
Guidelines for Contractor Background Checks

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CONTRACTOR BACKGROUND CHECKS

Purpose

The Contractor Background Check Guidance Document (hereafter Guidance Document) is intended to provide companies in the chemical and petrochemical industries with guidance in determining if background checks for a Contractor Company's workers are appropriate for a facility and if so, to determine the elements to consider when developing a Contractor Background Check Plan. The guidance document is intended to assist companies in their efforts to provide a safe and secure worksite, prevent workplace violence, protect sensitive intellectual property, protect the company's reputation, reduce the risk of negligent hiring lawsuits, prevent theft and fraud and comply with federal, state and local regulations. Background Check Plans help eliminate unqualified applicants, prevent major security incidents, and avoid potential liability by identifying individuals who might cause harm to the company or its employees.

The Guidance Document does not constitute legal advice and is not intended to be all-inclusive, describe any industry standard, or prescribe mandatory elements to implement. This Guidance Document is not intended to replace the requirements of regulated facilities; however, it may provide assistance when implementing regulations. The Operating Company (hereafter Company) is free to adopt or reject any of these measures consistent with the needs of the facility.

It should be noted that employment laws vary by city, county, state and country. For example, many states and local jurisdictions have laws in place that restrict how background checks may be conducted for employment purposes. The user must be aware of the applicable laws where the Company operates and should consult with legal counsel to ensure that the Contractor Background Check, if permitted and implemented, is fully compliant with all applicable law.

Scope

This Guidance Document is intended to provide the Company with sufficient information to determine if individuals with unescorted access to the facility have been vetted, if deemed appropriate, according to the company's policies. The document includes options and sources of information available to the Company and how this information may be evaluated and used. It also addresses some of the regulations that may impact the Contractor Background Check process and the responsibilities of the Contractor Company.

Risk Assessment – the Insider Threat

Facilities face a spectrum of threats, ranging from international terrorism to disgruntled employees. The threat may be internal, presented by an employee or contract worker inside the facility, or external to the facility by a third party. The insider poses the greatest risk to the facility because he has access to the facility and possesses special knowledge of the facility's vulnerabilities, Information Technology (IT) System and the location of critical and sensitive information and assets. Occasionally, the employee or contract worker inside the facility works in collusion with someone outside the facility.

In today's environment, most companies augment their workforce with temporary workers and contractors. This extended workforce is used to fill both entry level positions and higher level positions with access to critical IT systems and information, sensitive processes and restricted areas. In some organizations, contract workers are holding supervisory positions, giving them special access and control of some of the Company's most valuable assets and information.

A risk assessment of the facility to identify potential threats and adversaries can help determine if Contractor Background Checks are appropriate in order to reduce the risk to the facility. If the company conducts background checks on its employees, it should strongly consider requiring background checks on contract workers. The un-vetted contract worker could represent gaps in an otherwise sound security program.

Background checks are an important component of a successful security program that can significantly enhance the facility's ability to deter and prevent insider threats. The objectives of the background check program are to enhance the security of the facility by:

1. Positively identifying individuals prior to granting unescorted access to the facility;
2. Determining the suitability of individuals for the position and their legal authority to work;
3. Identifying and rejecting individuals that may cause harm to the facility and its employees.

I. General Rules, Regulations, Legal Issues and Laws Impacting Background Checks.

General

State and federal regulations generally permit companies to consider information obtained from background investigations when making personnel decisions such as hiring, promotion, retention and reassignment. However, the Company must ensure that the decisions are being implemented in a fair and impartial manner, in accordance with all applicable employment laws and regulations.

Written guidelines for background checks for both employees and contract workers help ensure employment decisions are applied consistently throughout the organization in a fair and impartial manner that complies with state and federal employment laws and regulations. Written guidelines highlight expectations, eliminate confusion, form a basis for training and provide a framework for audits. The expectations within the guidelines could be included in the contract with the contractor.

International law governing the collection and use of background information to make employment decisions is much more restrictive in some countries. The user must be aware of the laws in every country the company operates in to ensure that the prescreening process, if permitted, is fully compliant.

Several federal statutes governing background checks are introduced below. Please note that some states have enacted similar laws that parallel these statutes. Some states have enacted requirements and/or restrictions exceeding the federal statutes. In those cases, the more restrictive state statute should be followed. It is incumbent upon the user to be familiar with both federal and state regulations to ensure the prescreening process is fully compliant.

Occupational Safety and Health Act - General Duty Clause¹

The “General Duty Clause”² of the Occupational Safety and Health Act (OSHA), requires employers to furnish to each employee a place of employment that is free from recognized hazards that are causing or are likely to cause death or serious physical harm to employees. Workplace violence is a recognized hazard, and the employer’s duty can extend to hiring practices that may lead to negligent hiring lawsuits if employees or contract workers are not properly vetted. (<https://www.law.cornell.edu/uscode/text/29/654>)

Equal Employment Opportunity Commission

Discrimination laws in employment are interpreted and enforced by the Equal Employment Opportunity Commission (EEOC) under the provisions of Title VII of the Civil Rights Act of 1964³, as amended. EEOC protects employees from discrimination in hiring when the Company uses background information to make these decisions. The EEOC published “EEOC Enforcement Guidance Document number 915.002” on April 25, 2012 entitled “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964”⁴ (hereafter EEOC Guidelines) to ensure that all applicants are treated equally, and the decision to conduct a background check is not based on the applicant’s race, national origin, color, sex, religion, disability or age. (<http://www.eeoc.gov/laws/statutes/titlevii.cfm>)

An arrest record does not provide a basis for inclusion in a protected class under Title VII. However, according to the EEOC Guidelines, national data, analyzed by EEOC, has established that arrest and conviction rates for minorities, protected under Title VII, are disproportionately high. Thus, excluding applicants due to their criminal record has a disparate impact based on race and national origin, which provides a basis for EEOC to investigate claims of employment discrimination under Title VII. EEOC employs two analytical tools, Disparate Treatment and Disparate Impact, to determine if the Company used criminal record information to discriminate based on race, color, religion, sex or national origin.

