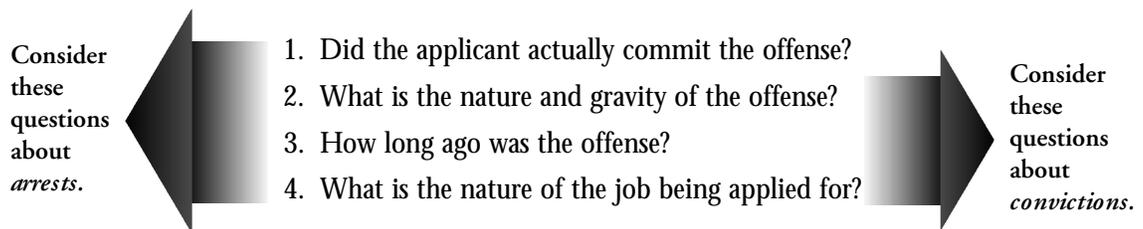


Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Summary

It is a common belief that the Equal Employment Opportunity Commission (EEOC) prohibits the use of arrest and misdemeanor information in the hiring process. As is discussed below, this is not the case. What the EEOC does prohibit is the use of arrest and misdemeanor information to exclude an applicant from employment without considering the four factors below. Furthermore, what many employers do not realize is that the EEOC also requires that they consider the last three of the following four factors in determining whether even an applicant's felony conviction is grounds for denying employment.



The EEOC also states that employers should not ask applicants about arrests which have not lead to convictions, since such questions may have a “chilling effect” upon minorities and discourage them from applying for a job. This does not prohibit employers from learning about these arrests from court records supplied by GIN.

This information reflects GIN understanding of these issues at the time of this writing. It is not legal advice and is not intended to replace competent legal counsel.

You may wish to seek an opinion from legal counsel on these issues.

Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Pros and Cons of Screening Out Arrest and Misdemeanor Information from Criminal Records

A few of our customers have requested that GIN screen out all arrest and misdemeanor information from the criminal records they receive. We believe that screening out such information has both advantages and dangers for our clients.

Advantages of screening out arrest and misdemeanor information: Many times the information which we provide is used by local managers who do not have extensive human resources training. By precluding these managers from seeing arrest and misdemeanor records, corporations ensure that those managers will not use the information improperly. The corporation is then safeguarded from the risk of a discrimination suits which could result from the inappropriate use of those records.

Dangers of screening out arrest and misdemeanor information: Following are two hypothetical examples demonstrating scenarios which could occur if a hotel screens out arrest and misdemeanor information:

- The hotel interviewed Amy and did a criminal background check. Although Amy had a history of shoplifting and other small dollar thefts, this information was screened out of the reports to the hotel because all of the convictions were misdemeanors. Later the hotel was forced to terminate Amy when she was caught stealing from guests' rooms. The hotel lost several regular customers because of the incident.
- John applied for a job as a maintenance person in the hotel. He had been arrested twice for child molestation but was not convicted either time because the parents of the alleged victims refused to allow their children to testify, saying that they had "suffered enough." Because the hotel had directed that arrest information be screened from the criminal records they ordered, they hired John without being aware of the past allegations against him. John later was convicted of using his hotel key to enter a guest's room and molest a 12 year old girl who had been left there by her parents. The judge in the case ruled that there was no law prohibiting the hotel from using arrest information in the hiring process and that the hotel did have a duty to protect the safety of its guests by making a reasonable inquiry into the background of those who could enter guests' rooms. The jury awarded a multi-million dollar judgment against the hotel.

In light of the fact that the EEOC does not prohibit the use of arrest and misdemeanor information in the hiring process, employers must weigh the possible discrimination suits which could be brought against them for misusing the information against the possible consequences of refusing to consider the information.

Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Background of the EEOC's Position

The EEOC states that if a hiring standard disqualifies a disproportionate number of minority applicants from employment, then an employer must prove that there is a business necessity for using that standard. Because minorities are both arrested and convicted more often than the general public, businesses are in danger of being charged with discrimination if they do not follow the EEOC guidelines for the use of this information.

Using Arrest Information in the Hiring Process

The EEOC states that it is permissible to use arrest information in the hiring process.

"...an arrest record may be used as evidence of conduct upon which an employer makes an employment decision. An employer may deny employment opportunities to persons based on any prior conduct which indicates that they would be unfit for the position in question, whether that conduct is evidenced by an arrest, conviction or other information provided to the employer. It is the *conduct*, not the arrest or conviction *per se*, which the employer may consider in relation to the position sought." (EEOC Policy Statement, N-915.061, II.B.2., September 7, 1990, underlining added)

What is forbidden by the EEOC is a blanket policy barring employment to those who have been arrested for a crime. "An arrest record does no more than raise a suspicion that an applicant may have engaged in a particular type of conduct." (Ibid., II.B.3.)

