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WHITE PAPER

# 10 KEY CONSIDERATIONS WHEN USING CRIMINAL HISTORY IN HIRING DECISIONS



Evaluating candidates to fill a position has always been a challenge for employers, no matter whether a candidate has a criminal record. Such an important decision inherently comes with risks. For example, there is always a risk that the employee will not perform the job well or will engage in serious misconduct. Depending on the job, applicants with criminal records may present an additional challenge.

Employers who are concerned about negligent hiring liability need to remember that courts may impose liability for a crime committed post-hire by the employee if the employee's work history provides clear indications of instability or unreliability, even when the employee does not have any prior convictions. Employers who do thorough employment reference checks are rarely found to have negligently hired an employee, even when they determine, after learning of a criminal record, that the prior conviction is not relevant to the duties of the job being filled.

Employers should also consider the fact that refusing to hire anyone with a criminal record will sometimes deprive the company of a strong candidate and can lead to liability under Title VII of the Civil Rights Act and/or under state and city anti-discrimination laws.

This document contains excerpts from the Best Practice Standards: The Proper Use of Criminal Records in Hiring - Lawyers' Committee for Civil Rights Under Law, The Legal Action Center, and National Workrights Institute.

The Best Practice Standards presented here are designed to help employers evaluate applicants with criminal records by applying concrete, practical procedures, based on the recommendations from the EEOC in its 2012 "Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of

1964" (EEOC Guidance). Following them will help employers make hiring decisions that will maximize productivity and minimize the risk of liability.

## **1. IDENTIFY RISKS OF THE JOB FOR A RELEVANCE SCREEN OF CONVICTIONS**

As the EEOC Guidance points out, proper use of criminal history data begins with looking at the risks that arise from the nature of the job. Starting with the job description for the position, the Standards give examples of questions about risks associated with the job that will identify the kinds of prior convictions that are relevant. This is the first determination the employer makes in developing what is called a "Relevance Screen," which lays out which convictions should be considered in the hiring process.

The second determination for the Relevance Screen is the length of time to consider convictions, referred to in these Standards as the "look-back" period. Some states have statutes that limit this period for many jobs. Where no state limitation applies, if research data is available to guide the employer on how long to consider convictions, the EEOC Guidance recommends using that research. The employer must make an informed judgment about how long to consider convictions.

When applying the Relevance Screen, only convictions and pending prosecutions should be considered. Arrests that are not subject to active prosecution should not be considered. In states that do not allow consideration of any arrests whatsoever, the state law must be followed.





## **2. CHOOSE A REASONABLE ‘LOOK-BACK’ PERIOD**

Human resource professionals commonly use what are called “look-back” periods, or lengths of time to consider a conviction relevant. These periods are calculated from the date of the conviction or, if the applicant was incarcerated, from the date that he or she was released from incarceration or on parole.

Several states have regulated the length and/or the beginning date for this “look-back” period by state statute, and it is critical that employers be sure to hire a Consumer Reporting Agency for background checks that complies with the applicable local law. If there are no state law time restrictions, the employer should consult other sources to decide what “look-back” period to use for the job in question.

Both for the duration of the “look-back” period and the commencement of the “look-back” period, any of the commonly used periods are consistent with these Best Practice Standards as long as the employer does an individualized assessment review for qualified candidates.

## **3. DON’T ASK ABOUT CONVICTIONS IN THE APPLICATION**

While there are exceptions, job postings or announcements generally should not refer to criminal background checks, and the application form should not require candidates to list convictions. Many large organizations, including most federal government agencies, do not inquire about criminal history at the interview, but defer the criminal background check until after the employer has decided to make an offer of employment. Other employers may inquire about criminal history at the interview, which is consistent with these Standards as long as the inquiry is limited to convictions of the type and within the period identified by the Relevance Screen.

## **4. USE AN EXPERIENCED CONSUMER REPORTING AGENCY (CRA) FOR BACKGROUND CHECKS**

Employers should engage the services of a qualified and experienced organization that provides background screening services. These companies often provide several options for the nature and extent of the background investigations they conduct. Under the Fair Credit Reporting Act (FCRA) and parallel state statutes, any communication of information from such an organization that is used to establish a person’s eligibility for employment is a “consumer report.”





15 U.S.C. Sec. 1681a(d) (1)(B). Any organization that regularly provides such reports is deemed to be a Consumer Reporting Agency (CRA), 15 U.S.C. Sec. 1681a(f), and the use of the information provided must comply in all respects with the requirements of the FCRA and of parallel state laws.

Employers should carefully consider the reliability and quality standards of all Consumer Reporting Agencies it is considering before making a selection. Employers should work with a firm that demonstrates familiarity and compliance with the FCRA and parallel state requirements. Price should not be the determining factor in choosing a CRA.

Employers should also consider whether the CRA has a certification of reliability or accreditation from a reputable organization. As described below, other factors to consider include whether the CRA follows the recommended best practices for using online databases, such as determining whether a reported conviction is that of the applicant and getting current dispositions. The report format is also important to evaluate.

## **5. CONFIRM ALL CONVICTION DATA FROM THE ORIGINAL SOURCE**

Some Consumer Reporting Agencies offer inexpensive “criminal background checks” based solely on database searches. It is never a good practice to rely on reports based solely on these searches. While they contain useful information, databases are not sufficiently current and

accurate, principally because they are not updated regularly and may not contain all relevant records. Any reliable report must search the records available from the courts in the county and/or state where the candidate resided. Additionally, if federal crimes are considered relevant for the position, the appropriate U.S. District courts should be searched.