Disparate Treatment⁵

EEOC may determine the Company violated Title VII if it rejects an equally qualified individual, who is protected under Title VII, based on his arrest record but accepts a non-covered individual with a similar record.

Disparate Impact⁶

EEOC may determine the Company violated Title VII when analysis determines the Company’s neutral background checking policy or practice disproportionately screens out individuals protected under Title VII and fails to demonstrate that the policy is consistent with business

¹ 29 USC 654, § 5 (a) (1),

² OSHA Fact Sheet, https://www.osha.gov/OshDoc/data_General_Facts/factsheet-workplace-violence.pdf

³ 42 USC § 2000e

⁴ United States, Equal Employment Opportunity Commission, EEOC Enforcement Guidance Document, Number 915.002, “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, (Washington: GPO, 2000), https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

⁵ EEOC Enforcement Guidance, 6

⁶ EEOC Enforcement Guidance, 8

needs and/or directly related to the position. This is a two-pronged test, and EEOC must establish both elements.

Disparate Impact Discrimination and Criminal Records⁷

To avoid liability, the Guidelines suggest the Company develop a background check process that considers, on an individualized basis, the nature of the crime, the time elapsed since the conviction the nature of the job, and whether any exclusion of an individual based on criminal history would be consistent with business necessity. It is recommended that an individual screened out because of a criminal conviction should be given an opportunity to appeal the decision and demonstrate why the exclusion should not be applied to him and his particular circumstances. The Company should reevaluate the decision based on the additional information provided by the individual to determine if an exception should be made. Compliance with other laws and/or regulations that conflict with Title VII may be a defense to a charge of discrimination under Title VII.

The EEOC Guidelines provide the following “Best Practices” for companies to consider when using criminal record information to make employment decisions:⁸

- a. Eliminate policies and practices that automatically exclude people from employment based on a criminal record;
- b. Train managers, hiring officials and decision-makers about Title VII and its prohibition on discrimination in employment;
- c. Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct that includes:
- d. Identifying essential job requirements;
- e. Determining the specific offense that may demonstrate unfitness for performing the job;
- f. Determining the duration of exclusion for the criminal conduct based on all available evidence including an individualized assessment;
- g. Record the justification for the policy and procedures;
- h. Keep a record of consultations and research considered in crafting the policy and procedures;
- i. Train managers, hiring officials and decision-makers to implement the policy and procedures consistent with Title VII;
- j. Limit questions about criminal records to the records that would be job related and consistent with a business necessity;
- k. Keep information about applicants’ and employees’ criminal records confidential and only use it for the purpose for which it was intended.

Fair Credit Reporting Act (FCRA)⁹

The Fair Credit Reporting Act (FCRA), is administered and enforced by the Federal Trade Commission (FTC) and regulates the collection and use of information obtained by a Consumer Reporting Agency (CRA). The CRA compiles background information and provides it, for a fee, to a third party that uses the information to make employment decisions. If the Company chooses to use a CRA, or otherwise conducts background checks, the Company must comply with the FCRA. The FCRA prescribes how adverse information may be used and the steps the

⁷ EEOC Enforcement Guidance, 8

⁸ EEOC Enforcement Guidance, 25

⁹ 15 USC § 1681 et seq

Company must take prior to conducting background checks or initiating any action based on the adverse information. (<http://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0111-fair-credit-reporting-act.pdf>)

Before a company initiates background checks to obtain information such as a credit report, criminal history, etc., it must notify the applicant in writing that a background check is being conducted and that the information obtained might be used in the employment decision. The Company must also obtain the applicant's written permission. This authorization can be structured to allow the company to conduct background checks throughout the person's employment, as long as the statement is clear and a conspicuous part of the authorization. If the company obtains a more in depth "investigative report", consisting of personal interviews concerning a person's character, general reputation, personal characteristics and lifestyle, the company must advise the applicant of his right to a description of the nature and scope of the investigation.

When using a CRA to conduct a background check, the Company must certify that the individual has been notified and has given permission to conduct the investigation. The Company must also certify that they do not discriminate against applicants or employees or misuse the information in violation of federal or state equal opportunity laws or regulations.

Pre-Adverse Action Notification.

After receiving a Consumer Report containing adverse information, the employer must notify the individual that it is considering taking adverse action, based in whole or in part on the information in the Consumer Report, and provide him with a copy of the Consumer Report and a summary of his rights under FCRA before taking any adverse action. The candidate should be given an opportunity to review the Consumer Report and to correct or challenge information on the report before any adverse action is taken. The FCRA provides a "reasonable period of time," referred to as the Adverse Action Waiting Period, before any adverse action can be taken.

Adverse Action Notification

After allowing the applicant a reasonable period of time to respond, the employer may take action but must notify the candidate of the action to be taken. The notice must include the name, address and toll-free number of the credit reporting agency that furnished the consumer report and state 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. Finally, the notice must notify the consumer that he may obtain a free copy of the consumer report within 60 days from the consumer reporting agency and that he has the right to dispute the accuracy of any information in the consumer report.

