

American Society of Safety Engineers
Council on Practices and Standards

White Paper Addressing

PRE-EMPLOYMENT TESTING AND INVESTIGATION FOR SECURITY-SENSITIVE AND OTHER POSITIONS

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Members of the American Society of Safety Engineers (ASSE) practice specialties have the strong belief that the importance of pre-employment testing or investigation of applicants cannot be overstated. This is particularly true for security-sensitive positions. There are many questions to be answered, and the answers will vary according to local jurisdiction or organization policy. The purpose of this paper is to pose some questions that will require further research or study, to present some of the testing or investigation methods that are required by certain entities such as the U.S. Department of Homeland Security, Transportation Security Administration or the Department of Defense and to present some of the methods that can be used to test individuals or to investigate their background. There are state and federal requirements under development for certain types of positions (and others, which are already firmly established). In addition to what is legally required, there are also best practices that should be considered to limit potential liabilities. Given the current security environment, the number of background checks conducted has increased. This increase is tied to negligent hiring lawsuits, failure to conduct background checks for healthcare workers, child abuse- and child abduction-related incidents, security concerns related to terrorism fears post-9/11 and scandals in the financial world. 1

One of the questions to be answered is what constitutes a security-sensitive position. Many personnel who work in the airline industry—flight crew, ground crew, security screeners—have positions that are clearly “security-sensitive.” Others employed in government or in pharmaceutical laboratories may have access to hazardous substances such as biochemical agents that can cause serious harm to the public (or at least significant hysteria) if released to the general public in harmful ways. Additional key personnel to consider should include those with government security clearances, individuals working as government contractors in security, some in the oil and gas industry, those who transport hazardous materials, individuals who work at nuclear plants and

chemical manufacturing facilities, law enforcement and military personnel, emergency services personnel, customs agents and border control personnel. The healthcare industry is mandated to conduct background checks to ensure that healthcare workers do not have a history of abuse, neglect, theft or a criminal history of fraud in billing procedures. One could expand the term “security-sensitive” to include many information technology personnel who would be able to maliciously disrupt communication channels. This list could be quite comprehensive depending on the specific definition of what includes “security-sensitive.”

The federal government designates positions in different levels of “sensitive” positions, each of which has different requirements for background checking. A Personnel Security Investigation (PSI) may be required. A PSI is an inquiry into an individual's loyalty, character, trustworthiness and reliability to ensure that he or she is eligible to access classified information or for an appointment to a sensitive position or position of trust.

A PSI consists of one or more of the following inquiries:

- A National Agency Check (NAC)—A search of investigative files and other records held by federal agencies such as the Federal Bureau of Investigations (FBI) and Office of Personnel Management (OPM).
- A Local Agency Check (LAC)—A review of appropriate criminal history records held by local law enforcement agencies, such as police departments or sheriffs, with jurisdiction over the areas in which one has resided, gone to school or worked.
- Financial checks.
- Field interviews of references to include coworkers, employers, personal friends, educators, neighbors and other appropriate individuals.
- Checks of records held by employers, courts and rental offices.
- A subject interview—An interview with a person by an investigator.

Some organizations have defined “security-sensitive” by policy while others have had “security-sensitive” defined by statute or government code [for example, the State of Texas has described security-sensitive positions in Texas Education Code § 51.215(c) and in Texas Government Code § 411.094(a)(2)] .

Some of the positions that have been designated as “security-sensitive” include those in which employees:

1. Handle currency.
2. Have access to confidential information.
3. Have routine access to building master control and key systems.
4. Are responsible for the care or instruction of children.
5. Work in an area designated as a security-sensitive.
6. Drive company vehicles and/or equipment.

In addition to what may be required by certain entities, there are some best practices that can be applied to limit your risk of hiring unsuitable employees. These options fall into fairly discrete categories, including job applications, reference checks, DNA and fingerprint checks, credit checks, substance abuse screening, psychological screening, medical screening and criminal background checks.

The rights of applicants are protected by laws such as the Americans with Disabilities Act (42 USC §12101), the U.S. Equal Employment Opportunity Commission (www.eeoc.gov), the Fair Credit Reporting Act (15 USC §1681 et seq.), the Federal Trade Commission (www.ftc.gov) and others. The limitations placed on employers must be understood by those completing employment screening.

In addition to due diligence that is required by law, many human resource and risk management professionals recognize the value in additional testing. The key is to do this testing in a manner that is consistently applied and is legally allowed. The risk management world is familiar with the concept of “negligent entrustment,” which holds an organization responsible for acts of an employee when the organization did not properly screen the applicant or employee to discover certain information or when the employer has knowledge of certain facts and yet takes no action. A common example of this is an employer who hands the keys of the company car to the new employee and tells the employee to “run an errand” without verifying the status of the individual's driving record. The concept of “negligent entrustment” could be applied if the employee does not

have a valid license or has a history of “suspect” behavior (this could be a driving under the influence conviction, multiple accidents or violations). One problem with this concept is that the application of it is subject to a decision of a jury, not necessarily what is printed in the law. Another example is a known sexual offender who is placed in a role of direct contact with children.

Knowing what is required and/or allowed by law is the first step to minimizing liability. Making a determination regarding best practices, and implementing those best practices where allowed by law, is another step. Monitoring the effective implementation of your selected controls is often a weak link in the process. Without an effective auditing process, the quality and consistency of your screening process will suffer (resulting in increased liability for failure to follow your existing policy).

