

RISK CONTROL SERVICES

CRIMINAL BACKGROUND CHECKS AND HIRING

Today, more than 90 percent of employers rely on criminal background checks as part of their hiring process. While there are circumstances under which an applicant's criminal record may be relevant, there are other situations where using this information to deny employment may create liability for the potential employer. That's because a growing number of states have passed legislation aimed at eliminating 'criminal background' as an automatic disqualifier. This reflects a society in which 'criminal background' increasingly applies to a growing number of Americans. In 2017, close to 1,500,000 people were incarcerated in the United States. Studies show that a disproportionate number, about 40 percent, are black. As a result of this racial disparity, employers that exclude all job applicants who have been convicted of a crime from hiring may be violating the Civil Rights Act of 1964's prohibition against disparate impact.

Aside from the sheer number of Americans who have been involved in the criminal justice system, criminal background screenings may pick up arrests where the applicant was exonerated, or they may reflect inaccurate information.

In April 2012, the U.S. Equal Employment Opportunity Commission (EEOC), issued guidance to employers that included the following among its suggested best practices:

- If you are including criminal background checks in your employment process, make sure the criteria for disqualification are tailored to the job. This may include identifying the specific criminal offenses that would demonstrate an 'unfitness' for the job.
- Each situation needs to be evaluated on its own merits, and employers are encouraged to perform an individual assessment that includes a conversation with the applicant to determine the facts. The assessment should include a determination of when the criminal conduct occurred. If the incident is well in the applicant's past, it shouldn't be used as a disqualifier for a job today.

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In addition to the guidance provided by the EEOC, states have imposed a variety of laws aimed at protecting those who have been involved in the criminal justice system. Most jurisdictions have enacted “ban the box” legislation. This prohibits employers from using a simple checkbox on their employment application to screen for a criminal background. Other states prohibit a criminal background check until after an offer is extended.

Like any document used in your human resources process, your job application, along with your hiring policies, should be reviewed on a regular basis to ensure that you are complying with current laws.

Learn More

Employment practice lawsuits not only come with a high price tag, but they can also harm your organization’s reputation. Watch our webinar, [How to Reduce Employment Practice Claims](#), to learn more about employment laws and regulations.