



This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

Background Screening for Employees and Volunteers

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Given the risks to safety, possible liability, and the potential damage to the employer of hiring a dishonest, unreliable, unqualified or even dangerous individual, a nonprofit organization should always perform some type of background investigation before hiring an employee and, in some cases, before engaging a volunteer. For some positions, it may be sufficient to check the work history and references of any prospect. For others, it may be necessary to check criminal records, driving records and/or credit history. This article provides guidance on “best practices” for performing background screening.

Note that employers can be held liable for discriminatory hiring practices, and for their employees’ actions if they fail to conduct a reasonable investigation into prospective employees’ backgrounds. In order to minimize liability, employers should consider taking the following steps before engaging an employee or volunteer:

1. Properly Draft Job Applications

Job applications should be drafted so that the objective qualifications for the job are revealed from the information provided by the applicant. To acquire this information, applications should require:

- the full name(s) of the applicant;
- addresses for the past ten years (in order to accomplish the appropriate background check);
- emergency contact information;
- Social Security number;
- detailed employment history;
- position for which the applicant is applying;
- availability to work (schedule, attendance issues, whether the individual can perform the necessary functions of the job “with or

without a reasonable accommodation”¹);

- a criminal conviction inquiry (however, the application should not request information that has been sealed or expunged pursuant to court order or “first offender” status. In addition, the application should reflect that a “yes” answer will not necessarily exclude the applicant from being hired);
- a driving record (if appropriate for the job type);
- educational information (however, the application *should not* request dates of high school graduation in order to avoid age-related claims);
- and references (both personal and employment-related).

2. Avoid Interview Questions That Could Trigger Discrimination Claims

An interviewer can and cannot ask prospective employees certain questions when considering them for employment. Likewise, employers conducting reference checks or background investigations must be careful not to go beyond these limits. Some of these restrictions protect individual privacy, while others are meant to prevent discrimination in the hiring process. These restrictions do not only apply to executives making final hiring decisions, but also to each person interviewing a job candidate or contacting references or other information sources concerning applicants. As a general rule of thumb, interview questions should concentrate on the applicant’s ability to successfully perform the job duties fundamental to the position being filled. Below are a few examples of “permissible questions” that employers should keep in mind when interviewing prospective employees or conducting reference checks or background investigations.

Permissible:

¹ A “reasonable accommodation” is any change in the work environment or in the way a job is performed that enables a person with a disability to enjoy equal employment opportunities. Although many individuals with disabilities can apply for and perform jobs without any reasonable accommodations, workplace barriers may keep others from performing jobs which they could do with some form of accommodation. These barriers may be physical obstacles (such as inaccessible facilities or equipment), or they may be procedures or rules (such as rules concerning when work is performed, when breaks are taken, or how job tasks are performed). Reasonable accommodation removes workplace barriers for individuals with disabilities.

- “Have you ever been convicted of a criminal offense?” (Do not include convictions that were sealed, eradicated or expunged, or convictions that resulted in referral to a diversion program. Note: Convictions may not necessarily disqualify a prospective candidate from employment. Factors such as the age and time of the offense, the seriousness and nature of the violation, and rehabilitation should be considered when making any employment decisions.)
- “Are there any criminal charges currently pending against you?”
- “Has a court, jury or government agency ever made a finding you committed unlawful harassment or discrimination?”
- “Do you currently use illegal drugs?”
- “Have you recently used illegal drugs?”

Not Permissible:

- Any question regarding criminal records that have been sealed, eradicated or expunged.
- “Have you ever had a bankruptcy?”
- “Have you ever sued or filed claims or complaints against your employer?”
- “Have you ever been a plaintiff in a lawsuit?”
- “Have you been addicted to illegal drugs in the past?”
- Questions about use of prescription drugs or frequency of alcohol use.