Some of the following are more effective methods than others, but each has a potential role to play in determining if your applicant is capable of performing the required tasks, while at the same time identifying any issues, which may increase your risk (security or otherwise) from hiring that individual.

- ***Job Application***—A good job application form, when completed by the applicant and adequately reviewed by the employer, is a critical component. Applicants with issues to hide or with suspicious backgrounds are often inclined to lie about certain issues or to omit these issues from their application. It is the employer's responsibility to review this information and to verify the facts as presented. Since human resource law changes frequently, this is an area that must be monitored to ensure that your application is acceptable and that your processes are current. “ Some estimates are that 30% to 40% of all job applications and resumes include some false or inflated facts.” 1
- ***Reference Checks***—References are often requested as part of an application or otherwise. Conducting a thorough review of these references, whether personal or professional, is a source of valuable information. References, even as provided by an applicant, should not be assumed to support the applicant. Although there are significant limitations on what a past employer may legally

divulge, many references will provide information that may be useful in evaluating a candidate.

- ***DNA or Fingerprint Checks***—As technology advances and as databases become more extensive and better-connected, DNA and fingerprint testing becomes more important as a method of evaluating applicants. From a risk management perspective, not identifying someone's history with respect to an issue such as child molestation is foolish for positions in which your applicant will be dealing with children. There are also laws that require fingerprinting for certain positions, such as childcare workers, law enforcement and some social service employees.

“Commercial truck drivers transporting hazardous materials soon will be required to undergo background checks and fingerprinting by the Homeland Security Department to protect against terrorist attacks. The requirement, which takes effect May 31 [2005], is the final phase of a three-part plan by the Transportation Security Administration (TSA) to secure interstate trucking shipments. It is mandated by the USA Patriot Act.” 2

- ***Credit Checks***—Credit files as maintained by Equifax, Experian and TransUnion include a considerable amount of information. There are predictive models that use some of this data to identify individuals who are more careless by nature, who might be more inclined to file a fraudulent workers' compensation claim or who might be inclined to embezzle money as a result of personal financial problems. The extent to which this information and predictive modeling can be used is a matter of law.

- ***Substance Abuse Screening***—Substance abuse is acknowledged as a significant problem in the general population. Studies have shown that those with a substance abuse problem are more likely to have injuries and diminished performance. Some jobs, such as commercial motor vehicle drivers, have requirements for testing new hires, randomly testing existing drivers, testing for cause and testing post-accident. The Drug-Free Workplace Act of 1988 requires contractors and grantees of federal agencies to provide drug-free workplaces as

a precondition of receiving a contract or grant from a federal agency. If these types of programs are in place, there must be clear policies regarding what should be done if there are positive tests. The importance of substance abuse screening can be demonstrated by the following statistics.

“More than six percent of the population over 12 years of age (13.9 million people) has used drugs within the past thirty days. Rates of use remain highest among persons aged 16 to 25—the age group entering the work force most rapidly.”³

“Seventy-three percent of all current drug users aged 18 and older (8.3 million adults) were employed in 1997. This includes 6.7 million full-time workers and 1.6 million part-time workers.”³

“According to the results of a National Institute on Drug Abuse (NIDA)-sponsored survey, drug-using employees are 2.2 times more likely to request early dismissal or time off, 2.5 times more likely to have absences of eight days or more, three times more likely to be late for work, 3.6 times more likely to be involved in a workplace accident and five times more likely to file a workers' compensation claim.”⁴

- ***Psychological Screening***—Psychological screening is mandatory in some jurisdictions for law enforcement personnel and others. In these cases of mandatory screening, the requirements are often clear as to what constitutes screening. Non-mandatory screening is used by many employers in the form of a personality-type test. Medically validated tests of this nature can help to identify personality types that would present a more significant risk to an organization.

- ***Medical Screening***—Medical screening is required for some individuals who are exposed to certain environmental factors. Other medical screening can be used to screen applicants who are not physically able to perform the essential functions of a given job. The technology of functional capacity testing has developed in the last several years, and there are medically valid tests that can be used to predict susceptibility to certain types of injuries.

- ***Criminal Background Checks***—In addition to conducting DNA or fingerprinting checks, criminal background checks based on identifiers other than DNA or fingerprints are essential in identifying “at-risk” applicants.

A number of screening methods have been briefly reviewed above. Each of these methods is subject to additional research and study. The intent here was to identify methods that need to be better understood and applied to the process of testing or investigating an applicant. Screening applicants or investigating their background serves several purposes, including demonstrating due diligence, discouraging applicants from falsifying information or applying if they have something to hide and identifying better job applicants.

Properly testing or investigating an applicant is required by law for many positions. For those where such extensive testing is not mandatory, there are risk management ramifications to not conducting appropriate testing or investigations. Many organizations do not adequately screen their applicants and then end up paying multiples of the costs of such screening through poor performance, fraud, injuries, judgments and damages and other costs associated with hiring an applicant who should have been screened out during the application phase.

REFERENCES

- 1 Fact Sheet 16: Employment Background Checks, [Copyright](#) © 1994-2005. Privacy Rights Clearinghouse/UCAN, December 1994 . Revised June 2004.
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- 3 National Household Survey on Drug Abuse. U.S. Department of Health and Human Services. Rockville, MD. August 1998.
- 4 Backer, T.E. Strategic Planning for Workplace Drug Abuse Programs, p. 4. National Institute on Drug Abuse. Rockville, MD. 1987.