

Criminal and Arrest Records in Employment Background Checks

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Most employers conduct criminal background checks, citing legal requirements along with concerns about negligent hiring liability, theft and workplace violence as reasons for doing so. Criminal background checks can provide an employer additional information about an applicant (or employee), or verify information already provided by the individual. However, when considering and evaluating the weight given to criminal background investigations, employers must balance provision of a safe environment for all employees and customers against systematic exclusion of a significant swath of the population which could result in disparate impact discrimination.

Legal Landscape

While no law clearly prohibits a private employer from asking applicants or employees about arrest or conviction records, the EEOC has long espoused the dangers of criminal background check policies that rely on such records in making selection decisions. Both the [EEOC](#) and the Oregon Bureau of Labor and Industries have issued cautionary statements and suggested guidance on how to deal with criminal background information. The agencies have essentially stated that when an employer uses an arrest or conviction record (or both) as an absolute measure, as a determinative bar, to prevent an applicant (or current employee) from being hired or promoted, thereby limiting employment opportunities to a protected group, that practice will likely be deemed discriminatory.

Importance to Employers

In January 2012, the EEOC announced a \$3.13 million settlement with Pepsi based on its finding that its former criminal background check policy violated Title VII of the Civil Rights Act of 1964. Under Pepsi's policy, a job applicant would not be hired for permanent employment if the person had been arrested and prosecution was pending – even if the individual had never been convicted of any offense. The policy also excluded applicants who had been arrested or convicted of certain minor offenses. The EEOC found that the policy was discriminatory on its face, and as it was applied, it disproportionately excluded African-American applicants from permanent employment.

For some positions, it is wise, prudent and consistent with the job position, to screen out employees who have certain criminal backgrounds – namely when working with children, elderly, and when working with a company's finances. However, a broad use of arrest or conviction records can lead to a pattern of discrimination based on race or national origin.

Statistically, more African Americans and Hispanic men will serve prison sentences than White men. As developed in the EEOC enforcement guidance, nationally, African Americans and Hispanics are arrested in numbers disproportionate to their representation in the general population. In 2010, 28% of all arrests were of African Americans, even though African Americans only comprised approximately 14% of the general population. In 2008, Hispanics were arrested for federal drug charges at a rate of approximately three times their proportion of the general population. Furthermore, African Americans and Hispanics were more likely than Whites to be arrested, convicted, or sentenced for drug offenses even though their rate of drug use is similar to the rate of drug use for Whites.

On April 25, 2012, the EEOC issued extensive guidelines for employers in considering the criminal history of a job applicant or employee in a document titled “[Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#).” The guidance clarifies and updates the EEOC’s longstanding policy concerning the use of arrest and conviction records in employment, and outlined best practices.

When evaluating a criminal background report, the EEOC cites the most important considerations to be the nature and gravity of the offense, the time that has lapsed since the offense and the nature of the job. Consider the nature and seriousness of the offense. Not every conviction translates automatically into labeling an individual unfit or unable to perform the duties of all jobs. Consider the offense in relation to what the individual would be doing for the company. Examine how long ago the offense occurred and what has happened in the person’s life since the offense.

Arrest Records vs. Conviction Records

In the Guidelines, the EEOC also addressed the differences between arrest and conviction records. The EEOC guidelines discuss that the existence of an arrest does not establish that criminal conduct has occurred, and that an outright exclusion from employment is not necessarily job related nor consistent with business necessity. An employer, however, may make an employment decision based on the conduct underlying an arrest if the conduct makes the individual unfit for the position in question. For example, an arrest for theft, robbery, or forgery arguably may render an applicant unfit for a bookkeeping position.

In Oregon, employers are well advised to follow the EEOC Guidelines. In Washington, employers are cautioned to carefully inquire about convictions limited to the last 10 years, and these inquiries must reasonably tie to job duties of the particular position

Best Practices

Eliminate policies or practices that exclude people from employment based on any criminal record.

Develop a narrowly tailored written policy and procedure for screening applicants and employees for criminal conduct.

Identify essential job requirements and the actual circumstances under which the jobs are performed.

Determine the duration of exclusions for criminal conduct based on all available evidence. Document the justification for the criminal and arrest record policy and procedures.

Train managers, hiring officials, and decision makers about Title VII and its prohibition on employment discrimination.

Include an individualized assessment based upon a review of the applicant's information.

***DISCLAIMER** This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, please contact Lisa Amato at Wyse Kadish LLP, 503.228.8448, or laa@wysekadish.com*

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