

Best Practice Considerations for Background Screening Employees and Independent Contractors (ICs)

July 25, 2023



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Agenda

- ✓ Understanding the unique legal compliance considerations in background screening ICs versus direct hire employees (FTEs)
- ✓ Legal compliance tips for each labor class
- ✓ How to avoid the inferences of co-employment in IC and vendor screening programs
- ✓ Developing screening program processes and workflows to promote positive screening experiences for ICs, vendors and FTEs

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IC (1099) & Employee (W-2) Legal Compliance Considerations

Federal

W-2 employers and companies contracting with 1099 labor must comply with Fair Credit Reporting Act (FCRA) requirements for screening for employment purposes

It is commonly held Fair Credit Reporting Act (FCRA) sections affording specific protections to employees apply to both W2 employees and 1099 contract labor

Key applicable FCRA Sections are as follows:

Federal

Permissible Purpose: §604(2) IC: In Accordance with the Written Instructions of the Consumer & §604(3)(b) W2 Employee: Employment

- Employment purposes generally requires the written permission of the consumer to procure a consumer report.
- Employer or Company procuring the report must provide to the consumer in writing a clear and conspicuous disclosure that it may obtain a consumer report for employment purposes prior to procuring a report.

Investigative Consumer Report: §606 IC & Employee

Report contains information about a consumer's character, general reputation, personal characteristics, or mode of living – Non-public information like employment verifications

1. The user clearly and accurately discloses to the consumer that it may obtain an investigative consumer report.
2. The disclosure contains a statement of the consumer's right to request other information about the report and a summary of the consumer's rights under the FCRA.
3. The disclosure is in writing and is mailed or otherwise delivered to the consumer not later than three business days after the date on which the report was first requested.
4. The user procuring the report certifies to the consumer reporting agency that it has complied with the disclosure requirements and will comply in the event that the consumer requests additional disclosures about the report.

Federal

Public record information for employment purpose: §613 IC & Employee – Furnishers of reports (CRAs) must:

1. at the time such public record information is reported to the user of such consumer report, notify the consumer of the fact that public record information is being reported by the consumer reporting agency, together with the name and address of the person to whom such information is being reported; or
2. maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date (i.e. verify at record source)

Federal

Requirements on users of consumer reports : §615 (Adverse Action) IC & Employee – Prior to taking adverse employment or contracting action that is based in whole or in part on the consumer report, the user generally must provide to the consumer with:

1. Oral, written, or electronic notice of the adverse action to the consumer;
2. The name, address, and telephone number of the consumer reporting agency that furnished the report to the person*;

* Including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis

Federal

FCRA §615 – Adverse Action

3. A statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken;
4. Provide to the consumer an oral, written, or electronic notice of the consumer's rights and a free copy of their consumer report and;
5. A statement of right to dispute findings with the furnishing CRA

Wait for designated time period before sending final adverse action letter

Local & State Compliance Considerations

Many states and municipalities have employment screening legislation and regulations employers must also follow

State/Local legislation may or may not extend to ICs

Some states/municipalities have specific language extending protections to ICs and contract labor

- For example, City of Los Angeles and City/County of San Francisco employment screening laws extend to ICs
- Be aware of fair chance laws that require specific adverse action steps

Legal Compliance Tips

Create a specific IC Screening Program

Build separation in your IC screening program to ensure it is wholly separate from employment screening

- If using the same provider for both employment and IC programs, separate into unique sub-accounts so there is no co-mingling of records
- Do not use employment terms like hiring, placement, employment screen – Use IC-friendly terms like contracting requirement, access screen, security screen
- Ensure your IC screening program designates the correct permissible purpose for screening - §604(2) Written Instructions

Create a specific IC Screening Program

- Consider replacing employment verifications (if required in IC screening program) with professional references on past assignments/projects – aligns with contract relationship
- Tailor disclosure and consent forms to ensure they reference IC relationship and avoid employment language
 - Ensure to obtain authorization for any potential viewers of completed reports
- Obtain fresh disclosure and consent with each new screen processed on each IC
 - California restricts or prohibits “evergreen” consent
- Consider continuous monitoring services for ongoing compliance/risk mitigation

Ensure compliance in Employee Screening

- Use a background screening process that supports electronic capture of disclosure and consent
 - Promotes storage of required documents with screening results
 - Aids in audits and document production
- Ensure your human resource, risk mitigation, safety and security teams have consistent access to ongoing compliance training and resources
- Obtain fresh disclosure and consent with each new screen processed on each employee
 - Avoid using stale consent disclosure and consent forms
 - Ensures appropriate form sets based upon employee work/residential jurisdiction
- Consider continuous monitoring services for ongoing compliance/risk mitigation

Avoid Inferring Co-employment

Top Misclassification Issues – IC versus Employee

Behavioral Control:

- Autonomy in work product/processes and minimal to no training = Supports IC classification
- High oversight on work product/processes and significant training provided by Company = Supports employee classification

Financial Control:

- Pays for own equipment, expenses, travel, services more than one company = Supports IC classification
- Company supplied equipment, reimbursed expenses and travel, exclusive service arrangement = Supports employee classification

Worker Relationship

- No benefits, signed contract, can't quit or be fired at-will = Supports IC classification
- Paid benefits, no contract, can quit without liability to company, can be fired, performs standard business services = Supports employee classification

Tips for Avoiding Co-employment in screening

- Consider contractor self-pay for background screen
 - Can stipulate for reimbursement after a specific time period or if company paid, document as a term in IC contract
- Minimize company interaction in screening process
 - Use a landing page for IC to initiate individual screen
 - Utilize a process that puts most, if not all, background screening processes on CRA and IC
 - Company should keep interaction to no more than initiating an invite to screen and reviewing completed screening file for compliance with access requirements
- Ensure maximum IC access throughout the screening process

Greater degree of contractor independence = less inference of employment relationship

Tips for Avoiding Co-employment in screening

- Avoid processing IC background screens through ATS unless you can separate and segment process from employee background screening
- Use separate end-user and management staff for processing and evaluating IC access/security screens
- If you engage in continuous monitoring programs, maintain separate pools for ICs and employees
- Ensure you avoid standard employment language for IC screening – common verbiage creates co-mingled inference, unique terms infers purposeful separation

Promoting Positive Screening Experiences

Creating Positive Screening Experiences for ICs and Employees

- Ensure ease of use – partner with CRAs offering intuitive, mobile-friendly applications that can be accessed on any wi-fi enabled device
- Create trust through visibility – processes that enable employees and ICs to view screening progress and engage CRAs directly promote better candidate outcomes and reduce fall-off even when unavoidable delays occur
- Provide a one-stop shop option – top screening platforms enable ICs and employees to schedule drug screening and occupational health service requirements directly from the screening platform, affording flexibility in identifying collection facilities and clinics to meet their needs

Creating Positive Screening Experiences for ICs and Employees

- Direct candidate/donor engagement in the screening process is the single area where you can give ICs and employees alike a similar quality experience
- Ensure quality CRA vendor support – if Company users have support challenges, candidates will likely encounter a similar experience
- Promote clear instructions – CRA vendors with capacity adjust messaging to meet specific Company needs lead to global ease of use
- Chose a CRA partner with extensive Company end-user and candidate resources & ensure the partner invests in technology solutions – chat, intuitive resource libraries, multiple channels for answers

Thank You

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