

Market Snapshot: Background Screening Reports

Criminal background checks in employment

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1. Introduction

Employers¹ use background screening reports² to evaluate prospective and current employees for employment, promotion, reassignment, or retention.³ Background screening reports may include many types of information, including credit history, public records from civil court proceedings – such as bankruptcy filings and other court documents – and information related to employment history. They may also include other public record information on arrests and convictions of individuals. According to the most recent survey of state criminal history information, “[f]ifty states, Guam, and Puerto Rico report the total number of persons in their criminal history files as 110,235,200.”⁴

Employment screening companies provide information such as credit history, employment, salary, education, and professional license verification to employers and others. They may also collect, evaluate, provide, or make available criminal arrest and conviction information; driving record information; drug and alcohol testing and health screening information; and non-profit and volunteer activity verification.

The Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau (CFPB) both enforce the Fair Credit Reporting Act (FCRA),⁵ which includes provisions related to the inclusion and use of criminal history information. The CFPB has general rulemaking authority

¹ The terms “employers”, “users” and “requestors” of reports will be used interchangeably in this report. “Applicants” and “individuals who are the subject of the request” will be used interchangeably.

² Background screening reports are generally prepared by background screening companies that are consumer reporting agencies and therefore subject to the requirements of the Fair Credit Reporting Act (“FCRA”).

³ 15 U.S.C. §1681a(h).

⁴ BECKI R. GOGGINS & DENNIS A. DEBACCO, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS, 2016 : A CRIMINAL JUSTICE INFORMATION POLICY REPORT, Dep’t of Justice, Office of Justice Programs 2 (2018)[hereinafter *2016 Criminal History Survey*] available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/251516.pdf> (Dep’t of Justice, Office of Justice Programs) (fifty states, Guam and Puerto Rico report the total number of persons in their criminal history files as 110,235,200, of which 105,927,700 are automated records and 4,307,500 are manual records.) However, the estimate generally used is 70 million to 100 million individuals with criminal records to account for individuals that may have records in more than one state. For an example of a methodology accounting for the duplication, see Michelle Natividad Rodriguez and Maurice Emsellem, *65 Million ‘Need Not Apply’: The Case For Reforming Criminal Background Checks For Employment*, National Employment Law Project (2011), http://www.nelp.org/page/-/SCLP/2011/65_Million_Need_Not_Apply.pdf?nocdn=1 interpreting the BUREAU OF JUSTICE STATISTICS, SURVEY OF STATE CRIMINAL HISTORY INFORMATION SYSTEMS 2014: CRIMINAL JUSTICE INFORMATION POLICY 2 (2015) available at <https://www.ncjrs.gov/pdffiles1/bjs/grants/249799.pdf>

⁵ 15 U.S.C. §1681 *et seq.*

over most of the FCRA.⁶ The FTC and the CFPB provide educational materials to help consumer reporting companies, users of consumer reports, and consumers understand their rights and responsibilities under the FCRA.⁷ Both the FTC and the CFPB work to ensure accuracy and completeness of information in consumer reporting company files. For example, the agencies filed a joint amicus brief in 2013 addressing when the seven year allowable reporting period under the FCRA commences for certain criminal history information.⁸

This report describes (i) the background screening industry; (ii) how background screening reports, including criminal history information, are generated; (iii) how screening reports are used by employers; (iv) challenges related to accuracy and dispute resolution, and (v) developments in the market. While background screening reports can include various types of information and be used for several purposes, this paper focuses on reports used for employment purposes that include criminal history information.

2. Industry Structure

The background screening industry has grown over the past two decades.⁹ Following the September 11, 2001 terrorist attacks, the monthly volume of criminal history check requests to one major firm providing multi-state criminal history checks increased from about 3,000 to almost 25,000 by February 2002.¹⁰ According to a 2016 human resource industry survey, approximately 72 percent of employers surveyed conduct background checks; 82 percent of

⁶ 15 U.S.C. § 1681s(e).

⁷ See, e.g., Federal Trade Commission, *Background Checks: What Employers Need to Know*, <https://www.ftc.gov/tips-advice/business-center/guidance/background-checks-what-employers-need-know>; Consumer Financial Protection Bureau, *Focus on Reentry Companion Guide*, section 6, Background Screening reports available at <https://www.consumerfinance.gov/practitioner-resources/your-money-your-goals/companion-guides/>.

⁸ See *Moran v. The Screening Pros, LLC*, No. 12-57246, Ninth Circuit, Brief of *Amici Curiae* Consumer Financial Protection Bureau and Federal Trade Commission supporting reversal available at <https://www.consumerfinance.gov/policy-compliance/amicus/briefs/moran-screening-pros-llp/>.

⁹ U.S. GOV'T ACCOUNTABILITY OFFICE, GAO 15-162, CRIMINAL HISTORY RECORDS: ADDITIONAL ACTIONS COULD ENHANCE THE COMPLETENESS OF RECORDS USED FOR EMPLOYMENT-RELATED BACKGROUND SCREENING BACKGROUND CHECK 33, note 8 (2015) [hereinafter *GAO Report*] available at <https://www.gao.gov/products/GAO-15-162> (number of private companies conducting criminal record background checks appears to be increasing because of employer demand).

¹⁰ Ann Davis, *Firms Dig Deep Into Workers' Past Amid Post-Sept. 11 Security Anxiety*, Wall St. J. (updated March 12, 2002), <http://www.wsj.com/articles/SB1015886922323674160>.

those that conduct background checks include criminal background checks.¹¹ A 2018 survey of employers, commissioned by the background screening industry, found 95 percent of employers surveyed stated they conduct one or more types of background screening; 94 percent of those employers that conduct background screening include some form of criminal history check.¹² State and federal law require criminal background checks for certain types of jobs or industries, including those working with the elderly, children or other vulnerable populations.¹³ Those laws often require FBI criminal background checks, which require fingerprints to be submitted, for certain types of positions, volunteers, and organizations. While there is some overlap in terms of the industry and challenges, such criminal checks are outside the scope of this paper.

