



BETTER WORKPLACES
BETTER WORLD™

JANUARY 2019

Getting Talent Back to Work Toolkit

THE RESOURCES YOU NEED TO ADVANCE THE HIRING OF WORKERS WITH A CRIMINAL BACKGROUND.

COMPLIANCE

Employers who use criminal records in their hiring decisions need to be aware of applicable federal and state laws.

Additionally, the **Fair Credit Reporting Act (FCRA)** governs how employers obtain and handle consumer reports, which include standard background checks. Legal compliance with these laws is key when considering formerly incarcerated applicants for hire.

Compliance

Title VII of the Civil Rights Act of 1964

Although federal law does not explicitly protect applicants from discrimination based on their criminal record, Title VII of the Civil Rights Act of 1964 does protect against discrimination based on race and ethnicity. **The Equal Employment Opportunity Commission (EEOC)** has issued guidance on employers' use of criminal background checks to address its concern that those checks have an unintended discriminatory impact on particular minority groups.

An employer who adopts a blanket policy of excluding all applicants with an arrest record could face disparate impact liability under federal nondiscrimination law if **(a) such policy or practice disproportionately affects a protected class, and (b) the employer cannot show that the policy or practice is “job related and consistent with business necessity.”**

A violation may also occur when an employer treats criminal history information differently for different applicants or employees based on their race or national origin (disparate treatment liability).

The EEOC's guidance emphasizes that any denial of employment due to an arrest record should be based on an individualized assessment that considers the applicant, the nature of the criminal offenses in his or her history, and how these offenses relate to the performance of a particular job.



Compliance

Tools & Resources

The following information and tools will help to ensure a compliant hiring process:

- **QUIZ:** [Take our quiz to test your knowledge!](#)
- **CHECKLIST:** [6 Tips for Using Criminal Records in Hiring Decisions](#)

Additional Resources

Please see the following resources for additional guidance:

- [EEOC Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964](#)
- [Pre-Employment Inquiries and Arrest and Conviction](#)
- [What You Should Know About the EEOC and Arrest and Conviction Records](#)
- [EEOC Tips for Small Businesses – Criminal Records](#)
- [Background Checks: What Employers Need to Know](#)
- [PowerPoint Presentation – Federal Discrimination Laws](#)
- [Managing Equal Employment Opportunity](#)
- [How to Conduct Compliant Criminal Background Investigations](#)

Compliance

Ban the Box

Several state laws and local ordinances limit the use of arrest and conviction records by prospective employers. Commonly referred to as “ban-the-box” laws, these restrictions prohibit the employer from asking an applicant any questions about criminal records on the employment application or early in the screening process. Other state laws restrict the employer’s use of arrest or conviction data in making an employment decision, except in limited circumstances, or the laws may require that criminal history questions be asked only after an offer of employment has been made.

Employers should investigate any state or local laws prior to asking about an applicant’s criminal history.

