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Be careful when using police records in hiring decisions



LABOR LAW

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John Williams is the hiring manager for his advertising company. He just received the background check for Susan Jones, a potential employee to whom he had given a job offer conditioned upon a satisfactory result from the background check.

John just learned that Susan has an 8-year-old conviction for driving

under the influence and an arrest last year for aggravated battery. Can John decline to hire Susan based on either the conviction or the arrest, or both?

The answer is, of course, it depends.

In Florida, there is no legal prohibition against making hiring decisions based on either convictions or arrests, nor is there any limitation on the length of time since a conviction or arrest that an employer can consider.

A few states prohibit employers from considering arrests, some exclude certain types of crimes from consideration, and others limit how many years back an employer may look. However, even in Florida, a blanket policy against hiring individuals with convictions or arrests, without further consideration, could be problematic.

Although not legally binding, the Equal Employment Opportunity Commission (EEOC) has provided guidance on the use of convictions and arrests in making hiring decisions. This guidance is often referred to by courts.

The EEOC explains that it would certainly be discriminatory for an employer to disqualify an individual of one race because of his record but not disqualify an individual of another race who has the same record. However, the EEOC has taken it a step further and stated that, in the context of a criminal conviction, if the use of the record can be shown to have a "disparate impact" on a certain class of individuals, the employer must justify the practice based on business necessity.

A disparate impact, also known as "unintentional discrimination," arises when a facially neutral policy, such as a prohibition against hiring any individual with a criminal conviction, has a disparate impact on a certain category of individuals.

In the context of convictions and arrests, statistics show that racial minorities are arrested and convicted at higher percentage rates than non-minorities. If a disparate impact is present, the EEOC requires the employer to show that it considered (1) the nature and gravity of the offense; (2) the time that has passed since the conviction and/or completion of the sentence; and (3) the nature of the job held or sought.

Therefore, according to the EEOC, a blanket policy excluding all persons convicted of any crime from employment would not be consistent with business necessity. For example, in the situation above, because Susan's conviction for driving under the influence has little relation to her likely job duties in an

advertising firm, the conviction should not be used to exclude Susan from employment. The analysis could be different if Susan's job duties included driving a company vehicle, because the relation between the conviction and the job is not as tenuous.

In regards to arrests, the EEOC cautions that while an actual conviction constitutes reliable evidence that a person engaged in the conduct alleged, an arrest without a conviction does not establish that a person actually committed any wrongdoing.

Therefore, considerations of arrests must not only be related to the job, but employers must also evaluate whether the individual actually engaged in the misconduct. The EEOC suggests giving the individual the opportunity to explain the situation and making follow-up inquiries as necessary to evaluate the individual's credibility.

Ultimately, John may decide not to hire Susan because Susan's arrest for aggravated battery creates an unreasonable risk to her future co-workers. Whatever his decision, John and other

employers alike should evaluate the requirements of each of their job positions and make sure that any resulting exclusions are truly based on legitimate safety and security concerns.

While not legally binding, the EEOC's guidance is influential to courts, and employers should use this guidance to evaluate their policies on the use of convictions and arrests in making hiring decisions.

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