

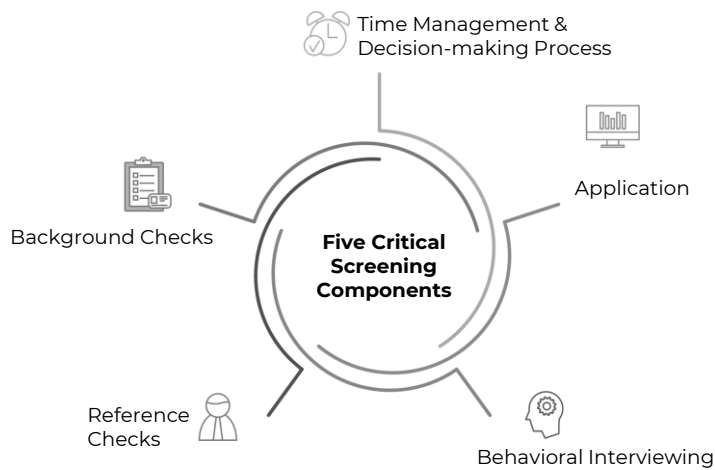


Back to Basics: Understanding Background Checks

Presented by
PRAESIDIUM
In partnership with FADICA

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Critical Screening Components



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DISCLAIMER

Praesidium cannot provide you with legal advice or counsel. The information and opinions expressed are for educational purposes only and are based on current practices, industry-related knowledge, and business expertise. The information provided shall not be construed as legal advice, express or implied. Please consult with your own counsel as appropriate regarding your compliance with federal and state law.

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TOPICS

- Common misconceptions about background screening
- Scope of background screening
- Court structure
- Compliance and background screening
- Social Media and background screening
- References
- Developing Your Program



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MISCONCEPTIONS

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Misconception:

BACKGROUND CHECKS ARE SECRET

- Background screening for employment, when executed properly, is a transparent process:
 - Applicants must be advised that a background check will be run on them in writing, and the applicant must consent to the background check. (Disclosure/Authorization)
 - Applicants have a right to see their background check, no matter when the check was completed.
 - Employers must advise them if the information in a background check was used adversely. This notice must be in writing. (Adverse Action)
- We'll discuss disclosure/authorization and adverse action later in the presentation

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Misconception:

ALL BACKGROUND CHECKS ARE THE SAME

- There is no standard or default background check. There are practically endless combinations of searches that can be included in a background check. Organizations consider a number of factors, such as the customers they serve, compliance, employee/company safety, public perception, cost, volume, and their own understanding of background screening when designing their programs.
- It's common that there will be different levels of backgrounds based on access and the level of the position.
- It is important to review your background screening program with stakeholders, counsel, and your background screening vendor. When it comes to background screening, there's always more you can do, and it's important to periodically review and update your program.

