



Interviewing & Hiring Applicants with a Criminal Record

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As a result of the high rate of incarceration in the United States, a record percentage of working age adults have a criminal record.¹ Some employers have reacted by refusing to consider any applicant with a criminal record, but a hiring ban is wrong for several reasons.

First, employing people with a criminal record has a positive impact on society and public safety. Second, employers who use hiring bans lose out on many strong applicants. And third, unless justified, hiring bans may violate the Civil Rights Act of 1964.²

We all know employment is more than just a job. Being employed provides a sense of belonging and self worth, strengthens community bonds, increases the tax base, supports families, prevents homelessness, and reduces recidivism

to prison. For all of these reasons, employment is especially important for individuals with a criminal record in their background.

Employers may feel they're walking a legal tightrope when considering an applicant with a criminal record. The purpose of this guide is to provide an overview of recommended practices and federal and Colorado laws in lay language; however, the guide should not be construed as legal advice and cannot substitute for experienced legal counsel.

It's recommended that employers consider the following:

- *The nature and gravity of the offense*
- *The length of time elapsed since the offense*
- *The nature of the job sought*

Recommended Interviewing & Hiring Practices

As a best practice, employers should develop a written policy to guide their hiring practices for applicants with a criminal record. The policy should identify the positions that require a background report and, when applicable, justification for such (such as statutory, licensing, regulatory). Depending upon the employer, the policy may need to list the specific criminal offenses that demonstrate a relationship or unfitness for such positions as well as the length of time for which an exclusion would apply. In addition, hiring officials should be trained on how to implement the policy consistent with Title VII of the Civil Rights Act of 1964 and to keep all information about criminal records confidential.³

In the event an applicant has a criminal history and there is no statutory, licensing, or regulatory justification for excluding the applicant from the labor pool, employers should follow a two-step

process to screen the applicant.

Step one is to consider the nature of the crime, the time elapsed, and the nature of the job.

Step two is to individually assess the applicant in order to ensure the applicant was not mistakenly screened out due to incomplete or inaccurate information.⁴

The two-step process allows an employer to determine in an informed manner the relevance of the applicant's history to the job and helps employers make hiring decisions for eligible applicants with a criminal history on a case-by-case basis.⁵

1. Consider the nature of the crime, time elapsed, and nature of the job.

2. Ensure applicant wasn't mistakenly screened out.

Federal Laws

Title VII of the Civil Rights Act of 1964 established that employers could not refuse to hire applicants based on their "race, color, religion, sex, or national origin."⁶ Because African Americans and Hispanics are disproportionately arrested and incarcerated in the United States, policies and practices that refuse to consider or hire applicants with a criminal record may violate the Act's prohibition against employment discrimination.

This is why the Equal Employment Opportunity Commission (EEOC) recommends employers develop hiring policies that allow a company to assess applicants on an individual basis.

Employers should be aware that using arrest records in a hiring decision could also violate federal law. Employment Coordinator, a comprehensive legal reference for employment practices, advises: "Because

the fact that an individual has been arrested is not conclusive as to any wrongdoing and is irrelevant to work qualifications, and because the mere inquiry into arrest records tends to have a chilling effect on black applicants, such inquiries alone violate Title VII, in the absence of a strong showing of business necessity.”⁷

Policies and practices that refuse to consider or hire applicants with a criminal history may violate the prohibition against employment discrimination contained in the Civil Rights Act of 1964

Colorado’s Laws

Colorado has several laws that pertain to employment of people with a criminal history.

Colorado Revised Statute § 24-5-101, adopted in order to expand public employment opportunities for people with a criminal background, states: a criminal conviction “shall not, in and of itself, prevent the person from applying for and obtaining public employment....” The law also indicates a criminal conviction should not prevent an applicant from applying for or receiving a license, certification, permit, or registration necessary for employment, unless there is a specific statute indicating such.⁸

In addition, Colorado’s state agencies are not legally allowed to

request a criminal background check until an applicant is a finalist or there is a conditional offer of employment. After that point, if the applicant is determined to have a criminal history, the law directs the state agency to consider the nature of the conviction, the nature of the relationship between the conviction and the position, including whether the conviction was for unlawful sexual behavior and might place a co-worker or the public in a vulnerable position, the time elapsed since the conviction, and information provided by the applicant on behalf of his or her rehabilitation.⁹

The Colorado Legislature has also addressed negligent hiring concerns. This law is explained on page 5.

