



TOPIC: Proposed Board Policy on Criminal Background Checks for Faculty and Staff Employees

COMMITTEE: Finance Committee

DATE OF COMMITTEE MEETING: March 31, 2016

SUMMARY: In early 2015, the Council of University System Presidents requested that the University System of Maryland (USM) examine issues related to the use of criminal background checks for applicants and employees on their campuses. Issues concerning the legal requirements for background checks had raised numerous questions among both institution staff and counsel and auditors reviewing current institution practices. In response, the USM convened a Workgroup consisting of USM and institution staff and attorneys representing the Office of the Attorney General and institution in-house counsel to examine these issues.

The attached draft policy is the culmination of the Workgroup's efforts to develop a clear and uniform set of minimum expectations for USM institutions that captures state and federal law requirements regarding: 1) when background checks are mandatory, 2) what discretion institutions have to obtain background checks under other circumstances, and 3) what limitations exist for the proper institution use of background check results. In particular, the policy addresses the implications of the following:

- State child abuse law mandatory background check requirements for individuals who work in programs that primarily involve minors;
- EEOC restrictions on the use of background checks to avoid discriminatory effects;
- Federal Fair Credit Reporting Act requirements when commercial agencies are used to conduct background checks; and
- State "ban the box" laws that limit the use of arrest records in employment decisions.

Key elements of the policy include:

- Clarification of the types of child-serving programs and other circumstances in which complete Criminal Justice Information System background checks, including fingerprinting to identify state and federal offenses, must be obtained (i.e., "mandatory" background checks);
- Discretion to the institutions to seek background checks for other applicants, employees and volunteers (i.e., "permissive" background checks);
- Recognition of EEOC requirements regarding the use of background check information so as to prevent the discriminatory use of background check results; and
- Direction that institution contracts with entities that provide programs for children on campus (e.g., summer camps) include provisions requiring the contractor to meet all mandatory background check requirements.

This draft policy has been reviewed and approved by USM institution leadership and the Office of the Attorney General and has been reviewed by the USM Councils of University System Faculty and Staff and AFSCME.

ALTERNATIVE(S): The Committee may choose not to approve the proposed policy or may recommend revisions to the proposal.

FISCAL IMPACT: The fiscal impact is anticipated to be minimal.

CHANCELLOR'S RECOMMENDATION: That the Committee on Finance recommend that the Board of Regents approve the USM Policy on Criminal Background Checks for Faculty and Staff as presented.

COMMITTEE RECOMMENDATION: RECOMMEND APPROVAL

DATE: 3/31/16

BOARD ACTION:

DATE:

SUBMITTED BY: Joseph F. Vivona (301) 445-1923

USM POLICY ON CRIMINAL BACKGROUND CHECKS FOR FACULTY AND STAFF EMPLOYEES

I. Purpose and Scope

- A. Purpose: To establish minimum standards for the appropriate acquisition and use of criminal background records in order to support safe and secure campus environments.
- B. Scope: Applies to all regular and contractual faculty and regular and contingent staff, student employees (including students in federal and other work-study programs), and applicants for employment.

II. Definitions

- A. Commercial Criminal Background Check: A criminal background check completed by a commercial entity through a review of publicly available law enforcement, court and other records, including international records as appropriate. A commercial criminal background check typically is based upon identifying information regarding the individual, but does not utilize fingerprints.
- B. Criminal Justice Information System (CJIS) Record History: A criminal background check completed by the Maryland Department of Public Safety and Correctional Services of all criminal history information regarding an individual maintained by the CJIS Central Repository, consistent with the requirements of the Maryland Annotated Code (Md. Code Ann.), Criminal Procedure Article , Sections 10-201 et seq. A CJIS record history is based upon national and state criminal history records and uses an individual's fingerprints and other identifying information.
- C. Minor: An individual under the age of 18.
- D. Permissive Criminal Background Check: A commercial criminal background check or CJIS Record History that is not required by law, but is permitted at an institution's discretion.
- E. Program Involving Minors: For the purposes of this policy, a program or event hosted by or closely associated with the institution in which:
 - 1. The program's purpose is to provide benefit, service or activity to or for minors;
 - 2. Institution personnel have significant roles or regular contact with minors; and
 - 3. Not including spontaneous gatherings, single social events or academic courses open to and attended by both minors and adults.