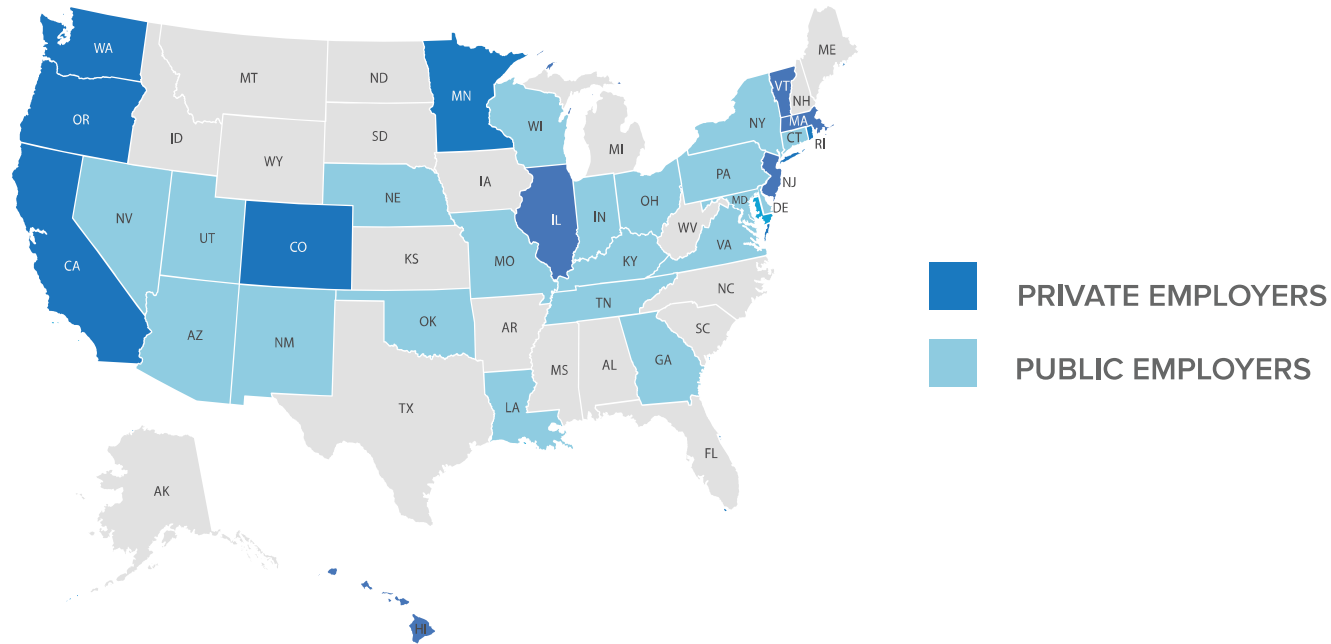


Although there is no federal prohibition on asking applicants about criminal history on an employment application, the EEOC states:

“As a best practice, and consistent with applicable laws, the Commission recommends that employers not ask about convictions on job applications and that, if and when they make such inquiries, the inquiries be limited to convictions for which exclusion would be job related for the position in question and consistent with business necessity.”

Compliance

Ban-the-Box Laws by State



The following states have implemented laws for **private employers**:

- California
- Colorado
- Hawaii
- Massachusetts
- Minnesota
- New Jersey
- Oregon
- Rhode Island
- Vermont
- Washington

The following states have implemented laws for **public employers**:

- Arizona
- Connecticut
- Delaware
- Georgia
- Indiana
- Kentucky
- Louisiana
- Maryland
- Missouri
- Nebraska
- Nevada
- New Mexico
- New York
- Ohio
- Oklahoma
- Pennsylvania
- Tennessee
- Utah
- Virginia
- Wisconsin

Compliance

Companies That Have Voluntarily Banned “the Box”

Even when state laws do not restrict employers from asking about criminal history early in the hiring process, many employers have voluntarily removed the question from their applications and moved such inquiries to the end of the hiring process.

Voluntarily banning the box not only sets a tone with applicants and lets them know that fair-chance hiring practices are in place, it also ensures legal compliance as ban-the-box laws continue to spread.

Companies That Voluntarily Banned “The Box”

The Walmart logo, featuring the word "Walmart" in blue and a yellow six-pointed starburst icon.

Banned in 2010

The Google logo, with the word "Google" in its multi-colored font.

Banned in 2011

The Koch logo, featuring a blue square icon with a white 'K' and the word "KOCH" in bold black letters.

Banned in 2015

Ban-the-Box Resources

Please see the following resources for additional guidance:

- [Ban-the-Box Laws by State and Municipality](#)
- [The Fair Chance/Ban-the-Box Toolkit](#)
- [‘Ban the Box’ Turns 20: What Employers Need to Know](#)

Compliance

CHECKLIST: FCRA COMPLIANCE

The following checklist can be used to ensure compliance with the requirements of the FCRA.



Provide written notice in a stand-alone document to the applicant or employee that a background check will be conducted and the information will be used when making employment decisions.



