

Law Trends

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An Employer's Guide to Criminal Background Screening Part One: Significance

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The most recent Ohio Courts Summary, a report published annually by the Ohio Supreme Court, indicates that nearly 498,000 misdemeanor non-traffic charges, 70,000 D.U.I. offenses and 112,000 felony cases were prosecuted statewide in 2004 alone. Further, according to reports released by the Ohio Department of Rehabilitation and Correction, 28,177 individuals were released from Ohio correctional institutions in 2004, and pursuant to their parole requirements, they should be presumed to be actively seeking employment.

With a statewide labor force of 5.9 million, these numbers may not seem significant, but when compared with current statewide unemployment figures of 339,000 workers, it is perhaps much easier to see a significant likelihood that many prospective employees share a potentially distressing characteristic. However, before taking any applicant out of contention, there are some legal ramifications of which to be aware.

According to the Equal Employment Opportunity Commission (EEOC), an employer may not automatically bar a candidate for employment based on his or her past criminal conviction(s) because it would have an adverse impact on minority groups. The EEOC does however find that candidates with a criminal history may be turned down for employment where the employer's decision is justified by business necessity. The EEOC has held that the business necessity doctrine requires employers to only consider the job-related circumstances surrounding a conviction in determining whether an applicant's employment would be inconsistent with the safe and efficient operation of a business.

The following is a suggested process to determine whether an offer of employment should be extended to an applicant with a criminal history.

Hiring Committee and Human Resource Director

The assessment of an applicant should be objective and begin by focusing on his or her abilities, skills, experience and qualifications. But, if a qualified applicant has a criminal history, the hiring committee or human resources director should consider the nature of the conviction(s) and the relevance, if any, to the job before making any employment decisions. The hiring committee or human resources director should be able to identify the potential risks an applicant presents to the organization's business, customers, clients and other employees. It is important for everyone involved in the hiring process to realize that not all convictions should preclude an applicant from consideration or, ultimately, employment.

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Identify Key Convictions

From the EEOC's perspective, the most important factor is the determination of whether the disqualification of an applicant based on his or her criminal history is justified by business necessity. For any applicant disqualified from employment on this basis, his or her past conviction must be established as job-related for the employer's actions to be in compliance with the Title VII business necessity doctrine.

Because of the EEOC's emphasis on job-relatedness it is a good idea to centralize the procedure for making initial assessments of particular criminal offenses. This can be accomplished by categorizing types of convictions and employing a rating system comparing the relevance of a particular conviction with the job's tasks and environment. For example, convictions deemed highly job-related would be assigned a one, those that may be job-related but will require further information are assigned a two and those convictions not job-related would be assigned a three.

Assess the Risk

Beyond the initial assessment of the job-relatedness of particular conviction types, the criminal history of an otherwise desirable applicant may require a more thorough evaluation. For example, if an applicant for a daycare position had a past conviction related to child pornography, his or her employment would obviously present an increased risk to the employer. But what about a conviction for public indecency—is the individual a playground flasher, or is it actually related to an unfortunate decision to urinate behind a tree when leaving a college football game?

In assessing the risk a particular conviction may present to an employer several elements should be taken into account including:

- Nature of the offense
- Length of time that has passed since the offense was committed.
- Circumstances surrounding the offense and whether those circumstances have changed (i.e. domestic or financial difficulties).
- Sentence imposed.
- If the applicant demonstrates a history of committing criminal offenses.
- Has the applicant taken positive steps to avoid re-offending.
- Whether the applicant expresses any remorse for having committed the offense.
- The requirements of the job such as the workplace environment and the applicant's potential exposure to money or vulnerable people.
- Whether there are safeguards against the applicant committing an offense while at work (For instance, the degree of job supervision).

Taking all of these things into consideration will allow a hiring committee or human resources director to determine the job-relatedness of a conviction, assess the risk of employing a particular applicant and determine what precautions and safeguards will minimize that risk for an otherwise desirable candidate.

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