



www.texascbar.org

The materials and information contained in this document may not reflect the most current legal developments. Specific fact situations may result in different outcomes, conclusions, or answers. Persons reviewing this document should not rely upon the following information without seeking professional legal counsel.

PRE-EMPLOYMENT BACKGROUND CHECK

By Martha Rose

1. Criminal History. Inquiring into a prospective employee's criminal history can pose numerous difficulties since the EEOC and judiciary consider many such inquiries to be "suspect," though not *per se* discriminatory. In light of this fact, employers should consider whether they have a legitimate business need that would warrant an inquiry into a prospective applicant's criminal record and a verification thereof. Where such inquiries are warranted, employers should also consider whether their inquiries can be limited to convictions and deferred adjudication, or whether business necessity requires probing into a prospective employee's arrest records as well. Following are some of the factors to consider when engaging in such deliberations.

a. Arrest Records. Inquiring into an applicant's arrest record is not *per se* unlawful. However, the EEOC and the courts have held that because members of some minority groups are arrested substantially more often than Anglo-Caucasians in proportion to their numbers in the population, personnel decisions based upon an applicant's arrest record may have a disproportionate effect on these minority groups. The Equal Employment Opportunity Commission has taken the position that, without proof of business necessity, the disqualification of a prospective employee on the basis of his arrest record alone is unlawful discrimination.

Therefore, before requesting information regarding an applicant's arrest history (or pending indictments), an employer should carefully consider whether such a request would be justified by business necessity. The employer should keep in mind that the EEOC is likely to find the inquiry unlawful, regardless of the justification, particularly since the mere request for such information tends to discourage minorities from applying. Proving a "business necessity" to the EEOC is very difficult standard to meet. Therefore, such information should not be requested unless it is an absolute necessity.

If an employer decides that such information is critical, the request should be accompanied by a statement that the information “will not necessarily be a bar to employment.” The applicant should also be given the opportunity to explain the circumstances of the arrest. Finally, the applicant should not be denied employment on this basis alone, unless there is a compelling business necessity for doing so. Absent compelling business necessity, the employer should refrain from inquiring into arrest records altogether.

b. Convictions. The federal courts have taken the position that a conviction for a felony or a misdemeanor may not, by itself, lawfully constitute an absolute bar to employment. However, an employer may give fair consideration to the relationship between a conviction and the applicant’s fitness for a particular job.

Conviction records should therefore be considered in relation to the position for which the applicant has applied. For example, a recent DWI conviction would be relevant to an applicant’s suitability for a truck driving position. The criminal record would prompt the rejection of an applicant only if the number, nature and proximity in time of the criminal conduct causes the applicant to be unsuitable for that position. There should be a direct correlation between the conviction record and the job being applied for.

If criminal inquiries are made by an employer, they should be accompanied by a statement that a conviction record “will not necessarily be a bar to employment” and that factors such as the date of the offense, the seriousness and nature of the violation, subsequent rehabilitation and work record will be taken into account by the employer. This statement is important in order not to discourage minority applicants from applying. The applicant should also be given the opportunity to explain the circumstances of criminal conduct, either on the application form or during the job interview.

c. Limitations on Hiring Applicants with Criminal Records. Some statutes limit the employability of applicants with a record of certain criminal conduct. For example, the Texas Health & Safety Code Ann. §250.001 *et seq* (Vernon Supp. 1996), prohibits the employment of individuals in nursing homes who have a criminal record which includes various offenses, such as criminal homicide, arson, robbery and aggravated robbery, among other. In addition, convictions for other crimes, such as burglary and criminal trespass, theft, or public indecency, may also bar employment in a nursing home under the statute. Employers should always determine whether any federal or state laws would restrict individuals with certain criminal records from employment. If applicants with such criminal records would be restricted from employment, the statement following criminal record questions that “conviction is not a bar to employment” should be modified to reflect the statutory limitation.

d. Texas Statute Regarding Criminal History. Similarly, under the Texas Human Resources Code Ann. §135.003 (Vernon Supp. 1996), an employer who

hires employees to work at an apartment building, duplex, condominium, hotel, or similar facility may request an applicant to disclose his or her criminal history at any time, before or after an offer of employment is made to the applicant. After an offer of employment is made, the employer may verify criminal record information through the Texas Department of Public Safety (“DPS”).¹

