

## A. Introduction

An employer's use of an applicant's criminal history in making employment decisions may, in some instances, constitute employment discrimination if not handled properly by a prospective employer. Employers need to be aware of the appropriate steps that must be followed before undertaking a criminal background check on a jobseeker. Likewise, employers should also be informed the law of before they make a decision not to hire an individual based upon the information revealed through the criminal background check.

## B. Obtaining Criminal Background Checks – Initial Steps

A criminal background check is classified as a “consumer report” under the Federal Fair Credit Reporting Act (FCRA) because it has bearing on a consumer's general reputation and personal characteristics, and it is being collected in whole or in part for the purpose of serving as a factor for employment purposes. “Employment Purposes” is broadly defined under the FCRA to include a consumer report which is used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee.

Therefore as a starting point, if an employer wishes to obtain a consumer report (which includes criminal background information) for employment purposes, the employer must make certain certifications to the consumer reporting agency that will be providing the background report. Generally, the certifications include that they have complied with the provisions of the FCRA, including specifically a certification that the employer has:

1. Provided a clear and conspicuous disclosure, made in writing to the prospective employee, in a stand-alone document, that a consumer report may be obtained for employment purposes; and
2. The consumer has authorized in writing the procurement of the report by the employer.

Therefore, employers should always provide a clear and conspicuous disclosure, made in writing, in a stand-alone document, that they will be obtaining a consumer

report which may contain criminal history background information, and have that document signed by the jobseeker prior to obtaining the report.

Another certification that must be made by the employer to the consumer reporting agency is that the employer will comply with the conditions on the use of the report if they choose to take an adverse action based upon information contained in the report. An “Adverse Action” is defined in the FCRA as a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

If an employer intends to take adverse action against a jobseeker based upon information found in the background check, then the employer must first provide a copy of the report to the job seeker as well as a written description of the rights the consumer has under the Federal Fair Credit Reporting Act. A copy of the rights of consumers under the FCRA, commonly called the “Summary of Rights” can be found online here: <http://www.ftc.gov/sites/default/files/documents/one-stops/credit-reporting/pdf-0096-fair-credit-reporting-act.pdf>

It is important to remember that these steps must be followed before the employer ever intends to review or use a criminal background check in the hiring process. However, even if an employer correctly follows these steps, they may still find themselves in trouble if they do not have a uniform method for applying the use of criminal background information in the hiring process.

## C. Hiring Process and EEOC Discrimination

It is not illegal for an employer to ask a job applicant about his or her criminal history, and it is not illegal for an employer to use that information to make a decision not to hire an individual as long as they follow the procedure outlined above. However, employers must also make certain that they are applying this procedure uniformly during the hiring process, as improper use of the information can potentially result in lawsuits. There are certain guidelines that every employer should follow when collecting this information during the hiring process (in addition to following all of the FCRA rules discussed above).

First, if an employer elects to request criminal history information from an applicant, it must be done in a uniform and consistent manner for all applicants. If an employer demonstrates inconsistencies in the hiring process by only requesting criminal history information from one group or class of applicants and not others, then it creates the possibility of disparate treatment among the job candidates. Likewise, if an employer provides an applicant with an opportunity to explain his or her criminal history, then the employer must also afford the same uniform opportunity to the other applicants with criminal history.

Second, an employer should never automatically exclude an applicant from a position simply because they have any type of prior criminal conviction. An employer must demonstrate that the exclusion is warranted because the conviction is “job related for the position for which they have applied” and that their exclusion based upon their criminal record would be “consistent with business necessity.”

For example, a children's pre-school could justifiably exclude an applicant for a teacher position if they have a prior conviction for injury to a child; a doctor's office could legally exclude an applicant from a job as a medical records custodian if they have a prior conviction for identity theft; or a bank could legally exclude an applicant for a teller position who has a prior conviction for embezzlement. However, an applicant should not be automatically excluded from consideration for a position if the prior conviction has no bearing on the essential requirements of the job.

Third, if an applicant does have a prior conviction that is job related and relates to a business necessity, the employer should first take into consideration the following factors before deciding whether to exclude an applicant from a job:

1. The nature and gravity of the offense or the underlying conduct,
2. The amount of time that has passed since the offense was committed or the sentence was completed, and
3. The nature of the job held or sought.

## Arrests Versus Convictions

Employers should be very cautious about relying on information about an arrest when making hiring decisions. Criminal databases often contain incomplete or inaccurate data, and the existence of an arrest does not establish that a crime has occurred. Further, the courts have held that excluding an applicant solely because of an arrest, and not a conviction, is not job related and consistent with business necessity. However, an employer may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question.

In contrast, a conviction record will typically serve as sufficient evidence that a person engaged in particular conduct. However, there still may be circumstances where an employer may not want to rely on the conviction alone when making a hiring decision.

## D. Removal of Criminal History Box from Applications

Nationally, there has been a significant push to eliminate the criminal history question from job applications. This is often called the “ban the box movement.” California, Minnesota, Nebraska, and Delaware have all passed legislation that either bans or limits the use of the criminal history question on applications for public and private positions, and some nationwide employers have recently joined in the trend. For example, Target and Walmart have both removed the criminal history box entirely from their job applications. Many of these employers still conduct background checks on the applicants; however the information comes up later in the hiring process after the applicants have had a chance for an initial interview. Many employers have seen an overall increase in the number of qualified applications from candidates once the criminal history question was removed.

## E. Drug Testing of Potential Employees

Under State and Federal law, a private employer is permitted to test job applicants for drug and alcohol use as long as the test is a standard part of the application process. A drug test is not considered to be a medical examination under the Americans with Disabilities Act

(ADA), and therefore may be administered at any point in the hiring process. However, an employer must treat all applicants for the same job in a similar manner and should not engage in selective drug testing of applicants and certainly should not discriminate and require drug testing of members of a certain race or national origin and not other. If an employer only drug tests the job applicants who have criminal records, then the employer may expose themselves to discrimination claims and EEOC violations for the same disparate impact discrimination discussed above.

## F. Benefits of Hiring Employees with Records

There are many success stories of rehabilitated offenders who have been given employment opportunities by employers and have turned out to be committed, valuable employees.

### Beneficial Tax Incentives

The Work Opportunity Tax Credit (WOTC) is a federal income tax credit that provides incentives to private for-profit employers and encourages the hiring of individuals from certain targeted groups of jobseekers, who traditionally have difficulty finding employment. This group includes convicted felons, veterans, and certain disabled and low-income individuals. With this credit, an employer can reduce their federal income tax liability up to \$9,600 during the first year of the qualified employee's employment. There is no limit to the number of qualified employees for which an employer may receive this tax credit.

To apply for this credit, an employer must submit IRS Form 885 and US Department of Labor ETA Form 9061 to the Texas Workforce Commission (or the respective state workforce agency if outside the State of Texas) within 28 days of the employee's employment start date.

Note: The federal legislative authority for the WOTC target groups expired on December 31, 2013, and is currently undergoing an authorization lapse. Therefore, this tax credit is temporarily unavailable. However, employers may still submit applications for qualified employees with the Texas Workforce Commission, pending legislative action by congress. For more

information, contact the Texas Workforce Commission at 800-695-6879.

### Vocational Training

Many ex-offenders are taught a variety of vocational and trade skills while incarcerated, which may provide added value to an employer.

### More Likely to Become Long-Term Employees

Many employees are willing leave their employment once a better offer arrives. However, many ex-offenders are hungry for work and extremely grateful and loyal when given the opportunity for a meaningful job. Consequently, ex-offenders are much more likely to stay with your company and become long term employees.

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