The Sarbanes-Oxley Act of 2002 ¹⁰

The Sarbanes-Oxley Act of 2002 (SOX) was enacted to protect investors from the possibility of fraudulent accounting activities by publicly traded corporations. SOX prescribed financial reforms to improve disclosures from corporations to prevent fraud. SOX relies on the Company to properly vet personnel involved in financial reporting and compliance and/or those who have access to sensitive financial information in order to ensure that they are qualified for the position. (<https://www.gpo.gov/fdsys/pkg/PLAW-107publ204/pdf/PLAW-107publ204.pdf>)

¹⁰ Sarbanes-Oxley Act of 2002. Corporate responsibility, 15 USC § 7201, July 30, 2002

Co-employment Issues

When companies utilize independent contractors or contractor companies, they incur potential risks and liabilities associated with co-employment issues. A co-employment relationship between two companies exists most frequently when they both have a relationship with a single worker. This relationship often exists between a company providing manpower (hereinafter Contractor Company) to the Company needing additional manpower, but not every such relationship would cause a company to face liability as a co-employer. Both companies have certain separate and distinct duties and responsibilities toward the employee. The Contractor Company typically retains the majority of the employer/employee relationship associated with recruiting, screening, selecting, hiring, firing and other human resource functions. The client company is often responsible for assigning the contract workers daily work assignments and determining the length of the assignments. The hiring decisions should remain the responsibility of the Contractor Company, not the client company.

The Internal Revenue Service has established criteria to determine if a worker should be considered an employee or an independent contract employee, as have other agencies, such as the EEOC, the U.S. Department of Labor, and the National Labor Relations Board. If it is determined that a Company treats contract workers as its own employees or reserves a sufficient amount of control over the contract workers, the Company may be held liable and required to pay company benefits to the contract worker, among other potential penalties¹¹. This issue is discussed in greater detail in the section entitled “Co-Employment Issues; On-Site Contractors” below.

II. Security Related Rules, Regulations, Legal Issues and Laws Impacting Background Checks.

Federal Security Regulations Requiring Background Checks

Since September 11, 2001, the Federal Government has enacted several security regulations to enhance the security of facilities, including facilities within the petrochemical industry. Some of the more significant regulations are listed below. All of the listed regulations require the facility to conduct background checks

Chemical Facility Anti-Terrorism Standards (CFATS)¹²

The Department of Homeland Security (DHS) has jurisdiction over CFATS and has stated background checks are a key component of a successful security program. In CFATS related facilities, the level of screening should be proportionate to the position and level of access the worker has to critical assets and sensitive information. Any contractor background check program should address the need for high risk facilities to ensure individuals allowed on site have suitable background checks for their level of access. The contractor background check program can be as simple or complex as deemed appropriate by the Company. DHS requires

¹¹ Browning-Ferris Industries of California, Inc., et al, August 27, 2015. This case has been appealed to the First circuit.

¹² Chemical Facility Anti-Terrorism Standards, 6 CFR § 27

CFATS-regulated facilities to conduct a background check that includes the following four measures:¹³

1. Measures designed to verify and validate identity
2. Measures designed to check criminal history
3. Measures designed to verify and validate legal authorization to work
4. Measures designed to identify people with terrorist ties¹⁴

The Company can add additional elements to the program if they believe a particular position requires additional scrutiny. These measures are not mandatory in unregulated facilities.

Maritime Transportation Security Act (MTSA)¹⁵

On November 25, 2002, Congress passed the Maritime Transportation Security Act of 2002 (MTSA), giving the U.S. Coast Guard (Coast Guard), the authority to regulate facilities and vessels located on or adjacent to waterways under U.S. jurisdiction. The Coast Guard issued an interim final rule on October 22, 2003 requiring regulated facilities to conduct a security assessment to identify critical assets and their vulnerability to potential threats and adversaries. Following the assessment, regulated facilities were required to submit a Facility Security Plan that addresses the vulnerabilities and the measures adopted by the facility to mitigate these threats. All the required elements of the FSP were outlined in 33 CFR § 105. The regulation also requires any employee, contractor or visitor having unescorted access to a restricted area of the facility be in possession of a valid Transportation Worker Identification Credential (TWIC) which is discussed below.¹⁶

Transportation Worker's Identification Credential

The Company could consider requiring workers to have, or allowing the Contractor Company to accept, the Transportation Worker Identification Credential (TWIC), a Hazardous Materials Endorsement or other similar government program in lieu of a background check, if such credentials are related to the work to be performed by the worker. In such circumstances, the government has completed its own investigation of the individual and issued the credential. It should be noted that the primary purpose of these programs was to prevent a terrorist attack of the facility. After a close review of TWIC and other related programs, the Company can decide if the TWIC alone is a sufficient background check to allow someone to have unescorted access to the facility or if additional checks are prudent. Some details regarding the TWIC are provided below that might assist the Company with its determination about whether the TWIC would be a sufficient security measure.

Disqualifying Criminal Offenses¹⁷

TSA has established “permanent disqualifying criminal offenses” and “interim disqualifying criminal offenses” that can result in the denial of a TWIC. Both types of disqualifying offenses

¹³ United States, US Department of Homeland Security, Risk-Based Performance Standards Guidance, Chemical Facility Anti-Terrorism Standards, Washington: GPO, (2009)

¹⁴ “Chemical Facility Anti-Terrorism Standards” 6 CFR 27 (2007)

¹⁵ Maritime Transportation Security Act, 33 CFR § 101-105 (2007)

¹⁶ Maritime Transportation Security Act, 33 CFR § 101-105 (2007)

¹⁷ Transportation Worker's Identification Credential, Disqualifying Criminal Offenses, <https://www.tsa.gov/disqualifying-offenses-factors>

only include felonies, not misdemeanors. In addition to the disqualifying criminal offenses, TSA may determine that an applicant is not eligible based on analyses of the following:

1. Interpol and other international information, as appropriate.
2. Terrorist watch lists, other government databases and related information.
3. Any other information relevant to determining applicant eligibility or an applicant's identity.