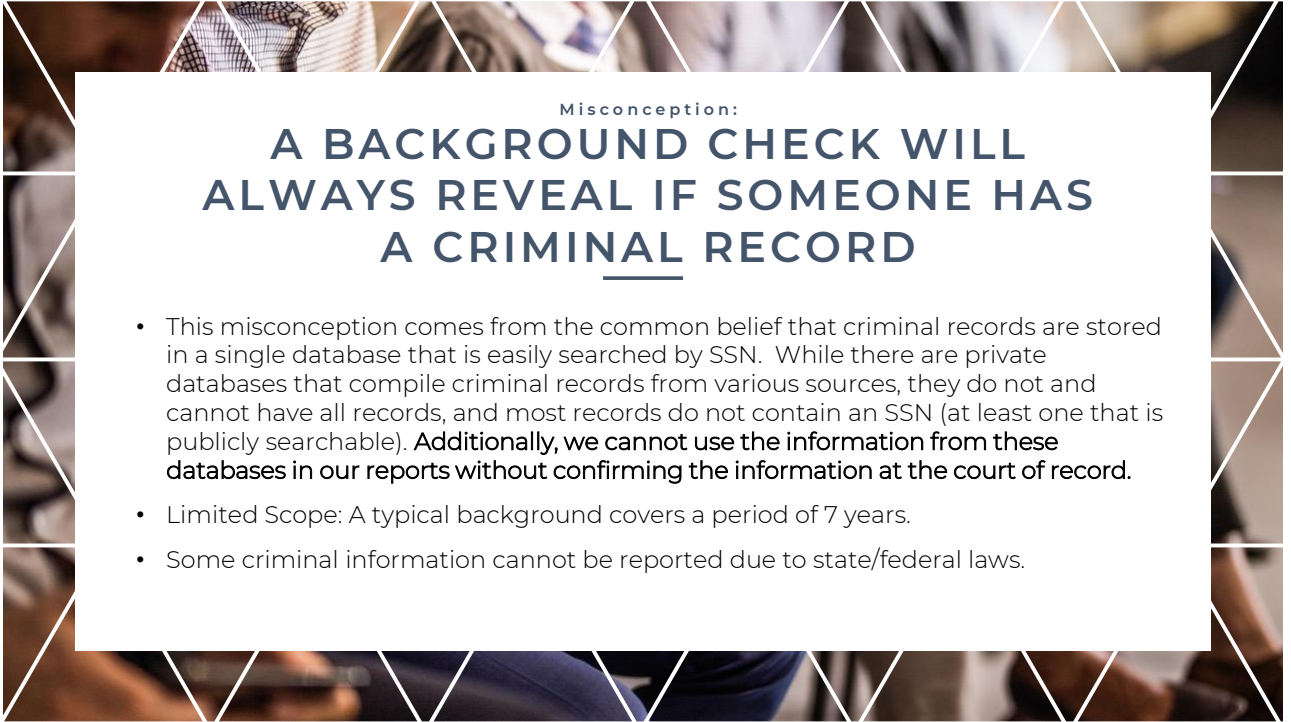
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Misconception:

EVERYTHING IS ONLINE

- While the internet has certainly made background checks more efficient and cheaper, it's led to a misconception that backgrounds can be easily conducted with a simple internet search.
 - Not all court information is available online, and practically none would come back just by entering information into an internet search bar.
 - Provide a false sense of security if nothing is found on an internet search that the individual has a clear background.
 - Leads to people doing their own searches and finding out-of-date and false-positive information on candidates.
 - Belies the complexity of background screening.

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Misconception:

A BACKGROUND CHECK WILL ALWAYS REVEAL IF SOMEONE HAS A CRIMINAL RECORD

- This misconception comes from the common belief that criminal records are stored in a single database that is easily searched by SSN. While there are private databases that compile criminal records from various sources, they do not and cannot have all records, and most records do not contain an SSN (at least one that is publicly searchable). **Additionally, we cannot use the information from these databases in our reports without confirming the information at the court of record.**
- Limited Scope: A typical background covers a period of 7 years.
- Some criminal information cannot be reported due to state/federal laws.

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COURT STRUCTURE

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- The United States has a fractured court system
- There are state and federal court systems that are not interconnected.
- Additionally, there are ancillary courts, such as military, juvenile, and drug courts.

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CRIMINAL COURT STRUCTURE



State Courts

- Upper court and several Lower county courts
- Over 3000 counties in the United States
- The majority, over 90%, of criminal cases are heard in county-level courts.*



Federal Courts

- States are divided up into 1-5 federal district courts
- Federal cases include violations of the Constitution or federal law and crimes on federal land. Charges could include kidnapping, drug trafficking, bank robbery, child pornography, money laundering, and counterfeiting.
- Cases can be heard in any of the federal courts no matter where the offense took place, though most are heard in the area of the offense.
- Less than 10% of criminal cases are heard in federal courts*



Non-Public Courts

- Juvenile Courts
- Military Courts

Records from these courts are not available to the public (with rare exceptions), so proceedings from these courts cannot be included in background checks.

