

ASSESSING POTENTIAL HIRES WITH A CRIMINAL RECORD: BEST PRACTICES AND LEGAL CONSIDERATIONS

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According to some studies, more than 90 percent of employers conduct criminal background checks for some job applicants and more than 70 percent of employers conduct background checks on all potential new hires.

Construction employers also may be required to perform background checks to comply with owner or general contractor requirements or state and local laws or regulations. Most employers want information about criminal behavior before bringing a candidate into their organization. Generally, the rationale for seeking this information is to prevent theft or fraud, workplace violence and potential liability for negligent hiring.

Although employers may believe they can limit their liability by refusing to hire applicants with criminal records, this solution carries its own risks. For instance, the Equal Employment Opportunity Commission (EEOC) and some states take the position that, given the disproportionate rate of minorities that are arrested and convicted of crimes, an employer's policy of disqualifying all applicants with criminal history can have a discriminatory impact on minority candidates and thereby violate Title VII's discrimination laws.

There are several best practices that employers should implement when considering who to hire and who to fire in order to prevent a discrimination lawsuit while still protecting the company from other potential liability.

Out With the Old, in With The New

Employers must rethink the wisdom of broad background check policies that are one size fits all, and instead decide whether background information is relevant, helpful and nondiscriminatory on a job-position-by-job-position basis. Employers must

consider the following when creating new policies and procedures for hiring individuals with criminal histories.

- 1. The nature of the job the candidate is seeking.** Work with leadership to determine what type of convictions are relevant to the workforce and which are not. The key here is to identify (prior to hiring candidates) what kind of criminal background information (including how many years back) the company will look for and to ensure that the same level of background check is done for every applicant for that position. As an employer makes an assessment of positions for which screening should be pursued, they should consider whether the particular position being filled is one where the nature of duties, the environment where the work is performed, or the exposure to certain types of customers or clients makes it important to know and be able to evaluate a candidate's criminal history or current financial position as part of the suitability assessment.
- 2. The amount of time that has passed since the offense.** Employers should take into account the passage of time since the offense and/or completion of the sentence. If a candidate's conviction occurred in the distant past, it may not accurately reflect that candidate's qualifications, skills or capabilities today. Employers also should consider what has occurred since the applicant's conviction (e.g., successful employment in a similar role, any evidence of rehabilitation or compelling work references).
- 3. The nature and gravity of the offense.** It is also important to consider the number, nature and gravity of the offense(s). Is the candidate a repeat offender? How old was he or she when convicted? What were the circumstances and severity of the crime, and does it have any relation to the areas of business that this individual may come in contact with?

By adopting this procedure for evaluating job applicants, employers can ensure that any background information considered in the hiring process is relevant, job-related helpful and nondiscriminatory when it is used to assess a candidate's suitability for employment.

Training and Monitoring

A policy is great, but compliance requires understanding of the reason for the change, clarity about what is now different and buy-in for new practices. Training is the best tool to move an organization forward and reduce the risk of misunderstanding or intentional non-compliance with the new policy. Advise managers and decision-makers that the old policy is being revised in favor of more precise disqualification standards.

In addition to properly training hiring managers and decision-makers about the new policy, it is critical for employers to ensure consistent implementation of the policy.

Remember, inconsistency in the selection of what type of background check each applicant gets is what often can get employers sued for discrimination. Establishing a policy and procedure to make sure each applicant for a job description gets the same background check and having a defensible job-related justification for the relevancy and need for the information for each job position is critical to defending against future discrimination claims.

In order to monitor and protect against other potential liability (including negligent hiring or workplace violence), employers should adopt and publicize a zero tolerance policy regarding threats, harassment and violence in the workplace. Additionally, employers should update their personnel policies and employee handbook to include safety policies dealing with violence in the workplace, including any type of verbal or physical harassment and any type of physical altercations.

While the use of background checks can provide employers with unique insights into who they might be hiring, incorrect use of background information can lead to a host of problems. Employers need to revise their policies and procedures to ensure they are consistent with the EEOC guidelines, while still protecting the company from other potential liability. It is critical that managers are trained on implementing and enforcing the new policies, in addition to monitoring the workforce for any safety issues that arise.

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