The National Institute of Justice and the American Bar Association Criminal Justice Section provide a database of Colorado statutes regarding employment and criminal history at www.abacollateralconsequences.org. The Office of the State Public Defender also provides a link to Collateral Consequences at pdweb.coloradodefenders.us.

Criminal Background Reports

Criminal background reports are usually obtained from the Colorado Bureau of Investigation (CBI), a division of the Colorado Department of Public Safety. A CBI report is a record of fingerprint-supported arrests submitted by law enforcement agencies in Colorado. These reports should include any arrest made in Colorado and the final disposition, or resolution, of any arrest, but this may not always be the case.

A criminal background report is just one of the tools that an employer uses when making a hiring decision, along with interviewing and checking references.

Criminal background reports are also available from private vendors whose services may include additional background information. Private vendors buy database information from law enforcement agencies, courts, and other sources. The advantage to using a private vendor is their reports usually include out-of-state arrest and conviction information. The disadvantage is that private vendors are largely unregulated. The nonprofit National Consumer Law Center reports that information provided by private vendors may be inaccurate or misleading, and like CBI reports, may not always provide the final disposition of a charge.¹⁰

Keep in mind that a criminal background record is just one of the tools that an employer uses when making a hiring decision, along with interviewing and checking references.

Most criminal background reports include information about the arrest, charge, date of the offense, and the disposition of the case.

Sometimes there may be several arrests listed, some of which may be multiple listings of the same arrest. Look for the charge date in order to sort these listings out.

If the final disposition for an arrest is not included in a background report, the information may be obtained by calling the court of record.

It is possible that an arrest did not lead to a conviction and the charge was dropped, reduced, or the applicant was found not guilty. This information may or may not be included on the background report.

The best practice is for an applicant to be allowed to explain the circumstances and outcome of any arrest.

Negligent Hiring Concerns

One of the major reasons employers give for not hiring an applicant with a criminal record is their fear of a negligent hiring lawsuit. Negligent hiring is based on the principle that an employer may be liable for harm caused by an employee's acts, even if the act is not in the scope of

employment.¹¹ However, the reality is that most employers are unlikely to ever face a negligent hiring lawsuit.¹²

The members of the Colorado Legislature worked to clarify negligent hiring concerns in 2010 when they unanimously passed a law to address employers' concerns about negligent hiring lawsuits. This statute explains that in the event of a civil action against an employer for an employee's actions, an employee's criminal background could not be introduced as evidence unless there was a direct relationship between the criminal history and the underlying facts of the claim.¹³

In other words, an employee's background could not be used against an employer in a civil claim if the employer had considered the nature and gravity of the employee's offense and its relevance to



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the employee's position in the company.

Since liability is usually based on whether the employer could have foreseen the employee's actions, when an employer considers the nature of the crime, the time elapsed, and the nature of the job, the employer is making a reasonable effort to protect his or her business in the unlikely event of a negligent hiring lawsuit.

Employers should be aware that most successful negative hiring lawsuits involve employees with unsupervised access to vulnerable populations such as children or the elderly.¹⁴

Work Opportunity Tax Credit

The Work Opportunity Tax Credit (WOTC) is a federal income tax credit for employers that hire people with a felony conviction within one year of release from incarceration. The tax credit is 40% of qualified wages for employees that work 400 or more hours during the first year of employment or 25% for new hires employed 120 to 399 hours. Since qualified wages are capped at \$6,000, this tax credit is worth up to \$2,400 for each qualified employee's first year of employment following release from incarceration.

Employers must first register with the Colorado Department of Labor and Employment at wotc.cdle.org/. Employers

also need to submit IRS form 8850 and Department of Labor ETA Form 9061 within 28 days of the employee's start date to the Colorado Department of Labor & Employment, WOTC Unit, 633 17th Street, Suite 700, Denver, CO 80202.

Information about the WOTC and links to the required forms are online at www.colorado.gov/cdle/taxcredits.

