

STAFFING SOLUTIONS

Going Postal: Employer Use of Criminal Information in Hiring and Promotion Decisions

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Unfortunately, this is not the first (or last) time we have heard this kind of story:

On August 24, 2012, a 58-year old laid off clothing designer returned to work with a .45 caliber pistol and shot a co-worker in the face. He put the gun in a bag and walked up New York's ritzy 5th Ave. He was confronted by two police officers and a gun fight ensued, injuring nine and leaving the co-worker and laid-off worker dead.

According to a 2010 Bureau of Labor Statistics study, homicide accounts for 10% of all on-the-job deaths in the U.S. From 2005-2010, there was an average of 564 workplace homicides a year.

The term "going postal" has been a common part of American slang since 1983 when a series of Postal Service workers shot and killed managers, co-workers and others; however, the majority of shootings occur in the private sector (86%).

By law, employers must provide a safe working environment for all employees. In view of increasing violence, many employers choose to conduct background checks on prospective employees. But to what extent, if any, may employers use arrest and conviction records in making hiring and employment decisions?

Last April the Equal Employment Opportunity Commission (EEOC) issued new guidelines regarding criminal records and employment. The guidelines address how employers should handle inquiries into arrest and convictions of applicants and employees, as well as how to make employment and hiring decisions where criminal backgrounds are considered.

According to the guidelines, statistical evidence demonstrates that blanket exclusions from employment or promotion for individuals with criminal records have an adverse impact on minority groups, specifically Hispanics and African Americans. Unless they can demonstrate the exclusion is job-related and consistent with business necessity, an employer is vulnerable to disparate impact discrimination claims.

The guidelines encourage an "individualized assessment" that considers (1) the nature of the crime, (2) the time elapsed, and (3) the nature of the job.

The guidelines contain examples of "best practices" when using criminal records when making employment decisions. Specifically, the guidelines state:

General

- Eliminate policies or practices that exclude people from employment based on *any* criminal record.
- Train managers, hiring officials, and decision makers about Title VII and its

prohibition on discrimination.

Developing a Policy

- Develop a narrowly tailored written policy for screening for criminal conduct.
- Identify essential job requirements.
- Determine the offenses that may demonstrate unfitness for performing such jobs.
- Determine the duration of exclusions for criminal conduct based on available evidence.
- Record the justification for the policy and procedures.
- Keep a record of consultations and research when crafting the policy and procedures.
- Train managers, hiring officials, and decision makers on implementing the policy and procedures consistent with Title VII.

Questions about Criminal Records

When asking questions about criminal records, limit inquiries to records for which exclusion would be job related and consistent with business necessity.

Confidentiality

Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose intended.

Though the EEOC Enforcement Guidance is not binding, many courts

will likely consider it when issuing rulings. Additionally, the EEOC and California Department of Fair Employment and Housing will likely give significant weight to these guidelines in evaluating claims under their jurisdiction.

In addition to the EEOC guidelines, the California Labor Code restricts an employer's ability to inquire about certain criminal records.

With limited exceptions, employers are prohibited from asking applicants to disclose information about an arrest or detention that did not result in a conviction, or information relating to a referral to or participation in a criminal diversion program. Employers also may not inquire about convictions for most marijuana possession offenses more than two years old.

Employers who utilize arrest or criminal background information in hiring or promotion are advised to review the guidelines - as well as state laws - to ensure their practices are in compliance. A complete copy of the EEOC Enforcement Guidance is available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

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