If an investigative report that includes personal interviews concerning a person's character, general reputation, personal characteristics and lifestyle will be conducted, notify the applicant or employee of this in writing and include a statement that the individual has a right to request additional disclosures and a summary of the scope and substance of the investigative report.



Obtain the applicant or employee's written consent to obtain the background check and/or investigative report.



Provide certification to the company that is providing the background check information that you have obtained the individual's permission, complied with all FCRA requirements, and will not discriminate or otherwise misuse the information in the report.



If a decision is made to take an adverse action based on the background check information, provide the individual with a notice of pre-adverse action that includes a copy of the background check results and a copy of A Summary of Your Rights Under the Fair Credit Reporting Act.



Allow the individual at least five business days to dispute the information in the background check before making a final employment decision.

Make a final decision. If an adverse action is taken, provide the applicant or employee with a final notice of adverse action that includes the following:

- The name, address and phone number of the consumer reporting company that supplied the report.
- A statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it.
- A notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished and to get an additional free report from the company if he or she asks for it within 60 days.



Retain records as required under state and federal law and dispose of records by burning, pulverizing or shredding paper documents and destroying electronic information so that it can't be read or reconstructed.

Compliance

The Fair Credit Reporting Act (FCRA)

The Fair Credit Reporting Act (FCRA) governs how employers obtain and handle consumer reports, which include criminal history background checks. When an employer uses a third party to conduct background checks, the employer must advise the applicant or employee in writing that a background check will be conducted and obtain the individual's written authorization to obtain the records.

Certain other disclosures are required upon the applicant or employee's request and prior to the employer's taking any adverse action based on the reports obtained. Employers must also comply with state and local laws regarding the use of consumer reports.



FCRA Resources

Please see the following resources for additional guidance:

- [When do employers need to comply with the Fair Credit Reporting Act?](#)
- [FCRA Authorization to Obtain a Consumer Report](#) (background/credit check)
- [Fair Credit Reporting Act Disclosure Statement](#)
- [Summary of Rights Under the Fair Credit Reporting Act](#)
- [FCRA Preliminary Notice of Adverse Action](#)
- [FCRA Final Notice of Adverse Action](#)

BACKGROUND CHECK PROVIDERS

Making an informed decision regarding a job applicant with a criminal record starts with having an accurate report.

Therefore, employers must evaluate prospective providers, known as consumer reporting agencies (CRAs), to ensure a quality supplier.

Background Check Providers

CHECKLIST: SELECTING A RELIABLE BACKGROUND CHECKING COMPANY

Conducting a criminal background check is far more difficult than it may appear, and not all CRAs offer reliable reports. Mistakes by CRAs can result in liability for the employer under the Fair Credit Reporting Act and can lead employers to turn down highly qualified applicants or hire applicants they would not have hired based on an accurate report.

This checklist can be used by employers to assess the quality standards of prospective CRAs to determine if they will provide reliable reports. Additionally, [SHRM's Guide to Background Screening Systems](#) can be used to research and compare providers.

IS THE COMPANY ACCREDITED?



The National Association of Professional Background Screeners (NAPBS) has a certification program. NAPBS certification indicates that a CRA meets minimum industry standards (such as having written procedures in place for key components of the process).

DOES IT CONFIRM ALL INFORMATION WITH THE ORIGINAL SOURCE?



It is essential that CRAs confirm all information received from secondary sources with the original criminal justice source before reporting it to the employer. Numerous commercial databases contain criminal records collected directly or indirectly from original criminal justice records. Acquiring millions of records sometimes produces mistakes, and these secondary databases will not be up-to-date regarding records that have changed since they were acquired.

WHAT ARE ITS STANDARDS FOR REPORTING A MATCH?



There is no legally required standard for what is considered a match. Each CRA sets its own standards. If the standards are not high enough, mistakes will occur. For example, since thousands of people have the same first and last name, additional information is required to be sure a criminal record belongs to the applicant:

- At least two primary identifiers (full name, date of birth, driver's license number, Social Security number) must match before reporting.
- All identifiers present in both the criminal record and the applicant's file must match before reporting.
- Apparent matches are reviewed by trained personnel before reporting.

