

## CTSI recommends cautious use of criminal background checks

This Technical Update is the last in a series of three on criminal background checks. This Technical Update provides some suggestions for applying the laws concerning criminal background checks.

### **What is the risk of ignoring a candidate's criminal background?**

Although the chance that any job candidate has any criminal background is low (less than 5 in one hundred), the risk of civil liability is high if you hire a candidate with a poor conviction history that is directly relevant to the job duties he or she will be performing. A person suing a county in a negligent hiring (or retention) case would have to prove that it was reasonably foreseeable that the harm they suffered would result from the county's action in hiring (or retaining) that particular person for a particular job.

For example, if a county hires a bookkeeper with a fairly recent embezzlement conviction, it might be reasonably foreseeable that the person would be tempted to take funds again. It also might also be reasonably foreseeable if the person has a high amount of debt. However, if the person had successfully served time or probation and had held other jobs for 10 years, it might not be reasonably foreseeable.

The convictions and facts for which you eliminate candidates must be narrowly tailored to meet the required job skills and abilities, including "soft" issues such as good judgment or ability to withstand pressures.

### **Are you eliminating candidates for reasons unrelated to necessary job qualifications?**

On the other hand, a county policy to not hire any person with a misdemeanor or a felony might eliminate more

male candidates than females. A conviction for possession of marijuana might not have any predictive value for a man wanting a job as a counter clerk. However, the conviction might be relevant to a dispatcher job if the job included evidence room access.

Don't base your criteria on moral judgments about convictions in general. The best policy is to use criminal background checks only if specifically required, or if your county attorney informs you that there is case law supporting a negligence claim if you fail to do criminal checks.

Before the county considers any candidates for an open position, the county should:

- Obtain copies of any laws, regulations, executive orders, letter rulings, or memos from state and local authorities which may support criminal background checks. Provide those to the county attorney to review.
- Determine what specific types of convictions (such as financial crimes, or crimes of violence) would disqualify a candidate from that job.
- Determine what specific information you need from the report (use your county sheriff to assist in this) and verify how that information fits the statutory requirements.
- Determine what, if any, criminal background checks will be necessary for the position, and what specific statute authorizes you to access background information for this particular purpose.

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## **Criminal background checks** (continued)

### **Intervening factors may suggest a conviction won't affect future job performance**

A county can use the following general factors to set their specific criminal conviction criteria for a job:

- The nature or type and seriousness of the conviction and in some instances, the actual facts relating to the conviction (i.e., what was the extent of the person's involvement in the crime, and were there extenuating circumstances).
- The time since the conviction, the completion of the sentence including probation, and the evidence that the person has been able to live a life free of similar criminal activity.
- The nature or type of job duties which are sought, and whether that conviction might be a factor that would interfere with, or be predictive of the person's ability to perform the specific job duties.

It is always a good idea to allow space on your application form for a job candidate to explain the particular details of a conviction, or to explain why the candidate thinks the conviction is not predictive of their ability to perform the job they apply for. You can use their information to make a fully informed decision after you receive the results of the background check.

For more information, contact CTSI at 303-861-0507.