

CAN YOU STILL CONSIDER AN APPLICANT'S CRIMINAL RECORD?

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Some of our dealership clients are confused about whether or not it is still permissible to check an applicant's criminal record. The confusion is due in part to the publicity concerning recently passed state and municipal laws which restrict the right of some employers to check an applicant's criminal record, and partially due to the EEOC's recently issued "Enforcement Guidance" on the topic.

LET'S CLARIFY SOME THINGS

First, more than 40 cities, a handful of counties, and at least two states have passed laws which limit an employer's right to consider an applicant's criminal record when making a hiring decision. This is all part of the "ban the box" movement, named for its expressed goal of requiring employers to eliminate the box on their applications where the applicant must answer the question "Have you ever been convicted of a crime?" Proponents of the movement believe that it is unfair for an employer to exclude any applicant from consideration just because he or she has a criminal record and therefore employers should not be allowed to use such records.

Fortunately, most of these laws apply only to public employers and therefore would not apply to private employers, like dealerships. But a few of them do restrict private employers in the way in which they may *use* criminal records.

For example, some laws provide that a private employer may not check or discuss an applicant's criminal record until after the first interview or until it makes an actual job offer. These laws apparently presume that if an employer "gets to know" the applicant in the interview, it may be more inclined to ignore a criminal record. Other laws provide that an employer must completely ignore certain convictions, e.g., misdemeanors over five years old.

The second source of confusion has been the EEOC's recent pronouncements in the area of criminal records. In April 2012, the EEOC issued an updated "Enforcement Guidance" which summarized the current law concerning the use of criminal records in hiring decisions as well as its "best practices" for employers.

In the Guidance, the EEOC suggested that employers should not ask broad questions about an applicant's criminal record, but instead limit questions on the application to only those convictions that would disqualify an applicant from that particular position. While this might represent the EEOC's idea of a best practice, it is not "the law" and is not binding on any employer.

It might be helpful to review how the courts have addressed cases involving the use of criminal records. After all, it is the courts, not the EEOC, that have the final say on what our laws mean. In the criminal-record context, the courts have held that using a criminal record to screen out certain applicants is a "facially neutral" policy, that is, it does not completely screen out any protected group. However, statistics show that a greater percentage of minorities have criminal records than whites. Therefore, screening applicants on the basis of their criminal record is likely to have a "disparate impact" on minorities. This then requires the employer to prove that screening out certain criminals is "job related and consistent with business necessity."

The courts tell us that in order to carry this burden, the employer must consider the following:

1. The nature and gravity of the applicant's offense or offenses;
2. The time that has passed since the offense and the completion of any prison sentence or probation; and
3. The nature of the job that the applicant is seeking.

The employer is then required to make an individualized assessment of each of these factors as they apply to the particular applicant and determine if hiring the applicant into that position might impose an unacceptable risk of harm to the employer, coworkers, or customers. If an objective analysis of these factors concludes that the applicant's history of violence or dishonesty or theft creates an unacceptable risk, the employer has established that the use of the criminal record is "job related and consistent with business necessity."

Remember, though, that if a rejected applicant files a discrimination charge claiming the rejection was because of race, the employer will have to prove to the EEOC and possibly to a jury that its analysis was *objective* and *reasonable*. If the rejected applicant was applying for a technician position and the criminal offense was a misdemeanor contempt of court for failing to make child-support payments dating

back seven years, it will be difficult to show that the applicant posed any real risk to the dealership, its employees, or its customers.

On the other hand, if the individual was applying for a porter position and has a three-year-old car theft conviction, the dealership would be able to show a significant potential risk to the dealership. So while the employer is charged with making this decision, it is always subject to review by the EEOC and the courts.

Dealerships are unique businesses with little room for any employee with a history of criminal activity. As a part of their job, every employee has access to – or can easily get access to – customer financial information, customers' home addresses and phone numbers, valuable parts and keys to every car on the lot. While a poultry-processing plant may be able to safely hire a convicted sex offender to work on the processing line, a dealership simply cannot hire such an individual as a salesperson who will have unsupervised access to female customers and their personal information. Similarly, that processing plant may be able to safely hire an applicant who has been convicted of theft of property from a previous employer, but a dealership may not want to take the risk of hiring him into its parts department.

SO WHAT ARE THE RULES FOR CHECKING CRIMINAL RECORDS?

1. ALWAYS check the laws in your city, county and state to see if they impose any restriction on how you must handle criminal record inquiries. If your state says you can't ask about criminal records until after the first interview, fine. Conduct the interview and *then* check the criminal record. Do not let some limitations on using criminal records prevent you from checking them at all.

2. ALWAYS check criminal records as aggressively and thoroughly as you can. A dealer related that a police officer had come into his dealership and noticed a new sales person. He asked the manager if the sales person worked there and the manager responded that he did. The police officer told him that the dealership did not want him working there. That prompted the dealership to check the new salesman's criminal record.

Turns out he was a serial rapist, registered "violent sexual predator," and wearing an ankle monitor! The dealership had not bothered to conduct criminal record checks because of the administrative hassle. You can bet that that dealership now checks criminal records on every new hire.

3. ALWAYS check criminal records in *all* the states where the applicant has lived or worked. Since criminal records are maintained on a state-by-state basis, it is not uncommon for convicted individuals to put some distance between themselves and the state where they were convicted in the hope that future employers will not spend the extra money necessary to turn up their record.

4. ALWAYS check an applicant's federal criminal record, at least for sales and finance managers and sales people. Identity theft, bank and mortgage fraud, many drug offenses, and other serious crimes are typically prosecuted in the federal court system. A state criminal record check will not turn them up.

5. NEVER refuse to hire an applicant because of an arrest. An arrest without a conviction does not prove any illegal conduct.

6. ALWAYS give employees an opportunity to explain the details concerning their criminal records. Official criminal records are unfortunately very cryptic and simply do not tell a layperson very much. So the best way to get a complete understanding of the offense – as the courts require – is to ask the employee to explain *in writing* the facts and circumstances leading to arrest and conviction, the specific charge, whether it was a felony or misdemeanor, exactly how the case was adjudicated, whether there was jail time, etc.

The best way to do this is to use a simple questionnaire that specifically asks each of these questions and provides ample space for answers. Using such a questionnaire will provide proof that you did, in fact, consider all the circumstances surrounding the applicant's criminal convictions and did not rely solely on what the charge was.

7. If you do not understand the difference between "nol prossed" or "nolle prosequi" and "nolo contendere," or if you do not know what "deferred prosecution" and "first offender treatment" means in your state, contact your attorney for an explanation.

8. If in doubt about any applicant, contact your Fisher Phillips attorney or an experienced employment law attorney and review all the facts.

THE BOTTOM LINE

There are a number of forces at work pushing employers to lower their hiring standards and to "take a chance" on an applicant. At the same time, a dealership can face significant liability for negligence if it hires a criminal who then injures a customer physically or just by stealing the customer's identity. As a result, a dealership must be prepared to carefully navigate the minefield between rejecting an applicant who has made a mistake but poses no real danger and hiring an applicant who does.

If you would like a sample criminal record questionnaire or a copy of the EEOC's Enforcement Guidance, let us know.

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