Employers are not required to obtain the criminal history of applicants for the above-referenced facilities. However, if they do so, the information about criminal history received by employers may only be disclosed to an authorized officer, employee or agent of the employer for the purpose of making a determination regarding the suitability of the individual for employment. Tex. Hum Res. Code Ann. §§135.003(g); 135.004 (Vernon Supp. 1996). Employers may terminate employees who submit false information relating to their criminal history.

e. **Questions to Elicit Criminal History.** An employer should therefore carefully construct its criminal record questions to ascertain both traditional convictions and guilty pleas and nontraditional determinations relating to criminal conduct. Sample questions for criminal record inquiries for Texas are set forth below:

Have you ever been convicted of, pled guilty to, received probation, deferred adjudication, or been placed on any form of diversion for any criminal offense (misdemeanors and felonies)?

If yes, describe in full, including dates, criminal offenses, location (city and state) and disposition.

Are you currently serving probation, deferred adjudication or any form of diversion for any criminal offense?

If yes, describe in full, including criminal offense(s), current status, expected date of completion and the name(s) and telephone number(s) of the probation officer or other person or persons to whom you report while on probation, deferred adjudication or other form of diversion.

These questions elicit information regarding an applicant’s criminal history without inquiring into suspect areas such as arrest records.

f. **Considerations When Conducting a Criminal Record Investigation.** Detailed below are various considerations that employers should keep in mind when considering and initiating a criminal history verification.

¹ Under amendments to Sections 411.088 and 411.135 of the Texas Government Code, which became effective on June 1, 1998, any person is permitted to request from the DPS the statewide felony record for any individual. The DPS charges a \$10.00 fee for this service. Send requests to DPS Criminal Records Service, P. O. Box 15999.

(1) Researching State Law for Limitations. No federal or state law prohibits an employer from undertaking a criminal record search (including felonies and misdemeanors) on current prospective employees. Some federal and state legislation, however, may restrict the manner in which those inquiries are undertaken (*see* discussion of Fair Credit Reporting Act, *infra*). They may also restrict employers from inquiring into certain minor offenses, and considering those offenses in making employment decisions. Employers should, therefore, carefully research both federal law and the laws of the states in which they employ individuals, to assure that they comply with any such limitations and procedures.

(2) Consistency. Any policy on criminal record checks should be consistently applied in order to avoid claims of discrimination, whether the policy encompasses record checks on all applicants or just those applying for specific positions.

(3) Notification. In addition to obtaining a separate release, employers should notify employees (on the employment application form) that their criminal records will be checked, and that the employer may decline to further consider any applicant who refuses to sign the release.

g. Authorization for Criminal Record Investigation. Detailed below are elements to be included in employee authorizations, and considerations that employers should keep in mind when drafting such documents.

(1) Title. Where possible, a separate authorization/release (for a criminal record check) should be obtained. It should also have a title that clearly reflects the intent and purpose of the document.

(2) Statement of Purpose. For reasons of notice to the applicant or employee, it is recommended that the purpose and nature of the form be explained to the applicant before any information is solicited. The following is a sample introductory statement.

All final applicants for employment with [Employer] must complete a Release of Criminal History Information. The failure to provide all of the information requested below will result in rejection of your application for employment. The information sought on this form will be used solely for the purpose of assisting [Employer] in conducting a criminal history check, and not for any other purpose.

(3) Information Requested. The same concerns which relate to general identifying information on an employment application also exist with respect to this release. Thus, only information which is necessary to correctly identify the applicant for the criminal record investigation should be

requested on the form. If the date of birth is necessary to complete a criminal history check, a disclaimer/purpose statement should be included on the form to assist the employer in demonstrating that age data was sought only for a legitimate purpose and was not used for other employment decisions. In such circumstances, the completed criminal history form should be kept separate from the employment application form until a hiring decision is made by the employer.

(4) Types of Inquiries. Inquiries should include both traditional conviction/guilty pleas and non-traditional criminal processes, such as probation and deferred adjudication.

(5) Acknowledgment. The authorization/release should include an acknowledgment by the applicant of the purpose of the form and the truthfulness of the information provided. It should also include specific language releasing claims against the employer, its agents conducting the criminal history investigation, and agencies providing data in response to the investigation.

