

STRATEGIES IN MANAGING
TODAY'S WORKFORCE

**Fisher
Phillips** South Florida
Labor &
Employment
Conference


What To Do When The Background Check Has A Hit

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Hot Topics Related to Background Checks



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- > Ensuring Compliance with applicable laws and EEOC guidelines
- > Second Chance Hiring–Getting Talent Back to Work
- > How to Read a Background Check Report
- > Understanding Criminal Dispositions

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**70 million Americans have a
criminal record — that's one in
three adults***

**If an applicant has a criminal
record, the first step is to
educate yourself on the top
legal issues**

Source POLITIFACT New York

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Applicable Laws and Guidelines



- > Fair Credit Reporting Act (FCRA)
- > Equal Employment Opportunity Commission Guidance on Screening Applicants
- > State Law

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Fair Credit Reporting Act



- > FCRA applies to employers using third party consumer reporting agencies to obtain consumer report; does not apply to employers conducting own background investigations.
- > If using a consumer reporting agency, you must:
 - > Provide disclosure and obtain the applicant's written consent;
 - > Give the applicant pre-notice of possible adverse action if you are considering disqualifying him/her from employment based on information in the report;
 - > Give the applicant an opportunity to explain if the applicant thinks there is an error on the report.

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Fair Credit Reporting Act



- > Give the applicant a notice of the applicant's rights and a copy of the criminal background report; and
- > Then give final notice that you will not hire the applicant based in whole or in part on the report.

We have an FCRA kit if you want to have a handy tool with forms to use for compliance.

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Equal Employment Opportunity Commission



- > Guidelines require that you apply the same standards to everyone, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older).
- > Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older
- > Be prepared to make exceptions for problems revealed during a background check that were caused by a disability

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It's a Hit-Criminal Record



What to make of negative findings in a background check

- > Criminal records don't automatically disqualify candidates
- > Under Federal law, you should look at:
 - > The nature and gravity of the offense.
 - > The time that has passed since the individual was convicted or they completed their sentence.
 - > The nature of the job sought and whether the conviction is relevant to it.
 - > The person's contributions to society and rehabilitation efforts after the conviction.
 - > The age at the time the person was convicted vs. age now.
- > Keep the company's interest in mind when rating the seriousness of uncovered issue
- > Discuss the results of the background check with candidates in case of minor discrepancies

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It's a Hit-Individualized Assessment



- > The employer should also make an individualized assessment based on:
 - > The specific facts surrounding the offense
 - > The number of offenses for which the person was convicted
 - > Evidence that the individual has performed the same type of work since conviction without difficulty or criminal conduct
 - > The length and consistency of the individual's employment history before and after the conviction
 - > Character references
 - > Additional education or training

It's a Hit-EEOC Guidelines



- > The EEOC's guidance reflects a preference that employers not ask about the criminal conviction on the application itself.
- > EEOC wants you to wait until you have otherwise decided the person is qualified (during the "conditional offer" stage). This is to give the persons with criminal records a better shot of showing you who they are before you make decisions based on the criminal records alone.
- > You should note that several states and some counties have "banned the box" which is to say that they have banned employers from asking about criminal convictions on the application itself.
- > No state or local law in Florida requires that private employers ban the box.

Second Chance Hiring-Getting Talent Back to Work



- > SHRM has been making a national push for companies give people a "Second Chance" and hire individuals with criminal records.
- > With unemployment below 4 percent and an untapped labor pool of almost 75 million people-companies need to start thinking about a different approach.
- > First Sep Act-enacted in December 2018-new law aims to reduce sentences for nonviolent offenders and improve programs related to workforce readiness.

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Second Chance Hiring-Getting Talent Back to Work



- > Incentives and Support when giving a Second Chance
- > DOL offers the Work Opportunity Tax Credit to organizations that hire ex-felons within a year of their being convicted or released from prison.
- > DOL Federal Bonding program provides fidelity bonds for at-risk, hard to place job seekers for the first six months of employment at no charge to employer.
- > State and Local Workforce development programs.
- > Local re-entry programs.

