

Don't Hire the Perp: Avoiding Organization-Killing Pitfalls During the Recruitment Process

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Jill Ostrove is the VP of SML, EPL Public Entity, and D&O Risk Management at ePlace Solutions, Inc. She is a licensed attorney in California, where she received her JD with honors in both criminal law and public service from Western State University College of Law and her Bachelor of Arts in Political Science from University of California, Riverside.

Prior to joining ePlace Solutions, Jill gained significant experience in various areas of law, including civil, insurance defense, and as in-house corporate counsel. However, from a young age, her passion was firmly rooted in criminal prosecution.

As a prosecutor, Jill handled thousands of cases from filing charges through hearings, jury trials, and sentencing. Those cases encompassed, in part, domestic violence, child abuse, sex offenses, animal cruelty, gang crimes, and everything in between.

As the VP of EPL Public Entity, SML, and D&O Risk Management, Jill is responsible for oversight of all 3 practice areas. She develops thorough policies, procedures, and extensive training materials to prevent avoidable tragedies, claims, and suits.

Since she was a child, Jill has always focused her attention on helping vulnerable and at-risk populations, whether that is sending sex offenders to prison, volunteering on the Board of Directors for local nonprofits, helping the homeless population, or running a nonprofit animal rescue.

Agenda

The Reality

The 4 Steps

Warning Signs

Q & A

Take Some Handouts!

The Reality

Yes, it happens everywhere.

Yes, it can happen in a very small
municipality.

Yes, EPL and SML claims are on the rise.

Why Should You Care?

Award Trends by Defendant Type (2014 – 2020)

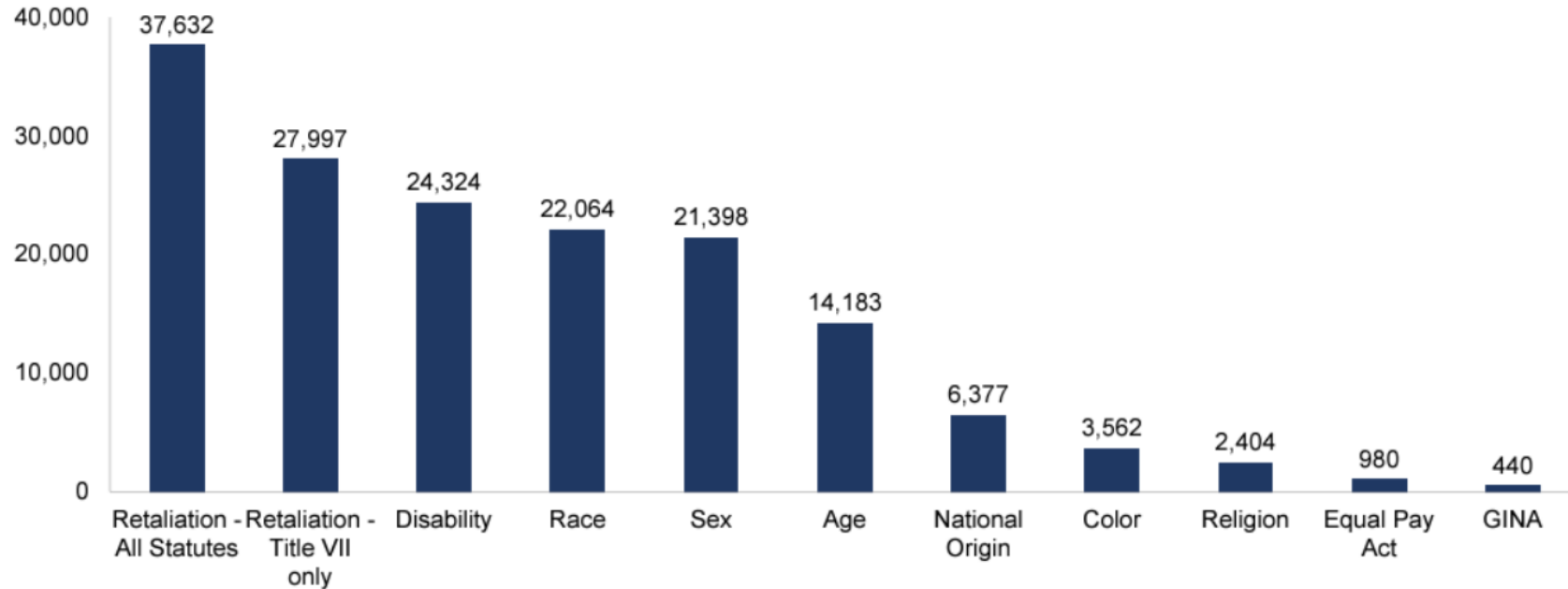
The compensatory award median, probability range, award range, and award mean for all plaintiff verdicts collected for the years 2014 through 2020 are analyzed in the table below and are broken down by defendant type.

