

Liability

Pre-employment Screening - Criminal Background Checks

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Abstract

The criminal histories of job applicants are available to employers willing to put the time and effort into performing the investigation. However, state and federal statutes have put limitations on how this information can be used for pre-employment screening purposes. This report discusses the availability of state and federal criminal records as well as basic limitations in using these records in the hiring process.

Introduction

There are a variety of types of investigative searches that can be used by potential employers. Information, such as credit records, work history, military records, education records, and criminal history, is available to employers. According to Liability Consultants, Inc. of Sudbury, Massachusetts, the failure to check criminal records is the most common reason for employer liability in negligent hiring cases.

Employers are not required, as a matter of law, to conduct an investigation into the criminal background of a job applicant. However, for employees who have close contact with persons due to a special relationship, current case law emphasizes the importance of a thorough investigation into their background.

Employees in this “special relationship” category would include: workers in day-care centers or nursing homes; workers that have contact with the public, such as security guards; and workers providing services in customers’ homes, such as cleaning, repair personnel, or salespersons. For these employees, the investigation should include a criminal history check.

Businesses that use contract services or business partners to perform such “special relationship” job functions may be liable for the criminal actions of the contract agency’s workers. As such, they should require the contract service to perform the same background screening, including criminal history checks, which they perform on their own workers. Additionally, they should require a hold harmless and indemnification agreement in the contract with the service for the actions of the service’s employees.

Employers may also be exposed to liability if, after hiring a worker, they subsequently learn that the worker has a criminal history and they take no action against the worker after learning of the criminal past, and the worker assaults a third party. Under such circumstances, an employer may be subject to a lawsuit from a third party based on the tort of negligent retention.

This report discusses the availability of state and federal criminal records and basic limitations in using these records in the hiring process.

Background

Employers are often faced with a conflict between the need for background information on which to base hiring decisions and the job applicant’s constitutional right to privacy. Access to criminal records raises questions of public policy. Obviously, there is a clear public interest in reducing the risk of crime by

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employees. However, should a prior conviction for a violent offense bar a person from future employment, even for entry-level jobs? Society obviously benefits when ex-convicts are able to re-enter the work force and become contributing members of their communities. As such, criminal records information may cause some well-deserving person with a prior conviction to be passed over as too risky to be employed.

Another question with regard to criminal history concerns recidivism. Because a person has been convicted of a violent crime, does that mean they will necessarily commit another violent crime? While the recidivism rate for criminals is high, the American Psychological Association has taken the position that the likelihood of future violence is very hard to predict accurately, even with extensive and costly psychological assessment. The most recent federal research, conducted by the U.S. Bureau of Justice Statistics in the mid-1990s and 2007, indicates that most ex-offenders present some risk of committing another crime, but not necessarily the same type of crime, and that recidivism risk is highest within three years of release.

There is also the privacy issue. Does the release and use of conviction records violate an individual's constitutional right to privacy? The U.S. Supreme Court, in *Paul v. Davis*, 424 US 693, ruled on this issue in 1976. The court found that criminal records are not within the scope of privacy protection. As a result, information about prior convictions is public record.

Most states and the federal government have adopted the Supreme Court's ruling on criminal conviction records and provide access to these records. However, they have also recognized the dangers in releasing criminal histories by placing solid safeguards on the use of the records.

At the federal level, the Equal Employment Opportunity Commission (EEOC) has mandated that an applicant cannot be denied employment solely based on a prior criminal record that is unrelated to job performance. The nature and severity of the conviction, as well as job-relatedness, should be considered, along with the applicant's age at the time of conviction. Furthermore, an employer may not inquire about misdemeanor convictions, which are more than five years old, or arrest records.

At the state level, the safeguards can include legal remedies to protect those unfairly discriminated against, better controls on the state's recordkeeping system to reduce the chance of error, and restrictions on the use of the records that are generally similar to those mandated by the EEOC.

Arrest Records

In general, employers are prohibited from asking applicants about arrest records. This is a result of court rulings that found that making employment decisions based on arrest records, as compared to convictions, has a disproportionate effect on the employment opportunities of minority groups because members of these groups are arrested more often than whites. Inquiries on arrests, if at all permissible, are usually restricted to information relevant to job performance, to pending prosecutions, and to prosecutions resulting in convictions.

Some states provide exemptions to inquiries about arrest records for certain industries or occupations, such as law enforcement and the healthcare industry. Some states also permit employers to inquire about arrests if the criminal prosecution is still pending. However, even when these inquiries are permitted, a decision to reject a job applicant based solely on an arrest record may be in violation of both state law and Title VII of the Civil Rights Act of 1964.

In light of the concerns with regard to criminal and arrest records, employers are advised to consult with their attorney concerning local, state, and federal laws that might affect the use of these records for employment screening purposes.

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Accessibility of Criminal Records

Most criminal cases are tried at the state level. Many other serious crimes, such as mail fraud, interstate drug trafficking, and civil rights violations, are heard in a federal court. A thorough criminal records search, therefore, would require a search of both state and federal records.

State Records

At the state level, criminal convictions are recorded either in a central repository or at a county level. Every state has a central repository containing certain criminal justice case histories. In addition, individual counties within a state may maintain a separate set of records on cases involving their courts. Therefore, to perform a complete state criminal history check, an employer must not only check the appropriate state's central repository, but also each county that may have had jurisdiction over a job applicant.

The major advantages to the use of the state repositories are their convenience and the fact that, in theory, they will hold records from throughout the state. However, the information in the state repositories may not be complete. While some states have well-maintained databases, other states may not have the full cooperation of the counties in forwarding the information to the central repository. This could lead to inaccurate information being provided. Additionally, some states limit access to the central repository to only criminal justice or other authorized agencies, while in others, only certain classes of records, such as serious felonies, are kept.