An industry analysis characterizes the background screening industry as mature and growing, experiencing consolidation and price competition.¹⁴ According to the analysis, three key drivers of growth are 1) increased demand due to improvements in the labor market, 2) a decline in the rental vacancy rates, and 3) the continuing increase of online services.¹⁵ The analysis estimates that for 2019 there are 1,954 background screening companies¹⁶ with revenue of \$3.2 billion; two firms account for fourteen percent of the industry's revenue.¹⁷

¹¹ *More than 1 in 4 Employers Do Not Conduct Background Checks of All New Employees* (November 17, 2016) https://www.careerbuilder.com/share/aboutus/pressreleasesdetail.aspx?sd=11/17/2016&siteid=cbpr&sc_cmp1=cb_pr975_&id=pr975&ed=12/31/2016; see also Society for Human Resource Management (SHRM), *Background Checking – The Use of Criminal Background Checks in Hiring Decisions* (2012) (69 percent of the 300 member companies and 285,000 individual members polled reported conducting criminal background checks on at least some job applicants), available at <https://www.shrm.org/research/surveyfindings/articles/pages/criminalbackgroundcheck.aspx>.

¹² National Association of Professional Background Screeners (NAPBS), *How Human Resource Professionals View the Use and Effectiveness of Background Screening Methods* (2018) (HR.com was commissioned by NAPBS to conduct the survey of 2,137 human resource professionals) available at https://www.hr.com/en/resources/free_research_white_papers/napbs-background-screening-2018-jun2018_jiexgh27.html.

¹³ See generally *GAO Report*, *supra* note 9, at 10-15 (providing background on state law requirements for FBI background checks).

¹⁴ Evan Hoffman, *Background Check Services in the US*, IBISWorld Industry Report OD6058 10-11 (April 2019) [hereinafter *IBISWorld*] (IBISWorld is publisher of business intelligence reports that specializes in industry research). Note: IBISWorld does not consider drug and health screening services as part of the Background Check Services industry. *Id.* at 25.

¹⁵ *Id.* at 3-5.

¹⁶ *Id.* at 3. See also SEARCH: The National Consortium for Justice Information and Statistics, *Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information 5* (2005) [hereinafter *2005 Task Force Report*] available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf> (The portion of the commercial information industry that provides criminal justice information products is difficult to quantify. In addition to a few large industry players, there are hundreds, perhaps even thousands, of regional and local companies).

¹⁷ *IBISWorld*, *supra* note 14, at 3, 23-24. (First Advantage accounts for 7.4%, Sterling for 6.6% of industry revenue).

Companies that provide consumer reports for employment purposes vary in size, the users they serve, the services they provide, and the geographic regions they cover. A majority of the companies that provide background screening services for users assess applicants for employment or tenant screening purposes. The industry analysis for 2019 estimates that 32.1 percent of revenue in the background screening industry will come from prospective tenant reports, and the remainder of revenue will mostly come from reports requested by employers and businesses.¹⁸

Some background screening companies only provide employment screening services; others solely tenant screening; and others provide both.¹⁹ Criminal record check services as part of background screening account for 36.5 percent of industry revenue; credit check services account for 46.4 percent; and reference check services 17.1 percent.²⁰ With the growth of digitized and online access to public records, some companies, including even some smaller companies, can offer national criminal searches.²¹ Background screening companies typically provide a variety of other services, including education and employment verification, credit checks, identity checks, driving records checks, and form I-9 US employment eligibility verification.²²

Based on information on company websites, some background screening companies state that they use official court repositories from each relevant jurisdiction; others rely on private databases of public criminal records information, either run internally or by third parties, which may be national in scope or state/county specific.²³ Background screening companies often also

¹⁸ *Id.* at 14-15. The data includes requests by businesses for reports used for employment purposes as well as reports used to assess certain customers.

¹⁹ *See, e.g.*, TransUnion SmartMove <https://www.mysmartmove.com/>; MyRental (owned by CoreLogic) <https://www.myrental.com/>; and Tenant Background Search <https://www.tenantbackgroundsearch.com/> (tenant screening); AccuSource <https://accusource-online.com/>; HiresShield.com <https://hiresshield.com/>; and DataCheck <https://www.datacheckinc.com/default.php> (employment screening); ChoiceScreening <https://www.choicescreening.com> and SentryLink <https://www.sentrylink.com/> (employment and tenant screening).

²⁰ *IBISWorld*, *supra* note 14, at 12-13.

²¹ *See, e.g.*, AccuSource, *Court Records*, <https://accusource-online.com/solutions/screening-services/court-records/>; iprospectcheck, *The Power of Your Own Custom-Built Screening Program*, <https://www.iprospectcheck.com/background-checks-screening/>; Corra Group, *Background Checks & Pre-Employment Screening*, <http://www.corragroup.com/nationwide-criminal-records.html>; Employment Background Investigations, Inc., *Background Check Services*, <https://www.ebiinc.com/solutions/background-checks/criminal-record-checks>.

²² *See* National Association of Professional Background Screeners (NAPBS), *The Facts About Background Screening* <http://pubs.napbs.com/pub/0822433E-CAEA-32D3-A1F2-C4970C002321>.

²³ *See, e.g.*, Validity Screening <https://validityscreening.com/screening-solutions/all-solutions/criminal-records/> (search includes official court repositories for each identified jurisdiction of residence); CoreLogic

use third party companies that provide “runner” services or may have those services in-house that will search individual courthouse records directly.²⁴ Some large companies that maintain national databases for their own use sell access to their databases to other companies.²⁵

Background screening companies state they will customize their searches to address the needs of their users,²⁶ often employers in certain sectors, e.g., transportation. Or, users may have specific criteria related to the type and extent of risk related to the position. For a position in the company’s controller’s office, for example, the employer may limit search to information about any financial crimes such as embezzlement.

