



## **CUTTING CORNERS ON BACKGROUND CHECKS COSTING EMPLOYERS MILLIONS**

By Kevin P. Prendergast, President & General Counsel, Research Associates

Imagine the effect of having to add a \$5 million expense to your HR budget because you decided to save money by choosing an inexpensive, “big box” background screening vendor. Yet this scenario is becoming an everyday reality for many employers as an alarming number of class action lawsuits are being filed and won by plaintiff lawyers cashing in on big paydays.

Thousands of claimants are filing for their share of huge awards against some well-known employers (Publix- \$6.8 million; Kelly Services-\$6.75 million; Express Personnel- \$5.75 million; and Food Lion- \$3 million). These cases represent a small fraction of cases currently pending or recently concluded that have been filed against employers over faulty background checks. Settlements and judgments in 2017 alone are expected to approach \$250 million.

Consider two cases decided in March, 2017 in separate federal courts. In *Syed v. M-I, LLC*, a federal court of appeals allowed a plaintiff to proceed with a class action lawsuit against an employer even though there was no allegation that the individual was denied employment. The court found that a technical violation in the employer’s background screening protocols was sufficient to allow Mr. Syed to proceed with a lawsuit. The court went on to state that this technical violation rose to the level of willful misconduct thus entitling the entire class of plaintiffs to recover mandatory statutory damages and their attorney fees. The employer had been using a big box screening firm.

Four days later, another federal court ruled in favor of an individual even though the person was hired by the employer and suffered no harm to his reputation or out-of-pocket losses. In *Lagos v. Leland Stanford University*, the employee reviewed his personnel file and discovered that the forms he signed to authorize his background check years earlier had two clauses that were not allowed to be included under federal law. He also filed a class action against his current employer and the court found that the inclusion of the two objectionable clauses constituted willful misconduct. The class will now be entitled to recover mandatory statutory damages and all of their attorney fees. Again, a big box provider was involved.

These cases are not aberrations or a reflection of the views of these two courts alone. Decisions like these are being handed down nationwide against employers at an alarming rate. “We expect that class-action lawsuits alleging noncompliance with the Fair Credit Reporting Act will continue to increase in 2017. The Fair Credit Reporting Act has been a hotbed for litigation for a couple of years and does not show signs of slowing down in the near future,” said Melissa Sorenson, executive director of the National Association for Professional Background Screeners.

My firm, RAI, was founded by former FBI agents and has developed a worldwide clientele through a commitment to accuracy, attention to detail and a high-level of customer service. For our 50-plus years in business, we have never strayed from this approach of delivering background investigations, not “background checks.” The risk has always been too high for our clients to allow for cutting corners or taking shortcuts.

However, as background investigations became more common, new providers began selling cheap and quick background checks. The primary drivers for this commoditized approach has been speed and low cost with little quality control. While this has garnered some benefits for employers in terms of initial savings and quicker processing time, it has led to a stark increase in regulatory enforcement actions and class action lawsuits as a result of errors in background screening reports. Disgruntled candidates who

have been spurned as a result of an inaccurate background check tend to be angry and often have ready access to legal resources. The market pendulum is beginning to swing back towards more in-depth analysis and reporting.

“Accuracy is critically important not only to the consumer, whom the laws and regulations are designed and created to protect, but also to the employer who relies on the information in the background check to make an informed placement decision,” said Ms. Sorenson.

Indeed, inexpensive background checks miss important information. The big box background screening firms are designed to quickly gather and report information, not to detect fraud or deception. They sell primarily based upon price and supposed ultra-quick turn times. There is no review of the data provided by the applicant or analysis of the information obtained during the search. A savvy applicant can easily defeat these basic checks with very little effort. All that is needed is a few disposable cellular phones, fake email addresses or some doctored documents. We see it every day. Since there is usually no penalty for getting caught for submitting a fraudulent application, unqualified applicants see little risk in overplaying their credentials or hiding a checkered past.

In fact, we regularly see professional and administrative candidates applying to our clients who have items in their past that make them absolutely unsuitable for the positions they are seeking. Yet they are often working in a similar role in the same industry. Either the current employer is not performing background investigations or they are using one of the big box providers that simply report information at face value.

But equally important in today’s litigious climate is legal compliance. As the president of my firm and a practicing lawyer for 30 years, RAI made a commitment to helping our clients navigate through the legal minefield and sort through the plethora of notices and forms which employers must provide to applicants prior to, during and even in some cases, after a background investigation has been completed. We view compliance as a shared responsibility.

In 2014, we developed our proprietary Compliance Manager Platform which manages the entire applicant background experience while seamlessly integrating into the employer’s human resource platform. All required notices are provided to the candidate from California to New York in a documented, auditable system. Data entry by both the client and their candidate is minimal and the experience for both users takes less than a few minutes to complete. Documents and notices are updated as laws change and as new regulations are added.

Reputable employers recognize the need to conduct legally compliant background investigations on their employment candidates. In a recent survey of over 1,500 human resource professionals, 96% indicated they perform background investigations. More and more, these professionals are moving away from commoditized background checks and presenting a strong business case for performing accurate and compliant background investigations. The cost difference is not as much as you might think and the added turn time is typically less than a day for an analyst to properly review the investigative results.

A background screening program should reduce risk, not create exposure and liability. The stakes are simply too high to cut corners in this area of your HR program.

### **About the Author**



Kevin P. Prendergast is the President & General Counsel at Research Associates, Inc., a corporate investigative firm serving clients since 1953. Kevin oversees the compliance program at RAI and works with clients and their counsel in developing legally compliant background screening programs. Mr. Prendergast graduated from the Cleveland Marshall College of Law and has been licensed to practice law since 1987. He is a member of the American Bar Association, Ohio State Bar Association and the Society for Human Resource Management. Kevin can be reached at 800.255.9693 or [kprendergast@raiglobal.com](mailto:kprendergast@raiglobal.com).