Defendant Type	Award Median	Probability Range			Total Range			Award Mean
Government Entities	\$ 239,266	\$ 65,441	-	\$ 654,052	\$ 1	-	\$ 17,394,972	\$ 634,488
Manufacturing/Industrial Companies	145,081	39,500	-	559,631	1	-	3,200,660	546,223
Service/Retail Companies	70,200	18,606	-	300,000	1	-	15,544,413	410,005
Transportation Companies	125,000	21,175	-	433,656	1	-	5,317,162	414,162
Defendant Type, Overall	125,000	25,000	-	439,937	1	-	17,394,972	491,716

Source: Employment Practices Liability: Jury Award Trends & Statistics, 2021 Edition (Thomson Reuters)

U.S. Equal Employment Opportunity Commission (EEOC) – All Charge Data

Charge Receipts by Basis FY 2020



Please note that individuals often file charges claiming multiple types of discrimination, therefore the sum of the discrimination bases will exceed total charges filed.

*Charge data includes all charges filed by individuals in the private sector and state and local government workplaces; it does not include discrimination complaints in the federal sector.

**For all definitions of terms please go to: <https://www.eeoc.gov/enforcement/definitions-terms>.



Why Should You Care?

Because you – the defendant – will pay for the following if you lose:

- Compensatory damage award to the employee (or former employee), discussed above
- The employee's attorney fees (usually similar to your own fees)
- Your own attorney fees to defend the case

Because you – the defendant – will pay your own attorney fees EVEN IF YOU WIN.

The reality is that defending a discrimination or other employment lawsuit is expensive. Defending a case through discovery and a ruling on a motion for summary judgment can cost an employer between \$75,000 and \$125,000. If an employer loses summary judgment (which, much more often than not, is the case), the employer can expect to spend a total of \$175,000 to \$250,000 to take a case to a jury verdict at trial.

The 4 Steps

Job Applications

Behavioral Interviewing

Reference Checking (A secret gold mine!)

Multistate pre- and post-hire
background checks

Warning Signs



Job Applications

Let's Talk About Job Postings

Include EEO language in all job advertisements.

At a minimum, state the employer as an equal opportunity employer and all applicants will be considered for employment regardless of race, color, religion, sex, sexual orientation, gender identity, national origin, veteran, or disability status and any other characteristic protected by law.

But, what about when religion, sex, or national origin is a “bona fide occupational qualification?” Talk to an attorney if you think this applies to a position!

Consider including a statement about disability accommodations.

Check for any state or local requirements that a salary range be disclosed *in the job post*.

Do *not* state that those with a criminal background need not apply.

Ensure *where* you are advertising is not inadvertently excluding protected classes (i.e. Advertise in two separate markets to reach different audiences).

Don't target job advertisements to particular classes.

Dos and Don'ts

Don't ask for an applicant's date of birth, age, race, national origin, religion, gender, or other protected characteristics. Such information is generally not relevant to job qualifications and duties or whether the applicant has those qualifications and can perform those duties. These questions open you up to a discrimination claim if the applicant is not hired.

Don't exclusively use online applications, as this can exclude groups of people from applying and open you up to a discrimination claim. Using only online applications can have a disparate impact on older candidates or minority groups who have less access to computers than other groups of candidates.