Background screening companies report that it can take from a few hours to a week to complete a background check.²⁷ The companies note that the timeframe depends on the types of information the employer requests and how quickly the information, e.g., court records, can be accessed.

The price of a background screen that includes a criminal history review can range from under \$10 to \$100 or more, depending on the level, number or type of service offered.²⁸ Based on

<https://www.corelogic.com/solutions/background-data.aspx>; Background Screeners of America; <https://backgroundscreenersofamerica.com/services/court-record-searches/>.

²⁴ See, e.g., Securitec <https://www.securitecscreening.com/>; Sterling <https://www.sterlingcheck.com/services/criminal-background-checks/> (Sterling notes that “[w]hen automation isn’t available, we have our team of court runners”). Companies that have private databases, maintain national databases, and third party companies or other companies that provide services may also be background screening companies or may provide services or products such that they are subject to the requirements of the FCRA.

²⁵ See, e.g., GIS/Hireright, KwikScreen <http://www.geninfo.com/EXTRAS/background-screening/KwikScreen-National-Criminal-Database.pdf?v=00000069t> (company states that “[a]s one of the largest and most updated national criminal databases in the US, GIS | HireRight’s KwikScreen National Criminal Database contains more than 600 million criminal records from a comprehensive list of sources”); Innovative Enterprises, Inc. <https://www.knowthefacts.com/ncis> (company states that “NCIS™ is a powerful, high-speed multi-jurisdictional search of our proprietary databases compiled from multiple sources consisting of court records, incarceration records, prison/inmate records, probation/parole/release information, arrest data, wants and warrants and/or other proprietary sources”).

²⁶ See, e.g., Paladin Background Screening, *Industries Served*, <https://paladinbackgroundscreening.com/background-screening/industries-served-2/>; Crimcheck <https://crimcheck.net/services/criminal-checks/> (“We provide customized reports: the criminal online background checks which we provide are customized according to your needs”).

²⁷ See, e.g., Goodhire <https://www.goodhire.com/trueme/faq>, (a few hours to a few days); Hireright <https://www.hireright.com/background-check-faq/answers/how-long-does-a-background-check-take> (depending on nature and scope of the background check your potential employer has requested, an average employment background check will typically take between two and four business days to complete); Verified Credentials <https://www.verifiedcredentials.com/state-criminal-history/>. (one to three business days).

²⁸ See, e.g. Verifirst <https://blog.verifirst.com/blog/bid/305407/cost-of-a-background-check-how-much-should-you-pay>; Goodhire <https://www.goodhire.com/pricing>; HireRight, “Types of Criminal Records” <https://www.hireright.com/services/criminal-background-checks>; Hiresield, “Pre-Employment Online Background

information on some company websites, they may charge more for more customized products or manual searches of criminal court records.²⁹ A higher-priced product also might include searches of other databases that include criminal history information.³⁰ Companies sometimes list the types of sources they use to conduct their background checks.³¹

3. Background Screening Reports – the Process

If an employer wants to obtain a background screening report for a potential or current employee, in most cases it must first inform the individual of its intent and secure their authorization in writing.³² Employers typically obtain background screening reports from a background screening company.³³ Depending on the purpose and needs of the particular employer or industry,³⁴ background screening companies provide their clients with an array of verification and background check services.

Check Pricing” <https://hireshield.com/pricing/>; Backgrounds Online, “*Products & Services*” <https://www.backgroundsonline.com/products-and-services>; Backgroundchecks.com, <https://www.backgroundchecks.com/Business/Packages2>; Criminal Watch Dog, <https://www.criminalwatchdog.com/faq/how-much-does-background-check-cost>.

²⁹ See, e.g. Backgroundchecks <https://www.backgroundchecks.com/products> (offers multi-jurisdictional instant criminal database, supplemented with “direct searches at specific courts.” It also provides “role-specific reports or verifications”); Verifirst <https://www.verifirst.com/employment-screening> (Verifirst Doublecheck service: “A manual review of potential ‘hits’ on a criminal record database search”).

³⁰ See, e.g., HireRight, “*Types of Criminal Records*” <https://www.hireright.com/services/criminal-background-checks>; Hireshield, “*Pre-Employment Online Background Check Pricing*” <https://hireshield.com/pricing/>; Backgrounds Online, “*Products & Services*” <https://www.backgroundsonline.com/products-and-services>.

³¹ See, e.g., Asurint <https://www.asurint.com/solutions/criminal-background-searches>; Career Builder <https://www.screen.careerbuilder.com/services/criminal-civil.aspx>; s2verify http://s2verify.com/backgroundcheck_services.

³² 15 U.S.C. § 1681b(b)(2).

³³ When employers do not use the services of a third party and instead conduct background research themselves, such activity may not be regulated by the FCRA. See generally Federal Trade Commission (FTC), *Background Checks - What Employers Need to Know* (2015) available at <https://www.ftc.gov/system/files/documents/plain-language/pdf-0142-background-checks-what-employers-need-know.pdf>.

³⁴ See, for example, the North American Background Screening Consortium (NABSC), which is a standardized criminal background screening program developed for companies hiring and using contractor employees who provide maintenance, construction and operational support services at petrochemical facilities and other industrial manufacturers. The stated purpose for standardized background screen criteria is so contractor employers do not have to comply with multiple owner requirements when using and choosing from among background screening companies that serve as Third Party Administrators (TPAs). http://d32kk2dy6b1283.cloudfront.net/hg/medialibraries/hasc-stage/media/nabscpolicy2010_000.pdf.