* <https://www.americanprogress.org/article/fact-sheet-state-or-federal-court/>

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IT COULD HAPPEN ANYWHERE

As you can see, the court system is fractured, and there is no centralized location with all criminal records. Even those who are authorized for fingerprinting can't rely only on a fingerprint as there are gaps in that information as well.

Searches are based on where the applicant has lived, and it's possible that a record is located in an area outside of where they have resided.

Some screening programs will only search the current county of residence to help keep costs down

A National search helps fill in those gaps, but it is not foolproof.

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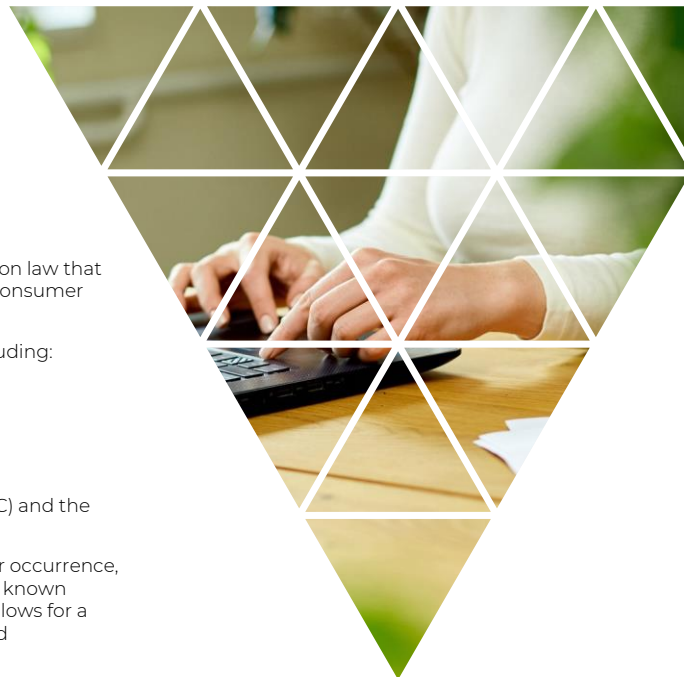
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FAIR CREDIT REPORTING ACT

- The FCRA was enacted in 1970 and is a consumer protection law that regulates consumer reporting agencies and the users of consumer reports.
- The FCRA covers different types of consumer reports, including:
 - Consumer credit reports
 - Loans/extension of credit
 - Pre-employment background checks.

The FCRA is enforced by the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB).

Violations can result in statutory penalties of \$100-\$1,000 per occurrence, and the statute of limitations is two years from the date of a known violation or five years from the occurrence date. The FCRA allows for a private right of action, and plaintiffs can recover punitive and compensatory damages.



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THE PLAYERS

Applicant/Candidate/Consumer

The subject of the background report. You may not think of the applicant as a “consumer” in the traditional sense; however, the FCRA refers to them as a consumer.

End-User/Client/Employer

The organization requesting the background check, aka consumer report; users of consumer reports.

Background Check Company / Consumer Reporting Agency (CRA)

The company contracted with the end user to complete the background check/consumer report



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COMPLIANCE AND BACKGROUND CHECKS

- Background checks are heavily regulated by the federal Fair Credit Reporting Act and state consumer reporting laws.
- Many of the obligations fall solely on the employer to comply with the law.
- If you are using a third party to conduct your background checks, you are subject to regulations.