Anyone initially denied the credential may appeal the decision to the government. The government has granted numerous waivers following the appeal process. TSA does not share the results of the background check with the Company.

Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials Department of Transportation HM-232¹⁸

In March 2003, The all Department of Transportation Research and Special Programs Administration issued a final rule (49 CFR Part 172 Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials) that enhanced security requirements for facilities that receive or offer the hazardous materials to third party drivers and rail carriers. The regulation was amended in March, 2010 to narrow the list of materials subject to the regulation and to clarify certain requirements related to security planning, training, and documentation.

The HM-232 regulation requires facility use to develop a security plan that must include an assessment of possible transportation security risks for shipments of the hazardous materials listed in § 172.800 and appropriate measures to address the assessed risks. At a minimum, a security plan must include the following elements:¹⁹

1. Personnel security.
Measures to confirm information provided by job applicants hired for positions that involve access to and handling of the hazardous materials covered by the security plan. Such confirmation system must be consistent with applicable Federal and State laws and requirements concerning employment practices and individual privacy.
2. Unauthorized access.
Measures to address the assessed risk that unauthorized persons may gain access to the hazardous materials covered by the security plan or transport conveyances being prepared for transportation of the hazardous materials covered by the security plan.
3. En-route security.
Measures to address the assessed security risks of shipments of hazardous materials covered by the security plan en-route from origin to destination, including shipments stored incidental to movement. (b) The security plan must be in writing and must be retained for as long as it remains in effect.
4. Training requirements.
Each employee who handles hazardous materials, performs a regulated function related to the hazardous materials or is responsible for implementing the plan must be trained concerning the security plan and its implementation. Security training must be provided at least once every three years.

¹⁸ Hazardous Materials: Security Requirements for Offerors and Transporters of Hazardous Materials, 49 CFR § 172.800 (2010)

¹⁹ Components of a Security Plan, 49 CFR § 172.802

III. Contractor Responsibilities

General

Both the Company and the Contractor Company have separate and distinct responsibilities relating to the recruitment, hiring, vetting and providing of work for contract employees. It is important to understand the roles of each to avoid potential co-employment issues and liabilities.

If the Company retains control over the Contractor Company's pre-employment screening process, which might include setting requirements for conducting background checks and retaining the right to oversee the Contractor Company's procedures, it may be more likely to be considered a co-employer with the Contractor Company. In deciding how to manage relationships with a Contractor Company, including but not limited to aspects of the hiring and background check process, the Company should weigh its security and safety concerns with the potentially increased risk of being found to be a co-employer of the Contractor Company's employees.

Written Policies and Procedures

To the extent the Company requires a Contractor Company to conduct background checks, the Company should prepare Background Check Guidelines as described more fully in the Section entitled "Company Considerations" below. It should be the responsibility of the Contractor Company to develop a background screening policy and procedures that meet or exceed the Company's Background Check Guidelines.

Recruiting and Selection

The Contractor Company should be responsible for recruiting and selecting employees that meet or exceed the Company's position requirements.

Screening

Screening, if any, of selected applicants should be the responsibility of the Contractor Company. The Contractor Company should be responsible for ensuring compliance with local, state and federal regulations and that the Contractor Company's process meets or exceeds any screening criteria in the Company's Background Check Guidelines, prior to assigning individuals to work on the Company premises. The Contractor Company should also be responsible for screening the consultants and subcontractors they employ who work on the Company's projects, if required by the Company.

Re-screening

The Company may have contract workers who are assigned to the facility on a long-term basis, other contractors may come to the facility for specific assignments on an "as needed" basis, or who are at the facility for a "one-time job" that often occurs with little or no advanced notice. The facility could consider different strategies for each situation. The Company could require that any contract worker who is assigned to the Company's facility on a long-term basis be rescreened at the same frequency as the Company's employees. The Company could also require workers who return to the facility on a regular basis, such as repairman or service personnel, be rescreened on a predetermined basis, which could be based on a length of time, such as every two or three years, or based on the length of time between assignments at the facility by requiring rescreening after an absence of 180 days or other appropriate time period.

It should be the responsibility of the Contractor Company to ensure that the background check does not lapse. In lieu of requiring a background check of short time contractors, the Company could provide an escort.

Escorting

In lieu of a background check, the Company may decide to provide an escort (a Company Employee or an approved contract worker) if the facility's security concerns require. If the Company implements an escorting requirement, the escort should remain in the immediate vicinity and be able to continuously observe the person or group to ensure they do not enter restricted areas or engage in unauthorized activity. The Company could implement an escorting requirement in a variety of ways: by routinely permitting all short-term workers escorted access, allowing it to be an exception to background checks only for emergency work, or allowing it to be an exception for Contractor Company workers who will be present only for a reasonable period of time such as two or three days. Emergency work could be limited to work that is critical to keep the facility in operation. Escorting in lieu of a background check, if permitted, should be documented and approved by the Facility Security Officer (FSO) or facility manager.

Notification

If the Company requires the Contractor Company to conduct background checks, it should also require the Contractor Company to notify the Company immediately if one of the Contractor Company's workers no longer meets the Company's screening criteria.

Records Retention and Confidentiality

It should be the Contractor Company's responsibility to maintain background check records in accordance with the Company's Background Check Guidelines and state and federal regulations. The Contractor Company shall secure all information received during the background check process, protect it from unauthorized disclosure, and properly destroy it in accordance with applicable law once the information is no longer required to be maintained.