When an employer requests a report that includes a request for a criminal background check from a background screening company, it provides identifying information about the potential or current employee to the company, such as name, date of birth, and social security number.³⁵ Identifiers are used to conduct a search in various databases to determine if there is a “match” to the information provided in the criminal record information.³⁶ Some background screening companies may utilize additional verification processes to ensure that the results match the individual who is the subject of the request.³⁷ Users may request customized background screening searches based on the type of criminal history data sought, e.g., misdemeanors or felonies, or the type of position involved.³⁸

Background screening companies vary in the way in which they obtain information on the individual and prepare reports. Background screening companies use different levels of identifiers to conduct searches,³⁹ have individual protocols to update information, and apply varying criteria to determine whether a record in a database being searched matches the individual associated with the request for background information, e.g., the job applicant. In addition, background screening companies use various databases, external and internal, to access information about individuals.

Once a background screening company uses its process to match the individual to records in databases being searched, the company prepares a report that includes any criminal history that

³⁵ See GAO Report, *supra* note 9, at 38 (private companies generally conduct name-based checks (versus fingerprint-based checks), which can decrease the accuracy of the information that the check produces). Some employers send applicants links to background screening sites for the applicant to input identifying information directly. See, e.g., Checkr, <https://applicant.checkr.com/>; Trusted Employees, <https://www.trustedemployees.com/learning-center/faqs/>.

³⁶ See generally Marina Duane, Nancy LaVigne, Mathew Lynch & Emily Reimal, *Criminal Background Checks: Impact on Employment and Recidivism* 7-9 Urban Institute (2017)[hereinafter *Duane, Criminal Background Checks*], available at https://www.urban.org/research/publication/criminal-background-checks-impact-employment-and-recidivism/view/full_report; see also U.S. Dep’t of Justice, Office of the Attorney General, THE ATTORNEY GENERAL’S REPORT ON CRIMINAL HISTORY BACKGROUND CHECKS 39 (June 2006), available at https://www.bjs.gov/content/pub/pdf/ag_bgchecks_report.pdf.

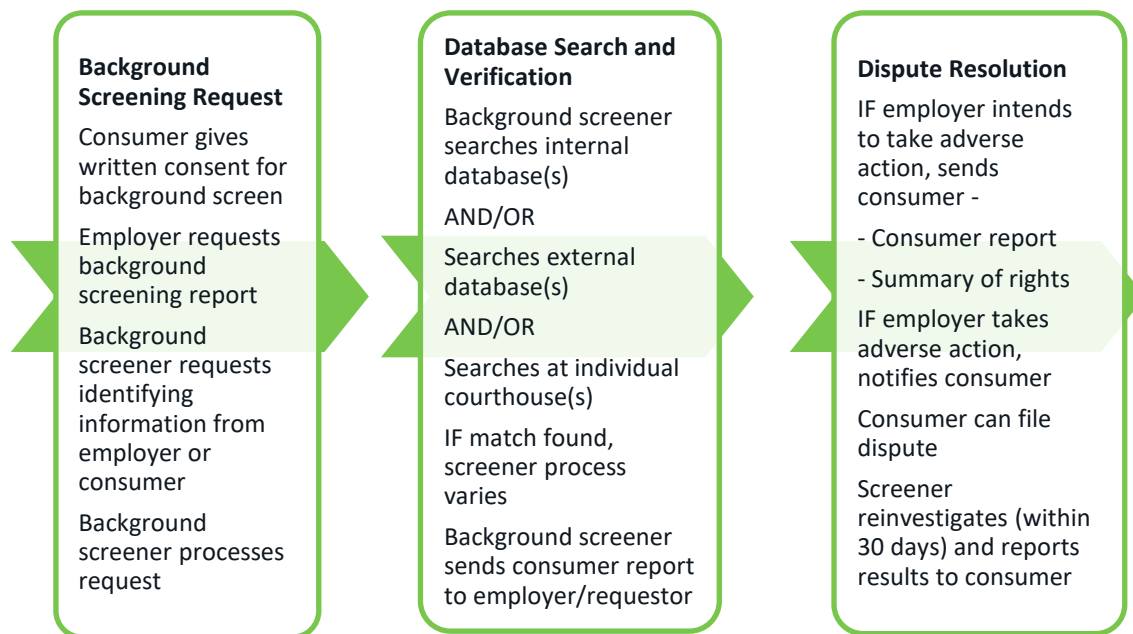
³⁷ For example, First Advantage describes its National Criminal File search as involving running the consumer’s identifying information through an automated search of that database, reviewing any “hits” to determine whether they can be matched with the consumer. *Williams v. First Advantage*, 4-6 (N.D. Fla. 2017); see also Sharon Dietrich, *Ants Under the Refrigerator* CRIMINAL JUSTICE (Winter 2016)[hereinafter *Dietrich*], available at <http://ccresourcecenter.org/wp-content/uploads/2017/03/Ants-under-the-Refrigerator-published.pdf>.

³⁸ See, e.g., Hireright, *FAQs - Will a misdemeanor or felony show up on a background check?* <https://www.hireright.com/background-check-faq/answers/will-a-misdemeanor-or-felony-show-up-on-a-background-check>.

³⁹ It is unclear the extent to which identifiers are provided by employers or the applicant. According to some websites, employers send applicants links to background screening sites for the applicant to input information directly. See, e.g., ESRCheck <https://esrcheck.com/app/Applicants/AgrLogin.aspx?ib=o&un=&pw=> (applicant portal).

has been located through the matching process and any other types of information requested. The company then sends the report to the employer. If the employer intends to take any adverse action based in any part on information in the report, it must first provide to the consumer 1) a copy of the report and 2) a summary of the consumer’s rights under the FCRA.⁴⁰ If the employer takes an adverse action, it must notify the individual. The individual has the right to dispute information in the report and the results of the investigation are sent to the consumer.⁴¹

FIGURE 1: BACKGROUND SCREENING PROCESS



4. Challenges

There are a number of challenges that background screening companies, employers, and individuals that are subject to background screens face. The inconsistent systems across jurisdictions for reporting criminal records may make it difficult to access complete records, or records that use consistent terminology and reporting events, e.g., different definitions of

⁴⁰ 15 U.S.C. §1681b(b)(3)(A).