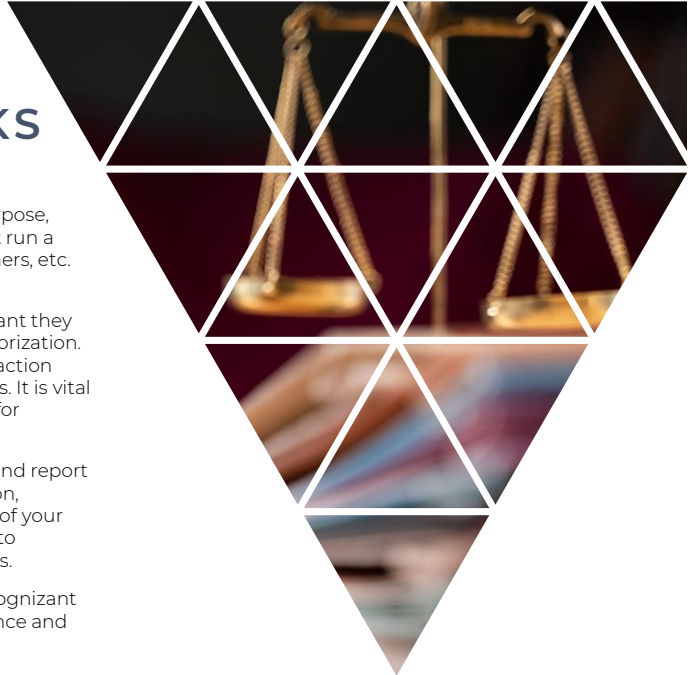


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COMPLIANCE AND BACKGROUND CHECKS

- **Permissible Purpose:** You must have a reason to run the background check, and you can only run one for that purpose, typically employment (including volunteers). You cannot run a background on family members, neighbors, dating partners, etc. (unless, of course, you're hiring them).
- **Disclosure/Authorization:** You must disclose to the applicant they are subject to a background check and obtain their authorization. This area of the law is heavily litigated and leads to class-action lawsuits. Also, certain states have disclosure requirements. It is vital to have these documents reviewed regularly to account for changes in law and litigation trends.
- **Adverse Action:** If you are using ANY part of the background report to make an adverse decision (deny employment, retention, promotion, etc.), you must notify the applicant in writing of your decision and provide the applicant with the opportunity to respond and/or dispute the report. This is a 2-step process.
 - When considering adverse action, you need to be cognizant of federal and state guidelines such as EEOC guidance and state Fair Chance laws.



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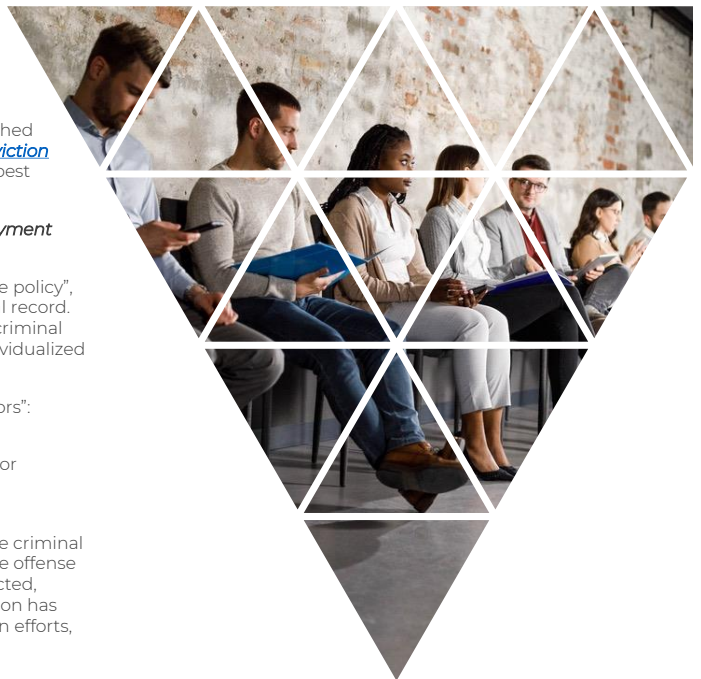
EEOC GUIDANCE

In 2012 the Equal Employment Opportunity Commission published [Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions](#) with guidance on employer best practices.

•**Eliminate policies or practices that exclude people from employment based on any criminal record.**

This means not having a policy, often referred to as a "bright-line policy", to exclude anyone simply based on the fact they have a criminal record. This does not mean you cannot deny employment based on a criminal record; however, the EEOC recommends you complete an "individualized assessment".