3. Background Checks Do Not Have to Be “One Size Fits All,” But Must Non-Discriminatory

An employer need not perform exactly the same background check on every applicant, provided that any difference in the investigation is based on legitimate business interests and an investigation policy that reasonably attempts to further those interests. For example, an employer may more stringently investigate the backgrounds of prospective employees who have applied for positions that will handle confidential information or financial data. However, employers must avoid any disparate treatment that could violate discrimination laws (note that an employer could be held liable for unlawful discrimination if its investigation policy results in unequal treatment or impact as to protected categories such as race, national origin, gender, pregnancy, sexual orientation, marital status, physical or mental disabilities, age, political activities, bankruptcy, or other legally protected categories or activities).

4. Obtain Written Consent to Perform Background Checks

Employers should always request every applicant's written consent to their investigation of employment, educational, reference, licensing and public records information, as well as to the release of such information to the employer by third parties.

5. Review Criminal Records, if Necessary

In Georgia, an employer may obtain the criminal history of an individual from the Georgia Crime Information Center (among other sources). To obtain access to these records, the employer must submit the individual's fingerprints or a signed consent of the individual to obtain the records on a form prescribed by the Center which shall include such person's full name, address, social security number, and date of birth. If an employer obtains an individual's criminal records from the Georgia Crime Information Center and decides not to hire the individual, or makes any adverse employment determination based on the records, the employer is required by law to disclose to the individual that a record was obtained from the Center. The disclosure must include the specific contents of the record and a statement regarding how the information affected the employment decision.

In general, criminal background checks should be conducted for most applicants to avoid claims that employers have hired employees negligently. In particular, employees who work in positions caring for children, the disabled, or seniors should undergo criminal background checks. In fact, certain employers in Georgia are required to obtain a criminal records check of their employees. No facility operated as a day care center, group day care home, family daycare home, or childcare institution may employ an individual until that individual has provided the facility with a satisfactory "preliminary" records check indicating that the individual has no criminal record. A "preliminary criminal records check" is an initial review, often conducted by an outside vendor, of an applicant's criminal record. If the preliminary records check for any potential employee reveals a criminal record of any kind, then that potential employee is not allowed to begin working until the potential employee has either: (1) obtained satisfactory state and national fingerprint records check determinations; or (2) had the unsatisfactory preliminary or fingerprint records check determination reversed

Note that if and when a criminal conviction is discovered, a fact-specific analysis of job requirements should be applied. As an example, an employer may wish to still hire an applicant with a twenty year old conviction for public intoxication for a position as a store clerk. However, an employer would likely not choose to hire an employee who has been convicted of a home invasion as an outside salesperson.

The *Georgia First-Offender Statute* authorizes a court to place on probation a criminal defendant who pleads guilty "without entering a judgment of

guilt.” Upon fulfillment of the terms of probation, the defendant is *discharged*, which means that the defendant “shall not be considered to have a criminal conviction.” The First-Offender Statute provides that a discharge is not a criminal conviction and “may not be used to disqualify a person in any application for employment or appointment to office in either the public or private sector.” However, where the crime is one of a sexual nature against children, discharge under the First Offender statute may be used to disqualify persons from employment in the following sectors: (1) public schools; (2) private schools; (3) child welfare agencies; and (4) daycare centers (including individuals who provide childcare services in their homes). Discharge under the First Offender Statute also may be used to disqualify a person for employment for the care of the elderly where the discharged crime was one of a sexual nature. Additionally, persons applying for employment with a mental health facility may be disqualified from employment even if they have been discharged under the First Offender statute where the discharge was for a crime of a sexual nature.

6. Understand the Fair Credit Reporting Act

The Fair Credit Reporting Act (“FCRA”) imposes reporting and disclosure requirements for consumer report users (including specific requirements for employment-related users) and consumer reporting agencies. Pre-employment reports such as credit reports, criminal record reports, and department of motor vehicle reports are subject to the provisions of the FCRA, as well as any consumer reports used for employment purposes. Any employer who wishes to use a consumer report for employment purposes is covered by the FCRA. Note that even independent contractors may be considered “employees” for purposes of the FCRA. Common examples of consumer reports include department of motor vehicle records checks, criminal background checks, and credit history checks, when this information is obtained from an outside agency.