⁴¹ See 15 U.S.C. §1681i.

dismissals.⁴² Criminal history information about an individual case may be included in many databases.⁴³ Primary sources include the federal and state courts, the Federal Bureau of Investigation (FBI) databases, state repositories, and law enforcement agencies.⁴⁴ There are more than 13,000 state courts of record in the United States, 94 district level and 13 appellate federal courts,⁴⁵ and how each jurisdiction keeps records and makes records available to the public vary greatly.⁴⁶

Background screening companies create, use, and sell private databases that collect public records, including from law enforcement agencies, state courts, corrections offices, and state criminal record repositories where available.⁴⁷ According to a U.S. Government Accountability

⁴² See GAO Report, *supra* note 9, at 37 (“Officials from private background check companies, states we contacted, and DOJ identified challenges that private companies face in obtaining complete and accurate criminal history records.”); see also Duane, *Criminal Background Checks*, *supra* note 36, at 7-9; Sharon Dietrich & Persis Yu, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Business* 6 (2012)[hereinafter *Broken Records*], available at <https://www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf> (table 1 presents list of types of inaccuracies and poor practices authors identified in private criminal background screening reports).

⁴³ See, e.g., Federal Bureau of Investigation, National Criminal Information Center (NCIC), <https://www.fbi.gov/services/cjis/ncic> (the NCIC includes information from multiple sources); See Dietrich, *supra* note 37, at 27-28.

⁴⁴ See, e.g., 2005 Task Force Report, *supra* note 16, at 22; see also BackgroundChecks, <https://www.backgroundchecks.com/Portals/0/Docs/backgroundchecks.com%20County%20Criminal%20Sample.jpg> (sample report states: “Data is collected from state repositories counties, correctional institutions, and other government agencies. Criminal history information reflected should not be considered as 100% comprehensive history of any individual”).

⁴⁵ National Center for State Courts <http://www.ncsc.org/sco-table3%201c> (state court total number based on discussion with resource specialist at NCSC, 1/10/2019); Federal Judicial Center <https://www.uscourts.gov/about-federal-courts/court-role-and-structure> (federal court numbers).

⁴⁶ See National Center for State Courts, Court Statistics Project, http://www.courtstatistics.org/Other-Pages/State_Court_Structure_Charts.aspx (Alabama, for example, has more than 400 lower level courts); Conference of State Court Administrators (COSCA), *Policy Paper 2012-2013: To Protect and Preserve: Standards for Maintaining and Managing 21st Century Court Records* 2 (2013) available at <http://cosca.ncsc.org/~media/Microsites/Files/COSCA/Policy%20Papers/12012013-Standards-Maintaining-Managing-21st-Century-Court-Records.ashx> (“While individual court systems all have rules dictating what is or is not “of record” in a particular jurisdiction, the basic principles of what constitutes a court record have not been made as clear nationally.”) According to a blog from September 12, 2013 on best practices from ebi,inc., a background screening company, which acknowledged the disparity and accuracy of criminal records data, “[a] comprehensive pre-employment criminal background check can only be conducted by using several sources of information such as county/parish, state, federal and even proprietary national criminal database information. Remember that the original reporting jurisdiction/court provides the most current and reliable case information available.” <https://www.ebiinc.com/bid/95142/What-Employers-Need-to-Know-about-the-FBI-Criminal-Records-Database-Part-2>.

⁴⁷ Federal court records are available through the Public Access to Electronic Court Records (PACER) system and are typically not included in national private databases. For descriptions by companies about the source of their records for national databases, see, for example, backgroundchecks.com <https://www.backgroundchecks.com/learningcenter/nationalcriminaldatabases> (stating that the company “collect[s] public available information from hundreds of data sources which include county courts, state administrative of the

Office (GAO) analysis, the criminal records reporting system, through these repositories, has improved but there are still disparities in accuracy and reporting of dispositions to the repositories.⁴⁸ A 2016 survey of state reporting jurisdictions found that in 50 states and Guam, an average of 68 percent of all arrests in state databases have final dispositions reported.⁴⁹

Advances in information technology have made it easier to obtain access to criminal records, either directly through digitized court records, through state criminal repositories, or from private databases (third party or internally generated) that collect public criminal records.⁵⁰ Though most courts now have digitized systems, they vary in how they make their digitized systems available.⁵¹ Some court systems provide remote online access but only on an individual, rather than bulk, records basis and only from individual courts.⁵² Other states have statewide online systems, allowing the user to make one search for the entire state.⁵³ Some limit online

courts, state department of corrections, county courts and many more); Checkr, *What is the difference between national, federal, state, and county searches?* <https://help.checkr.com/hc/en-us/articles/360001093727-What-is-the-difference-between-national-federal-state-and-county-searches>. State repositories have websites where they may allow public or private sector firms access for a fee. See SEARCH, *Noncriminal Justice Background Checks & the NICS* <http://www.search.org/solutions/criminal-history-records/noncriminal-justice-background-checks-and-the-nics/>.

⁴⁸ GAO Report, *supra* note 9, at 18-19.

⁴⁹ 2016 Criminal History Survey, *supra* note 4, at 2.

⁵⁰ See GAO Report, *supra* note 9, at 33 (the GAO report cited a senior official from the Consumer Data Industry Association, a trade association that represents background screening companies and other companies that compile data on consumers, opining that “new companies that perform criminal records checks are regularly forming due in part to employers’ increasing demand for background checks, as well as the availability of online criminal history records and publicly available databases of court records”). The main trade associations that represent the background screening industry are the [National Association of Professional Background Screeners](#) (NAPBS), the [Consumer Data Industry Association](#) (CDIA), and the [National Consumer Reporting Association](#).