DOES IT HAVE THE FLEXIBILITY TO TAILOR REPORTS TO CLIENTS' NEEDS?



Not every client wants all available information. Some may want to know only about specific convictions that relate to the job in question (such as DUI/DWI convictions for jobs involving driving) or convictions that have occurred within a certain time period (such as in the past 10 years). It is important that a prospective CRA be willing to provide records that meet the specific needs of your company.

WHAT IS ITS LEGAL COMPLIANCE EXPERTISE?



Criminal background checks must comply with the Fair Credit Reporting Act and a variety of state and local laws, including “ban-the-box” laws. It is essential that a CRA have the legal expertise to meet these requirements.

WHAT IS ITS LITIGATION HISTORY?



It isn’t necessary that a CRA have no litigation history. In the U.S. legal system, anyone can be sued. But there is a marked difference between a CRA that has been sued once or twice for technical mistakes it quickly fixed and a CRA that is constantly involved in class-action cases for the same legal violations.



INTERVIEWING & ASSESSMENT

HR professionals and hiring managers frequently ask, “Should we interview applicants with criminal records differently from candidates without a record?”

The answer is no.

Interviews should be equal and fair assessments, and the basic structure should not vary between candidates. Formerly incarcerated applicants are people—looking to be employed, functioning members of our society, with strengths and weaknesses just like any other candidate.

Interviewing & Assessment

INTERVIEWING

Some criminal history may come to light during the interview process, whether volunteered by the applicant or given in response to questions about gaps in his or her employment history.



Ask Relevant, Job-Related Questions

Where state laws allow, employers may ask relevant, job-related questions to **assess the applicant's honesty and sense of accountability** and to better understand the circumstances and nature of the crime. These questions will be part of the individual assessment discussed later in this guide.

Focus on an Applicant's Skills and Abilities

During any interview, making a connection with applicants who are more like us is common as we find them easy to engage with and feel comfortable around. But it's a slippery slope toward unlawful discrimination when we consistently reject those less like us, and the formerly incarcerated may seem foreign to many HR professionals and hiring managers. They should continually remind themselves to focus on the applicants' skills and abilities to assess who the best overall candidate is and not who they might prefer to grab a coffee with.



Don't Make Assumptions About a Candidate's Experience

Don't generalize or make assumptions about the skills and experience these individuals have. Employers often assume that a new hire who has spent time behind bars will require extensive training in common workplace skills. According to data from the Department of Justice, however, more than one-third of incarcerated citizens have at least a high school diploma. To meet parole requirements, many individuals are regularly drug-tested and closely supervised by their parole offices and have to observe curfews. In short, these candidates may demonstrate more reliability and accountability than similarly skilled peers in the general population.

Interviewing & Assessment

ASSESSMENT

Employers must ensure that any selection tests are reliable and valid, yielding consistent results that predict success on the job. If not, discrimination claims are an increased risk. A background check is considered a selection test.

The [EEOC's Uniform Guidelines on Employee Selection Procedures](#) detail how the EEOC will evaluate a testing method called into question; the agency offers additional guidance in its [Employment Tests and Selection Procedures](#) fact sheet. States may have individual requirements and guidelines for those working in that state. Consulting with an attorney before implementing any selection method is advised.

The guidelines state that discriminatory practices exist when a selection test has an adverse impact on the employment opportunities of a race, sex or ethnic group. Adverse impact refers to employment practices that appear neutral but have a discriminatory effect on a protected group.

As minority men and women are more likely to be incarcerated than their white counterparts, race and ethnicity discrimination could arise when background assessments are conducted without evidence of validity or a basis in job relatedness. Consulting with an attorney before implementing any selection method is advised.

These are human beings who are finding ways to be resilient—to transform their lives and to reimagine who they'll be when they come home from prison or jail.