When confronted with information about the applicant's previous arrest record, the EEOC directs employers to:

1. "...determine whether the applicant is likely to have committed the conduct alleged." (Ibid.)
2. Consider "...the nature and gravity of the offense." (Ibid., II.B.2.)
3. Consider "...the time that has passed since the...arrest." (Ibid.), and
4. Consider "...the nature of the job held or sought." (Ibid.)

Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Using Arrest Information in the Hiring Process (continued)

The material below provides a more detailed explanation of these four obligations.

1. Determine whether the applicant is likely to have committed the alleged conduct.

The first requirement is the most difficult. The EEOC states that an employer "...must determine whether the applicant is likely to have committed the conduct alleged. ...An employer need not conduct an informal 'trial' or an extensive investigation to determine an applicant's or employee's guilt or innocence. However, the employer may not perfunctorily 'allow the person an opportunity to explain' and ignore the explanation where the person's claims could easily be verified by a phone call, i.e., to a previous employer or a police department. The employer is required to allow the person a meaningful opportunity to explain the circumstances of the arrest(s) and to make a reasonable effort to determine whether the explanation is credible before eliminating him/her from employment opportunities."

Pages 6-8 of the attached EEOC Policy Statement provide excellent examples of what the EEOC believes to be reasonable in this area. Obviously it will be very helpful to have this step handled by someone with experience in human resources.

2. Consider the nature and gravity of the offense or offenses.

Failure to pay cab fare is a misdemeanor in some states. So is parking where temporary "No Parking" signs have been posted. But are they grave enough offenses to warrant rejecting someone for a job? The EEOC asks employers to consider the nature and gravity of an offense rather than adopting a policy which rejects all applicants who have even an insignificant criminal record.

3. Consider the time that has passed since the arrest.

The EEOC Policy Statement does not provide guidance on when an alleged action is too old to be considered relevant. Most employers would feel that a charge of murder or rape would stay relevant much longer than a charge for the possession of a small amount of marijuana. It should be mentioned that the Fair Credit Reporting Act prohibits consumer reporting agencies like GIN from reporting on criminal histories which are over seven years old unless the applicant makes over \$75,000 a year. (Unless specifically requested to do otherwise, we limit all of our inquires to the last seven years.)

4. Consider the nature of the job held or sought.

An arrest or conviction for a DUI may not be relevant information for a job as a mail clerk where there are no driving responsibilities. A conviction for unemployment benefit fraud may not be relevant information for a job as a bus driver. On the other hand, even misdemeanor theft charges would be relevant for a job as a hotel maid where the applicant would have easy access to guests' property.

Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Asking About Arrest Information in the Hiring Process

The EEOC has stated that asking applicants about arrests which have not led to convictions may have a “chilling effect” upon minorities and discourage them from applying for a job. In addition, some states prohibit employers from asking about arrest information. (See following information about state laws.) For these reasons many employers ask applicants to disclose convictions but not arrests on their job application. They rely on the actual criminal history records they obtain from GIN to inform them about arrests which have not led to a conviction.

Using Conviction Information in the Hiring Process

The EEOC states that employers generally may not have a policy excluding all applicants who have been convicted of a crime, even if the crime was a felony. If there is a conviction, the employer may presume that the applicant did commit the alleged conduct and is not required to make further investigation. This is the only way in which the treatment of a conviction in the hiring process is different from the treatment of an arrest. The employer must still:

1. Consider “...the nature and gravity of the offense.” (Ibid., II.B.2.)
2. Consider “...the time that has passed since the conviction.” (Ibid.), and
3. Consider “...the nature of the job held or sought.” (Ibid.)

To comply with the EEOC policy statement, employers should establish guidelines which reflect reasonable background standards for the job. For instances, a hotel hiring for positions which allow access to guests rooms might exclude applicants with a felony conviction in the last seven years. Some employers also allow an appeal to the home office human resources department for exceptional cases.

Using Misdemeanor Information in the Hiring Process

The EEOC does not prohibit the use of misdemeanor information in the hiring process. As described above, the EEOC does require that employers consider the nature and gravity of an arrest or conviction. Employers should not, therefore, automatically exclude all employees who have a misdemeanor on their record. On the other hand, some misdemeanor charges can be highly relevant to hiring decisions. Possession of marijuana, shoplifting, and domestic violence are all considered to be misdemeanors in some states. That does not mean that employers cannot consider this information in the hiring process.

Helping the Local Manager Comply with EEOC Guidelines

Some corporations take these steps to assist their local managers to apply the EEOC guidelines:

1. Provide reasonable and clear guidelines on what is an unsatisfactory criminal history for a given position.
2. Refer hiring decisions involving arrest information to a senior human resources person who has the experience and knowledge to do the type of investigation required by the EEOC.

Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Sample Policy for the Use of Arrest, Conviction, and Misdemeanor Information

The following is an example of a policy which attempts to comply with the EEOC guidelines on the subject.

SAMPLE POLICY

All applicants are required to disclose on the employment application if they have been convicted of or served time for a felony. If they have, they are required to describe the situation on the application. The application states that this information will be reviewed for job relatedness and time since conviction.