- An individualized assessment should consider the "Green Factors":
 - The nature and gravity of the offense or conduct;
 - The time that has passed since the offense, conduct and/or completion of the sentence; and
 - The nature of the job held or sought.
- An individualized assessment includes other factors besides the criminal record itself, including; facts and circumstances surrounding the offense or conduct, number of offenses for which the person was convicted, age at the time of conviction/release from prison, evidence person has performed the same type of work since conviction, rehabilitation efforts, employment or character references.



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EEOC BEST PRACTICES

Review your policy related to hiring individuals with a criminal record.

EEOC recommends:

Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.

- *Identify essential job requirements and the actual circumstances under which the jobs are performed.*
- *Determine the specific offenses that may demonstrate unfitness for performing such jobs.*
- *Identify the criminal offenses based on all available evidence.*
- *Determine the duration of exclusions for criminal conduct based on all available evidence.*
- *Include an individualized assessment.*



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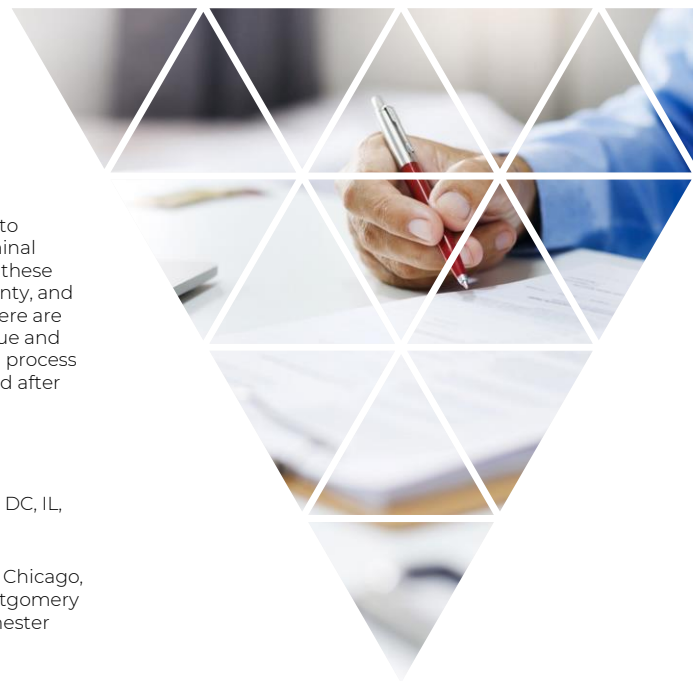
OTHER CONSIDERATIONS

Ban-the-Box

Sometimes referred to as “Fair Chance,” it is a movement to remove the question asking an applicant about their criminal history from an initial job application. In the last 10+ years, these laws have proliferated across the country at the state, county, and city levels. A majority affect public employers; however, there are many that also affect private employers. Each law is unique and includes exceptions and different parts of the onboarding process when the question can be asked. For some, it can be asked after the initial application, while for others, not until an offer of employment and every step in between.

16 states have enacted BTB laws affecting private employers: CA, CO, CT, DC, IL, LA, MA, MD, ME, MN, NJ, NM, OR, RI, WA, VT

Cities and counties include: Buffalo, NY, Chicago, IL, Los Angeles, CA, New York City, San Francisco, CA, Montgomery & Prince George’s County, MD, Suffolk County, NY, Westchester County, NY