⁵¹ For a discussion of the various types of access to court records, see Center for Court Excellence (CCE), *Remote Public Access to Electronic Court Records: A Cross-Jurisdictional Review for the D.C. Courts* (April 2017) available at http://www.courtexcellence.org/uploads/publications/RACER_final_report.pdf [hereinafter *CCE Electronic Court Records*] (In its findings, the organization noted the tension that exists between “fears of potential misuse by commercial data miners, e.g., real estate data firms engaged by landlords and background check agencies, and desire in some states to realize income from bulk data with commercial value” *Id.* at 5).

⁵² *Id.* at 7. See, e.g., Vermont Judiciary, Request for Access to Court Records <https://www.vermontjudiciary.org/about-vermont-judiciary/records-requests> (Vermont limits criminal court records to request for individual court records from the individual court; online access to court records only available for civil cases); State of Connecticut, Judicial Branch, <https://www.jud.ct.gov/faq/courtrec.html> (FAQ#14: Connecticut court requests for criminal file searches must be made at the individual court); Arizona Judicial Branch <https://apps.supremecourt.az.gov/publicaccess/caselookup.aspx?AspxAutoDetectCookieSupport=1> (online access to some courts available).

⁵³ See, e.g., Nebraska <https://www.nebraska.gov/justicecc/ccname.cgi>; New York https://www.nycourts.gov/courts/problem_solving/pa/home.shtml.

access to terminals at the courthouse, and/or permit online remote access only to attorneys.⁵⁴ Several states allow “bulk data purchasing.” Bulk purchasing allows those requesting records access to a one-time or ongoing “subscription service” to a compilation of a court’s records information system.⁵⁵ The cost for accessing individual records or bulk data purchasing varies from jurisdiction to jurisdiction.⁵⁶

Courts vary in their policies and practices regarding the frequency of information updates, the type of information included in a record, and terminology. Despite the increased access available by online systems, the National Center for State Courts (NCSC), as well as individual courts, acknowledge the potential for erroneous or incomplete reporting in online court records systems.⁵⁷ If a background company’s external or internal database updates do not align with the frequency of a court’s record updates, it could lead to incomplete reporting or reporting of expunged or dropped cases.⁵⁸

Although courts generally have policies related to privacy and access to court records information, these vary across jurisdictions. While companies may be able to access records, some courts have implemented policies that may remove certain types of personally identifiable information (PII), such as the last four digits of a social security number (SSN), driver’s license

⁵⁴ See *CCE Electronic Court Records*, *supra* note 51, at 8-9.

⁵⁵ See, e.g., Minnesota Court Rules, Rule 8. Inspection, Copying, Bulk Distribution and Remote Access https://www.revisor.mn.gov/court_rules/rule.php?type=ra&id=8. The precise definition and approach a state takes in providing access to court records compilations varies by state. See the list of statutes and rules of the states that permit bulk data access at <http://www.ncsc.org/Topics/Access-and-Fairness/Privacy-Public-Access-to-Court-Records/State-Links.aspx?cat=Rules%20on%20Bulk%20Data>.

⁵⁶ *CCE Electronic Court Records*, *supra* note 51, at 21-22 (fees vary and depend on whether third party vendor or court itself operates electronic access system). See, e.g., Wisconsin <https://wcca.wicourts.gov/download/REStAgreement.pdf> (\$5,000 annual subscription and \$500 for monthly subscriptions); Indiana <https://www.in.gov/judiciary/iocs/3285.htm> (\$.01 per closed case, \$.10 for open cases, and other fees); Pennsylvania <http://www.pacourts.us/assets/files/page-1089/file-266.pdf> (schedule of fees on recurring request for records form).

⁵⁷ <http://www.ncsc.org/Topics/Technology/Records-Document-Management/Background-Checks.aspx> (“[o]nline court records are not the official records of the court and are provided for informational purposes only -- and may be subject to error or omission. Users of these court systems therefore have the responsibility to verify the accuracy, currency and completeness of the information retrieved from those systems”). For individual state court disclaimer, see, e.g., New Jersey <https://portal.njcourts.gov/web6/ACMSPA/CaptchaController> (“[t]he information displayed on this Web Site is generated from computerized records in the custody and control of the New Jersey Judiciary and is intended for informational purposes only. The Judiciary provides this information as a public service and makes no warranties, either expressed or implied, regarding its accuracy, reliability, currency, completeness, or suitability for any particular purpose. Additionally, the Judiciary assumes no liability for the improper or illegal use of information obtained from its computerized systems”).

⁵⁸ See *Duane, Criminal Background Checks*, *supra* note 36, at 3.

numbers, dates of birth, and other PII from public court records.⁵⁹ According to the industry, the lack of identifiers in records makes it more difficult to identify whether an individual has any records in the system and can increase the number of individuals associated with the limited identifying information that is sometimes provided or requested. This may result in an increase in the number of false matches.⁶⁰

Other challenges in the background screening process include the inability for individuals to access the reports or the information that will be provided to employers in advance of the application process, potential inaccuracies in the reports received by the employers, and inaccuracies in the underlying criminal history information. Individuals and employers may also experience ongoing reporting of erroneous information that has been corrected or expunged; it may be challenging to make sure that information is updated by background reporting companies once it has been corrected in the underlying criminal record history.

A challenge may arise when individuals are unable to correct an inaccurate report before a prospective employer relies on the report containing inaccurate information to make an employment decision.⁶¹ Employers are required to provide a copy of the report and a description of consumer rights *before* taking any adverse action based on information in the report.⁶² However, it may be difficult for an individual to get an inaccuracy corrected before the employer takes an action, such as a decision not to hire.⁶³

⁵⁹ See, e.g., 204 PA. CODE § 213.81, PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA: CASE RECORDS OF THE APPELLATE AND TRIAL COURTS <https://www.pacode.com/secure/data/204/chapter213/s213.81.html>. Some court systems, most notably Idaho, limit information that is often otherwise used to identify the subject of a search, e.g., street addresses, telephone numbers or personal identification number, such as driver's license numbers, see <https://icourt.idaho.gov/public>. For federal court records, the Public Access to Court Electronic Records (PACER), www.pacer.gov, is an electronic public access service that allows users to obtain case and docket information online from federal courts. An industry trade group, the National Association of Background Screening Professionals (NAPBS), stated that PACER presents challenges because it does not provide for searches by date of birth. Letter to The Honorable Wm. Terrell Hodges, Chair, Judicial Conference Committee on Court Administration and Case Management (March 6, 2018) *available at* <https://pubs.napbs.com/pub.cfm?id=0ECDA301-BBDD-B24A-B419-3B8F43A71B90>.