The applicant will be rejected if the applicant discloses or if a criminal history report reveals that the applicant has:

1. Any felony convictions in the last seven years. However, exceptions may be considered in truly unusual cases where the conviction does not reflect upon the applicant's suitability for employment.
2. Any misdemeanor convictions in the last seven years involving violence, theft, drugs, or sexual misconduct. Again, exceptional cases may be considered.
3. If an applicant has been arrested (but not convicted) in the last seven years for any crime that would have made him/her unacceptable for employment by ABC Corporation if the applicant had been convicted, the manager will make a reasonable effort to determine if the applicant actually committed the offense. If the manager is not convinced that the applicant did not commit the offense, then the applicant will be rejected for employment.

Exceptions and questionable cases may be referred to the Regional Human Resources Manager for assistance.

Complying with State Laws

State laws dealing with the use of criminal history information in the hiring process are more complicated than the EEOC guidelines. A number of states have laws requiring that certain professions, such as people working in child care, elder care, schools, and law enforcement, be checked for relevant criminal histories. Following is a summary of our current understanding of state laws which affect the use of criminal histories in hiring for more general employment. This information is drawn from materials published by CCH Incorporated, references are attached. This list is not all-inclusive, but attempts to highlight major state legislative initiatives.

Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Complying with State Laws (continued)

Many states have laws granting employees certain protections regarding criminal record disclosure. While protections vary from state to state, prospective employees generally do not have to disclose any information concerning an arrest or criminal charge that did not result in a conviction or any information about convictions which have been pardoned by a governor.

Some of the states, notably California, Massachusetts, and Michigan, will commence legal action against employers who violate their statutes regarding the use of criminal records.

California: Employers are restricted from asking applicants about any arrest that did not result in a conviction, **and are also prohibited from seeking the information from any other source.** There are exceptions to this rule. Three of them are listed below.

An employer may ask about arrest information:

- When the employee who was arrested is out on bail on his own recognizance pending trial.
- When an employee is applying for jobs with access to patients, drugs, or medication.
- When an employee is applying for a supervisory position or a position which involves disciplinary power over minors or other persons.

Because of the complexity of California's law with regard to the use of arrest and conviction information in the hiring process, GIN especially encourages California employers to seek legal counsel in this area.

Reference: California Labor Code, Section 432.8

Hawaii: Hawaii has the nation's most restrictive law on the use of arrest and conviction records in the employment process. Hawaii Revised Statute 378-2 completely bars most Hawaiian employers from using either arrest or conviction information in the employment arena. (There are limited exceptions which apply to the state, counties, private schools, the Department of Education, financial institutions, the board of an association of apartment owners, and the manager of a condominium.) It is not our understanding that this statute prohibits an employer from another state from checking the Hawaiian criminal history of an applicant who formerly lived in Hawaii.

As far as we have been able to determine, this far reaching statute has not been challenged or interpreted in the courts.

Reference: Hawaii Revised Statute, Section 378.2

Illinois: Employers cannot ask if an applicant has been arrested.

Employers cannot use criminal history information which has been expunged, sealed, or impounded as a basis for denying employment or promotion. (Of course, if this information has been expunged, sealed, or impounded, GIN will not be able to include it in our reports.)

Reference: Illinois Compiled Statute Annotated, Chapter 775, Section 5/2-103

Using Arrest, Conviction, and Misdemeanor Information in the Hiring Process

Complying with State Laws (continued)

Minnesota: Employers are restricted from asking applicants about any arrest not followed by a valid conviction, convictions that have been annulled or expunged, and misdemeanor convictions for which no jail sentence can be imposed.

Employers who deny an applicant a position, or deny an individual a license, solely or in part because of that person's prior conviction, must notify the individual in writing of the grounds for the denial and the earliest date for re-application.

Reference: "Pre-Employment Inquiries Generally Prohibited by the Minnesota Human Rights Act"

Ohio: Employers may not question prospective employees as to any criminal record (arrest or conviction) that has been expunged or sealed.

Reference: Ohio Revised Code Annotated, Section 2151.358(A)-(I)

Oregon: Employers must tell employees and prospective employees that criminal history information might be sought.

Reference: Oregon Revised Statute, Section 181.555 and 181.560

Washington: Employers can get criminal history information only for specified purposes, which include pre-employment background checking as it relates to that applicant's fitness to perform the particular job sought. Employers must notify the employee or prospective employee that they are making an inquiry into their criminal record and must make the records available to the employee.

Reference: Washington Admin. Code, Chapter 162, Sections 162-12-100et seq

CCH Incorporated published material referenced in this report:

1. "How Arrest Records May Be Used in Employment Decisions."
 2. "Criminal Record Inquiries."
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This information reflects GIN's understanding of these issues at the time of this writing. It is not legal advice and is not intended to replace competent legal counsel.

You may wish to seek an opinion from legal counsel on these issues.