

Be Careful What You ask Applicants about Their Criminal Records

Your company could be hit with big damages for asking illegal questions about an applicant's criminal record.

Although it is permitted to ask about most convictions, employers can get into trouble under anti-discrimination laws if they have a policy of automatically denying employment to anyone ever convicted of a crime. This policy could have the effect of eliminating applicants from protected groups that in some instances may have statistically higher conviction rates.

Employers must never treat people with similar criminal records differently because of their race, national origin, or another Title VII-protected characteristic (which includes color, sex, and religion).

Title VII also prohibits employers from using policies or practices that screen individuals based on criminal history information if:

- They significantly disadvantage Title VII-protected individuals such as African Americans and Hispanics; AND
- They do not help the employer accurately decide if the person is likely to be a responsible, reliable, or safe employee.

Rather than having a blanket no-hire policy, consider whether a direct relationship exists between the person's offense and the responsibilities of the job.

The fact that an individual was arrested is not proof that he or she engaged in criminal conduct. Therefore, an individual's arrest record standing alone may not be used by an employer to take a negative employment action (e.g., not hiring, firing or suspending an applicant or employee). However, an arrest may trigger an inquiry into whether the conduct underlying the arrest justifies such action.

In contrast, a conviction record will usually be sufficient to demonstrate that a person engaged in particular criminal conduct. In certain circumstances, however, there may be reasons for an employer not to rely on the conviction record alone when making an employment decision.

What you can Ask

- Have you ever been convicted of a crime? (Exclude convictions for marijuana-related offenses more than two years old; and convictions that have been sealed, expunged or legally eradicated)
- Briefly describe the nature of the crime(s), the date and place of conviction and the legal disposition of the case.

Note that the company should not deny employment to any applicant solely because the person has been convicted of a crime. The company should always consider the nature, date and circumstances of the offense as well as whether the offense is relevant to the duties of the position applied for.

What you can't Ask

Here are some questions you should avoid:

- Have you ever been arrested?
- What is your arrest record?

Employers should tread carefully whenever making employment decisions based on criminal background information. For more guidance, call eqHR Solutions today!

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Whenever you require HR advice or help navigating the ever-changing landscape of California and Federal Employment Laws and Regulations, call for a no obligation consultation.

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