

Criminal Background Checks: What You Know Can Be Used Against You

Labor & Employment Law Update

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Would you want to know if you were about to offer a job to a convicted felon? Most employers would say “of course,” but both seeking and acting on that information could land you in legal trouble. Before obtaining criminal background information on all potential new hires, you should know that the U.S. Consumer Financial Protection Bureau, the EEOC, and your state government may have something to say about that practice.

As a general rule, it is legal to inquire into the criminal history of employees and potential employees; however, concerns about fraud and discrimination are bringing those inquiries under increased scrutiny. An employer who uses a third party screening company to obtain information about an individual’s credit history, criminal background, or other personal information must follow the procedures set out in the Fair Credit Reporting Act (“FCRA”). Administered by Consumer Financial Protection Bureau (“CFPB”), the FCRA is designed to give individuals a chance to clear up errors in government records before being denied employment based on inaccurate or incomplete information. If you are using a covered third party agency, you must follow very specific procedures to obtain and act on the information you receive. Requirements include obtaining written consent before obtaining information, giving the employee notice and a copy of the report before taking any adverse action, and providing additional, post-action notice. Employers who do not follow FCRA procedures are subject to fines, actual and punitive damages, and even criminal prosecution.

Do-it-yourself criminal background checks may also pose problems. Although the FCRA does not apply to an employer’s own efforts to obtain background information, an increasing number of states have enacted laws to restrict what may be obtained and considered. Some states have enacted “ban the box” laws which prohibit most employers from making any inquiry as to criminal history. Illinois is among several states that permit an employer to inquire about convictions, but not arrests. Illinois goes one step further, forbidding employers to ask about convictions that have been sealed or expunged, and applicants for state government jobs are not asked about criminal convictions at all. Indiana has similarly restrictive laws and even gives convicted persons the opportunity to petition the court to have certain conviction records expunged. Other states, such as Missouri, have no laws restricting or regulating inquiries about and use

of criminal or arrest information, but this is becoming the minority position.

Recently, the EEOC has weighed in, giving increased scrutiny to the use of criminal background checks as an employment screening tool. Citing significant disparities in arrests and convictions between people of color and Caucasians, policies that automatically disqualify convicted criminals from employment are viewed as potential tools for purposeful discrimination or unintended disparate impact. Over the last year, the EEOC has filed several high-profile lawsuits against employers who failed to hire or terminated employees solely on the basis of criminal conviction information. The relationship between the crime and the job will be scrutinized as will the date of the conviction, and the applicant/employee's post-conviction job history.

If you do hire an individual with a criminal record, your liability for the employee's actions will likely be limited to foreseeable harm that occurs within the scope of employment. Thus, an employer who hired an inmate under a work release program was not liable when the inmate shot and killed three people on his way back to prison after work. On the other hand, a painting company who hired a known arsonist, thief and burglar to work in clients' homes unsupervised was held responsible when he stole credit cards from and burned down a house he was assigned to work on.

Bottom Line: Review your criminal background check practices with a knowledgeable employment attorney to determine whether your program is having a disparate impact on minority applicants and be prepared to justify your use of criminal screening in the employment process. If you use an outside service to screen applicants, be sure that your procedures comply with the FCRA.

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