



INSTITUTE

INFORM. CONNECT. SHARE.

Risky Business: Considering Criminal Conviction Records in Employment

APRIL 5, 2017

Benefits of Background Checks

Reduce Risk

- Bad actors/characters
- Accidents waiting to happen
- Negligent hiring

Promote/Establish

- Longevity of employment
- Qualifications for position
- Reduce hiring administration

Why is considering criminal record information so risky?

- EEOC- disparate treatment, disparate impact, arrest records
- Ban the Box claims
- Negligent hiring lawsuits
- Protected class discrimination claims, i.e. NY Corrections Law
- Class action FCRA lawsuits

Criminal Background Checks: EEOC Guidance

The EEOC enforces Title VII, prohibiting discrimination based on race, color, religion, sex or national origin. Criminal history inquiries are generally allowed with the following restrictions:

- Disparate treatment
- Disparate impact
- Arrest records
 - Green Factors
 - Nature and gravity of the offense or conduct
 - Time that has passed since the offense or conduct
 - Nature of the job held or sought
 - Individualized assessment
 - Facts surrounding offense, evidence of inaccuracies, age, number of offenses, character references, length of prior employment, rehabilitation effort

Criminal Background Checks: EEOC Best Practices

1. Eliminate policies and procedures that exclude people based on criminal record or arrest record
2. Develop a narrowly tailored policy for screening applicants and employees for criminal conduct
3. Limit inquiry to records for which offense is job-related for the specific position
4. Maintain confidentiality

Our recommendations:

1. Individualized assessment
2. Documentation
3. Limited to decision-makers
4. Consistent policy for desired decision points

Risky Business: Considering Criminal Records in Employment

Ban-the-Box

“Have you ever been convicted of a crime or pled guilty or no contest to a crime? If “yes,” please provide the name of the offense/violation, the date of the conviction and the court.”

- States: Connecticut, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon, Rhode Island, Vermont
- Local jurisdictions: Buffalo, Rochester, New York City, (Syracuse has limited Ban-the-Box laws)

Negligent Hiring

Claim arises when an employer places an employee in a position to cause foreseeable harm, which would have been avoided had the employer taken reasonable care in supervising or retaining the employee.

- Employer knew or should have known of the employee's propensity for the conduct that caused the injury
- Often comes up in the context of criminal convictions
- Recommendation:
 - Evaluate the conduct involved, not just conviction
 - Tie analysis to specific job, not just general employer
 - Document your analysis!

Risky Business: Considering Criminal Records in Employment

New York Corrections Law

An employer may not deny employment or take adverse employment action due to a previous conviction unless:

1. There is a direct relationship between one or more of the previous criminal offenses and the specific employment sought or held by the individual; or
2. The hiring or continued employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Article 23-A is enforced by the New York Division of Human Rights under the New York Human Rights Law

8- Factor Analysis

To determine whether there is a direct relationship and/or unreasonable risk, Article 23-A requires employers to consider the following eight factors:

1. Public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses;
2. Specific duties and responsibilities necessarily related to the employment sought or held;
3. Bearing, if any, the criminal offense(s) for which the person was previously convicted will have on the individual's fitness or ability to perform one or more such duties or responsibilities;
4. Time that has lapsed since the occurrence of the criminal offense(s);

8-Factor Analysis (continued)

5. Age of the person at the time of the occurrence of the criminal offense(s);
6. Seriousness of the offense(s);
7. Any information produced by the person (or on the person's behalf) in regard to rehabilitation and good conduct; and
8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.

A Certificate of Relief from Disabilities or a Certificate of Good Conduct issued to an individual creates a presumption of rehabilitation.

Fair Credit Reporting Act (FCRA)

- Applies to information obtained from a consumer reporting agency
- Restricts the type of information that can be disclosed on a consumer report
- Limits how that information may be obtained

Fair Credit Reporting Act (continued)

Notice Requirements

- **Disclosure of intent** to conduct a criminal background check
- Obtain **written authorization** of applicant/employee's consent
 - If employer wants consent to last for 1 year or duration of employment, it must be indicated on authorization
- **Pre-Adverse Action Notice:** provided to an individual against whom any adverse action may be taken based on information contained in a consumer report before the action is taken
 - At least 5 days recommended in FTC opinion letters
 - Adverse action construed broadly
 - Disclosure of intent to conduct a criminal background check
- **Adverse Action Notice:** Once final decision made, must immediately notify candidate of decision.

Sources of Criminal Conviction Information

1. Background checks
 - Triggers FCRA requirements
 - Minefield for lawsuits
2. Direct court/county information
 - Some states require special notices, i.e., Massachusetts
3. Social media
 - Pros: discover poor judgment and inappropriate conduct, due diligence, protect company reputation
 - Cons: Prohibited considerations like race, religion, sexual orientation, age, disability, pregnancy; unreliable information

Recommendation: Do not use direct sources or social media unless you (1) use a non-decision maker; (2) screen the information; and (3) limit screener and decision-maker communications.



INSTITUTE

INFORM. CONNECT. SHARE.

Iskra M. Bonanno

585-231-1347

ibonanno@hselaw.com



Harter Secret & Emery LLP

ATTORNEYS AND COUNSELORS

hselaw.com