

# Job Applicants with Criminal Records Present Challenges to Employers

## The Employer's Dilemma

Employers wishing to hire an applicant with a criminal record are faced with a dilemma. The Department of Labor estimated in 2012 that one in three American adults has a criminal history record. Many of these individuals apply to jobs unaware that they have a record, believing their record has expired, or thinking their convictions are irrelevant to the position. This makes it increasingly important for employers to draft hiring policies that comply with applicable state and federal requirements.<sup>1</sup>

Employers often err when structuring background checking policies, illustrated by the examples below.

- **Employer A** has a blanket policy that denies employment to individuals with any criminal record at all. Employer A's "Now Hiring" ads are accompanied by phrases such as "No Arrests" or "Spotless Background/Criminal History."<sup>2</sup>
- **Employer B** wants to avoid the time and expense involved in performing background checks. Employer B's hiring manager examines applicants'

resumes, calls references, and conducts in-depth interviews to screen those with questionable character.

Employer A has implemented hiring practices that make it vulnerable to an Equal Employment Opportunity Commission (EEOC) investigation. Employer B has avoided an EEOC investigation but has opened the door to a negligent hiring lawsuit. Whether hiring or refusing to hire, employers should be well-versed in the applicable legal issues, which are discussed in more detail below.

## Guidelines for Employers

### *Denying Employment to Individuals with Criminal Records*

What is a "Criminal Record"? In general terms, a criminal record encompasses arrests, dismissals, and convictions for any number of infractions, including felonies, misdemeanors, municipal ordinance violations, and some traffic offenses. Contrary to popular belief, criminal records do not expire after a certain amount of time.<sup>3</sup> They can only be removed

from public view by taking appropriate legal action.

Because a criminal record includes arrests and dismissals as well as convictions, many individuals who have criminal records have never been convicted of any crime. For this reason, the use of arrests and dismissed case records is restricted by the EEOC and many state laws.<sup>4</sup> Specifically, the EEOC takes the position that employers should not even ask about arrest records because they may disproportionately exclude minority applicants. Employers may only inquire into an applicant's convictions in an employment application or interview and may make adverse decisions based upon them only if there is a business justification for that use.<sup>5</sup> Thus, "have you ever been convicted" is a permissible line of questioning while "have you ever been arrested" is not.<sup>6</sup>

Further, the conviction must be reasonably related to the job requirements in order to disqualify the job applicant. The EEOC explains in its

<sup>1</sup> See *Office of Federal Contract Compliance Programs (OFCCP)*, UNITED STATES DEPARTMENT OF LABOR (Jan. 29, 2013), <http://www.dol.gov/ofccp/regs/compliance/directives/dir306.htm> for a discussion of this issue.

<sup>2</sup> However, some social enterprises intentionally hire those with criminal records in an effort to contribute to their reintegration into society. Second Chance Coffee Company LLC, a Bea & VandenBerk client, is one such organization. Its mission is "to positively impact the lives of post-prison men and women, their families, and the communities in which we live." For more information, see "I Have a Bean" coffee at <https://www.ihaveabean.com/>.

<sup>3</sup> As a caveat, under the Fair Credit Reporting Act, arrests are only reported for seven years for jobs paying under \$75,000.

<sup>4</sup> In Illinois, it is a civil rights violation for any employer to inquire into or to use the fact of an arrest as a basis to refuse to hire or otherwise take adverse action in employment. 775 ILCS 5/2-103.

<sup>5</sup> The EEOC has indicated conviction records could only be used if the employer can show a business justification for the use. For example, a person who was imprisoned for check kiting may be hired upon his release to serve as a social worker, but not as a bookkeeper.

<sup>6</sup> As a clarification, employers may consider deferred sentences that did not result in a conviction, such as supervision and certain types of probation, without violating the Illinois Human Rights Act.

Enforcement Guidance that there are three factors relevant to whether a criminal conduct exclusion is “job related and consistent with business necessity” as follows:

- The nature and gravity of the offense or conduct, the harm caused, and whether, for example, it involved deception, threat, or intimidation;
- The time that has passed since the offense, conduct, or completion of the sentence; and
- The nature of the job held or sought and whether there is a demonstrable relationship to successful performance of the jobs for which it was used.<sup>7</sup>

Finally, the Fair Credit Reporting Act (FCRA) governs the manner in which an employer may acquire and use information from a consumer reporting agency.<sup>8</sup> Before performing a background check, employers must obtain the applicant’s permission and authorization, usually in writing. If an employer intends on using information from the background check to deny the applicant employment, it must provide the applicant with a copy of the report, the contact information of the company that supplied it, and a summary of the applicant’s rights under the FCRA before taking any adverse action.<sup>9</sup> Employers who go beyond the statutory requirements and allow the applicant

to provide mitigating information further insulate themselves from an EEOC lawsuit. Employers in Illinois must give the applicant seven days to correct any inaccurate information in the report before sending the actual adverse action letter.

### ***Expungement and Sealing***

Persons with arrests, dismissed cases, and certain convictions may petition the court of their sentencing county to expunge or seal their records. Petitioners wishing to expunge or seal a criminal record in Illinois must meet stringent requirements, including waiting periods, drug testing for certain offenses, and a hearing before a judge. When a petition is granted, employers may not reopen the petition in an application or interview to delve into the details of that offense. A job applicant whose record has been expunged or sealed may lawfully answer “No” when asked, “Have you ever been convicted of a misdemeanor or felony.”

