

Federal laws concerning criminal background checks

This Technical Update describes some of the federal regulations concerning criminal background checks. It is the second in a series on criminal background checks.

Federal regulations for public jobholder qualifications are growing. In particular, there have been a number of new laws requiring criminal background checks for public jobholders. Many of these new requirements apply to county pass-through funds.

Federal laws require that equal hiring consideration be given to all applicants when comparing applicants with no convictions to applicants who have past convictions which are older than 7 years. The Equal Employment Opportunity Commission (EEOC) has a long-standing rule under Title VII of the Civil Rights Act which prohibits employment policies that exclude individuals *solely* on the basis of prior conviction records. Counties must show that they acted consistently with EEOC guidelines (Notices N-915 and N-915-061).

The EEOC presumes that an arrest record is not job relevant unless evidence shows the applicant actually engaged in the conduct for which he or she was arrested (the best evidence is a conviction), and that the conduct can be shown to be directly relevant to the job duties.

Both Colorado and federal laws prohibit a county from having a blanket policy of denying employment to persons with criminal histories. How can a county handle this apparent conflict?

The law requires employers to individually assess each applicant's history to determine whether hiring someone with a criminal history is appropriate for a particular job class. Even a public employer must show a "business

necessity" for refusing to hire a person on the basis of a prior criminal conviction. If a law specifically forbids hiring an applicant with certain convictions for specific job classes, post a copy of that legal requirement so that job applicants can review it. Keep a copy with applicant files.

If a state or federal agency conducts the background clearance and determines the pass/fail status of the applicant, keep all records relating to their decision. If the agency decides to prevent the hiring of a particular person with a particular criminal history, get a written confirmation of their individualized decision regarding that person. *Do not accept the decision via phone call!* A county can rely on this written decision for a particular applicant as a "business necessity" if it is a legal requirement for that job class. Keep a copy of the individualized decision in the applicant's file for a period of two years, or four years for a current employee.

If the law states that the county must do the background check and must make the individualized decision, then a county may potentially have liability for refusing to hire someone if a pattern develops in violation of the EEOC rules. For example, if a county with a policy to not hire persons with felony drug convictions hires women with drug misdemeanors, but not men with drug felonies, the county might have to prove job necessity for felonies, but not misdemeanors.

The following is a brief list of federal laws which may bar persons with convictions from working in public jobs:

- Convictions for offenses involving dishonesty, breach of trust, or money laundering disqualify a person from working for institutions that are insured by the

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FDIC and, in some cases, in the insurance industry without the permission of a regulatory official.

- Certain classes of felonies bar persons from working for organizations that manage employee benefits plans, for a period of 13 years.
- Certain types of felony convictions prevent persons from providing health care services for which they would receive payment from Medicare (42 U.S.C. §1320a-7).
- In the absence of a state statute, federal laws require criminal history background checks for persons providing care for children, working with persons who may be at risk of harm, or working with disabled persons (42 U.S.C. §§13041 and 5119(a); USAG opinions under PL 92-544, PL 103-209, amended by PL 103-322, and PL 105-251).
- Felony convictions or domestic violence convictions prevent persons from being employed to transport prisoners (42 U.S.C. §13726(b)).
- Certain criminal convictions may also prevent persons from being employed at airports (49 U.S.C. §§44935 and 44936).
- Criminal convictions may also prevent an applicant from working in law enforcement, processing vital records, working as an emergency responder with federal duties, and transporting hazardous materials.

This list is not intended to be all-inclusive.

“Includable offenses” are defined as serious and/or significant adult and juvenile offenses. Arrests and court actions on non-serious charges such as drunkenness, vagrancy, disturbing the peace, loitering, suspicion or investigative arrests, and most traffic violations (except DUIs, drug violations, or hit-and-run traffic violations) are not considered sufficiently serious under most federal background checks to disqualify an applicant.

However, a recent Federal Transportation Administration memo defined “serious offense” to include arrests and non-paid traffic fines for the purposes of restricting commercial drivers licenses (CDLs) and hazardous materials licenses. For questions on Hazmat rules or other CDL matters, consult your CTSI loss prevention representative.

Federal Privacy Act

Don't forget that the Federal Privacy Law mandates strict privacy rules regarding the use and sharing of many forms of individual information, including criminal background information and personnel information collected for purposes of evaluating job applicants for employment. The Privacy Act applies to all information—no matter how it was derived—which is collected, stored, or disseminated by a non-federal agency (defined as “any state or local government which receives records contained in a system of records from a source agency for use in a matching program”). This Federal Privacy Act provides a private right of action—including attorneys' fees—to citizens suffering harm on account of a violation of this act by any agency (5 U.S.C. §551(1)).

For more information, contact CTSI or your county attorney.

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