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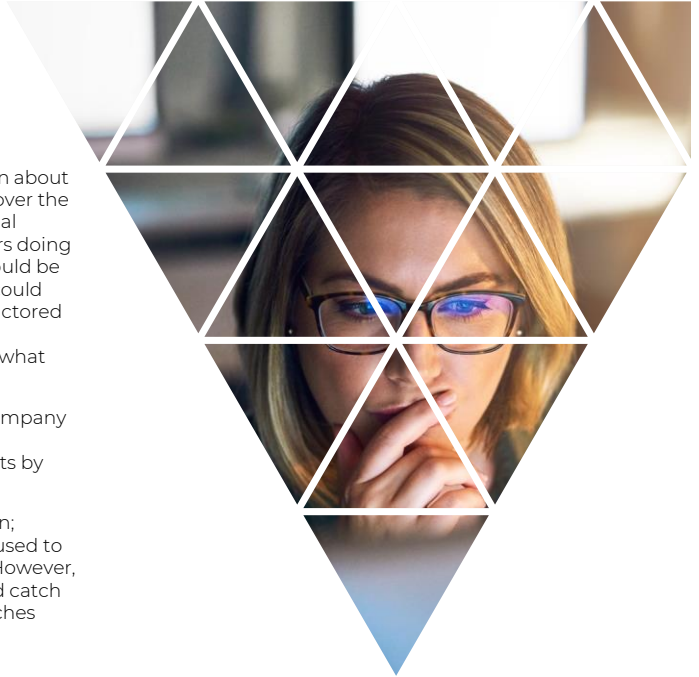
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SOCIAL MEDIA & JOB APPLICANTS

It is tempting to search social media accounts for information about your job applicants, but there are compliance landmines all over the place. More and more employers indicate they are using social media in the background check process, with some recruiters doing Google searches on candidates. This is something an org should be cautious of doing on their own for several reasons. A search could reveal information about the candidate that should not be factored into the hiring criteria, such as race, religion, disability, sexual orientation, nation of origin, etc. It can be difficult to confirm what you are seeing online really belongs to your candidate.

A social media search completed by a background check company will eliminate those concerns, and the search will only reveal demonstrably racist, sexist, violent, intolerant, etc., public posts by individuals.

Social media searches don't often reveal negative information; people are better at keeping their profiles private than they used to be, and companies have made it easier for users to do that. However, like with a criminal search, it may be important to search and catch something objectionable that is easily discoverable. SM searches may make the most sense for public-facing and high-profile individuals in your organization.



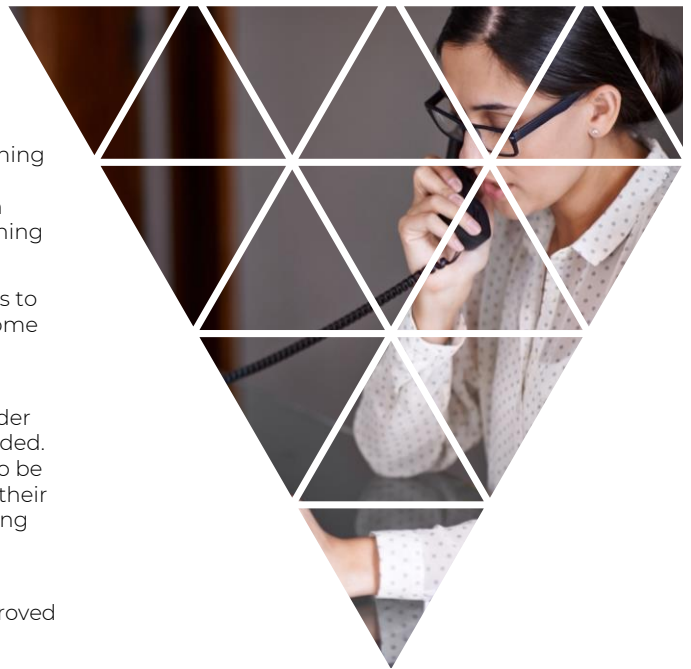
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REFERENCES

References are not always part of a background screening program, partially due to the time and cost it takes to complete. Many organizations may conduct their own reference interviews instead of engaging with a screening company to complete the interview.