III. Acquisition of Criminal Background Records

- A. Mandatory Criminal Background Checks. Under state and federal law, institutions are required to obtain and review pre-employment CJIS criminal background checks for their employees under the following circumstances:
 - 1. Certain Programs Involving Minors. Institutions must require pre-employment CJIS Record History checks of employees of certain programs involving minors operated by the

institutions, as required by Md. Code Ann., Family Law, Section 5-561, including, but not limited to:

- a. Child care centers;
 - b. Public primary and secondary school programs;
 - c. Recreation centers or programs primarily serving minors; and
 - d. Day or residential camps, as defined in COMAR Title 10, Subtitle 16, primarily serving minors.
2. Other Activities Requiring Background Checks for Institution Employees. In addition to the programs described in Section III.A.1, above, institutions are required to obtain and review pre-employment CJIS Record History checks for certain individuals employed in the following circumstances:
- a. Programs Serving Adult Dependent Populations. Under federal and state law (42 U.S.C.A. Section 12645(g) and Md. Code Ann., Health-General, Section 19-902), a CJIS Record History check is required for employees who work in adult dependent care programs. Examples include programs serving the elderly and dependent adults and adult dependent individuals with disabilities.
 - b. Employment in the Transportation of Hazardous Materials. CJIS Record History checks are required for all employees who have a commercial driver's license with a State-issued hazardous materials endorsement, consistent with federal and state law, including 49 U.S.C.A. Section 5103a and Md. Code Ann., Transp. Article, Section 16-815.

B. Permissive Criminal Background Checks

1. In addition to the circumstances under which an institution must obtain and review a criminal background check, described in section III.A, above, institutions also have the discretion to require background checks of other employees, applicants, and institution volunteers.
2. Each institution shall have standards and processes for guiding the acquisition of permissive criminal background checks.
3. An institution may elect to obtain criminal background checks with respect to any position. Examples include:
 - a. Employees in facilities and programs other than those for which such background checks are mandatory, if the employee's duties involve contact with minors,
 - b. Institution volunteers who have access to minors in institution activities and programs, and
 - c. Employees with:
 - i. Financial responsibilities, including access to cash and authority to expend institution resources;
 - ii. Access to controlled substances; or
 - iii. Other sensitive job duties.

4. Prohibited Actions. An institution may not inquire into the criminal background of an applicant for employment until after the institution provides the applicant an opportunity for an interview. Md. Code Ann., State Personnel and Pensions Article, Section 2-203.

IV. Proper Use of Criminal Background Checks

- A. Criminal Background Check Considerations. An institution's use of background checks in making employment decisions must be tailored to meet legitimate business needs, taking into consideration at least:
 1. The nature and extent of the employee's past criminal activities;
 2. The time elapsed since the activities took place; and
 3. The nature, duties and functions of the job.
- B. Nondiscrimination. The use of criminal background checks in an institution's employment decisions must be impartial, with no difference in their acquisition or use based on race, sex, religion, ethnicity, sexual orientation, gender identity, or other factors that might promote or imply discriminatory practice.
 1. Even a neutral policy or practice regarding background checks that has the potential to have a disparate impact on a class of individuals must be:
 - a. Related to specific job duties, and
 - b. Consistent with business necessity.
 2. No employee may be excluded from employment based upon generalized institution policies or practices regarding the use of criminal background checks without an individual assessment that includes the factors described in this section.
- C. Arrest Records. An institution may not deny employment to an applicant based solely on a record of arrest in the absence of a conviction, other criminal penalty or substantiation of facts underlying the arrest which relate to the applicant's fitness to perform the duties of the job.
- D. Commercial Background Checks. If an institution denies employment based upon background check information provided by a commercial vendor that qualifies as a Consumer Reporting Agency (CRA) under the federal Fair Credit Reporting Act, the institution shall:
 1. Notify the applicant/employee in writing, and
 2. Provide the applicant/ employee with a copy of the FCRA's report and a summary of the individuals FCRA rights.

V. Contracts with Vendors that Operate Programs for Minors

- A. Mandatory Background Checks. Institution contracts with vendors that operate camps, recreational or educational programs, child care centers or other services to minors on campus must require the vendor's compliance with mandatory background check requirements of this policy and state and federal law.
- B. Permissive Background Checks. Such contracts may also require commercial criminal background checks as appropriate to protect the interests of the institution and the individuals served by the institution, consistent with the requirements of his policy.

VI. Institution Responsibilities. No later than January 1, 2017, each institution shall:

- A. Develop standards and procedures for the acquisition and use of criminal background checks, consistent with this policy;
- B. Develop procedures for maintaining confidential records of background check results, consistent with applicable federal and state legal requirements;
- C. Provide training to employees who interview and hire employees regarding the appropriate methods for acquiring, using and maintaining background check information; and
- D. Establish a process by which an individual denied employment or other opportunity at the institution due to the results of a criminal background check may contest the accuracy of the records upon which the denial was based.

Note: This policy should be cross-referenced with the following other USM Policies:

- VI - 1.50 - Policy on the Reporting of Suspected Child Abuse and Neglect
- VII - 1.01 - Policy on Recruitment and Selection
- VII - 1.24 - Policy on Termination with Prejudice