Employers may call the WOTC Unit at 303.318.8845 for information and assistance with the forms.

Federal Bonding Program

The United States Department of Labor will provide a \$5,000 Fidelity Bond for at-risk individuals, defined as having a record of arrest, conviction, or incarceration (among others), for free to an employer for the employee's first six months of hire.

The bond insures the employer for theft, forgery, larceny, or embezzlement. The employee may be hired on a seasonal,

part time, or full time basis.

Employers may contact the state office where the program is administered for information and help with the certification form.

Additional information can be found online at www.colorado.gov/CDLE. Click *Employers*, then *Federal Bonding*, under the heading *Incentives & Tax Credits*.

The Colorado Bureau of Investigations provides a list of frequently used abbreviations on background records on its website www.cbirecordscheck.com. Click on the Questions link, then look for information on reading a disposition.

1 Schmitt, J. & Warner, K. (2010). Ex-offenders and the labor market. Retrieved from Center for Economic and Policy Research website: www.cepr.net/documents/publications/ex-offenders-2010-11.pdf. / 2 Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended. (April 25, 2012). Retrieved from U.S. Equal Employment Opportunity Commission website: www.eeoc.gov/laws/guidance/arrest_conviction.cfm#IIIB. / 3 Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended. (April 25, 2012). Retrieved from U.S. Equal Employment Opportunity Commission website: www.eeoc.gov/laws/guidance/arrest_conviction.cfm#IIIB. / 4 What You Should Know: EEOC's Response to Letter from State Attorneys General on Use of Criminal Background Checks in Employment. (August 29, 2013) Retrieved from U.S. Equal Employment Opportunity Commission website: www1.eeoc.gov/eeoc/newsroom/wysk/criminal_background_checks.cfm?renderforprint=1. / 5 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), www.eeoc.gov/laws/guidance/arrest_conviction.cfm#IIIB. / 6 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), www.eeoc.gov/laws/guidance/arrest_conviction.cfm#IIIB. / 7 Employment Coordinator. Thomson Reuters. 2012. 33:3. / 8 Colorado Revised Statutes § 9-2-201 / 9 Colorado House Bill 12-1263. Concerning Reducing Barriers to Employment by State of Colorado Agencies for People with Criminal Records. / 10 Yu, P. S. & Dietrich, M. (April 2012). Broken records: How errors by criminal background checking companies harm workers and businesses. Retrieved from National Consumer Law Center website: www.nclc.org/images/pdf/pr-reports/broken-records-report.pdf. / 11 Gallagher, S. R., Miller, K. E., & Brown, J. (Managing Editors). 2012. The practitioner's guide to Colorado employment law. Second edition. Volume 1. Continuing Legal Education in Colorado, Inc. Denver, Colorado. / 12 SEARCH, National Consortium for Justice Information and Statistics. (2005). Report of the national task force on the commercial sale of criminal justice record information. (p. 68). Retrieved from SEARCH website: www.search.org/files/pdf/RNTFCSCJRI.pdf. / 13 Colorado House Bill 10-1023. Concerning Clarifying Civil Liability Regarding Negligent Hiring Practices for an Employer that Hires a Person with a Criminal Record. / 14 SEARCH, National Consortium for Justice Information and Statistics. (2005). Report of the national task force on the commercial sale of criminal justice record information. (p. 68). Retrieved from SEARCH website: www.search.org/files/pdf/RNTFCSCJRI.pdf.

"Millions of Americans — one in four adults — have arrest or conviction records that often follow them throughout their lives. Most employers now conduct criminal background checks, potentially derailing qualified workers who are rebuilding their lives or who have inaccurate records or minor offenses. As a result, many employers are losing out on qualified workers in industries as diverse as trucking, health care and private security, where there are serious labor shortages."

—National Employment Law Project

"Employment can make a strong contribution to recidivism-reduction efforts because it refocuses individuals' time and efforts on pro-social activities, making them less likely to engage in riskier behaviors and to associate with people who do. Having a job also enables individuals to contribute income to their families, which can generate more personal support, stronger positive relationships, enhanced self-esteem, and improved mental health. For these reasons, employment is often seen as a gateway to becoming and remaining a law-abiding and contributing member of a community."

—The Council of State Governments Justice Center

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