Know your state's laws about inquiring into an applicant's salary history.

Know your state's "Ban-the-Box" laws

Know your state's laws about obtaining a consumer report (e.g., a credit report, background check, etc.). Many states prohibit employers from obtaining consumer reports before an offer of employment is made. Also be sure to follow the FCRA procedures (and any state equivalent) for giving proper notice, obtaining authorization, and making an employment decision based on information in the consumer report.

What to Include on Job Applications

Examples of statements that may be included, depending on your state's law, include:

- Statement requiring the applicant to provide proof of legal authorization to work;
- Certification that the applicant has not knowingly withheld any information, that the information provided on the application are true and correct, and a statement that any omission or misstatement of material fact shall be grounds for rejection of the application or immediate termination;
- Authorization for the employer to thoroughly investigate all references, work record, education and other matters related to suitability for employment;
- Understanding that nothing contained in this application or interview is a contract for employment and that any employment is at-will;

What to Include on Job Applications



Acknowledgement that the employer may obtain and investigate a consumer report about the applicant, with a list of types of reports that may be pulled, and a statement that any job offer is contingent upon receipt of a favorable consumer or investigative consumer report;



Understanding that any offer of employment is conditioned upon taking and passing a post-offer/pre-employment drug test, and if necessary for the position, a post-offer/pre-employment medical examination, with a statement that any refusal will result in the offer being immediately withdrawn; and



Bold or all-CAPITALIZED statement that the applicant has read, understood, and accepts *all* conditions of employment.

Job Application Pro Tip #1

Every person needs to fill out a job application.

Every single person.

No exceptions.

Job Application Pro Tip #2

The applicant doesn't want you to contact their previous or current employer.

Add a line to your application asking why.

Not contacting a current employer is not necessarily a red flag – In and of itself.

Behavioral Interviewing

Does This Sound Familiar?

“I’m a really great judge of character and have made excellent hiring decisions in the past. I can accurately get a sense of how good a job applicant will be by asking the standard “yes” and “no” interview questions I’ve always used.”

Behavioral Interviewing – Huh?

The most accurate predictor of future performance is past performance in similar situations.

Simple “yes” or “no” questions will not accurately reflect an applicant’s past experiences in the workplace.

Behavioral interviewing focuses on an applicant’s past experiences by asking them to provide specific examples of how they have demonstrated certain behaviors, knowledge/skills/abilities. The answer to these questions provides insight into the applicant’s thought process and can trigger red flags.

One of the most common ways to accomplish this is by using the **STAR** method:

- **Situation:** Tell me about a time...
- **Task:** When you didn’t agree with something your manager told you to do.
- **Action:** What did you do to resolve it?
- **Results:** How did it turn out? What did you learn from this experience?

Sample Questions

These questions and the answers that follow, provide important insight into the mind, thinking process, and past behavior of an applicant.

The answer to these questions can trigger red flags or warning signs of someone that may be potentially harmful to your organization.

Sample Questions

Tell me about a time when you were extremely upset with a coworker or your supervisor.

- What happened?
- What was the outcome?
- How do you feel about the outcome?
- Would you do anything differently to prevent this from happening in the future?

Tell me about a time when you tried to accomplish something you and it failed/didn't go as planned.

- What challenges did you come across?
- What was the outcome?
- How did you feel about the outcome?
- What did you learn from the experience?

Describe the most difficult employee relations situation you have had to handle.

- What was the situation?
- What did you do to try to resolve it?
- Did you come across any challenges?
- Were you happy with the outcome? Why?

Tell me about an ethical situation you have encountered at work.

- What challenges did you come across?
- What was the outcome?
- What did you learn from the experience?
- What would you do differently next time?

Questions to Avoid

Age

Do not ask:

- Date of birth
- Date of high school graduation
- Date of college graduation

Instead, ask:

- If hired, can you show proof that you are at least 18-year-old?

