Use of Criminal Background Checks and Consumer Credit Reports
In Employment Decisions

As information regarding criminal background becomes readily available on the internet, more employers are using criminal background checks as part of their screening process for prospective employees. Criminal background checks raise a number of important legal issues: (1) the right to privacy on the part of an existing and a prospective employee, (2) the implication of credit reporting and employment discrimination laws, and (3) other questions about the role of private employers, as ex-offenders who have “done the time” attempt to rejoin society. While legal cases addressing this issue date back to the 1970’s, the availability of records on the internet and the significant increase in the last 20 years of the number of working-age Americans who have been incarcerated have brought the issue to the forefront.

Because employment policies that exclude applicants based on criminal background disproportionately impact African-American and Hispanic men, such policies raise not only the societal question of the ability of ex-offenders to gain employment, but also the possibility of a claim of unlawful employment discrimination if there is no valid business reason for the policy.

Any policy a company decides to implement must be carefully designed and consistently applied so that the employee selection process is objective. Screening criteria must be narrowly tailored to avoid illegal discrimination, while also serving the legitimate business goals. Excluding every applicant with any criminal background, regardless of the crime and its relationship to the applicant’s ability to meet the job requirements will run afoul of fair employment laws.

California Law - Types of Offenses/Activities That May Not Be Considered

California law prohibits a consumer report from including arrests, indictments, or misdemeanor complaints that did not result in a conviction. Also, reports may not include arrests, indictments, misdemeanor complaints, or convictions of a crime that “from the date of disposition, release, or parole antedate the report by more than seven years.” (Civil Code Section 1785.13.) Labor laws and regulations also prohibit most employers from inquiring about arrests or detentions that do not result in conviction, expunged convictions, and certain misdemeanor convictions. These laws evidence a governmental policy that older convictions and arrests that did not result in conviction should not limit an individual’s ability to seek employment, credit, and perhaps housing. (Note: The existence of California’s on-line sex offender registry does contain older convictions, which indicates that the policy is different for certain offenses that are believed to have higher rates of recidivism.)
Federal Law – Title VII – Civil Rights Act of 1964- Disparate Impact Discrimination

A person with a criminal record is not specifically listed as a protected person or class in Federal Title VII of the Civil Rights Act of 1964 or any other fair employment law. Accordingly, whether or not an employer’s reliance on a criminal record to deny employment violates the law depends on whether there is either “disparate treatment” or “disparate impact” based on a protected class. An example of disparate treatment would be an employee who only performs criminal background checks on Hispanic applicants. However, even a neutral policy that is equally applied to all applicants may violate the law if it disproportionately affects some individuals protected under Title VII and is not job-related and consistent with a business necessity. According to the U.S. Equal Employment Opportunity Commission (EEOC), national data shows that criminal record exclusions have a disparate impact based on race and national origin. And this data provides a basis for the EEOC to investigate discrimination claims based on criminal record exclusions.

A 1977 federal case, Green v. Missouri Railroad, provided the initial framework for how an owner can establish an employee criminal record screening policy that is job related and consistent with a business necessity by considering, at least, the nature of the crime, the time elapsed, and the nature of the job. These factors were reiterated in the EEOC decisions and Policy Statements dating back to the 1970’s and early 80’s. On April 25, 2012, the EEOC issued an Enforcement Guidance document that consolidates and updates several decades worth of previous guidance documents and statements regarding the use of arrest or conviction records in employment decisions.


The following are the Best Practices provided by the EEOC for employers who are considering criminal record information when making employment decisions. These are guidelines used by EEOC to evaluate whether an individual has a claim. Please consult with your attorney and your criminal background check provider for assistance in developing an appropriate policy.

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 – Civil Rights Act of 1964 - and its prohibition on employment discrimination.

Developing a Policy

- Develop a narrowly tailored written policy and procedures 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.
  - Determine the duration of exclusions for criminal conduct
  - Have a process for making an individualized assessment of individuals that may be excluded because of past criminal conduct.
• 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.

• The EEOC recommends that the questions not be included in applications, but rather asked once an individual has otherwise qualified for the position.

Confidentiality

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

For a complete analysis, including detailed examples, please review the EEOC Enforcement Guidance document at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Other State Laws

Some states and cities are considering or have adopted laws that govern the use of criminal background reports in either employment or housing. They include,

Massachusetts - Under the state’s law, written job application forms cannot contain any questions about prior criminal convictions. Employers may, however, still ask applicants about their criminal history during an interview.

Employers can obtain an applicant's criminal offender record information in connection with any employment decision. They must, however, provide the applicant with a copy of the criminal history record: (a) prior to questioning the applicant about his or her criminal history and (b) if the employer makes a decision adverse to the applicant on the basis of his or her criminal history.

The law provides an exception for companies and nonprofit organizations that work with vulnerable populations, such as children, disabled and senior citizens, as well as those that are prohibited by federal or state law from hiring ex-offenders.