- Most questions are on the table when it comes to reference interviews, but there are certainly some topics to avoid to remain in compliance with federal, state, and local hiring guidelines.
- Topics such as race, religion, age, gender, gender identity, and sexual orientation should be avoided. Family, children, and marital status should also be avoided. A reference may offer information in their answers, but you should avoid specifically asking those types of questions from references.
- If you are conducting your own reference interviews, staff should be provided a pre-approved set of questions to ask references.



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DEVELOPING YOUR PROGRAM

When developing and reviewing your background screening program, there are a number of factors to consider.

- Have an understanding of what your background covers:
 - Consult with your provider/vendor so you have a clear understanding of what is included in your searches and other searches the provider can supply.
- Understand your compliance obligations and ensure staff is trained and understands those obligations
- Have policies and procedures for adverse action if you use information in a report to deny employment, including who at your organization has the authority to make those decisions.
- Review and update the documents you provide to applicants. If you have not reviewed and/or updated these documents in some time, they likely require adjustments.
- Ensure staff are clear on their roles and responsibilities in the onboarding process and are cognizant of can and cannot do in the hiring process.

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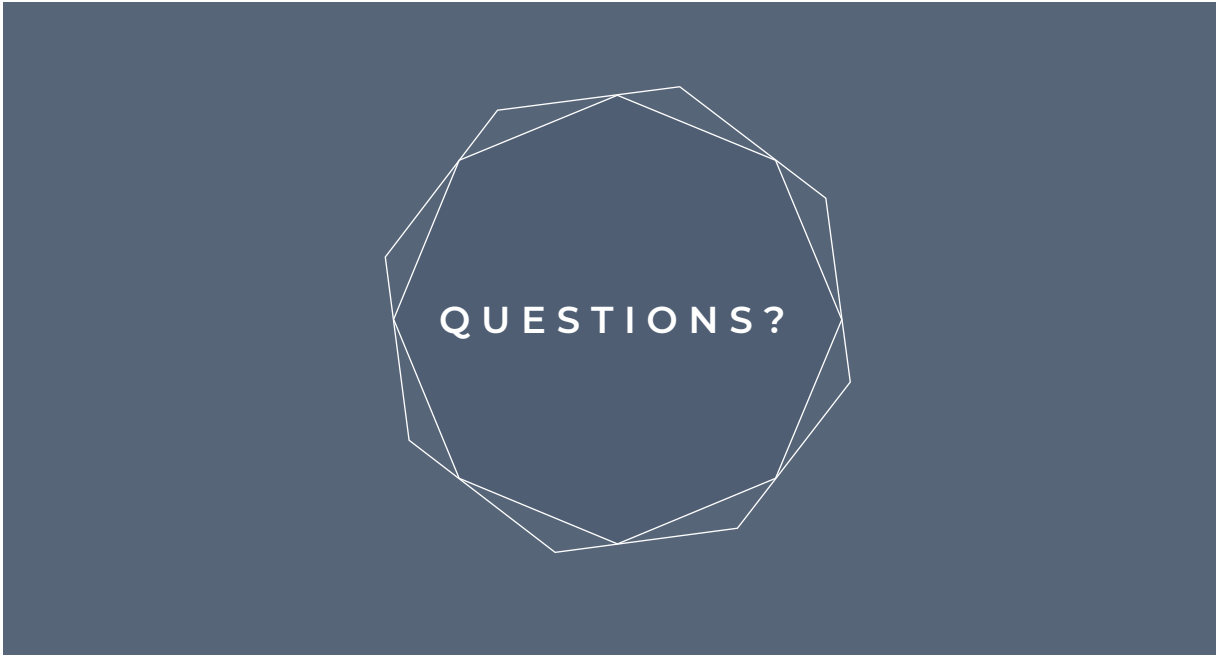


Resource Overview:

- *Screening and Selection Toolkit*, a Proprietary Praesidium Resource in English and Spanish
- safeguarding.fadica.org (archived videos and downloads on Screening and Selection best practices)
- 1:1 Safeguarding Consulting

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STAY IN TOUCH

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