On occasion, employers may wish to hire a job applicant who has noted in the application form that he or she has a criminal record. In that event, it is an acceptable practice to inform the applicant about the expungement and sealing process and suggest that he or she seek the services of an attorney who is experienced in this area of law.<sup>10</sup>

If the petition is granted, the applicant may then re-submit the application without mention of the expunged record. Sealing and expungement requirements vary from state to state, so be sure to check your state’s statutes or consult with legal counsel if your business is located outside of Illinois.

### ***Granting Employment to Individuals with Criminal Records***

Certain employers have a statutory duty to reject applicants with disqualifying convictions on their record.<sup>11</sup> Even absent a statutory duty, all employers have a duty to avoid hiring individuals who may create a danger of harm to third persons. Employers who disregard this requirement and either fail to check an applicant’s background or hire the applicant regardless risk being sued for negligent hiring.

Negligent hiring occurs when an employer hires “an employee it knew, or should have known, was unfit for the job so as to create a danger of harm to third persons.”<sup>12</sup> Thus, if Employer C is hiring an employee who will interact regularly with children, then C’s hiring manager should closely examine each applicant’s criminal history to see whether he or she poses a risk to children. Certain convictions, such as those for sexual and violent offenses, will immediately raise a red flag. But other convictions are further

<sup>7</sup> For more information see *Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*, as amended, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (April 25, 2012), [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf) (last accessed January 25, 2013) (Enforcement Guidance).

<sup>8</sup> A consumer reporting agency is any entity that assembles reports on individuals for other businesses. While the Fair Credit Reporting Act originally applied only to credit checks, it now applies to all background screening.

<sup>9</sup> See *Using Consumer Reports: What Employers Need to Know*, BUREAU OF CONSUMER PROTECTION (Jan. 2012), <http://www.business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>.

<sup>10</sup> In Chicago, Cabrini Green Legal Aid (CGLA) operates a Sealing and Expungement Help Desk at the Daley Center where volunteer attorneys and

law students meet daily with individuals seeking to clear their adult criminal records. CGLA partners with Legal Assistance Foundation of Metropolitan Chicago at the Cook County Juvenile Center to help individuals seeking to expunge their juvenile records. Persons seeking to expunge juvenile records may get more information at [www.expunge.io](http://www.expunge.io).

<sup>11</sup> For example, the Chicago Transit Authority, the Chicago Park District, and the Chicago Public School system are three such employers.

<sup>12</sup> *Van Horne v. Muller*, 185 Ill. 2d 299, 311 (Ill. 1998). In an action for negligent hiring or retention, the plaintiff to plead and prove (1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the employee’s hiring or retention; and (3) that this particular unfitness proximately caused the plaintiff’s injury. *Id.*

removed from the childcare setting, such as a 10, 15, or 20 year old misdemeanor conviction for retail theft, possession of a controlled substance, or driving under the influence. To resolve this tension, employers should draft and implement customized screening policies that take into account the duties and responsibilities of particular positions.

## Relief for Employers

In some instances, an applicant may not be eligible to have his or her record sealed or expunged. In that case, the employer may refer the applicant to an attorney who is skilled in drafting Certificates of Good Conduct (CGC), Certificates of Relief from Disability (CRD), and Health Care Waivers.<sup>13</sup>

A judge may issue a CGC or CRD to a petitioner who meets the statutory requirements if, after a hearing, the judge finds by clear and convincing evidence that the individual is rehabilitated. Both are discretionary remedies. An employer who hires an applicant with such a certificate “is not civilly or criminally liable for an act or omission by an employee who has been issued a [certificate], except

for a willful or wanton act by the employer in hiring the employee who has been issued a [certificate].” Thus, certificates protect the employer who chooses to hire an applicant with a criminal record.

Similarly, the Healthcare Worker Background Check Act (Healthcare Act) prohibits health care providers from hiring men and women with certain convictions but allows employers to hire an applicant who has a Health Care Waiver.<sup>14</sup> The waiver is issued by the Illinois Department of Public Health (IDPH) and allows health care facilities to hire those with certain convictions without violating the statute. Applicants must comply with applicable waiting periods, provide an explanation of the offense(s) in question, and submit proof of rehabilitation to the IDPH. Employers in a health care setting may hire the holder of a Health Care Waiver without violating the Healthcare Act.

## Conclusion

Employers must exercise caution when hiring or refusing to hire men and women with criminal records.

Although employers may not reject

every applicant with a record, they must be aware of the risks associated with hiring applicants with certain convictions. Thus, Employer A from the introduction must not deny employment to an individual whose criminal record consists only of arrests, dismissed cases, and old, non-job related convictions. On the other hand, Employer B has an obligation to deny employment to any applicant who would create a danger of harm to third persons, which likely means implementing background checks as part of its hiring process.

Employers should consult with legal counsel to draft hiring policies that comply with the guidelines outlined in state and federal law. If you have a question about a specific issue, we invite you to contact our office to discuss your legal concern. The foregoing article was provided for general information. Seek specific legal advice for your situation. The attorneys of Bea & VandenBerk are experienced in representing organizations in employment matters. If you have any questions, please do not hesitate to contact us. ♦

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<sup>13</sup> “A certificate of good conduct is granted when an offender demonstrates to a court by clear and convincing evidence that he or she has been a law-abiding citizen and is fully rehabilitated.” 730 ILCS 5/5-5.5-25. “A certificate of relief from disabilities is granted by a court when, in its discretion, it finds it proper

to remove employment-related disabilities imposed by a criminal conviction.” 730 ILCS 5/5-5.5-10. CGLA’s staff attorneys are skilled in drafting Certificates and Health Care Waivers.

<sup>14</sup> See 225 ILCS 46/1.

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