IV. Company Considerations

Written Policy and Procedures

Clearly written guidelines that comply with all applicable laws and regulations provide for a unified and consistent system of contractor background checks. If the Company decides to require background checks for a Contractor Company's workers and implement such guidelines, the Company's Background Check Guidelines should detail the scope of the background checks, establish expectations and identify the accountable parties and their responsibilities.

Recruiting, Screening and Hiring

It should remain the Contractor Company's sole responsibility to recruit its workers in accordance with the Company's Background Check Guidelines. The Company should not be involved during the Contractor Company's recruiting, screening or hiring processes.

Contractor Background Check - Scope

If the Company requires screening or background checks, the Company should identify the categories of information to be collected, the time period the background investigation will

cover, and the Company's expectations. The FCRA limits the collection of criminal history information to seven years.

Non-Compliance

The Company should consider taking action, such as imposing sanctions, against any Contractor Company that intentionally falsifies the results of a background check in order to assign any worker to the Company's premises.

A Contractor Company that in good faith erroneously assigns a worker, who failed the background check, to the Company's premises should be required to notify the Company as soon as possible after the error has been discovered. The contractor should be required to immediately initiate an individualized assessment to determine if the worker should be removed from the site (See the "Individualized Assessment" section below). If the worker's background indicates that he poses or could pose a threat to the facility, the Contractor Company must be required to remove the worker from the facility immediately.

The Company might require that these incidents be reported as a security incident, and if so, the facility manager should review the circumstances surrounding the incident to determine what penalties should be imposed.

Multilevel Background Checks

The Company may elect to establish multiple categories for background checks based on the worker's assignment and access to confidential and sensitive information. For example, the Company could establish a three-tiered approach that might include a Level One basic check for most contract employees, a Level Two check for professional contract workers such as engineers, and a Level Three check for security-sensitive positions such as workers in supervisory positions with access to the company's most sensitive information or IT professionals with administrative privileges or root access. The enhanced screening levels and corresponding positions that require additional scrutiny, if any, should be detailed in the Company's Background Check Guidelines.

Link Essential Job Requirements to Specific Disqualifying Offenses

The Contractor Company cannot exclude a worker solely based on a conviction record, and the Company's Background Check Guidelines should not require such exclusion. Instead, under applicable law and regulations, in order to take an adverse action against an employee based on a criminal record, the Contractor Company must demonstrate that the elements of the criminal offense and the requirements of the job are incompatible. Section V of the EEOC Guidelines states in part: *"A covered employer is liable for violating Title VII when the plaintiff demonstrates that the employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group and the employer fails to demonstrate that the policy or practice is job related for the position in question and consistent with business necessity."*

Clearly Define How the Results will be Evaluated

It is important that similar cases are adjudicated in a consistent manner with comparable results. A Contractor Company should develop its own background check procedures, but in general those procedures should include a process for individual assessment and appeal, instead of a blanket policy rejecting applicants with a criminal record. Section V (B) (9) of the

EEOC Guidelines state in part: *“Individualized assessment generally means that an employer informs the individual that he/she may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not properly apply to him; and considers if the individual’s additional information shows that the policy as applied is not job related and consistent with business necessity.”*

V. Contractor Background Checking Process (Elements to Consider)

General

The Company has several options available for contractor background checks in unregulated facilities. These options include: not conducting a background check; conducting a minimal background check; conducting a background check equal to the Company’s own pre-employment screening policy; or using a tiered approach based on the contract worker’s assignments, responsibilities and access to sensitive information. If the Company decides to require background checks for contractors, the Contractor Background Check Guidelines should define the Company’s expectations concerning the background check program. The contractor background check process can obtain information from a variety of sources to determine the suitability of the individual. The law requires an individual assessment of background check results, rather than a blanket policy regarding a worker’s criminal history. After a review of the requirements for each position category, the Company should determine if a background check is necessary and if so, determine the depth of the investigation for that position category. Understanding and complying with the EEOC Enforcement Guidance is essential to this process.

There should be a strict separation of duties at this point in the process. The Company should set forth its expectations, and the Contractor Company should execute the Company’s expectations to recruit, screen and assign manpower to the company.

Form an Industry Co-Operative to Perform Contractor Background Checks

Most Contract Companies perform services for multiple facilities and owners whose requirements for contractor background checks may differ. This may force the Contractor Company to conduct multiple background checks to satisfy the requirements of different facilities. Some areas, with a concentration of chemical manufacturing and petrochemical facilities, have formed co-operatives to conduct contractor background checks. The facility owners who join these co-operatives agree on a standardized screening format that incorporates elements such as verifying identity, criminal background check, legal authority to work in the United States, terrorist watch list, driving record and any other elements as appropriate. The system is more cost-effective and provides a larger pool of prescreened contract employees immediately available to the facility. Some programs are being run by the area safety councils who are already providing area wide safety training and drug testing.

The Employment Application

An employment application often provides the foundation for the background check investigation. The screening process typically begins with a critical examination of the employment application to identify omissions, inconsistencies, and gaps in employment, residence or other chronological breaks. The Company’s Background Check Guidelines may require that the Contracting Company verify that an application for employment is complete, free of errors and signed certifying that the information on the application is true and correct. Additionally, the Company may want to require that any omissions or false statements on a

worker's application are grounds for termination of employment or withdrawal of a previous offer of employment by the Contracting Company. The employment application should indicate that employment will be subject to a background check and, where permissible under applicable law, be accompanied by a separate authorization from the employee to conduct a background check.

