

Hiring and Firing Right

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Learning Objectives

- ▶ Understand EEOC guidance letter regarding criminal background checks
- ▶ Know the legal land mines when using criminal background checks for employment purposes
- ▶ Understand the difference between disparate treatment and disparate impact definitions
- ▶ Know the differences between arrest and conviction
- ▶ Be familiar with the individualized assessment tool when determining suitability for employment using a criminal background check
- ▶ Understand Ban-the-Box laws and its impact on employers
- ▶ Be familiar with best practices in developing policies that protect the employer when using a criminal background check
- ▶ Know the record retentions requirements for criminal background checks

Criminal Background Checks



Reason to Conduct a Criminal Background Check

- ▶ Human resources managers conduct background checks for a variety of reasons, from protecting the company from negligent hiring practices to ensuring employees are telling the truth about their past and to avoid harm or legal liability of various types to the employer or to others—for example, harm to:
 - ▶ The employer's business through financial loss or image and reputational issues.
 - ▶ Other employees by sexual harassment or workplace violence.
 - ▶ The organization's customers by, for example, sexual assault on business premises.
 - ▶ The public by negligent driving.
- ▶ Federal and state laws require that background checks be conducted for certain jobs

HR and Legal Issues

- ▶ Equal employment opportunity (EEO) legislation and affirmative action laws and regulations exist to ensure all individuals the right to compete for all work opportunities without bias because of their race, color, religion, sex, national origin, age or disability. Anyone having anything to do with any aspect of the employment process is expected to have a basic knowledge of EEO. Unintentional violations caused by ignorance of the law are not excusable.

Disparate Treatment and Disparate Impact Discrimination definitions

- ▶ Disparate treatment is one kind of unlawful discrimination, it means unequal behavior toward someone because of a protected characteristic under Title VII of the United States Civil Rights Act.
- ▶ Disparate impact holds that practices in employment may be considered discriminatory and illegal if they have a disproportionate "adverse impact" on persons in a protected class.

Consideration of Arrest and Conviction Records in Employment Decisions

- ▶ EEOC Enforcement Guidance, Number 915.002, 4/25/2012
 - ▶ EEOC guidance does not prohibit employers from considering criminal information during the hiring process. However, it does require employers to take new steps to prevent discrimination under Title VII.
 - ▶ Whether there is a business need to exclude persons with conviction records from particular jobs depends on the nature of the job, the nature and seriousness of the offense, and the length of time since the conviction or incarceration (Green Factors).
 - ▶ Unlike a conviction, an arrest is not reliable evidence that an applicant has committed a crime. Thus, an exclusion based on an arrest record is justified only if the conduct appears to be job-related and relatively recent and also if the applicant or employee actually engaged in the conduct for which he or she was arrested.

Green v. Missouri Pacific Railroad Company, Eight Circuit (1975)

Arrest versus Conviction

- ▶ Arrest
 - ▶ The fact of an arrest does not establish that criminal conduct has occurred. Arrests are not proof of criminal conduct. Many arrests do not result in criminal charges, or the charges are dismissed. Even if an individual is charged and subsequently prosecuted, he is presumed innocent unless proven guilty.
- ▶ Convictions
 - ▶ By contrast, a record of a conviction will usually serve as sufficient evidence that a person engaged in particular conduct, given the procedural safeguards associated with trials and guilty pleas. However, there may be evidence of an error in the record, an outdated record, or another reason for not relying on the evidence of a conviction.

Individualized Assessment

- ▶ Individual assessment means that the employer informs the individual that he or she may be excluded because of past criminal conduct; provides an opportunity to the individual to demonstrate that the exclusion does not apply to him or her.
- ▶ The individual's showing may include information that he or she was not identified correctly in the criminal record or that the record is otherwise inaccurate. Other relevant individualized evidence includes:
 - ▶ The facts and circumstances surrounding the offense or conduct.
 - ▶ The number of offenses for which the individual was convicted.
 - ▶ Older age at the time of conviction or release from prison. (Recidivism rates tend to decline as ex-offenders' ages increase.)
 - ▶ Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incident of criminal conduct.
 - ▶ The length and consistency of employment history before and after the offense or conduct.
 - ▶ Rehabilitation efforts, such as education and training.
 - ▶ Employment and character references and any other information regarding fitness for the particular position.
- ▶ Whether the individual is bonded under a federal, state or local bonding program.

Example 12: State Law Exclusion Is Not Consistent with Title VII.