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Criminal Background Reports



- > These reports can be difficult to read.
- > They might not always show a disposition.
- > Technical terms may lead you to the wrong conclusion.
- > If you are unsure what the information in the report reflects, check with counsel before you make any decisions.
- > You may need to get additional details about the applicant about their background before you can proceed.

Arrest Records v. Conviction Records



- > The fact that an individual was arrested is not proof that he/she engaged in criminal conduct.
- > An individual's arrest record standing alone may not be used by an employer to take a negative employment action (e.g. not hiring, firing or suspending an applicant or employee).
- > An arrest record may trigger an **inquiry** into whether the conduct underlying the arrest justifies such action.
- > A conviction record will usually be sufficient to demonstrate that a person engaged in a particular criminal conduct.

Case Study



- > During the hiring process, the background check reveals that your applicant has a criminal history:
 - > Name: Tyrion Lanninster
 - > Offenses: Driving Under the Influence
 - > Date: 04/23/1997
 - > Court Offense: Reduced/Amended to Reckless Driving
 - > Court Statute: 316.192(1)(A)
 - > Court Disposition: Convicted by Plea-Adjudication Withheld
 - > Court Level/Degree: Misdemeanor

Things to Consider



- > What are the specific facts surrounding the offense?
- > Does the applicant have any other offenses?
- > Has the applicant performed the same type of work since the conviction without difficulty?
- > How long ago was the offense?
- > Has the applicant been employed since the offense?
- > What about the applicant's character references?

Case Study



- > Florida Court:
 - > Name: Arya Stark
 - > Offenses: Grand Theft in the 3rd Degree
 - > Date of Offense: 4/17/2018
 - > Court Statute: 812.014(2)
 - > Court Disposition: Nolle Prosequi
 - > Court Level/Degree: Felony

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Risk Analysis



- > Does the conviction pose a job related risk?
 - > DUI Conviction indicates a risk for jobs involving operating a motor vehicle but for other jobs may pose no risk.
 - > Theft conviction may be relevant to a job that involves access to cash or property that can be sold for cash.
 - > Crimes involving violence may be a concern for jobs related to children, seniors, hospital patients.
 - > Consider
 - > How serious is the offense?
 - > How many prior convictions?
 - > The potential harm varies by the job/type of company

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Final Thoughts

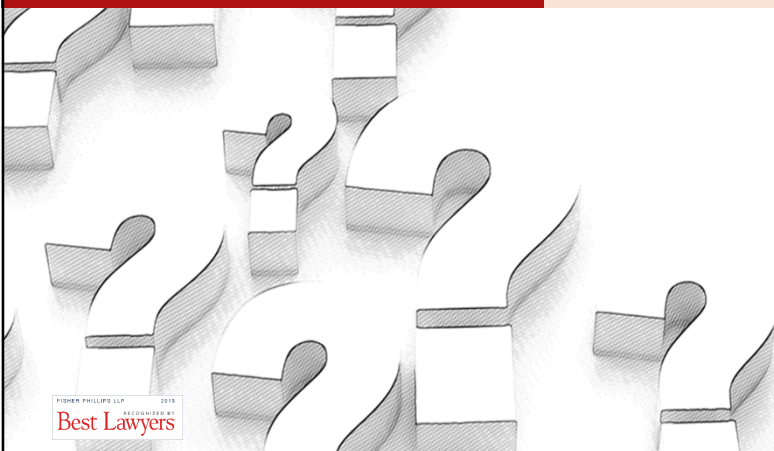


- > Give applicants a Second Chance!
- > When evaluating applicants, you should use the factors the EEOC has established.
- > Your decision not to hire someone without using those factors in your decision-making process could result in the individual going to the EEOC to file a race or national origin discrimination charge. You will be required to explain your decision-making.
- > Make informed decisions.
- > Seek counsel if you need assistance.

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FINAL QUESTIONS



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THANK YOU

FOR JOINING US

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