Identity Confirmation

When conducting background checks, it is important for the Contracting Company to verify the identity of the applicant to ensure that the background information and credentials he presents are accurate and belong to the individual presenting them. This could be done by utilizing a number of methods, described briefly below.

Social Security Number Trace

This is commonly referred to as a Credit Header and is obtained from one of the three credit bureaus. The information from this trace is obtained from the worker's credit file and provides a historical record of names, addresses and Social Security numbers used or associated with him. This information should be compared with information on the application, and any discrepancies should be investigated by the Contracting Company to determine if the omission was intentional to hide adverse information. The Social Security Number Trace may also reveal additional names and locations to incorporate in a later criminal history review.

Social Security Number Validation

The Social Security administration will verify that a Social Security number has been issued and is a valid number. Social Security will not provide the name or address of the person associated with the number. The Social Security Death File is a list of Social Security numbers that have been reported to Social Security as belonging to deceased individuals.

E-Verify

After an individual accepts an offer of employment and completes the I-9 Form, the employer can use E-Verify to submit the information on the I-9 form for verification. This is a joint effort with the Social Security Administration and the US Citizenship and Immigration Service sharing information to confirm the individual's identity and eligibility to work in the United States.

Criminal History Record Check

The EEOC guidelines²⁰ provide a general framework for criminal history record checks. Both the Company and the Contractor Company should be familiar with this document.

The EEOC guidelines permit criminal history information to be used to prevent theft and fraud, lower the possibility of workplace violence and reduce potential liability for negligent hiring if the Contractor Company follows the EEOC guidelines. To avoid charges of discrimination by the EEOC under Title VII, the section of the Contractor Background Check Guidelines on the use of criminal records should be narrowly and carefully constructed and should consider the following:

²⁰ EEOC Enforcement Guidance, https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Disparate treatment based on Race, National Origin, Sex, Color, or Religion²¹

The Contractor Company (or the Company, if a co-employer) may be guilty of disparate treatment if two equally qualified candidates, one of whom is in a protected class under Title VII, with similar criminal histories, are treated differently. (EEOC Guidelines, Section IV)

Disparate Impact Discrimination and Criminal Records²²

In the past, EEOC has determined that a covered employer was liable for violating Title VII when the plaintiff demonstrated that the employer's neutral policy or practice had the effect of disproportionately screening out a Title VII-protected group and that the employer failed to demonstrate that the policy or practice was job related for the position in question and consistent with a business necessity.

Arrests and Convictions

When conducting a background check, the Company might require that a Contractor Company obtain a complete criminal history of the applicant by searching federal, state, city and county records for both felony and misdemeanor charges to the fullest extent permissible under applicable law. The Contractor Company should only consider convictions and not deferred adjudications or arrests without a final adjudication. When an arrest is pending disposition, the circumstances and conduct leading to the arrest can be examined.²³

Felony and Misdemeanor Convictions

A felony conviction carries more weight than a misdemeanor conviction for the same offense. A Contractor Company might give special attention, however, to misdemeanor convictions that have been plea-bargained down after a felony arrest. The researcher should, to the extent permissible under applicable law, obtain the facts and circumstances surrounding all convictions to obtain a more realistic assessment of the worker by evaluating the alleged behavior leading to the conviction or plea bargain. Based on an analysis of the facts, the conduct leading to a misdemeanor conviction that was plea bargained down from a felony arrest may actually be more serious.

Individualized Assessment²⁴

The Company or Contractor Company cannot establish a policy that automatically excludes any applicant or worker just because he has a criminal conviction. In order to take an adverse action against an applicant or worker, such as refusing to select him for employment or for a particular assignment, the employer must determine that the particular conviction impact the individual's ability to do the job. The employer should also consider the seriousness of the offense, the amount of time that has passed and what the applicant or worker has done since the conviction or release from prison. The applicant should be given an opportunity to demonstrate that he should not be excluded solely based on the conviction. The employer may reevaluate the applicant,

²¹ EEOC Enforcement Guidance, Section IV, P6

²² EEOC Enforcement Guidance, Section V, P8

²³ EEOC Enforcement Guidance, Section V (B) (2) P 12

²⁴ EEOC Enforcement Guidance Section V (B) (9) P 18

taking this new information into consideration to determine if the exclusion is job related and consistent with a business necessity. [EEOC Guidelines, Section V (B)]

Verify Education and Degrees

If the position requires a certain level of education or a degree, the Company might require that the background check verify that the applicant actually received the degree and the college or university granting the degree is not a “diploma mill” that will grant a degree, together with a transcript of grades, for a fee. A list of accredited colleges and universities can be found at <http://www.chea.org/search/default.asp>. Information and questions about accreditation and degree mills can be found at <http://www.chea.org/degreemills>.

Verify License or Certifications

If the position requires a license or certification, the Company might require that the background check verify the status of the license or certification with the issuing authority. The check could also include a check for complaints, disciplinary action or sanctions.

Verify Previous Employment

The Company might also require that the Contractor Company review the applicant’s previous employment chronologically to identify and explain any gaps in employment. The background check investigation might be used to verify the dates of employment, positions held, salary, and reason for leaving and eligibility for rehire.

Drug Test

Federal and some state regulations require drug screening for certain regulated occupations and safety sensitive positions. In an effort to create a drug-free environment, many companies have implemented a pre-employment and random drug screening policy for all employees. The company may consider including pre-employment testing, random drug testing, post-accident drug testing and reasonable suspicion testing in the drug screening policy. This is another area where the company needs to understand both the federal and state laws and regulations concerning employee drug testing because they can vary by state.