- ▶ County Y enforces a law that prohibits all individuals with a criminal conviction from working for it. Chris, an African American man, was convicted of felony welfare fraud fifteen years ago, and has not had subsequent contact with the criminal justice system. Chris applies to County Y for a job as an animal control officer trainee, a position that involves learning how to respond to citizen complaints and handle animals. The County rejects Chris's application as soon as it learns that he has a felony conviction. Chris files a Title VII charge, and the EEOC investigates, finding disparate impact based on race and also that the exclusionary policy is not job related and consistent with business necessity. The County cannot justify rejecting everyone with any conviction from all jobs. Based on these facts, County Y's law "purports to require or permit the doing of an act which would be an unlawful employment practice" under Title VII.

Ban-the-Box (Fair-Chance Act)

- ▶ Currently there is no law prohibiting private employers in Colorado, Utah, Arizona and New Mexico from preventing employers from asking potential applicants regarding their criminal past.
 - ▶ Colorado House Bill 1263. Applies to state employment and licensing. Signed on May 29, 2012, prohibits state agencies and licensing agencies from performing a background check until the agency determines that the applicant is a finalist for the position or the applicant received a conditional offer. (does not apply to public safety positions).
 - ▶ City of Tucson, Arizona. Tucson Resolution No. 22373 (March 17, 2015) put in place the elimination of a question on city job applications related to convictions of the employment application. (Certain safety sensitive will undergo a background check only after a conditional offer is made).
 - ▶ Utah House Bill 156 State Job Application Process. (May 9, 2017) Applies to state employment. Does not apply to government jobs in criminal or juvenile justice; law enforcement; work involving children and vulnerable adults; and employment at both the State Tax Commission and Utah's Department of Alcohol Beverage Control.

NM Criminal Offender Employment Act, 28-2-1 through 28-2-6 (2006)

- ▶ 28-2-3. Employment eligibility determination.
 - ▶ A. Subject to the provisions of Subsection B of this section and Sections 3 and 4 [Sections 4 and 5 (28-2-4 and 28-2-5 NMSA 1978)] of the Criminal Offender Employment Act, in determining eligibility for employment with the state or any of its political subdivisions or for a license, permit, certificate or other authority to engage in any regulated trade, business or profession, the board or other department or agency having jurisdiction may take into consideration the conviction, but such conviction shall not operate as an automatic bar to obtaining public employment or license or other authority to practice the trade, business or profession.
 - ▶ B. The following criminal records shall not be used, distributed or disseminated in connection with an application for any public employment, license or other authority:
 - ▶ (1) records of arrest not followed by a valid conviction; and
 - ▶ (2) misdemeanor convictions not involving moral turpitude.

Employer Best Practices

- ▶ Review background screening policies and practices in light of EEOC Guidance
- ▶ Make adjustments needed to the extent practices cannot be justified as job related and consistent with business necessity;
- ▶ If your policy does not currently provide applicants and employees with the opportunity for individualized assessments, consider the feasibility of implementing a process in your workplace and consult Section V, B9 of the EEOC Guidance Letter for more information on how to conduct and individualized assessment;
- ▶ Train managers, hiring officials, and decision makers to use criminal history lawfully in accordance with the EEOC Guidance Letter.
- ▶ Beware of state laws prohibitions and mandates regarding arrests and conviction records in those jurisdictions where your company does business and how they interact with the EEOC Guidance Letter
- ▶ When asking questions about criminal records, limit inquiries to records for which exclusion would be job related for the position in question and consistent with business necessity.
- ▶ Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.
- ▶ https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm

Fair Credit Reporting Act (FRCA) 15 U.S. Code § 1681a

- ▶ (d) Consumer Report.
 - ▶ (1) In general.—The term "consumer report" means any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for—
 - ▶ (A) credit or insurance to be used primarily for personal, family, or household purposes;
 - ▶ (B) employment purposes; or

Application

EEOC, 29 CFR Part 1602

- Private employers must retain for one year
- Educational Institutions and State and Local Governments must retain for two years

Background Checks

- Fair Credit Reporting Act
- Section 618 imposes a 2-year statute of limitations on actions enforcing liability. There are exception to this rule for it to be longer.
- Criminal Record Check
- Credit Report



Firing Procedures



Learning Objectives

- Know the difference between For Cause v. Just Cause actions
- Understand due process rights.
- Demonstrate understanding of progressive discipline and correction action.
- Know what needs to be in a disciplinary action
- Understand the definition of insubordination
- Understand the nexus of off-duty misconduct

For Cause v. Just Cause

<ul style="list-style-type: none"> ▶ For Cause <ul style="list-style-type: none"> ▶ Termination for a specific reason <ul style="list-style-type: none"> ▶ Performance measures ▶ Illegal Activity ▶ Violation of a specific Company policy ▶ Willful Misconduct ▶ Can not be a discriminatory decision ▶ At-Will <ul style="list-style-type: none"> ▶ Termination for any reason ▶ Can not be a discriminatory decision 	<ul style="list-style-type: none"> ▶ Just Cause <ul style="list-style-type: none"> ▶ The employee know of the company's policy ▶ The company's policy was reasonable ▶ The company investigated to determine that the employee violated the policy ▶ The investigation was fair and objective ▶ Substantial evidence existed of the employee's violation of the policy ▶ Company's policy was consistently applied ▶ Discipline was reasonable and proportional
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Due Process Rights

