

A grayscale background image showing a close-up of a person's hand holding a pen and writing in a spiral-bound notebook. The image is slightly blurred, focusing on the action of writing.

The Perils of Asking the Criminal History Question on Employment Applications

Question:

What are some of the challenges of asking about an applicant's criminal history on an employment application?

Response & Analysis:

The recent wave of laws restricting or prohibiting criminal history inquiries on employment applications, combined with the Equal Employment Opportunity Commission (EEOC)'s guidance on the use of criminal records in employment decisions, has made the complete removal of the criminal history question from employment applications the safest and most advisable course of action for most employers.

There are various laws on both the state and local level that prohibit employers from asking the criminal history question on the initial employment application. These laws—widely known as “ban the box” policies—generally prohibit employers from asking about criminal records on employment applications and require employers to delay such inquiries until later in the application process. To date, 18 states and over 100 localities have put “ban the box” policies in place.

There have also been several efforts at the federal level to pass a national “ban the box” policy. While these efforts have not been successful to date, an increasing number of lawmakers are supporting these measures, making the passage of a national policy more and more likely.

Due to the lack of conformity amongst the various laws and policies on the state and local level, multistate employers who want to continue asking

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the criminal history question on their employment applications will have to use different employment applications across the United States in order to comply with these fragmented legal requirements. Thus, the best practice for employers is to remove the criminal history question from the employment application and to delay this inquiry until later in the employment process. However, it is important to note that even when it becomes lawful for employers to ask about criminal history, that inquiry may still be limited by state laws and EEOC guidelines that continue to apply regardless of when the question is asked.

In some states, even when an employer is permitted to ask the criminal history question on the employment application or later in the employment process, that inquiry may be further limited by other laws. For example, in California, employers may not inquire about arrests that did not result in a conviction, convictions that resulted in the individual being sent to a diversion program or convictions for certain marijuana-related offenses that are more than two years old.¹

In New York, employers may not inquire about or make an adverse decision based on an arrest or criminal accusation that is not pending and did not result in conviction and may not discriminate on the basis of conviction records unless there is a direct relationship between the criminal offense and the employment sought.²

In Massachusetts, employers may not request information about arrests not resulting in a conviction, a first conviction for certain misdemeanors or a misdemeanor that is five years before the application date.³ Several other states permit applicants to refuse to disclose or prohibit employers from asking about criminal records that have been expunged or pardoned or records related to criminal charges that were dismissed or where the individual was not convicted.

The EEOC has also published guidance for employers on the use of criminal records in employment decisions that continues to apply regardless of when criminal history is considered.⁴ Per the EEOC's guidance, broad criminal

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¹ CALIF. LAB. CODE §§ 432.7-432.8

² N.Y. EXEC. LAW § 296 et seq.

³ MASS. GEN. LAWS ANN. Ch. 151(B) § 4(9)

⁴ Equal Employment Opportunity Commission, *Enforcement Guidance on the Consideration of Arrest and Criminal Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964* (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.



inquiries or automatic disqualification based on criminal records may result in a disparate impact against minority applicants because national statistics reveal that some groups of minorities are arrested more frequently than non-minorities. The EEOC recommends that the employer's policy "effectively link specific criminal conduct, and its dangers, with the risks inherent in the duties of a particular position."⁵ Thus, rather than broadly requesting an applicant's entire criminal record, employers should limit criminal record inquiries to only those relevant to the duties of a particular position.

When a criminal record is identified, instead of treating the record as an automatic exclusion from employment, the employer should consider the surrounding circumstances and use an "individual assessment" that provides the applicant with an opportunity to explain before refusing to hire him or her.

The EEOC has also endorsed as a best practice the fair hiring practice mentioned above that has been adopted in many states and localities, which removes criminal background inquiries from the job application and delays it until later in the hiring process.⁶ Employers who ask the criminal history question on initial employment applications will likely find it more difficult to comply with the EEOC's guidance and may expose themselves to potential enforcement actions or discrimination lawsuits.

Thus, employers would be well-advised to remove the criminal history question from their employment application and to delay this inquiry until later in the application process unless making such an inquiry is necessary in order to comply with a legal or regulatory requirement. Furthermore, employers must be vigilant of various state laws and regulatory guidelines that continue to apply regardless of when criminal history is considered.

⁵ *Id.* at 14.

⁶ *Id.* at 13-14.

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