—Jasmine Heiss, former director of coalitions and outreach with the Coalition for Public Safety (CPS)

Interviewing & Assessment

Resources

Please see the following resources for additional guidance:



INTERVIEW RESOURCES

- [Guidelines on Interview and Employment Application Questions](#)
- [Interviewing Candidates for Employment](#)
- [PowerPoint Presentation – Interviewing Training](#)
- [PowerPoint Presentation – Basics of Effective Interviews](#)
- [SHRM's Interview Question Database](#)

ASSESSMENT RESOURCES

- [Screening by Means of Pre-Employment Testing](#)
- [Screening and Evaluating Candidates](#)
- [Avoiding Adverse Impact in Employment Practices](#)
- [Candidate Evaluation Form](#)

SCREENING GUIDANCE

The EEOC's long-standing position that criminal records may be used in hiring decisions only when the conviction is job-related and consistent with business necessity was formalized in its 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.

Screening Guidance

The [guidance](#) provides **that there are two circumstances** in which the commission believes that employers will consistently meet the “job related and consistent with business necessity” defense:



CIRCUMSTANCE #1

The employer validates the criminal conduct screen for the position in question, according to the Uniform Guidelines on Employee Selection Procedures standards, if data about criminal conduct as related to subsequent work performance are available and such validation is possible.



CIRCUMSTANCE #2

The employer develops a targeted screen considering at least the nature of the crime, the time elapsed and the nature of the job and then provides an individualized assessment for people excluded by the screen to determine whether the exclusion as applied is job-related and consistent with business necessity.

Since the first option can be an arduous task, most employers opt for some version of the second option. This would include developing a screen and applying it to assess the risk of hiring an applicant for which the employer considers:

- 1 The nature of the job held or sought.
- 2 The nature and gravity of the offense or conduct.
- 3 The length of time that has passed since the offense, conduct and/or completion of the sentence.

Per the EEOC, the individualized assessment would then include:

- ✓ A notice to the person that he or she has been screened out because of a criminal conviction.
- ✓ An opportunity for the individual to demonstrate that the exclusion should not be applied because of his or her particular circumstances.

Screening Guidance

DEVELOPING TARGETED SCREENS

The following should be helpful when developing targeted screens that meet the standard of being job-related and consistent with business necessity.



Determine the nature of the job held or sought

Describing the nature of the job helps when assessing whether the criminal conduct relates to successful performance on the job and is consistent with business necessity. This description would include:

- The basic duties of the job (e.g., data entry, lifting boxes).
- The essential functions of the job (e.g., processing mortgage loans, piloting an aircraft).
- The circumstances under which the job is performed (e.g., the level of supervision, oversight and interaction with co-workers or vulnerable individuals).
- The environment in which the job is performed (e.g., outdoors, in a warehouse, in a private home).



Determine the nature and gravity of the offense

Not all criminal convictions represent serious misconduct. Some offenses, such as disorderly conduct, motor vehicle offenses (other than DUI), and public indecency (often the result of public urination) are minor and of little relevance to employers.

Considerations for the targeted screen might include:

- The type of harm caused by the crime (e.g., property loss caused by theft).
- The elements of the crime (e.g., deception, threat or intimidation involved in a theft).
- That misdemeanors may be less severe than felonies.

Note: Unlike a conviction, an arrest is not reliable evidence that an applicant has committed a crime. Thus, an exclusion based on an arrest record is justified only if the case is still pending, if the conduct appears to be job-related and relatively recent, and if the employer has reason to believe the applicant or employee engaged in the conduct for which he or she was arrested (such as the existence of security-camera footage that has been released to the public).

Additionally, some states may not allow any arrest records to be used in such an assessment.



Evaluate the length of time since the offense or conduct

A person with a conviction does not represent a risk forever. The longer someone with a conviction goes without a new conviction, the less likely he or she will commit a new offense. Eventually, the risk becomes comparable to the risk presented by a person with no criminal record. In general, the risk that someone with a record will commit a new offense after five years is only about 1 percent to 2 percent greater than the same risk presented by someone without a record.