While county courts will not have the same extent of data as the central repository, the information will usually be more complete. The biggest drawback to a county-to-county search is that it can be time-consuming - each county that may have had jurisdiction over the applicant will have to be contacted. In addition, unless the information provided by the applicant, such as places of employment and residence, is complete, whether accidentally or intentionally, a search of all applicable counties becomes difficult.

Readers desiring information on the central repositories and the number of counties for the various states, and the basic requirements and/or limitations for conducting criminal history checks through the central repository or the county courts, are referred to *The Sourcebook to Public Record Information*, 10th Edition, which is available from BRB Publications, Inc.; PO Box 27869; Tempe, AZ 85285 (800-929-3811) (<http://www.brbpub.com>).

Readers desiring information on the various states' statutes regarding an employer's use of arrest and conviction records in hiring decisions are referred to the *State by State Guide to Human Resources Law*, 2012 Edition, which is available from Aspen Publishers, Inc.; 1185 Avenue of the Americas; New York, NY 10036 (800-638-8437) (<http://www.aspenpublishers.com>).

Federal Records

Records for crimes, such as mail fraud, interstate drug trafficking, and civil rights violations, that were tried in the federal court system are maintained in either of two repositories – the Federal Records Directory or the Federal Records Center.

The federal court system is divided into ninety (90) judicial districts. Each of the ninety District Courts maintains a Federal Records Directory where records of cases in process, as well as some records of closed cases, are retained. After a period of time, the Federal Records Directories send their records of closed cases, which can range from one- to five-years-old, to one of thirteen (13) regional Federal Records Centers, also known as "Federal archives."

Readers desiring information on the federal court system broken down by district are referred to *The Sourcebook to Public Record Information*, 10th Edition, which is available from BRB Publications, Inc.; PO

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Box 27869; Tempe, AZ 85285 (800-929-3811). Information on The Sourcebook, as well as online ordering information, are available at <http://pimall.com/nais/in.guide.html>.

Using an Outside Agency

Because a criminal history check is usually a difficult and time-consuming process, an employer may decide to use an outside agency, such as IntelliCorp Records Inc. (<http://www.intellicorp.net>), to conduct the background investigation. With information becoming easier to access through online services, these outside agencies can produce significant cost savings in conducting criminal history checks. In using an outside agency, however, the employer must ensure that the agency is thoroughly familiar with federal, state, and local employment laws.

Implementing Best Practices

Most practitioners and experts agree that background checks should be conducted after a candidate enters the final stage of the hiring process. A portfolio management approach helps ensure that background checks are relevant to specific jobs. It is recommended that an HR manager develop "screening profiles" that identify the types and depth of background checks each job should receive. For example, a candidate for an office position would not be subject to a background check on driving crimes. Moreover, candidates for the police force, firefighting team, and finance and accounting office would receive more intense checks than candidates for a maintenance position.

Employers should review their position-specific background screening approach annually or semiannually, depending on the nature of the positions. Jobs that require employees to interact with vulnerable populations and jobs with financial responsibilities are assessed more frequently than lower-risk positions. Screening experts recommend this type of review. Laws and legal interpretations of rules regarding the use of criminal background checks change regularly, and there is no need for an employer to court unnecessary risk of legal or civil actions due to outdated policies.

The EEOC released enforcement guidance in April 2012 on the use of criminal records in employment. The following are examples of what EEOC considers to be best practices for employers who are considering criminal record information when making employment decisions.

General

- Eliminate policies or practices that exclude people from employment based on any criminal record.
- Train managers, hiring officials, and decision-makers about Title VII and its prohibition on employment discrimination.

Developing a Policy

- 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 specific offenses that may demonstrate unfitness for performing such jobs.
 - Identify the criminal offenses based on all available evidence.
- Determine the duration of exclusions for criminal conduct based on all available evidence.
 - Include an individualized assessment.

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- Record the justification for the policy and procedures.
- Note and keep a record of consultations and research considered in crafting the policy and procedures.
- Train managers, hiring officials, and decision-makers on how to implement the policy and procedures consistent with Title VII.

Questions about Criminal Records

- When asking questions about criminal records, limit inquiries to records for which exclusion would be job-related for the position in question and consistent with business necessity.

Confidentiality

- Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

Summary

To what extent a private employer may consider an applicant's criminal history in making hiring decisions varies from state to state. For employees that may have access to minors, the infirm, or the public, current case law emphasizes the need to perform a thorough background investigation, including criminal history checks. However, state and federal laws place limitations on how criminal and arrest records can be used in making employment decisions. Employers are advised to seek the advice of legal counsel with regard to employment decisions based on criminal and arrest histories.

A recent analysis by the National Employment Law Project shows that more than one in four U.S. adults have an arrest or conviction that would appear in a routine criminal background check. The project's lawyers claim that many adults with criminal backgrounds face "unprecedented barriers to employment." Human resources professionals can expect to screen, interview, and hire more individuals with criminal offenses in their backgrounds, according to several sources, including researchers at the National Employment Law Project. Employers should not create a rule and then leave it on a shelf.

References

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3. Society for Human Resource Management. *What HR Professionals Need to Know About the EEOC's New Guidance on Criminal Background Checks*. Alexandria, VA: April, 2012. <http://www.shrm.org/Advocacy/Issues/Documents/Special%20report%20FINAL%20-%20Silverman%20on%20EEOC%20guidance%20042712.pdf>.
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