- ▶ Collective Bargaining Agreements
 - ▶ A procedural mechanism that allows a fair and objective investigation before imposing discipline
 - ▶ Depending on the nature of the charges, this usually means an opportunity for the employee to respond, and under some agreements it may mean a pre-disciplinary hearing of some sort.
 - ▶ Appeal process where documentary evidence is exchanged
- ▶ Public employees
 - ▶ "Property" interest in continued employment and have rights to procedural safeguards through the due process of the 14th Amendment (Cleveland Board of Ed. v. Loudermill, 470 US 532 (1985))
 - ▶ Pre-termination hearing which the employee is confronted with the evidence against him and provided opportunity to respond (Loudermill Hearing)

Progressive Discipline

When a violation of a company policy or rule does not warrant immediate dismissal, management has determined that the employee be given the opportunity to correct the violation or improve his/her performance to an acceptable level.

Examples

- Tardiness
- Excessive lunch breaks
- Personal calls
- Leaving work early
- Taking time off without permission

Corrective Action Discipline

Corrective Action discipline can range from a verbal warning to termination depending on the nature of the violation and severity.

Examples

- Theft
- Falsification
- Destruction of company property
- Violent
- Insubordination
- Sexual Harassment
- Discrimination

Correction Action Process

- ▶ **Verbal Warning**
 - ▶ Advises the employee orally of the violation or problem, and the need to correct.
- ▶ **Written Reprimand**
 - ▶ Advises the employee in writing of the violation or problem. The written reprimand should include guidelines and time tables for acceptable performance/behavior and should notify the employee that further discipline will result if the standards are not met within the prescribed time limits.
- ▶ **Suspension Letter**
 - ▶ Advises the employee in writing of the violation or problem and the need to take a more severe disciplinary position. Detail the events that led up to the employee's suspension. List company policies and regulations that were broken and any similar incidents. Timeframes of the suspension and when it will commence and end.
- ▶ **Termination Letter**
 - ▶ Advises the employee in writing why the employee was terminated. The date of termination and the last day of work. Information about prior warnings if applicable. When employee will receive last pay check and a scheduled time to remove belongings.

Verbal Warning

- ▶ Definition
 - ▶ Informal conversation regarding an employee performance or behavior that is not meeting the set standards developed by the employer
- ▶ Purpose
 - ▶ To bring to the attention of the employee that their performance or behavior needs improvement
- ▶ When to Use
 - ▶ Immediately when expected performance or behavior needs to be corrected.
- ▶ Required Information
 - ▶ Done in private between the supervisor and employee
 - ▶ Give some background
 - ▶ May need to review policies and procedures
 - ▶ Review job expectations and job requirements
 - ▶ Follow-up with an email to document the verbal warning



Written Reprimand

- ▶ Definition
 - ▶ A written reprimand is a formal conversation between the supervisor and an employee about a performance or conduct problem
- ▶ Purpose
 - ▶ Is to correct a performance or conduct problem
- ▶ When to Use
 - ▶ Previous verbal warnings with the employee have not been successful in solving the problem.
 - ▶ The employee knows exactly what is expected.
 - ▶ The employee is properly trained All employee interactions should be documented.
- ▶ Required Information
 - ▶ Employee's name;
 - ▶ Date of the warning;
 - ▶ Specific offense or rule violation;
 - ▶ Specific statement of expected performance outcome
 - ▶ What will happen if the expectations are not met
 - ▶ Employee's signature acknowledging the document
 - ▶ Send documents to HR

Confidential Memo

Date: [DATE]
 To: [EMPLOYEE'S NAME, TITLE]
 From: [SUPERVISOR'S NAME, TITLE]
 Issue: Written Reprimand

The Warning Notice is being issued to you for the following reasons and observations:

On [DATE], [Employee's Name] did not check incoming mail on his/her desk. One of the duties and responsibilities of a Receptionist, is to check mail twice daily, once in the morning by 8:30 a.m. and again in the afternoon by 2:30 p.m. On the day in question, [Employee's Name] did not check the mail at:

On [Date] I noticed the mail was piled on [Employee's Name] desk in his/her incoming box. When I was leaving the office, I noticed the mail had continued to accumulate throughout the day. When I asked [Employee's Name] if he/she had opened any mail today, he/she replied, "No". I instructed [Employee's Name] to open the mail first thing in the morning. He/she said, "Sure".