⁶⁰ National Association of Professional Background Screeners, *NAPBS Position: Availability of Identifiers in Public Records* <https://pubs.napbs.com/pub.cfm?id=3D84DA2D-B91B-4E7D-CBD0-3BD971C06242> (last visited June 11, 2019).

⁶¹ For an example of company link for consumers to access background report, see, e.g., Sterling <https://www.sterlingcheck.com/about/fact-act-disclosure/>. (“If Sterling Talent Solutions has prepared a consumer report or investigative consumer report in your name, you are entitled to a free copy of the completed report”).

⁶² 15 U.S.C. §1681b(b)(3)(A).

⁶³ The FTC stated that “There is no specific period of time an employer must wait after providing a pre-adverse action notice and before taking adverse action against the consumer. Some reasonable period of time must elapse, but the minimum length will vary depending on the particular circumstances involved,” Federal Trade Commission (FTC), 40

Individuals may be able to request a background screening report from a company in advance of seeking employment. However, unlike the credit reporting industry, which includes three national consumer reporting companies, there are a few thousand background screening firms that employers may use. It may be difficult to identify in advance which background screening company a particular employer uses. Even if the company can be identified in advance, the company may or may not have information on the individual or the information that they may provide to an individual in advance of the application process may not be the same as the information provided as part of a request by an employer. While many companies provide background screening reports to individual consumers at their request and as a service separate from requests by employers, not all companies may have the same information on the individual.

A review of complaints received by the CFPB as well as cases brought by the CFPB and the FTC about background screening reports shows that some individuals have complained that their reports contain inaccurate and incomplete information. For example, in some instances inaccuracies result from mismatches, possibly from reliance on non-unique identifiers to identify the individual. Identifiers that are insufficient, common or erroneous, e.g., wrong social security number, can increase the possibility of false positives in matching records to the individual.⁶⁴

Other inaccuracies may result from duplicative reporting of accurate criminal information, resulting in multiple listings of the same convictions or arrests, leaving the impression that there

YEARS OF EXPERIENCE WITH THE FAIR CREDIT REPORTING ACT, AN FTC STAFF REPORT WITH SUMMARY OF INTERPRETATIONS (July 2011) 52-53 *available at* <https://www.ftc.gov/sites/default/files/documents/reports/40-years-experience-fair-credit-reporting-act-ftc-staff-report-summary-interpretations/11072ofcrareport.pdf>. One company told the Bureau that it automatically imposes a 7-day waiting period between pre- and post-adverse actions and longer if required under applicable law. Industry information, April 18, 2018. See <https://help.checkr.com/hc/en-us/articles/216873808-The-Adverse-Action-process-deciding-not-to-move-forward-with-a-candidate>.

⁶⁴ See 2005 Task Force Report, *supra* note 16, at 17-18; see also Consumer Financial Protection Bureau, In the Matter of General Information Services, Inc. and e-Backgroundchecks.com, Inc. Consent Order 2015-CFPB-0028 Document 1 Filed 10/29/2015 [hereinafter *GIS Consent Order*], *available at* <http://www.consumerfinance.gov/about-us/newsroom/the-Bureau-takes-action-against-two-of-the-largest-employment-background-screening-report-providers-for-serious-inaccuracies/> (the Bureau alleged that the companies failed to use basic procedures for matching public records information to the correct consumer. For example, the Bureau found that GIS did not require employers to provide consumers' middle names, and neither company had a written policy for researching consumers with common names); Federal Trade Commission v. RealPage, Inc., Stipulated Order for Permanent Injunction and Civil Penalty Judgment No. 3:18-cv-02737-N (N.D.TX) Filed 10/16/2018 (the FTC alleged that in its tenant screening services RealPage used broad criteria to match applicants to criminal records and applied limited filters to the results, i.e., matching criteria only required an exact match of an applicant's last name along with a non-exact match of a first name, middle name, or date of birth, and did not have policies or procedures in place to assess the accuracy of those results.)

were multiple offenses.⁶⁵ Some errors in the background screening report may be the result of records that may have accurate but incomplete information. For example, the record may show an accurate arrest but not show that there was a later dismissal or deferred prosecution.

In some instances, information may be reported that is out of date or prohibited by law. For example, under the FCRA, an arrest is generally not allowed to be reported when it is older than seven years, or outside the governing statute of limitations.⁶⁶

Another challenge involves reports that contain information that has been expunged or sealed.⁶⁷ Industry claims that it is difficult to determine which cases have been expunged in order to update their databases to remove criminal records that no longer exist. Even where information is available indicating that a record has been expunged, companies with private databases vary in their processes for updating their databases to remove such records and there may not be an industry-wide standard practice.

In addition, while the FCRA provides a dispute resolution process to request that the background screening company correct errors in the background screening reports, e.g., a reporting of an arrest that is older than seven years, a consumer may face challenges in attempting to correct an underlying error. For example, if an error exists in a court record itself, the process for the consumer to resolve the error varies by court and can be difficult and time consuming.⁶⁸

⁶⁵ See, e.g., *Broken Records*, *supra* note 42, at 26-27 (example of redacted background screening report which reported single cases multiple times); *GAO Report*, *supra* note 9, at 5 (provided example from an FTC complaint that alleged a private background company failed to follow reasonable procedures to prevent the company from including the same criminal offense information in a consumer report multiple times, failed to follow reasonable procedures to prevent the company from providing obviously inaccurate consumer report information to employers, and in numerous cases provided the records of the wrong person to employers).

