

Use Of Lesser Offenses In Employment Consideration

Question:

Can I consider any conviction record when making employment decisions?

Response & Analysis:

It depends. When it comes to lower level offenses, several states have laws in place that limit the types of offenses an employer may consider when making hiring decisions.

WHAT IS A “LOWER LEVEL OFFENSE”?

This analysis uses “lower level offenses” to generally refer to minor crimes that are less serious and may impose minimum jail time or a fine.

States differ on the terminology for a lower level offense and may refer to the offense as: “violation, non-criminal offense, infraction, minor misdemeanor, petty offense, summary offense, forfeiture, or civil violation.” Regardless of the term used, a lower level offense can include the following convictions: theft, retail theft, harassment, selling alcohol to a minor, or carrying false identification. However, a true determination of whether a conviction is considered a lower level offense depends on the specific laws within each state.

DOES MY STATE LIMIT MY ABILITY TO CONSIDER LOWER LEVEL OFFENSES FOR EMPLOYMENT PURPOSES?

Several states have laws in place that limit an employer’s ability to consider certain lower level offenses such as: Hawaii, Kentucky, Massachusetts, Nevada, New Mexico, New Jersey, and Pennsylvania. New York City also recently amended its Fair Chance Act, restricting



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consideration of certain lower level offenses. The laws are discussed below:

HAWAII: Employers are only able to consider felony convictions that occurred within the last 7 years and misdemeanor convictions that occurred within the last 5 years.¹ The law does not permit employers to consider any other lower level offenses unless an exemption applies. The law provides exemptions for: state and political subdivisions, the department of education, the department of health employees or subcontractors, private schools, certain financial institutions, and the department of public safety.²

KENTUCKY: In Kentucky, a very narrow set of “employers”³ are prohibited from considering lower level offenses. The law states that an “employer” may request convictions involving any felony offense, any misdemeanor offense under KRS Chapter 218A⁴ committed within the five (5) years immediately preceding the application, or any conviction for violating KRS Chapter 189A⁵ committed within the five (5) years immediately preceding the application of a person who applies for employment or volunteers for a position in which he or she would have supervisory or disciplinary power over a minor.

MASSACHUSETTS: The law in Massachusetts provides specific convictions that employers are not permitted to request, keep record of, or use when making an employment decision. These include a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace.⁶ Additionally, employers may not request any conviction of a misdemeanor where the “date of such conviction or the completion of any period of incarceration resulting therefrom, whichever date is later, occurred 3 or more years prior to the date of such application for employment or such request for information, unless such person has been convicted of any offense within 3 years immediately preceding the date of such application for employment or such request for information.”⁷

NEVADA: The regulation regarding lower level offenses only applies to employment applications involving the board of county commissioners,

¹ See Hawaii Revised Statute Section 378-2.5

² *Id.* A complete list of provided exemptions may be accessed [here](#).

³ The law defines an “employer” as any “organization chartered by the congress of the United States or specified by the Attorney General which employs or uses the services of volunteers or paid employees in positions in which the volunteer or employee has supervisory or disciplinary power over a child or children.” *Ky. Rev. Stat. Sec. 17.160(4)*.

⁴ Regulation addresses controlled substance violations.

⁵ Regulation addresses motor vehicle violations while under the influence of controlled substances.

⁶ See Mass. Ann. Laws Ch. 151B Section 4(9)

⁷ *Id.*



county officers, or any person acting on behalf of the county. Such employers are not permitted to consider “an infraction or misdemeanor for which a sentence of imprisonment in a county jail was not imposed.”⁸

NEW MEXICO: In New Mexico, public employers are restricted from considering certain lower level offenses.⁹ Specifically, for applications “in connection with any public employment, license or other authority,” employers cannot consider “misdemeanor convictions not involving moral turpitude.”¹⁰

NEW JERSEY: New Jersey recently enacted the NJ Decriminalization law which addresses certain convictions that cannot be considered when making employment decisions. Employers are unable to require an applicant to disclose, or take adverse action because of any “conviction, or adjudication of delinquency[...] for the manufacturing, distributing, or dispensing, or possessing or having under control with the intent to manufacture, distribute, or dispense marijuana.”¹¹

PENNSYLVANIA: Pennsylvania law only allows employers to consider “felony and misdemeanor convictions” to the extent those convictions “relate to the applicant’s suitability for employment in the position for which he has applied.”¹²

NEW YORK CITY, NEW YORK: In January 2021, New York City passed an amendment to its Fair Chance Act.¹³ The law makes it unlawful for any New York City employer or employment agency to take adverse action against an applicant on the basis of having “been convicted of a violation as defined in Section 10.00 of the Penal Law.”¹⁴ New York City Penal Law defines a violation as an offense, other than a traffic infraction, for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.

CONCLUSION

In light of the above restrictions, employers are encouraged to carefully review their current practices to ensure compliance with laws in the various jurisdictions in which they operate. If you would like more information or would like to discuss your current reporting rules in more detail, please reach out to your Account Manager for assistance. ■■■

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⁸ See NV Rev. Stat § 245.046(4) (2019)

⁹ See Section 28-2-3 NMSA 1978

¹⁰ *Id.*

¹¹ See NJ Decriminalization Law (A1897)

¹² See 18 Pa. Cons. Stat. Ann. 9125 (b)

¹³ Law No. 2021/004

¹⁴ *Id.*