Gender/Family Status

Do not ask:

- Number of children/childcare arrangements
- Marital status
- Questions around pregnancy
- Maiden name
- Sexual orientation
- Gender identity

Instead, ask:

- What hours can you work?
- Can you meet the job's travel requirements?
- Do you have relatives employed here?

Religion

Do not ask:

- What is your religion?
- What church/temple/mosque do you attend?
- What is the name of your priest/rabbi/minister/religious leader?
- Does your religion prevent you from working holidays/weekends?

Instead:

- Make statements re regular days, hours, or shifts to be worked and ask if they can meet them.

Be consistent when asking your questions!

Protected Classes

Federal Law

Age (40+)
Race
Color
National Origin
Sex (inc. sexual orientation,
gender identity, and pregnancy)
Religion
Disability
Military/Veteran Status
Genetic Information

Many States and Cities

Marital Status
Domestic Violence Victim Status
Age (18+)
Citizenship Status
Arrest or Conviction Record

Some States and Cities

Weight
Familial/Caregiver Status
Parental Status
Credit History
Source of Income
Current Unemployment Status
Hair styles
And more!

Be consistent when asking your questions!

Reference Checks

Reference Checks

Did you know that reference checks are one of the best and easiest ways to find hidden red flags?

A step that is routinely overlooked by employers. Don't be scared!

There are many ways to avoid HIPAA and protected classes.

In a 2018 CareerBuilder survey, 75% of hiring managers reported they had caught a lie on a resume.

Remember: It is *fiction* that you don't need to check references. You will *not* pick up on all red flags during an interview.

Reference Checks Red Flags

Negative Comments - Applicants typically provide references who they know will speak highly of them. Any negative feedback about an applicant's work performance is something to consider prior to making a hiring decision.

Lack of Specificity - You can generally expect an overly positive review. When faced with overselling, ask for specifics. If a reference refuses to provide, it may mean that the person did not work closely enough with the applicant which may bring the applicant's judgment into question for choosing them as a reference. It may also mean that the reference had a negative experience and doesn't want to prevent the applicant from getting the job.

Inconsistencies in Factual Information - Small inaccuracies (i.e. the exact date of employment) might not be a reason to raise a red flag. However, if you find that an applicant is lying about more significant issues, such as what their responsibilities were, it may be a warning sign about their reliability and truthfulness.

References Who Did Not Know They Were References - If the reference is surprised to hear from you, it may be a red flag. The applicant should give their reference a head's up that you'll be contacting them before handing out their contact information.

Not Being the Correct Person to Speak With - If the reference states that they are not the best person to speak with, ask for specifics. In the uncommon event that your understanding differs from what you hear from the reference, you can also ask the applicant to explain and may find that it is nothing to be concerned with.

Reference Checks – How?

It's simple! Reference checks are simply behavioral interviewing for the reference!

Sample Questions

There are many questions that can be asked of references. These questions are likely to elicit substantive and material information about the applicant who could be potentially violent and/or dangerous.

If the Reference was a Superior of the Applicant

- How did they meet the challenges of the role and manage the pressure of the job?
- Were there any workplace conduct or ethical incidents caused by this applicant when they worked for your company? Please describe.
- Is the applicant eligible to be re-hired and would you re-hire them? Why/why not?

If the Reference was a Coworker of the Applicant

- What were the easiest and most challenging aspects of working with the applicant?
- Did s/he get along well with management and co-workers?
- How did the applicant handle conflict? How about pressure? Stress?

The MAGIC Question

One simple question...

That works *every* time.

What is their greatest strength and weakness?

A Quick Tip

You *can* ask references for additional people that may be helpful to speak with.

You are *not* limited to only the people the applicant lists.

Verify **all** credentials and employment listed on resume.

Use **different** forms for your Job Application and FCRA Background Check Consent.

It is **insufficient** to check convictions only. NASDTEC is **not** enough.

Most perpetrators are **not** convicted.

Avoid “Pass the Trash”

Pre- and Post-Hire Multistate Background Checks

Multistate Background Checks

Multistate checks are a must!



Registries are a mess!