Motor Vehicle Records

If driving is a requirement of the position, the investigation could include a review of motor vehicle records. For the purpose of this section, anyone who drives a vehicle, whether personally or company owned, to conduct or provide support to business could be considered a driver. Driving to or from work in a personally owned vehicle would not be considered a company driver.

Civil Court Records

The civil courts settle disputes between parties but do not produce criminal convictions like the criminal courts. After an evaluation of a position description and responsibilities, the Company can decide which positions, if any, for which a Contractor Company may be required to review civil court records as part of a background check.

Credit History

Where necessary for the position and permissible under applicable law, the Company may decide to require a Contractor Company to review a credit report as part of the background check for a worker. The credit report contains sensitive personal information and should be limited to contract employees in positions of trust with access to or control of sensitive and/or financial assets, including the company's IT assets. It is especially important to link the need for a credit report to the position's requirements. A properly obtained credit report for employment purposes differs from and contains less information than the credit report obtained for commercial purposes. The inquiry will not affect the applicant's credit score. The credit report contains the name and address, payment history and any adverse comments or activities linked to the account.

Privacy

The information collected on the worker's employment application and developed during the contractor background check is extremely sensitive, should be maintained by the Contractor Company and not shared with anyone without a legitimate need to know, and should be properly destroyed in accordance with applicable law.

International Hires

Many international locations have stricter privacy laws, where background checks will be limited, and in some cases, the results may be questionable and unreliable.

Record Retention

The Contractor Company should maintain all records in accordance with its record retention policy and pursuant to applicable law, and ensure that the records are properly destroyed as required by law once the retention period has expired.

Prohibited Parties Check

Although information regarding terrorist ties is not publicly available, several federal agencies have compiled lists of companies and individuals that have been sanctioned. These lists are outlined below and may be sources that the Company could require the Contractor Company to review in conducting any required background checks.

The Office of Foreign Assets Control (OFAC)

OFAC of the US Department of Treasury administers and enforces economic and trade sanctions based on US foreign policy and national security goals against targeted foreign countries and regimes, terrorists, international narcotics traffickers, those engaged in activity related to the proliferation of weapons of mass destruction, or other threats to national security, foreign policy or the US economy. OFAC maintains the following sections:

- Specially Designated Nationals List
- Consolidated Sanctions List
- Additional OFAC Sanctions Lists

<https://www.treasury.gov/about/organizational-structure/offices/Pages/Office-of-Foreign-Assets-Control.aspx>

GSA System for Award Management (SAM)

The System for Award Management (SAM) is combining federal procurement systems and the Catalog of Federal Domestic Assistance into one new system. This consolidation is being completed in phases. The first phase of SAM includes the functionality from the Excluded Parties List System (EPLS). (<https://www.sam.gov>)

VI. Co-Employment Issues; On-Site Contractors

General

When using contract workers, the Company is exposed to potential co-employment issues that, if not properly managed, could result in the contract employee being granted employee status under common law principles and thereby potentially eligible to receive Company benefits. This is especially true with long-term contract workers. A co-employment relationship between two companies typically exists when they both have a relationship with a single worker. This relationship is usually between a Contractor Company supplying manpower to the Company needing additional manpower. Both companies have certain duties and responsibilities toward the employee. The primary employer is usually the Contractor Company. The risk of co-employment issues is present when the Company exceeds what should be a limited role and responsibility by exercising control that is usually the responsibility of the primary employer. There are a number of different tests for co-employment that have been established by government agencies and courts. These tests, in general, focus on the amount of control a company actually exercises or could exercise over a Contractor Company or the workers themselves. One such test, established by the Internal Revenue Service, is set forth below, but the Company should review its practices and relationship with contractors under all relevant laws, in order to determine whether there are any specific co-employment concerns.

IRS Guidelines on Co-Employment ²⁵

To determine if a person providing a service is an employee or an independent contractor, the Internal Revenue Service (IRS) considers information showing the degree of control exercised by the Company and the amount of independence maintained by the contract employee. The IRS uses Common Law Rules and examines three categories of facts: behavioral, financial and the type of relationship between the parties to determine the degree of control and independence. The IRS outlined these categories in a bulletin entitled, "Independent Contractor (Self-Employed) or Employee?"

Behavioral ²⁶

The Company exerts behavioral control when there is evidence that shows that the Company has the right to direct and control how the worker completes their work. He is considered an employee if the Company has that right.

The factors indicating behavioral control fall into the categories of:

1. **Type of instructions given**-An employee is generally subject to the business's instructions about when, where, and how to work.

²⁵ Independent Contractor (Self-Employed) or Employee? <https://www.irs.gov/Businesses/Small-Businesses-&Self-Employed/Independent-Contractor-Self-Employed-or-Employee>

²⁶ Behavioral Control, <https://www.irs.gov/businesses/small-businesses-self-employed/behavioral-control>

2. **Degree of instruction**-The more detailed the instructions, the more control the business exercises over the worker. More detailed instructions indicate the worker is an employee.
3. **Evaluation systems**- An evaluation system that measures the details of how the work was performed indicates the worker is an employee.
4. **Training**-If the business provides the worker's training on how to do the job, it indicates that the business wants the job done in a particular way, which is strong evidence that the worker is an employee.

Financial ²⁷

The Company exerts financial control if the Company has the right to control the economic aspects of the worker's job. The financial control factors fall into the categories of:

1. **Significant investment**-An independent contractor often has a significant investment in the equipment he uses in working for someone else.
2. **Unreimbursed Expenses**-Independent contractors are more likely to have unreimbursed expenses than employees.
3. **Opportunity for profit or loss**-The possibility of incurring a loss indicates that the worker is an independent contractor.
4. **Services available to the market**-An independent contractor is free to seek out business opportunity elsewhere.
5. **Method of payment**-An employee is generally guaranteed a regular wage amount for an hourly, weekly or other period of time. An independent contractor is usually paid a flat fee for the job.

