

## Crime and Punishment: Using Criminal Histories, Arrest Records, and Background Checks in Employment

Every employer wants to promote and sustain a safe workplace. One way in which employers try to accomplish this goal is to conduct background checks on its applicants or new hires to assess whether they might pose a risk to other employees, customers, or other individuals they might encounter during their employment. However, when inquiring about applicants' criminal histories or arrest records and when basing employment decisions on information obtained through background checks, employers should make sure that they are in compliance with relevant federal, state, and local laws.

### Federal Law

Currently, there are no federal statutes or laws that 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 prior to conducting a background check. The authorization form must be separate from the application.

Although there is no specific federal law that precludes an employer from considering an applicant's criminal history in making an employment decision, employers should nevertheless be careful not to treat applicants with similar criminal records differently, because such differential treatment could result in a discrimination claim under Title VII of the Civil Rights Act or another federal employment discrimination statute. For example, if a female applicant is rejected for a particular position because of a DWI conviction, but a male applicant is later hired for the same position despite having a DWI conviction, the female applicant might have a potential sex discrimination claim under Title VII.

Employers also should make sure that 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 for the policy or practice. In other words, an employer must be able to demonstrate that its policy of considering certain types of criminal convictions in making hiring decisions helps to accurately predict whether the applicant is likely to be a responsible, reliable, and safe employee.

### New York Law

The New York Human Rights Law and the New York Correction Law prohibit an employer from denying employment to any individual based his or her criminal conviction record, unless: (1) there is a direct relationship between one or more of the criminal offenses and the employment sought or held by the individual; or (2) the granting or continuation of employment would involve an unreasonable risk to property or to the safety of particular individuals or the general public. 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. The eight factors to consider are:

- New York's public policy of encouraging employment of persons with prior convictions;
- The specific duties and responsibilities necessarily related to the employment sought;
- The bearing, if any, the criminal offense(s) for which the person was previously convicted will have on his ability to perform one or more such duties or responsibilities;
- The time which has elapsed since the occurrence of the criminal offense(s);
- The age of the person at the time of the occurrence of the criminal offense(s);
- The seriousness of the offense(s);
- Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct;
- The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

It is best practice to consider each and every one of the factors, balancing the factors that weigh against hiring an applicant against those that support a decision to hire an applicant. No single factor should be determinative of the hiring decision. Employers should document their consideration of each of the factors and the reasoning for their decision not to hire an applicant. It should be noted that this law also protects current employees from adverse employment action based on their criminal conviction record.

The New York Human Rights Law also prohibits employers from inquiring, in a job application or otherwise, about any previous arrest or criminal accusation which 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 inquire whether an applicant has any pending arrests or criminal accusations filed against him or her, nor is it unlawful to make an adverse employment decision based on a pending arrest that has not yet been resolved.

### **Local Laws**

Some cities and counties in New York have enacted ordinances that prohibit employers from asking applicants about their criminal record on an employment application or at any time prior to making a conditional job offer to the applicant (often referred to as "ban the box" or "fair chance laws"). Some of the cities and counties that have enacted such ordinances include:

- [New York City](#)
- [Albany County](#)
- [City of Buffalo](#)
- Dutchess County
- City of Ithaca
- City of Kingston
- City of Newburgh

- [City of Rochester](#)
- [City of Syracuse](#)
- Tompkins County
- Ulster County
- City of Woodstock
- City of Yonkers

Employers that have employees in the above local areas should confirm with their employment attorney regarding whether the law applies to them, and if so, what the law requires.

### **Conclusion**

Employers should be careful in conducting background checks and using the information obtained when making hiring decisions. If an employer routinely conducts background checks in the course of its hiring practices, the employer should understand the legal limits of using the information. Managers, supervisors, and any other hiring staff who conduct interviews should be trained so that they do not inadvertently make prohibited inquiries regarding an applicant's criminal convictions or arrest record.

If you have any questions about this Information Memo, please contact [Stephanie H. Fedorka](#), any of the [attorneys](#) in our [Labor and Employment Law Practice](#), or the attorney in the firm with whom you are regularly in contact.



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