The authorization should notify the applicant that more information may be necessary to complete the investigation, and that failure to provide such information upon request will disqualify the applicant from further consideration for employment.

(6) Providing Information to Third Parties. Because of the potential problems associated with collecting criminal history information, it is recommended that appropriate language be used when forwarding the applicant information to a third party or agency conducting an investigation on behalf of the employer. The following language is suggested:

The enclosed information is provided for the sole and limited purpose of conducting a criminal history check of the individual identified above. The information is to be used solely for the purpose of facilitating the requested criminal history investigation. The information provided, as well as the investigation results, are considered confidential and may not be released except to appropriate [Employer] personnel and/or persons required to conduct the investigation.

(7) Results. If the record check discloses a conviction, guilty plea or other form of criminal conduct (but not an arrest), the employer must then consider whether the applicant's criminal conduct is related to his job position and is sufficiently recent and severe in order to exclude him from employment. The EEOC has held that an employer must consider several factors in determining whether or not an applicant with a criminal record remains qualified for the position sought, including:

- i) the nature, gravity and number of the applicant's criminal acts,

- ii) the length of time since the convictions,
- iii) the nature of the job sought or held.

See Equal Employment Opportunity Commission Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, (No. N-915-061) (Sept. 7, 1990); see also EEOC Decision No. F4 02, 6 Fair Empl. Prac. Cas. (BNA) 830 (July 10, 1973).

The employer should carefully consider the job position for which the applicant is applying (or which the individual is currently employed) and that relationship of that position to the crime for which the applicant/employee was convicted or to which he pled guilty, when making an employment decision. For example, in *Richardson v. Hotel Corp. of Am.*, 332 F. Supp. 519 (E.D. La. 1971), *aff'd without op*, 468 F.2d. 951 (5th Cir. 1972), a bellman was discharged by a hotel employer after discovery of a conviction for theft and receipt of stolen goods. The applicant had truthfully admitted that he had been previously convicted of a crime, but the hotel had not researched his criminal record prior to commencement of employment. When the employee's prior convictions were confirmed through an employment/reference check, he was notified that he could not continue to work as a bellman. The hotel offered him employment in a position which did not provide access to guest possessions. When the employee refused, he was discharged. The discharge was upheld by the court since the conduct for which the bellman was convicted was directly related to his job position and his access to guest rooms.

2. Financial Status/Credit Reference Checks. Questions regarding an applicant's credit rating, such as whether he owns his own home, or rents, or other questions regarding the applicant's financial status should be avoided absent direct relevance to the position being applied for. The reason is that rejecting applicants because of a poor credit rating has been found to have a disparate impact on minority groups and, consequently, is viewed by the EEOC as an impermissible inquiry, unless a business necessity for the inquiry can be established. Equal Employment Opportunity Commission, *Pre-Employment Inquiries and Equal Employment Opportunity Law* (1983). It is also unlawful to refuse to employ a person because he has filed for bankruptcy or had wages garnished. 11 U.S.C. §525; 15 U.S.C. §1674.

Where applicants are candidates for sensitive positions, however, employers may use consumer reporting agencies to investigate their credit or financial history. Credit reference checks are particularly important, for example, where an applicant is applying for a position of trust involving money or the opportunity for financial gain. However, credit checks suffer from the same

problems associated with employment reference checks, background checks and the investigation of an applicant's criminal history.

a. Fair Credit Reporting Statutes. In those situations where it is established that the applicant's credit rating is a job-related business necessity, the employer must comply with the Fair Credit Reporting Act ("FCRA"). 15 U.S.C. §1681 *et seq.* (West 1998 & Supp. 1999). The FCRA was amended on September 30, 1997. Under the FCRA, as amended, employers must comply with stricter requirements on obtaining and using credit reports as the basis for "adverse actions" affecting applicants and employees.

Under the FCRA, any employer that desires to obtain a consumer report on an applicant or employee for employment purposes must:

- provide "a clear and conspicuous disclosure" in writing to the applicant or employee at any time before the report is procured that such report may be obtained for employment purposes. This written notification must be contained in "a document that consists solely of the disclosure"; and
- obtain written authorization from the applicant or employee for the procurement of the report.