Type of Relationship²⁸

The type of relationship refers to facts that show how the worker and the Company perceive their relationship to each other. The factors to consider generally fall into the categories of:

1. **Written contracts**-The IRS is not required to follow a contract stating that the worker is an independent contractor. How the parties work together determines whether the worker is an employee or an independent contractor.
2. **Employee Benefits**-Businesses generally do not grant employee benefits to independent contractors. However, the lack of benefits does not necessarily mean the worker is an independent contractor.
3. **Permanency of the relationship**-When a worker was hired with the expectation that the relationship would continue indefinitely, rather than for a specific project or period of time, that is generally considered evidence that the intent was to create an employer-employee relationship.
4. **Services provided as key activity of business**-If a worker provides services that are a key aspect of the business, it is more likely that the Company will have the right to direct and control their activities like an employee.

²⁷ Financial Control, <https://www.irs.gov/businesses/small-businesses-self-employed/financial-control>

²⁸Type of Relationship, <https://www.irs.gov/businesses/small-businesses-self-employed/type-of-relationship>

IRS 20 Factor Checklist²⁹

How to determine if a contract employee should be paid on a W-2 or a 1099

The IRS has established a 20-point checklist to be used as a guideline in determining whether or not a contract employee can legally be paid on a 1099. This checklist helps determine who has the "right of control." Does the employer have control or the "right of control" over the individual's performance of the job and how the individual accomplishes the job? The greater the control exercised over the terms and conditions of employment, the greater the chance that the controlling entity will be held to be the employer. The right to control (not the act itself) determines the status of an independent contractor or employee. The 20-point checklist is only a guideline; it does not guarantee that a person is correctly classified. There is no one single, homogenous definition of the term "employee." Most agencies and courts typically look to the totality of the circumstances and balance the factors to determine whether a worker is an employee.

Following are the **20-points** that have been established:

1. Must the individual take instructions from your management staff regarding when, where, and how work is to be done?
2. Does the individual receive training from your company?
3. Is the success or continuation of your business somewhat dependent on the type of service provided by the individual?
4. Must the individual personally perform the contracted services?
5. Have you hired, supervised, or paid individuals to assist the worker in completing the project stated in the contract?
6. Is there a continuing relationship between your company and the individual?
7. Must the individual work set hours?
8. Is the individual required to work full time at your company?
9. Is the work performed on company premises?
10. Is the individual required to follow a set sequence or routine in the performance of his work?
11. Must the individual give you reports regarding his/her work?
12. Is the individual paid by the hour, week, or month?
13. Do you reimburse the individual for business/travel expenses?
14. Do you supply the individual with needed tools or materials?
15. Have you made a significant investment in facilities used by the individual to perform services?
16. Is the individual free from suffering a loss or realizing a profit based on his work?
17. Does the individual only perform services for your company?
18. Does the individual limit the availability of his services to the general public?
19. Do you have the right to discharge the individual?
20. May the individual terminate his services at any time?

In general, "no" answers to questions 1-16 and "yes" answers to questions 17-20 indicate an independent contractor. However, a simple majority of "no" answers to questions 1 to 16 and "yes" answers to questions 17 to 20 does not guarantee independent contractor treatment. Some questions are either irrelevant or of less importance because the answers may apply equally to employees and independent contractors.

²⁹ (<http://galachoruses.org/sites/default/files/IRS-20-questions-W2-vs-1099.pdf>)

Avoid Co-Employment Issues - Contractor Company

To avoid co-employment issues, the Contractor Company, as the primary employer, should retain the majority of the duties and responsibilities of an employer. These primary responsibilities include:

1. Recruiting, screening and hiring/firing
2. Financial Responsibility
 - a. Paying payroll, worker's compensation insurance, unemployment insurance and withholding taxes
3. Human Resource Functions
 - a. The Contractor Company should handle contract employee training, evaluations, complaints, disciplinary action and other functions usually associated with Human Resources.

Avoid Co-Employment Issues -The Company

1. The Company should limit its oversight of the Contractor Company and its workers as much as possible. Oversight should be limited to the following types of activities, and only to the extent necessary to achieve business needs:
 - a. Supervise and direct day to day work activities, by explaining to the contract employee the work to be accomplished but not how to accomplish it
 - b. Control working conditions at the worksite
 - c. Determine the length of assignments
 - d. Ensure a safe worksite

Contracts

All contract owners may consider including the expectations from the most recent version of the Guidance Document in contracts, memorandums of agreement, master service agreements or any other agreements between the Company and the Contractor Company.

Audit

Right to Audit

The Company should consider ensuring that any contract that requires background checks includes the right to conduct a compliance audit of the Contractor Company's compliance with the Company's Background Check Guidelines. This is an important function to ensure the program is being administered in accordance with the Background Check Guidelines and applicable employment regulations.

Audit Review

It should be the Contractor Company's sole responsibility to procure background checks on employees and make all hiring decisions based on the results of the background checks. The Company may decide to reserve the right, through contracts, to review the individual records or hire a third-party to audit compliance with the Company's Background Check Guidelines. The Company could request that the Contractor Company periodically prepare a statement that criminal history information was applied equally for all applicants, regardless of their race or national origin, the screening process did not disproportionately impact any individuals protected under Title VII and all rejections were job related and consistent with a business necessity. The summary would not include the applicants' names or identifying information.

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