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Cautious Employers Could Cost Their Company – Running Criminal Background Checks and Using Them in the Hiring Process

Client Advisories

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As a cautious employer, let's say you run a criminal background check on all of your applicants. Your latest candidate's report comes up with an arrest record from just a few months ago for theft, but no conviction. What do you do? In a situation like this, it is best to call counsel because the wrong answer could cost the company.

When we hear something like this from a client, there are many questions that start coming to mind such as:

1. When in the hiring process did the employer ask about the criminal background or criminal record of the applicant/candidate?
2. Did the employer provide the proper notices and receive the requisite authorizations to run the background check?
3. What is it about the criminal background check that is concerning the client – an arrest or a conviction?
4. What are the details of the arrest/conviction compared to the job duties and requirements of the position of the applicant/candidate?

These are just a few of the questions that start the process of understanding (1) whether a violation has already occurred by an employer in simply asking for the criminal background check, and (2) whether the employer can proceed in using the information that they now know to make a decision affecting this applicant/candidate.

Can you ask a prospective employee about their criminal record or run a criminal background check?

Notably, there is no federal law prohibiting running criminal background checks. However, federal law requires employers to provide specific notices and obtain consent before doing so.

New Jersey has placed restrictions on an employer's ability to ask a prospective employee about their criminal record or run a criminal background check. Under New Jersey's Opportunity to Compete Act, an employer is prohibited from inquiring about an applicant's criminal record on an application or at any point until after the first interview. This includes prohibiting employers from stating in advertisements that those with criminal records will not be considered. While there are employers that do not fall within this law, its scope is pretty expansive, including most private employers with 15 or more employees over 20 calendar weeks.

While Pennsylvania has no restrictions on the ability to run the background check, local jurisdictions within the State may have restrictions, like in Philadelphia.

All employers in Pennsylvania are governed by the Criminal History Record Information Act, which does not prohibit inquiring about criminal histories. However, again, local laws, such as the Philadelphia Fair Criminal Records Screening Standards ("Ban the Box") Ordinance, prohibit Philadelphia employers from inquiring about criminal records on applications or during any round of interviews. Criminal background checks can only be run after a conditional offer is made.

Can you use the information you received to make your decision whether to hire?

Subject to the New Jersey Opportunity to Compete Act (and also, the New Jersey Law Against Discrimination, which protects against disparate impact based on protected classes), New Jersey employers are permitted by state law to use the information they receive about an applicant's criminal record history (which includes arrests and convictions) to determine their qualifications for the job.

In Pennsylvania, relying upon mere arrest records is a violation of the Criminal History Record Information Act. Further, relying upon any conviction record that is unrelated to the job duties that the applicant/candidate will perform is also a violation. That is, employers can use felony or misdemeanor convictions only to the extent such convictions relate to the suitability for the position for which the individual applied. In Philadelphia, convictions can only be used if they are less than seven years old. An employer can only reject an applicant if the applicant/candidate poses an unacceptable risk to others in the workplace or the business itself after considering the (i) type of offense and time that passed, (ii) its relationship to the position applied for, and (iii) the applicant/candidate's job history, character references, and any evidence of rehabilitation.

A Pennsylvania employer must notify any applicant/candidate in writing that it made its decision in whole or in part on any piece of information from the criminal history. A Philadelphia employer must also provide a copy of the report and provide the applicant/candidate time to respond.

However, in either jurisdiction, be mindful that the federal Equal Employment Opportunity Commission has taken a stance on how to use information from a criminal background check in your decision making. While Title VII of the Civil Rights Act of 1964 does not prohibit running criminal background checks, it does prohibit employment practices that create a disparate impact because of a protected class. For the EEOC's Guidance on this topic, visit here.

What can a violation cost an employer?

Despite the fact that New Jersey's law does not create a private cause of action for violations, a violation can still cost employers a civil penalty: up to $1,000 for the first violation, $5,000 for the second violation, and $10,000 for each subsequent violation.

Unlike in New Jersey, Pennsylvania law does create a private cause of action for individuals, permitting recovery of actual damages, costs and attorneys' fees, as well as punitive damages for willful violations up to $10,000.

If you have questions about how to conduct criminal background checks and utilize criminal history information, please contact any member of Archer's Labor & Employment Group in: Haddonfield, NJ at 856-795-2121, Princeton, NJ at 609-580-3700, Hackensack, NJ at 201-342-6000, Philadelphia, PA at 215-963-3300, or Wilmington, DE at 302-777-4350.

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Attachments

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