⁶⁶ See, e.g., *GIS Consent Order*, *supra* note 64, at 8 (the Bureau found that GIS and BGC failed to take measures to prevent non-reportable civil suit and civil judgment information older than seven years from being illegally included in its reports). Some state laws also limit time for reporting of convictions to seven years.

⁶⁷ See Press Release, Federal Trade Commission, Employment Background Screening Company to Pay 26 Million Penalty (August 2012) <https://www.ftc.gov/news-events/press-releases/2012/08/employment-background-screening-company-pay-26-million-penalty> (2012 action brought against HireRight Solutions, Inc. in which the FTC alleged HireRight was using a legacy database to compile its consumer reports and did not ensure that that the information it provided on its reports was current and reflected expungements).

⁶⁸ See, for example, the Federal Bureau of Investigation <https://www.fbi.gov/services/cjis/identity-history-summary-checks> and National HIRE Network <http://hirenetwork.org/clearinghouse> for links to state criminal repositories and other state-by-state information.

5. Developments

Technology involving machine learning and ever-increasing access to data about individuals appears to be changing the way some background screening firms conduct their search process to verify identity and match criminal records. Some companies may use staff to make the determination of whether there is a “hit” in the database while others may rely on algorithmically driven database searches.⁶⁹

Over the past few years, several states have issued or expanded expungement laws, often broadening the type of crimes or situations eligible for expungement.⁷⁰ Pennsylvania recently passed a law requiring that records for certain lower-level, nonviolent crimes automatically be sealed from public review after 10 years.⁷¹ In addition, at least two state court systems that provide bulk data purchasing, Minnesota and Pennsylvania, have adopted an approach referred to as the “lifecycle file” to help address the issue of expunged record reporting. Under the “lifecycle file” approach, when companies (subscribers) enter into contracts for bulk data purchasing from the courts in those states, the subscribers agree to update the files with updated court records to reflect expungement and other record events to ensure accuracy on a near real-time basis.⁷² The subscriber must also agree to allow court audits of the subscriber’s database.⁷³ Some advocates, a representative from a leading trade association, and court administrators have stated that they think the “lifecycle file” helps improve the reporting of up-to-date criminal

⁶⁹ Industry information, April 18, 2018.

⁷⁰ See, e.g., Indiana, IN Code 35-38-9-10. See generally Brian M Murray, *A New Era for Expungement Law Reform? Recent Developments at the State and Federal Levels*, 10 Harv. L. & Pol’y Rev. 361 (2016) available at http://harvardlpr.com/wp-content/uploads/2016/06/10.2_4_Murray.pdf (In the past decade, due to heightened interest in criminal law reform, several states have enacted specific laws attempting to expand the range of expungement remedies available to individuals with publicly available criminal records). For a state-by-state inventory of expungement-related laws, see www.cleanslateclearinghouse.org.

⁷¹ See Act 56 of 2018, <https://www.legis.state.pa.us/cfdocs/Legis/LI/uconsCheck.cfm?txtType=HTM&yr=2018&sessInd=0&smthLwInd=0&act=56> (18 Pa.C.S. §9122.2 provides for automatic sealing of certain offenses that meet eligibility criteria).

⁷² Minnesota Court Rules, Rule 8. Inspection, Copying, Bulk Distribution and Remote Access http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/pub_access_rules.pdf; 204 PA. CODE § 213.81, PUBLIC ACCESS POLICY OF THE UNIFIED JUDICIAL SYSTEM OF PENNSYLVANIA: CASE RECORDS OF THE APPELLATE AND TRIAL COURTS available at <https://www.pacode.com/secure/data/204/chapter213/s213.81.html>

⁷³ *Id.*, Minnesota Court Rule 8, Subd. 3(b) http://www.mncourts.gov/mncourtsgov/media/Appellate/Supreme%20Court/Court%20Rules/pub_access_rules.pdf (bulk purchasing rules require verification of records).

record information.⁷⁴ Court staff reported fewer disputes or complaints about criminal records since implementing the lifecycle approach.⁷⁵

As part of the employment application process, employers often ask whether the applicant has been arrested or convicted of a crime. This question is often included in a list of questions, the response to which can be checked off in an accompanying box. As of early 2019, thirty-five states, the District of Columbia, and more than 150 cities and counties have adopted some form of “Ban-the-Box” or fair-chance laws or policies, which prohibit prospective employers from inquiring about a person’s criminal history until after the initial employment screening or, in some cases, after an offer of employment has been made.⁷⁶ The background screening industry has expressed concern about ban-the-box laws, stating that the “current framework of fragmented and varying legislation at the state and local levels is not ideal.”⁷⁷

⁷⁴ See, e.g., *Dietrich*, *supra* note 37, at 29; comment of industry panelist representing NAPBS at the Center for Legal and Court Technology (CLCT) 10th Conference on Privacy and Public Access to Court Records (October 12-13, 2015).

⁷⁵ CFPB staff discussion with staff from Pennsylvania and Minnesota court administrative offices on March 22, 2018.

⁷⁶ See Beth Avery & Phil Hernandez, *Ban the Box: U.S. Cities, Counties and States Adopt fair Hiring Policies*, National Employment Law Project (April 20, 2019). <https://s27147.pcdn.co/wp-content/uploads/Ban-the-Box-Fair-Chance-State-and-Local-Guide-April19.pdf>. See, e.g., Illinois, IL Public Act 098-0774(2014); Philadelphia Bill No. 150815 <https://www.phila.gov/HumanRelations/PDF/BanTheBoxOrdinance.pdf>.

⁷⁷ See National Association of Professional Background Screeners (NAPBS) *Position: Ban the Box* <https://www.napbs.com/government-relations/policy-positions/>.