established when:
  - (1) An employer has a facially neutral policy or practice, and
  - (2) The policy or practice has an adverse disparate impact on certain protected groups
- A policy or practice prohibiting the hiring of an applicant with a criminal history is “facially neutral”
- EEOC claims that national data supports the premise that use of criminal history has a “disparate impact” on certain minority groups based upon race and national origin
  - Argument is that people of certain races and national origins are arrested/convicted more frequently than others outside of those groups

## **Disparate Impact (continued)**

- In determining disparate impact, the EEOC Guidance attempts to eliminate a key “statistical” proof component of the claim by stating:
  - Use of criminal conviction is presumed to establish adverse impact unless employer can show evidence that it does not
  - It is NOT enough for an employer to show a diverse workforce
  - EEOC will look at employer’s reputation in community for exclusion of people with criminal records, recruitment practices and publicly posted notices
- Once disparate impact is established, the burden then shifts to the employer to prove that its policy/practice is consistent with “business necessity” and “job relatedness”

## **EEOC Distinguishes Between Arrests and Criminal Convictions**

**Convictions** - An employer can consider a criminal conviction in employment disqualification or termination decisions but it must show that the conviction is “job related and consistent with business necessity”

## **When is a Criminal Conviction Disqualification “Job Related and Consistent with Business Necessity”?**

EEOC Guidance Says There Are Two Ways For Employer to Establish:

(1) **SCIENTIFIC/EXPERT VALIDATION**--The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or

(2) **TARGETED SCREEN**--The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job.

## **SCIENTIFIC/EXPERT VALIDATION**

- **EEOC scientific/expert standard is extremely difficult and impractical to satisfy.**
- **Requires detailed analysis of specific positions and specific types of convictions.**

- **EEOC doesn't have to agree with or accept the validation or supporting analysis so employer has uncertainty.**

### **THE TARGETED SCREEN**

**When considering disqualification/termination because of a criminal conviction, Employer must consider:**

- (1) Nature/Gravity of the Offense
- (2) Time since conviction and/or completion of sentence; and
- (3) Nature of the job sought or held

### **INDIVIDUALIZED ASSESSMENT**

**NO or Very Limited Automatic Disqualifications Based Solely on Fact of Conviction. Instead EEOC wants Employers to:**

- Give the applicant an opportunity to explain the conviction before any decision to disqualify the applicant based on a conviction.
- Consider the following factors in making any decision related to the conviction:
  - Facts or circumstances surrounding the conviction
  - Number of convictions
  - Age at time of conviction or release from prison
  - Evidence that individual performed same type of work with another employer with success
  - Employment history before and after conviction
  - Rehabilitations efforts and references
  - Employment or character references



## What is the difference between an arrest and a conviction?

### Arrest:

- Fact of an arrest does not equate with criminal conduct
- Practice Tip: Do not disqualify an applicant solely on the fact of an arrest
- May consider the conduct underlying an arrest

### Conviction:

- Can consider, but must show that it is job related and consistent with business necessity
- Two circumstances in which the Commission believes employers will consistently meet the “job related and consistent with business necessity” defense are as follows:
  - The employer validates the criminal conduct exclusion for the position in question in light of the Uniform Guidelines on Employee Selection Procedures (if there is data or analysis about criminal conduct as related to subsequent work performance or behaviors); or
  - The employer develops a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job.

### Employer Best Practices

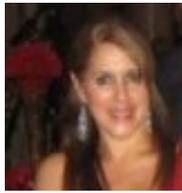
- Eliminate/Revise policies or practices that automatically exclude people from employment based on any criminal record.
  - When was the last time you had an expert review your handbook?
- Be consistent in handling criminal convictions
- Train managers, hiring officials, and decision makers about the use of criminal background information and employment discrimination.
- Keep information about applicants’ and employees’ criminal records confidential. Only use it for the purpose for which it was intended.

### Should Your Club Have a Policy?

#### Yes, But...

- Only if tailored to Club needs and carefully reviewed by legal counsel/expert
- Only if persons responsible for complying with policy are properly trained

**Clare Vazquez, HR Business Partner**



Clare Vazquez diverse HR background has enabled her to bring an innovative, practical and fresh perspective to HR issues. She has consulted with many Fortune 500 companies across a wide variety of industries including hospitality, manufacturing, construction, distribution, roofing, telecommunications, retail banking, call centers, oil and gas.

Clare has held several leadership roles for leading companies where she conducted harassment investigations, developed policies and procedures, talent acquisition and selection, organizational and leadership, and recruitment process outsourcing solutions.

Clare has a Master's degree in Labor and Employment Law from New York Institute of Technology and a Bachelor's degree in Management of Human Resources from Palm Beach Atlantic University. Clare is Six Sigma Certified (Green Belt).



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**Steven M. Parrish, Esquire, Attorney At Law**



Mr. Parrish was an attorney and Partner for over 13 years in one of Florida's preeminent state-wide law firms. In 2011, Mr. Parrish opened Steven M. Parrish, P.A., and brings a business-focused, efficient and practical approach to legal issues. His focus is always on making the law work to help your business, not cripple it through the legal process.

Mr. Parrish's primary focus is representing employers in all areas of labor and employment law, and handles all types of employment litigation in both state and federal courts. He also provides clients with day-to-day advice on all aspects of employee human resource issues including termination decisions, disciplinary actions, wage and hour issues, compliance, sexual harassment/hostile work environment investigations, the ADA, leaves of absence and discrimination.

Mr. Parrish is an AV rated attorney by Martindale-Hubbell, achieving the rating agency's highest marks for both competency and ethics. Mr. Parrish has been designated as a "Florida Legal Elite" in *Florida Trend* magazine by his peers, an honor awarded to less than 2 percent of the Florida Bar. Mr. Parrish has also been designated a "Top Lawyer" by the *South Florida Legal Guide* and a "Super Lawyer" by *Florida Super Lawyers*.



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