## **6. REPORT/UTILIZE CONVICTIONS ONLY WHEN FULL NAME AND ALL OTHER AVAILABLE IDENTIFIERS MATCH**

There are over 300 million Americans, and many people have the same first and last name. Reporting a match based on name alone will produce many mistakes. To minimize the number of these mistakes, a conviction can be included in an applicant’s record only when the full name (including middle name where available) and all other available identifiers match, as outlined to the right.

## **7. ENSURE REPORTED DISPOSITION IS CURRENT**

Online databases often do not include the final disposition of a charge. CRAs should confirm any information obtained from such databases with the appropriate court, to ensure that the information is complete, accurate, and current at the time it is reported. The Fair Credit Reporting Act (FCRA) requires that every CRA “follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.”



## **8. ALLOW TIME TO CHALLENGE A DISPUTED RECORD**

The Fair Credit Reporting Act requires employers who are considering not hiring an applicant because of information regarding criminal offenses to notify the applicant and advise him or her how to obtain from the CRA a copy of the report containing the information that may be disqualifying. By limiting the Consumer Information Report to offenses specified in the relevance screen, the employer will focus this process much better for all parties: The applicant will know exactly what convictions concern the employer.

The employer must give the applicant a reasonable amount of time to dispute the accuracy of this information. This period should take into account and allow for the method of notification between the employer and the applicant. If communicating by U.S. mail, seven days might be unreasonably short for the candidate. If communicating by email, seven days might be unreasonably long for the employer. Employers should use the fastest available form of communication to provide this notice and facilitate making the same form of communication available to the applicant.

When the applicant does dispute a reported criminal history record, the CRA has a legal obligation to reinvestigate using all available information. If this reinvestigation does not change the report, the CRA should use best efforts to help the applicant to obtain an official record of arrests and prosecution from law enforcement or use other methods to resolve the dispute.

When there is a disputed report, the employer should not make a final determination of the applicant's suitability for the job until the investigation is complete. If a decision must be made prior to the completion of the investigation, the employer should consider making a conditional offer of employment, while clearly stating that confirmation of the disputed report will result in termination. However, an employer need not make a conditional offer when the reported offense, if verified, indicates a serious risk of harm to other employees or the public.

## **9. CONSIDER ALL EVIDENCE RELEVANT TO REHABILITATION**

The Equal Employment Opportunity Commission (EEOC), in its Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions, identifies the following factors as among the appropriate considerations when an employer undertakes an individualized assessment of whether





an applicant (or an incumbent employee) has a record of rehabilitation that shows that the risk the person will commit acts harmful to the employer's customers, clients, or workforce is negligible:

- The facts or circumstances surrounding the offense or conduct: for example, when an offender received a purely probationary sentence with no prison time for a felony conviction, that is a common indication that the offense was not as serious as the "felony" classification would typically indicate
- The number of offenses for which the individual was convicted
- Older age at the time of conviction, or release from prison: studies indicate that people who commit offenses when they are older, and are older at the time of release from prison or completion of sentence, are less likely to re-offend
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct
- The length and consistency of employment history before the offense or conduct
- The length and consistency of employment history after the offense or conduct
- Rehabilitation efforts after the offense, e.g., education/training
- References from former employers, particularly from post-offense employment
- Character references and any other information regarding fitness for the particular position
- Whether the individual, since the latest offense, has been bonded under a federal, state, or local bonding program

Other factors not specifically listed by the EEOC, but relevant to many persons with a criminal conviction:

- Parole release obtained after serving only a short period in detention for a felony conviction, with no record of any subsequent offenses. The number of offenses for which the individual was convicted
- Establishment of stable family, united with spouse or partner and, if relevant, children
- Other evidence of family responsibility, such as caring for dependent relatives
- Rehabilitation after the offense, such as continuing participation in 12-step programs, succeeding in making a former substance abuser clean and sober

## 10. CHOOSE HIRING OFFICIAL SENIOR ENOUGH TO BALANCE ALL FACTORS

If the leading candidate for the job has no convictions described by the types and dates determined for the Relevance Screen, the hiring decision is complete. But the leading candidate may have a conviction within the parameters of the Relevance Screen. Then the employer needs to assure that the final hiring decision is made by a manager who can balance the competing factors in order to give no more weight to the conviction than is truly appropriate for the risk. This may be the manager who supervises the position, or it may have to be a member of senior management.

The EEOC Guidance is available online at [http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm).







## ABOUT CISIVE

Cisive, headquartered in Holtsville, New York, is a leading background screening provider focused on providing high-value employment background checks and industry-specific compliance services to highly regulated, risk-sensitive industries. Cisive has long-term relationships with a diverse base of clients across healthcare, financial services, transportation and other regulated industries.

Founded in 1977, Cisive has developed a broad range of differentiated vertical business lines and risk mitigation offerings including the core Cisive brand (global and enterprise), PreCheck (healthcare), Driver iQ (trucking and transportation), eVerifile (rail and contractor), Inquiries Screening (government), IntelliCorp (small and mid-market) and CARCO (insurance risk mitigation). Cisive's solutions deliver compliant employment intelligence to employers who are highly averse to employee-related risks and operate in highly regulated industries.

With Cisive, your business will not only gain a background screening provider, but a true partnership: a company that stands by our work, protects our clients, and provides the consultation and guidance world-class organizations seek.

## CONTACT US

 [www.cisive.com](http://www.cisive.com)

 [info@cisive.com](mailto:info@cisive.com)

 866.557.5984



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