Employers must be aware that there are specific FCRA rules that apply to background checks conducted by third parties. The employer must present the applicant with a clear, written disclosure that the employer may obtain a consumer report and use it to make future employment determinations. The disclosure must be in a separate document. The employer must further secure the applicant’s written authorization to obtain such a report. This authorization should be prospective so that it covers both the application process *and* the entire term of the individual’s employment. If the results of the consumer report convince the employer to take any type of “adverse action,” such as refusing to hire the applicant, the employer must provide the applicant a copy of the consumer report and written notice of the applicant’s rights under the FCRA. Any adverse action by an employer as a result of information gleaned from a consumer report requires the employer to take the following steps:

- notify the applicant of the adverse action;

- give the applicant the name and contact information of the consumer reporting agency used;
- inform the applicant that the consumer reporting agency did not make the decision to take the adverse action against the applicant;
- notify the applicant that they have a right to dispute with the consumer reporting agency the accuracy or completeness of information contained in the report; and
- notify the applicant that they may obtain a free report from the consumer reporting agency if such request is made within 60 days.

7. Generally Take Fingerprints & Photographs Only Post-Offer

While Georgia does not prohibit an employer from requiring applicants to furnish photographs or fingerprints as a condition of employment, these should not be obtained until *after* a hiring decision has been made. Requiring pre-offer submissions of fingerprints or photographs creates the potential for use in impermissibly screening out minority, disabled or older applicants. In addition, note that Georgia requires certain employers to fingerprint their employees, including daycare centers, group daycare homes, and childcare institutions. [but they can rescind offer if fingerprint check turns up criminal record, right?]

8. Use Caution When Conducting Physical Examinations, Including Drug Testing

Although Georgia does not regulate physical examinations, the Americans with Disabilities Act of 1990 (“ADA”) prohibits an employer from requiring medical examinations or making medical inquiries *before* a conditional offer of employment is extended to an applicant. An employer may, however, condition a job offer on the satisfactory result of a post-offer physical examination or inquiry, which may include substance abuse testing, if the examination is required of all employees in the same job category. With respect to an applicant/employee’s privacy concerns, the ADA imposes very strict limitations on an employer’s use of information obtained from such examinations and inquiries.

After an applicant receives an offer of employment, an employer may require the post-offer applicant to undergo testing for the presence of illegal drugs as a condition of employment. Any applicant who refuses to submit to a substance abuse test or who has a confirmed positive test may be denied employment, and conditional offers of employment may be withdrawn if the applicant cannot pass this test. However, in Georgia, such examinations should generally be limited to urine or hair samples tests (and not blood tests). In addition, any information obtained from a drug test about an individual’s medical condition must be treated as a confidential medical record.

Note that under the Genetic Information Nondiscrimination Act of 2008 (“GINA”), an employer should not request any information that includes an

applicant's family medical history, the results of the applicant's or applicant's families genetic tests, or other genetic information.

9. Polygraph Testing Is Not Allowed

Georgia does not currently regulate the use of polygraph testing. However, the federal Employee Polygraph Protection Act of 1988 ("EPPA") prevents private employers from polygraph testing. Essentially, the EPPA ends the employer practice of directly or indirectly requesting or requiring applicants or employees to take or submit to a lie-detector test except in limited circumstances.

Because federal law has virtually ended the use of polygraph tests, some employers have begun to use other methods to test prospective employees, including written honesty tests. These paper-and-pencil examinations attempt to assess the honesty of an applicant by measuring the applicant's self-perception of honesty through a series of questions directed at attitudes toward theft and personal experiences with dishonesty. As it stands now, Georgia does not prohibit or regulate the use of these examinations. Georgia employers must nevertheless review such tests carefully with a view toward protecting employee privacy interests. Any such tests should clearly be validated under stringent EEOC [this term hasn't been defined – can we get around using the term?] standards to avoid claims that such tests impose an unlawful disparate impact on protected groups.

10. If Negative Information Is Revealed, Be Consistent In Hiring

Finally, if results of a background investigation uncover negative information, employers need to remember to be consistent in their hiring decisions. For example, if one applicant for a particular job is hired despite a criminal conviction, past or future applicants for similar positions could allege unlawful discrimination if their applications were rejected based on the same type of conviction.