The acceptable length of time since the offense is typically set by employer policy. While no specific time frames are endorsed by the EEOC, blanket policies banning the hiring of anyone with a criminal record would not be allowable. Instead, it is suggested employers research recidivism rates (and their decline over a specified time) related to the type of conviction, including local and national data, and determine a time frame that reasonably relates to that data. This type of data often shows risk declines within 3 to 10 years depending upon conviction type.

Screening Guidance

Resources

See the following resources for more guidance. See state and local justice department websites for state-specific information.

- [Department of Justice – Recidivism](#)
- [Data.gov – Recidivism](#) (link not working while shutdown continues)
- [National Institute of Justice – Measuring Recidivism](#)
- [The Changing State of Recidivism: Fewer People Going Back to Prison](#)

In my experience, people with criminal records are often model employees. They are frequently the most dedicated and conscientious. A lot of doors are shut to them, so when someone gives them an opportunity, they make the most of it.

—A restaurant executive who employs hundreds of workers in Ohio and Florida

Individual Assessment

The applicant may reveal during the individual assessment that he or she was not identified correctly in the criminal record or that the record is otherwise inaccurate. Other relevant individualized evidence to consider is included in the checklist below.

Checklist: Criminal Record Risk Factor Assessment

The Equal Employment Opportunity Commission (EEOC) identifies the following factors as appropriate considerations when an employer assesses whether an applicant (or an incumbent employee) has a record of rehabilitation that shows a likelihood that the person will commit acts harmful to the employer's customers, clients or workforce:



The facts or circumstances surrounding the offense or conduct: For example, when an offender received a purely probationary sentence with no prison time for a felony conviction, that is a common indication that the offense was not as serious as the felony classification would typically indicate.



The number of offenses for which the individual was convicted.



Older age at the time of conviction or release from prison: Studies indicate that people who commit offenses when they are older and are older at the time of release from prison or completion of a sentence are less likely to re-offend.



Evidence that the individual performed the same type of work post-conviction with the same or a different employer and with no known incidents of criminal conduct.



The length and consistency of employment history before or after the offense or conduct.



Rehabilitation efforts after the offense (e.g., education/training).



References from former employers, particularly from post-offense employment.



Character references and any other information regarding fitness for the particular position.



Whether the individual, since the latest offense, has been bonded under a federal, state or local bonding program.

Other factors not specifically listed by the EEOC but relevant to many persons with a criminal conviction:



Parole release obtained after serving only a short period in detention for a felony conviction, with no record of any subsequent offenses.



Evidence of family responsibility, such as uniting with a spouse or partner and, if relevant, caring for children or dependent relatives.



Additional rehabilitation after the offense, such as continuing participation in a 12-step program.

Source: EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964; SHRM/Lewis Maltby, President, National Workrights Institute.

RISK ANALYSIS

All hiring decisions involve risk; even the strongest applicants sometimes fail to become strong employees.

And not all convictions pose a significant risk to all jobs. The threshold question is whether the job in question presents an opportunity for the type of conduct involved in the conviction.

Risk Analysis

RISK ANALYSIS

Considerations in your risk analysis would include the following:



Does the conviction pose job-related risk?

In some cases, this is very straightforward. A DUI/DWI conviction, for example, indicates a risk for jobs involving operating a motor vehicle. For other jobs, this poses no risk. Theft convictions are relevant for jobs that involve unsupervised access to cash or property that can be sold for cash. Convictions for crimes of violence are generally a concern for jobs that involve unsupervised access to vulnerable populations, such as children, seniors, women, hospital patients and others who have a reduced ability to protect themselves physically.

Other types of offenses are more complex. Possession of controlled substances raises different risks depending upon the drug involved. Relatively recent possession for “hard” drugs, such as heroin, cocaine and methamphetamines, indicates that the applicant may be addicted, which is a potential problem in any job. Possession of marijuana does not carry a similar risk but may still present legitimate concerns for safety-sensitive positions. Convictions for the sale of controlled substances are a risk factor in jobs involving access to controlled substances.



