Can You Refuse To Hire A Felon?

Insights
3.01.12

(Hospitality Update, No. 1, March 2012)

Imagine you are a hotelier hiring for a sensitive position – perhaps a night auditor or purchasing clerk. Your practice is to conduct criminal-background checks on all applicants, since almost all of your employees will have some access to your guests and their property. During an initial phone interview the applicant reveals a significant criminal conviction. He tells you that he was recently convicted of a felony involving distribution of narcotics, served a short sentence and is currently on probation.

You decide to reject the applicant. You base your decision on two things – the recent timing of the conviction and the nature of the offense. A night auditor will have access to cash, guest credit card information and keys to guest rooms. A purchasing clerk will have ready access to hundreds, if not thousands, of dollars of merchandise and supplies. You reason that if the individual was willing to sell narcotics to make a buck, he is too high a risk to put in close proximity to your and your guests' money and possessions.

Not surprisingly, an acceptable criminal background is a qualification required by many hospitality employers. The risk of a lawsuit for negligence by a guest, visitor or co-worker if you hire an individual with a serious criminal record, who then does harm, is too high not to take reasonable preventive steps, such as a criminal-background check.

But in our hypothetical case, the applicant filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging race discrimination. The hotel's defense is obvious. First, since you conducted only a phone interview you did not know the applicant's race. Second, the decision not to hire the applicant was based on a legitimate business reason. Unfortunately, the EEOC decided to expand the scope of its inquiry and undertook an investigation aimed at the hotel's *entire* hiring practices including its use of criminal-background checks – what the EEOC refers to as a "systemic investigation."

The EEOC's E-RACE Initiative

The EEOC has historically taken the position that an employer's policy or practice of excluding individuals from employment because they have criminal conviction records is unlawful under Title VII of the Civil Rights Act of 1964 unless the policy or practice is justified by a business necessity.

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The EEOC's position is based on statistics showing that African-Americans and Hispanics are convicted at a rate disproportionately greater than their representation in the population which, in the EEOC's view, means that employment decisions based on criminal conviction records have an adverse impact on African-Americans and Hispanics. "Adverse impact discrimination" is defined as a "substantially different rate of selection in hiring, promotion, or other employment decision which works to the disadvantage of members of a race, sex, or ethnic group."

If an employer's criminal-conviction policy has a disparate impact on minorities, then the policy likely violates Title VII ... unless the employer can demonstrate that the policy is job-related and consistent with business necessity. According to the EEOC, an employer making an employment decision based on a criminal conviction must consider the following three factors to meet this burden: 1) the nature and gravity of the offense; 2) the time that has passed since the conviction or completion of the sentence; and 3) the nature of the job held or sought.

The EEOC has recently shown renewed interest in background-check policies, and employers in the hospitality industry have found themselves the target of some of these systemic investigations. This is all part of the EEOC's E-RACE (Eradicating Racism and Colorism from Employment) Initiative, a program dedicated to strengthening the "EEOC's efforts to ensure workplaces are free of race and color discrimination." One of the EEOC's specific goals for the E-RACE initiative is to develop strategies for addressing "21st Century manifestations of discrimination," which the EEOC identifies as including arrest and conviction records, as well as other pre-employment hiring practices.

And the EEOC is serious about this initiative. Recently, Pepsi Beverages agreed to pay $3.13 million, and provide job offers and training to settle a case filed by the EEOC. The EEOC's investigation revealed that over 300 African-American applicants were adversely affected by Pepsi's criminal-background policy. Under Pepsi's former policy, applicants were denied employment if they had pending arrests, even if they had no convictions. Applicants with certain minor convictions were also denied employment. The EEOC found Pepsi's policy unlawful because it denied employment based on records which the agency determined were not relevant to the jobs.

State Law Issues

Both the EEOC and the federal Fair Credit Reporting Act (FCRA) set forth the legal framework for the use of criminal records. Many state laws place limitations on the use of both arrest and conviction records for employment purposes. These laws range from restricting an employer from asking about arrest records at all to limiting the use of conviction records in making employment decisions.

For example, under California law, employers may not ask applicants to disclose arrests that did not result in conviction and may not seek such information from other sources. New York law allows employers to consider criminal convictions only if the conviction bears a direct relationship to the job, would create an unreasonable risk to property or to the safety and welfare of the individual or the general public, or is related to the state's regulation of child-care facilities. Another example is

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Massachusetts, where employers are prohibited from asking about any misdemeanor convictions occurring five or more years before the application for employment.

A Safer Approach

All employers, but especially those in the hospitality industry, that use criminal-background checks extensively to protect their guests and property should carefully review their current policies. Be certain to consider the state law limits and assure that the credit reporting agency you use is in full compliance with the FCRA and state laws. Your policy should take into consideration the nature and gravity of the applicant's offense, the time that has passed since the conviction or completion of the sentence, and the nature of the job for which you are hiring.

Do not adopt or maintain a blanket policy or practice where you will not hire anyone with a criminal record – felony or misdemeanor. And be prepared to explain your decision not to hire any applicant because of the applicant's criminal record. In light of the EEOC's focus on these criminal-background checks in hiring decisions, hospitality employers must strike a balance – protecting your guests, customers and employees and maintaining a meaningful and legally defensible criminal-background -check policy.

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