Sex Offender

Child Abuse

Domestic Violence

Narcotic Offenders

Violent Crimes and Felonies

Animal Abuse

Vulnerable and Disabled Adults

Elder Abuse

Arson

White Collar Crime

Gun Offender

Warrants

What Can You Check?

- Criminal histories, subject to your state's laws. Search AKAs and alternate DOBs.
- Nationwide Federal and Specific State Offender Registries – Employers should be checking all offender registries in your state. Each state may have different registries.
- License database searches – Handymen, doctors, nurses, dentists, massage, HVAC, teachers, contractors
- Social Media - An astounding 73% of employers are not using social media to screen job candidates. It is an easy approach and may be hard to defend an organization that did not avail itself of free and publicly available information.
- Depending upon the position, some employers are allowed to check driving history, liens and judgments, and credit history. These categories, however, are very narrow.

Always Get Consent

You cannot conduct a background check unless you first provide the applicant with a notice that a background check may be done and obtain their written consent. Be sure to check your state laws, as there may be specific requirements for the notice and consent.

If you use a third-party consumer reporting agency to conduct your background checks, you must also comply with the FCRA. The FCRA requires employers to provide applicants with a written disclosure and a copy of the Consumer Financial Protection Bureau Summary of Rights. The disclosure must be a separate document from other pre-employment documentation that gives “clear and conspicuous” notice a background check may be done and what information may be requested.

When it comes to obtaining consent, a standalone disclosure informing that candidate or current employee that a background check will be conducted should be used. Non-standalone disclosures are an extremely risky legal area. Keep in mind that certain states such as CA, require specific disclosures, language, and formatting to be used. Verify your state requirements prior to proceeding.

Consent should be obtained **every** time.

Update Your Employee Handbook

Make sure to have a detailed and comprehensive policy in your employee handbook explaining both pre- and post-hire background checks, as well as how the organization will deal with a criminal record that may be uncovered during a periodic check.

This new policy should include:

- What, specifically, you will review (for example, criminal records, offender searches, social media, etc.).
- How often, and when, you will conduct this check. Depending on your industry, this could be annually or as frequently as monthly. In terms of timing, the background check might be based on an employee's anniversary date or some other date such as the beginning of each year.
- A statement that the policy applies to all employees.
- A request that employees self-report any criminal cases that they may have been involved in and a notice that failure to self-report may result in termination if, and when, such offense is found.
- An explicit policy that refusal to cooperate or provide consent can result in termination.
- A detailed and specific termination policy if something new is found in their background check or if any falsehoods or omissions are discovered post-hire.

Notify Employees

You will want to notify and clearly explain the new policies to existing employees, explaining the importance of regular screening for the company and for them. It is highly recommended to get each employee to sign-off on the new policy, thereby avoiding any potential future issue or statement that they did not know about the policy.

Some tips to keep in mind:

- Make sure that all employees know who to contact, and how, and ask that they be proactive in alerting you to any incidents that may occur with them.
- When you hire new employees, clearly state that your policy is to conduct routine background checks on all employees, and how often they occur.

Employees will find this new process less threatening if they:

- Remain informed and educated about your process, why it is being implemented, and its benefits to the company, them, and your customers can help alleviate any anxiety or concerns.
- Expect it to happen on a regular basis.
- Know that everyone is being screened for the benefit of all.

“Ban the Box” Laws

Removes the question about criminal convictions or arrests from employment applications.

Delays when an employer can request criminal conviction or arrest information.

In jurisdictions having ban the box laws, employers can only ask about criminal history after a conditional offer of employment.

Timing of inquiry varies by jurisdiction.

Credit History Inquiries

Many states and cities prohibit private employers from running credit checks and using credit information in making employment decisions

- CA, CO, CT, HI, IL, MD, NV, OR, VT, WA
- New York, NY; District of Columbia; Philadelphia, PA; Chicago, IL; Cook County, IL; Madison, WI

Many have broad exceptions if the position is managerial; requires handling money; or the person has access to confidential information

- Be familiar with the requirements in your jurisdiction.

Fair Credit Reporting Act (“FCRA”)



Not just about credit!