How serious is the prior offense?

The name of the offense reveals little about how serious it was. Theft can mean anything from shoplifting a low-cost item to stealing a million dollars. Assault can be getting into a shoving match after a traffic accident or attacking someone with a weapon and causing serious bodily injury. Selling drugs can refer to a large-scale distribution operation or selling a small amount of marijuana to another student in a college dormitory.

Employers can learn more about the conduct involved in the prior offense from the charge sheet (known as a complaint in some jurisdictions). This generally contains a brief description of the conduct that gave rise to the arrest. The charge sheet is part of the public record, which the employer can obtain through a consumer reporting agency. Charges frequently contain indications of the severity of the offense. For example, some jurisdictions divide assault into “simple assault” and “aggravated assault.” A person with experience in the criminal justice system can often provide insight into the nature of the offense from these distinctions. In some cases, employers may be able to get information about underlying conduct from a probation or parole officer, a prosecuting or defense attorney, or the applicant.



How many prior convictions does the applicant have?

Most people have done something in their lives for which they could have been arrested—perhaps driving while intoxicated or getting caught in a brawl outside the stadium of a losing team. The difference between someone with a single prior conviction and someone with no record is often just luck. In such cases, the risk of a new arrest is relatively low. Two or more prior convictions are a red flag that requires more careful analysis.



How serious is the potential harm?

The potential harm from misconduct by an employee with a criminal record varies from company to company. This is especially true for property crimes. The potential harm from a dishonest employee in a convenience store is much less than the potential harm from one in a jewelry store or a financial institution.

Additionally, a new arrest is not necessarily a problem for the employer. In many cases, neither the employer nor its employees are the victims of the new offense. In these situations, the employer is harmed by the new arrest only if the employee is incarcerated.



Has the applicant been referred by an established re-entry organization?

There is little or no risk when the applicant comes from an established re-entry organization with a strong history of successfully placing clients with employers. Some examples include:

- [Cara](#) (Chicago, IL)
- [Chrysalis](#) (Los Angeles, CA)
- [Hope for Prisoners](#) (Las Vegas, NV)
- [Per Scholas](#) (Atlanta, GA; Cincinnati and Columbus, OH; Dallas, TX; Washington, DC; New York, NY)
- [Prison Entrepreneurship Program](#) (Houston and Dallas, TX)
- [Thistle Farms](#) (Nashville, TN)
- [Twin Cities Rise](#) (Minneapolis and St. Paul, MN)

Has the applicant been bonded under a federal, state or local bonding program? Such organizations have great expertise in determining whether a candidate is job-ready. They also know that serious misconduct by a client would damage their ability to place other clients. This gives them an incentive to be extremely careful in recommending a client to an employer.



Has the applicant changed or been reformed?

People are not the same; some people learn from their mistakes, and others do not. While accurately assessing the level of reform someone may have achieved is beyond most of our abilities, taking the time to consider that the applicant may have changed is worthwhile.

Successful work experience after a conviction is a strong indicator that someone with a record has changed. Even if the person is not currently employed, the fact that the applicant worked successfully after the conviction suggests a positive change.

Rehabilitation efforts after the offense, such as participation in education and training programs, or continuation in a 12-step program (and acting as a sponsor), are additional signs that someone has made a change.

Finally, rehabilitation involves an internal change. People stop rationalizing their misconduct and accept responsibility for it. Their “internal narrative” changes. Of course, a person seeking a job knows the narrative an employer wants to hear. But it is difficult to fake a sense of responsibility, and an employer who listens carefully can often sense when this happens.

Risk Analysis

Insurance

There is an array of insurance products for businesses that protect against various types of liability. One, the fidelity bond, exists to protect a business and its customers from monetary theft perpetrated by an employee or independent contractor engaged by the employer. One of the oldest forms of insurance, a fidelity bond must be purchased before a business license is issued in many states.

