



Hiring Al Capone

Employers face new responsibilities in conducting criminal background checks.

If you are the typical employer, you perform a criminal background check on job applicants, right? Ninety percent of employers do, and it is understandable why criminal background checks are performed: More than 65 million people in the United States have been arrested or convicted, and employers have been sued successfully for criminal acts performed by employees with a criminal record.

But a train wreck is coming if you do not follow new guidelines established on April 25 by the Equal Employment Opportunity Commission (EEOC) on how to use the results of those criminal background checks.

PepsiCo Inc. learned the hard way. Pepsi agreed in January 2012 to pay the EEOC \$3.13 million because of Pepsi's blanket policy denying jobs to any applicant with an arrest or conviction. The EEOC contended that Pepsi's policy resulted in race and national origin discrimination. That's because African Americans and Latinos are overrepresented in the criminal justice system. One in three African Americans and one in seven Latinos have been incarcerated, while one in 17 Caucasians has met the same fate.

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The EEOC is making it clear that employers cannot refuse to hire someone solely on the basis that the applicant has been arrested or convicted, unless that conviction is job related and meets business necessity needs.

On April 25, the EEOC underscored this theory by issuing new guidelines confirming that employers may not deny employment solely because of a conviction. The employer must make an individual assessment of the applicant's criminal background and behavior, since the bad acts occurred before a decision is made not to hire the applicant.

Here is what you need to do now to best avoid Pepsi's fate:

- 1. Eliminate blanket policies that disqualify candidates because of prior arrests or convictions.** Narrowly tailor policies to conform to the new EEOC guidelines.
- 2. Train your managers on the federal laws prohibiting discrimination.**

- 3. Comply with the Fair Credit Reporting Act.** Obtain written permission from the applicant before you perform a criminal background check. If you discover some criminal history that disqualifies the candidate, then provide the candidate with the Federal Trade Commission's Summary of Rights under the Fair Credit Reporting Act, along with the information related to the criminal background check that disqualified the candidate.
- 4. Evaluate the position to be filled carefully.** Determine what types of specific criminal convictions may disqualify an applicant.
- 5. If the applicant has a criminal conviction, you need to make an individualized assessment of the facts surrounding the conviction.** Review information such as: What is the number, nature and severity of the crime(s)? How long ago did the crime(s) occur? What has been the applicant's behavior since the conviction(s)? Has the applicant been performing the same or similar job successfully since serving the sentence? Is the candidate bonded? How are the candidate's references?
- 6. The candidate has a duty to cooperate with you by providing information to make this assessment.** Failure to cooperate may be a basis to refuse to hire the applicant.
- 7. If you decide not to hire the applicant because of the conviction history, document the link between the conviction and the position, and why it was necessary not to hire the applicant because of the type of conviction and background circumstances.** If you decide not to hire the applicant for other reasons, like the candidate lacked necessary skills, document this information.
- 8. How does this affect current employees?** If you already hired someone and later perform a criminal background check that reveals a conviction, be careful whether you fire this employee, especially if the employee has had no performance issues.
- 9. Keep background information confidential.**
The EEOC will likely step up oversight on the use of criminal background checks. These best practices may help avoid a lawsuit or an EEOC charge.

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