Applies to all types of consumer information



- Criminal background checks
- Educational references
- Past addresses
- Credit checks
- Job references
- Social media searches



Only applies when an employer uses a third-party consumer reporting agency.



Failure to comply is **costly!**



Up to \$1,000 **per violation per employee, plus** punitive damages, costs, and attorney fees!

Obtaining a Consumer Report

Disclosure and Written Authorization

- Separate from other pre-employment documentation;
- Must be “**clear and conspicuous disclosure**” in writing; and
- **Must** get authorization in writing.

Attach the Consumer Financial Protection Bureau Summary of Rights

Don't forget state- and local-specific content, if required.

Arrests and Convictions – Uh Oh!

What do you do when a background check shows an arrest and/or conviction?

- **Do not** have a blanket policy you refuse to hire anyone with a criminal history!
- Follow EEOC balancing test detailed in [Enforcement Guidance on the Consideration of Arrest and Conviction Records.](#)
 - Check your state and local law for any additional balancing test requirements.



EEOC Balancing Test



Factors to consider:

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct, and/or completion of the sentence; and
- The nature of the job held or sought.

Examples:

- Conviction for credit card fraud; applying for a position collecting documents to be shred.
- Conviction for drug manufacturing; applying for a position as a residential pest control technician.
- Conviction for burglary of a residence; applying for a position on an oil rig.

Using Background Information

Step 1: Issue Pre-Adverse Action Notice

Step 2: Review Period

Step 3: Issue Adverse Action Notice

The Reality of Post-Hire Checks

Can an Employer Run a Post-Hire Background Check on an Employee?

Absolutely, and they should.

Almost 80 million Americans, or 1 in 3 adults, have a criminal record. This is a staggering number. As a result, background checks should **never** be a, “one and done,” type of situation.

- It is just as important to conduct a background check on a current employee. An employer may discover post-employment that critical information was missed during the hiring process.
- Employers should not assume that passing an initial background check means there will never be issues down the line.
- It is extremely likely that at least one person who passes a background check will commit a crime after beginning employment.

If you think that you don't have to run background checks because a prospective or current employee will be honest and volunteer their criminal background to you, think again.

Post-Hire Checks – How?!

01

Have an Updated Policy and Inform Employees

- Include a point of contact so employees can alert about an incident;
- If post-hire checks are a new policy, have a company-wide meeting to roll out the policy and answer any questions;
- Have employees sign an acknowledgment of the policy

02

Determine What to Screen

- Criminal history;
- Drug testing;
- DMV/MVR search;
- Professional license verification

03

Comply with State Laws

- FCRA notice;
- Drug testing policies, etc.

The 5 Easy Rules

Remember the 5 steps for background checks with the acronym **UPICD**, as in you picked the employee so you should make sure that they are not a potential safety hazard to your municipality!

U - Update job applications

P - Have a detailed policy in your employee handbook

I - Inform and notify

C – Always get consent

D - What to do if you find damaging information

Same Slide, Different Topic

You *can* ask references for additional people that may be helpful to speak with.

You are *not* limited to only the people the applicant lists.

Verify **all** credentials and employment listed on resume.

Different forms for Application and FCRA Background Check Consent (Even if not required).

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Avoid “Pass the Trash”

Warning Signs


The Importance of Identifying Warning Signs and Red Flags

Things to Remember

The handout describes subtle warning signs of both perpetrators and victims of violence. Please note that this is by no means an exhaustive list and it applies to all sexes and genders. These warning signs can apply to sexual abuse, physical abuse, emotional abuse, and general red flags of workplace violence.



Many of these warning signs may be exhibited by everyday average and kind people. Just because you notice one or more of these signs exhibited by someone, does not necessarily mean that they are a perpetrator or victim. Trust your gut instinct and use your good judgment and common sense to look at the totality of circumstances and make an informed decision. If in doubt, speak with your supervisor right away.



You don't need proof, evidence, or certainty of a crime. As long as your report is made in good faith, there is no liability to you or your organization!

Thank you for attending!

Contact me with questions.

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