

How to comply with laws regulating criminal background checks



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Employers want safe workplaces. Applicants with criminal records want a chance at gainful employment. Balancing those interests requires paying careful attention to laws that regulate inquiries about applicants' criminal histories or arrest records.

Federal issues

No federal statutes or laws prohibit employers from inquiring about an applicant's criminal history.

However, the federal Fair Credit Reporting Act expressly requires employers to provide a stand-alone disclosure and obtain a signed authorization form before conducting a background check. The authorization form must be separate from the application.

Be careful not to treat applicants with similar criminal records differently. Such differential treatment could result in a discrimination claim. For example, if a female applicant is rejected for a particular position because of a DWI conviction, but a man is later hired for the same job despite having a DWI conviction, the woman might have a sex discrimination claim under Title VII.

Employers also should make sure they can defend against any disparate-impact claims that might arise from screening applicants based on their criminal history. If individuals in a particular protected category are disproportionately disadvantaged by the employer's policy or practice, then the employer must be able to articulate a legitimate business justification. In other words, an employer must be able to demonstrate that considering certain types of criminal convictions in making hiring decisions helps it accurately predict whether the applicant will be a responsible, reliable and safe employee.

New York state law

The New York Human Rights Law and the New York Correction Law prohibit employers from denying employment to any individual based on his or her criminal conviction record, unless:

- There is a direct relationship between one or more of the criminal offenses and the employment sought
- Granting or continuation of employment would involve an unreasonable risk to property or personal safety.

Employers are required to consider eight factors when evaluating qualified applicants to make a determination regarding whether there is a direct relationship or unreasonable risk:

1. New York's public policy of encouraging employment of persons with prior convictions

2. The specific duties and responsibilities related to the employment sought
3. The bearing, if any, the criminal offense for which the person was previously convicted will have on his ability to perform job duties
4. The time elapsed since the occurrence of the criminal offense
5. The age of the person at the time the criminal offense occurred
6. The seriousness of the offense
7. Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct
8. The legitimate interest of a public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Consider all the factors, balancing factors that weigh against hiring as well as those that support hiring. No single factor should be determinative. Document how you weighed the factors. (Note that current employees are also protected from adverse employment action based on their criminal conviction record.)

Off-limits inquiries

The NYHRL prohibits employers from inquiring, in a job application or otherwise, about any previous arrest or criminal accusation that was resolved in the individual's favor or taking any adverse employment action against an individual based on an arrest or criminal accusation that was resolved in the individual's favor.

It is also unlawful to inquire about youthful offender adjudications or certain convictions that have been sealed under the criminal procedure law.

It is not unlawful, however, to ask if an applicant has any pending arrests or criminal accusations filed against him or her. It is not unlawful to make an adverse employment decision based on a pending arrest that has not yet been resolved.

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