The penalties for negligent or willful violation of the Act have also increased as a result of the amendments to the FCRA. Any person who fails to comply with any requirement of the statute may be held liable to the consumer for actual damages, costs of any action required to enforce liability, and attorney's fees. §1681 n(3)(b)&(c). Any employer who willfully fails to comply with the provisions of the Act may be held liable to the consumer for the actual damages of not less than \$100.00 and not more than \$1,000.00 §1681n(2)(1)(A). If a consumer report is obtained under false pretenses or for an impermissible purpose, the employer may be (i) liable to both the consumer and the reporting agency for actual damages or \$1,000.00, whichever is greater; and (ii) liable to the consumer for punitive damages "as the court may allow." §1681n(2)(1)(B) & (3)(b).

b. Who and What is Covered?

It would be easy for employers to assume that the Fair Credit Reporting Act applies only to credit agencies and credit investigations and not other investigations (such as investigations into an applicant or employee's criminal history or background). *However, the Fair Credit Reporting Act does not appear to be so limited.*

Both applicants for employment and employees are protected “consumers” under the law. A “consumer reporting agency” is broadly defined as “a consumer reporting agency that regularly engages in the practice of assembling or evaluating, and maintaining, for the purpose of furnishing consumer reports to third parties bearing on a consumer’s credit worthiness, credit standing, or credit capacity...” §1681a(p).

Therefore, if an employer hires an investigator to review public records on the *criminal history* of an applicant, under the Fair Credit Reporting Act, as amended, additional requirements must be met. For example, the applicant’s authorization must be obtained. Likewise, when an employer hires a company to investigate an employee’s background as part of an ongoing theft investigation, the above requirements must be met. For example, the employee must have been given a clear and conspicuous disclosure, in a separate document, that the employer might obtain such background information from an investigation agency and, further, the employee must be provided with a copy of the agency’s report before the employer takes any adverse action.

3. Driving Record. Detailed below are various considerations employers should keep in mind when considering verifying an applicant’s or employee’s driving record.

a. When to Request a Driving Record. Relevancy and common law privacy considerations dictate that an individual’s driving record be requested and considered only in circumstances where the position sought or held requires that the employee drive in connection with his job responsibilities, or where the employer might be held negligent for not investigating the driving record of the employee.

b. Notice and Consent. The State of Texas does not require a employer to obtain an applicant’s or employee’s consent prior to obtaining a copy of his driving record. Even where consent is not required, however, it is advisable that the employer provide employees and applicants with notice of the driving record verification requirement, along with a statement of the limited and business-related purpose of the request, including date of birth information, if required. Such notice may be included as a section on the employment application or as a separate page accompanying the application.

c. Sample Notice and Inquiry Language. If you are applying for a position involving regular or occasional driving, in [Employer] – owned or personal vehicles, answer the following questions:

Do you have a current and valid driver’s license? _____ Yes _____ No

Provide your driver’s license no.: _____

List all restrictions on your driver's license: _____

List all traffic offenses and citations you have received during the preceding ____ years, excluding only parking tickets. Explain circumstances and disposition.

Has your driver's license been revoked, suspended or restricted during the preceding ____ years? If yes, please provide details:

d. Liability Considerations. There are no Texas statutes or court decisions which restrict an employer from considering the driving record of an applicant for, or current employee in, a driving position. Employers should protect themselves from liability by maintaining a firm policy of requiring driving record checks of applicants or employees engaged in on-the-job driving. *See North Houston Pole Line Corp. v. McAllister*, 667 S.W.2d 829 (Tex. App. – Houston [14th Dist.] 1983, no writ)(employer found grossly negligent in personal injury case where it failed to check employee's driving record, did not request commercial driver's license or test or train him in truck driving, and permitted employee to continue driving after speeding tickets and accidents). However, as noted above, driver's record checks should only be made on those applicants or employees whose job duties include driving, apart from commuting to and from the residence and work.

4. Verification of License or Professional/Trade Certification.

a. Applicants. Individuals seeking employment in positions for which a license or professional/trade certification is required or preferred should be asked to verify the existence and number of their license/certification on the employment application form.

5. Military Service Road. The EEOC has taken the position that an employer's rejection of applicants with less than honorable discharges from military service may be discriminatory to minority applicants. EEOC Decision No. 74-25 (1973). The EEOC bases this position on the fact that minority military personnel tend to have a higher proportion of general and undesirable discharges than non-minority personnel of similar aptitude and education. This, an employer's requirement of an honorable discharge may have a disparate impact upon minorities.