New York - New York’s law applies to both public and private employers and prevents employers from making adverse hiring or termination decisions based on an individual's conviction record unless: (1) there is a direct relationship between the prior criminal offenses and the specific employment sought or held by the individual; or (2) hiring or continuing to employ the individual poses an unreasonable risk to the property or the safety or the welfare of specific individuals or the general public.
Philadelphia – The City passed its criminal background check law in the hopes that it would help qualified ex-criminal offenders obtain access to employment opportunities, reduce recidivism, increase public safety and stabilize city neighborhoods. The law precludes city agencies and private employers that employ 10 or more persons from the following actions when seeking to fill a job position:

- Making any inquiry regarding criminal convictions before and during the application process and initial interview process, or from requiring that applicants disclose such information; or
- Inquiring about an individual’s arrests that did not result in convictions, unless such inquiry is required or permitted by another law.

Employers are allowed, under specific conditions, to ask about criminal convictions and to conduct a criminal background check once the initial interview is conducted.

**Employment and Use of Consumer Credit Reports**

California law prohibits an employer from utilizing a consumer credit report for employment purposes unless the position of the person for whom the report is sought is any of the following:

- A managerial position. ¹
- A position that involves regular access, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to all of the following types of information of any one person:
  - Bank or credit card account information.
  - Social security number.
  - Date of birth.
- A position in which the person is, or would be, any of the following:
  - A named signatory on the bank or credit card account of the employer.
  - Authorized to transfer money on behalf of the employer.
  - Authorized to enter into financial contracts on behalf of the employer.
- A position that involves access to confidential or proprietary information, including a formula, pattern, compilation, program, device, method, technique, process or trade secret that,
  - Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who may obtain economic value from the disclosure or use of the information, and
  - Is the subject of an effort that is reasonable under the circumstances to maintain secrecy of the information.
- A position that involves regular access to cash totaling ten thousand dollars ($10,000) or more of the employer, a customer, or client, during the workday. ²

¹ "Managerial position" means an employee covered by the executive exemption set forth in subparagraph (1) of paragraph (A) of Section 1 of Wage Order 4 of the Industrial Welfare Commission (8 Cal. Code Regs. 11040).
http://www.dir.ca.gov/1t8/11040.html

² Other exemptions under the law include financial institutions, as defined, a position in the state Department of Justice; a sworn peace officer, or other law enforcement position.
Mandatory Employer Written Disclosure – Prior to Requesting Reports

Prior to requesting a consumer credit report for employment purposes, the user (e.g., the employer) of the report must provide written notice to the person (e.g., the job applicant) involved.

The notice must inform the job applicant that a report will be used, and shall identify the specific basis under the state law for use of the report (Labor Code Section 1024.5(a) outlined above). The notice must also inform the job applicant of the source of the report and must contain a box that the job applicant can check, requesting a copy of the credit report. If the job applicant indicates that he or she wishes to receive a copy of the report, the employer must request that a copy be provided to the person when the employer requests its copy from the credit reporting agency. The report to the employer and to the job applicant must be provided contemporaneously and at no charge to the subject applicant.

Notice by Employer When Applicant Denied Based on Credit Report

Whenever an applicant for employment is denied a position based wholly or partly on information contained in a consumer credit report from a consumer credit reporting agency, the employer of the consumer credit report must advise the job applicant and supply the name and address or addresses of the consumer credit reporting agency that provided the report.3

References

- CAA White Paper No. 14 – Criminal Background Checks - Deciding Whether to Add Criminal Checks to your Tenant Screening Process

3 A "consumer credit report" has the same meaning as defined in subdivision (c) of Section 1785.3 of the Civil Code, but does not include a report that (A) verifies income or employment, and (B) does not include credit-related information, such as credit history, credit score, or credit record.

Civil Code Section 1785.3(c) provides that a "consumer credit report" means any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: (1) credit to be used primarily for personal, family, or household purposes, or (2) employment purposes, or (3) hiring of a dwelling unit, as defined in subdivision (c) of Section 1940, or (4) other purposes authorized in Section 1785.11.

The term does not include (1) any report containing information solely as to transactions or experiences between the consumer and the person making the report, (2) any communication of that information or information from a credit application by a consumer that is internal within the organization that is the person making the report or that is made to an entity owned by, or affiliated by corporate control with, that person; provided that the consumer is informed by means of a clear and conspicuous written disclosure that information contained in the credit application may be provided to these persons; however, where a credit application is taken by telephone, disclosure shall initially be given orally at the time the application is taken, and a clear and conspicuous written disclosure shall be made to the consumer in the first written communication to that consumer after the application is taken, (3) any authorization or approval of a specific extension of credit directly or indirectly by the issuer of a credit card or similar device, (4) any report by a person conveying a decision whether to make a specific extension of credit directly or indirectly to a consumer in response to a request by a third party, if the third party advises the consumer of the name and address of the person to whom the request was made and the person makes the disclosures to the consumer required under Section 1785.20, (5) any report containing information solely on a consumer's character, general reputation, personal characteristics, or mode of living which is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on, or others with whom he is acquainted or who may have knowledge concerning those items of information, (6) any communication about a consumer in connection with a credit transaction which is not initiated by the consumer, between persons who are affiliated (as defined in Section 150 of the Corporations Code) by common ownership or common corporate control (as defined by Section 160 of the Corporations Code), if either of those persons has complied with paragraph (2) of subdivision (b) of Section 1785.20.1 with respect to a prequalifying report from which the information communicated is taken and provided the consumer has consented to the provision and use of the prequalifying report in writing, or (7) any consumer credit report furnished for use in connection with a transaction which consists of an extension of credit to be used solely for a commercial purpose.