The following day, I sat down with [Employee's Name] and asked why he/she did not open the mail. [Employee's Name] stated that he/she did not believe it was his/her job to check mail while others in the department do not need to. In addition, [Employee's Name] stated that due to his/her high volume of work in the front-desk, it would be beneficial to have another employee be assigned this task.

On the day in question, I witnessed [Employee's Name] take multiple breaks throughout the day lasting anywhere from 10-20 minutes each time. Each time [Employee's Name] has left his/her workstation without my knowledge and he/she did not let me know when he/she returned. This is not the first time [Employee's Name] has taken multiple breaks throughout the day. I have attached the Department's Expectations which instructs that there are two (2) fifteen breaks allowed each day and the Supervisor's Employee Journal which demonstrates that I have had conversation with [Employee's Name] regarding excessive break times.

Policy Violation: Code of Conduct
 Instructions/Expectations:

The conduct that has been described has interfered with the operations of this unit. Multiple attempts have been made to address this behavior to no avail. Therefore, effectively immediately I have the following expectations:

- [Employee's Name] will check the mail twice daily, once in the morning no later than 8:30 a.m. and again when we receive our afternoon mail, no later than 2:30 p.m.
- [Employee's Name] will take two (2) fifteen (15) minute breaks per day, no more.

[Employee's Name] will email me when he/she leaves for his/her breaks and email me when he/she returns.

Failure to adhere to my instructions after the issuance of this Warning Notice will be the basis for further disciplinary action up to and including termination.

Procedures in Issuance of Disciplinary Actions (Non Terminations)

- ▶ Procedures
 - ▶ Conduct meeting toward end of the workday
 - ▶ Meeting should be done privately
 - ▶ Have another supervisor present as a witness
- ▶ Before the Meeting
 - ▶ Prepare for the meeting by reviewing notes and previous conversation
 - ▶ Stay calm and stick to the script
- ▶ During the Meeting
 - ▶ State the specific problem in terms of desired performance and actual performance
 - ▶ Refer to previous oral warnings or disciplinary actions
 - ▶ Tell the employee the specific change you expect
 - ▶ Have the employee confirm that he/she knows exactly what to expect
 - ▶ Indicate your confidence in his/her ability to perform properly
 - ▶ Allow the employee to write any comments/explanation he/she wishes to give
- ▶ After the Meeting:
 - ▶ Give a copy to HR
 - ▶ Monitor the situation
 - ▶ Debrief with appropriate personnel

Termination Issuance

- ▶ Have a witness present
- ▶ Keep the meeting short
- ▶ Not there to debate: just communicate the decision
- ▶ Determine if security should be present or not
- ▶ Determine if the employee should be escorted off property by management
- ▶ Limit information given to co-workers
- ▶ Arrange for personal belongings to be picked up during non-work hours
- ▶ Have the action toward the end of the work week and later in the day

Insubordination

- ▶ Probably no other disciplinary offenses carries as much potential for anger and hostility as insubordination. It is critical that the supervisor remain quiet and rational throughout the incident.
- ▶ Types of Insubordination
 - ▶ Direct refusal to do an assigned job or obey an order;
 - ▶ Willful failure to do an assigned job or obey an order;

Insubordination (Cont.)

- ▶ Factors to consider
 - ▶ Where the supervisor's instructions or orders clear
 - ▶ Was the supervisor or other individual authorized to give the questioned orders, directions, or instructions, and did the involved employee understand that this individual was so authorized?
 - ▶ Did the affected employee understand that this was an order and not just a mere suggestion, request, or similar comment?
 - ▶ Was the employee clearly instructed by the person given the order about the penalty or the possible and probable consequences for failing to comply?
 - ▶ Was there a clear refusal to perform the requested task or was there merely a protest, discussion or disrespectful attitude manifested?
 - ▶ Did the order require the affected employee to do an unlawful act, place the employee in immediate danger, or constitute a violation of the union contract?
 - ▶ Was the employee's excuse not to follow instructions or order justified or investigated?

Off-Duty Conduct

- ▶ Definition of nexus, is a connection or series of connections linking two or more things.
- ▶ In cases of off-duty misconduct, a nexus between the employee's off-duty misconduct and the employer's business exist where the employee's misconduct has a detrimental or intolerable effect on the efficiency, profitability or continuity of business of the employer.

Employee's have rights to

- ▶ Employee can file a charge of discrimination with the EEOC if they believe that their discipline was due to their protected class (180 days)
- ▶ Employee can file a ULP with the NLRB if they believe their discipline was in response in exercising their concerted activities (6 months)
- ▶ Employee can file a charge of discrimination with the NMHRD, similar to EEOC but offers broader categories of protected classes (12 months)
- ▶ Employee can file in District Court and Federal Court