A fidelity bond typically covers monetary and asset losses that occur when an employee commits forgery, embezzlement, identity theft, securities fraud and other forms of theft. Long-standing insurance practices excluded employees with prior theft convictions from coverage, giving employers a reason to shy away from hiring them.

But changes are underway, and brokers and underwriters understand that employers cannot categorically refuse to hire people with a criminal record without risking a discrimination claim; therefore, fidelity bond coverage must meet that need.

Employers should educate their broker on the policies and practices in place to reduce hiring risks, such as screens and individual assessments, and orientation and mentoring programs. When a broker has evidence of how employment decisions are made regarding people with criminal records, and how orientation and other programs create an organizational culture in which employees know what is expected of them, they can take that information to underwriters to advocate for a fair and inclusive policy.

The background of the slide features a dark blue overlay with a faint image of three construction workers wearing white hard hats. One worker in the foreground is wearing safety glasses and looking down. The title 'NEGLIGENT HIRING' is prominently displayed in white, bold, uppercase letters, underlined with a thick orange horizontal bar.

NEGLIGENT HIRING

Some employers are concerned that hiring people with criminal records may lead to liability for negligent hiring.

While this is a legitimate concern and should not be overlooked, the risk of liability is often less than is commonly assumed. Relatively few negligent-hiring cases are filed, and many experienced corporate employment lawyers have never handled a negligent-hiring case. Most employers have never been sued on this ground.

More importantly, negligent hiring liability typically arises in only a handful of specific types of jobs with clear and obvious risks.

Negligent Hiring

Employer liability is generally not established just because the job involves one of the enumerated risks described below. In addition, the nature of the prior misconduct must make the ultimate harm foreseeable. For example, in cases when an employee hurts a member of a vulnerable population, the employer is liable only when the prior offense involved a crime of violence. There are, however, rare cases in which a court found an employer liable for employee violence based on nonviolent prior convictions involving drugs.

Additionally, it is not necessary for these elements to be the predominant part of the job—or even a regular part of the job—to determine liability should an incident occur. But they must be part of the job.

For example, a court held an employer liable for the conduct of a hotel food-service worker whose work involved unsupervised movement throughout the hotel, which would sometimes bring him into contact with unaccompanied children. But a job in a warehouse did not involve contact with people outside the warehouse, and the employer was not responsible when someone outside was lured inside by an employee and harmed.



Negligent Hiring

JOBS AT HIGH RISK FOR NEGLIGENT HIRING

If none of the following elements are involved in the job, liability for negligent hiring is **not** a significant risk:

JOBS WITH ACCESS TO VALUABLES



1. Cash or property that can be easily converted to cash.
2. Property that can be easily stolen.
3. Property belonging to third parties such as co-employees or customers.

JOBS WITH UNACCOMPANIED ACCESS TO VULNERABLE POPULATIONS



1. Minors, the elderly, women, hospital patients and others who have reduced ability to protect themselves physically.
2. Under circumstances where others are not likely to provide protection, such as in a customer's home.

JOBS THAT REQUIRE THE USE OF DANGEROUS IMPLEMENTS



The job involves the use of firearms, knives or other items that are clearly capable of causing serious injuries if not handled correctly.

JOBS THAT REQUIRE THE OPERATION OF A MOTOR VEHICLE



This includes indoor vehicles and other vehicles for which no driver's license is required.

JOBS THAT INVOLVE LIQUOR



This includes bars and other establishments with easy access to liquor.

Summary: Cases in which employers engaged in this type of analysis and were still found liable for negligent hiring are very few. In most cases where liability was found, the employer did not even run a criminal record check. Consistent use of screens and individual assessments are key to a successful defense strategy.

Absolute freedom from risk of liability does not exist. But employers who make informed judgment calls regarding applicants with records should not fear negligent hiring liability.

GettingTalentBackToWork.org

#WeAreWork