

A Guide for Workers with Conviction and Arrest Histories

Know Your Employment Rights

By: National Employment Law Project
August 2014

One in four adults in the United States has a conviction or arrest history,¹ and more companies than ever are requiring background checks when they hire new workers or promote workers within the company.

If you are one of these 70 million people with a conviction or arrest history, what are your rights when you apply for a job? Is it legal for an employer to say in a job ad that anyone with an arrest or conviction “need not apply”? Is the employer required to look at your job qualifications as well? Are you allowed to see a copy of the employer’s background check report to make sure it’s accurate?

With this fact sheet, we have responded to

¹ There are many ways that people who face employment discrimination may interact with the criminal justice system including but not limited to, convictions, non-conviction arrests, juvenile adjudications, and infractions, and border detentions.

these and other basic questions that all people with a conviction or arrest history should have answers to when they apply for work. We encourage you to share this information broadly with your friends, family, and in your community.

Question

Can an employer automatically refuse to hire anyone with a conviction or arrest history?

Answer

No. For most employers, it is illegal to have a ban against hiring anyone with a conviction or arrest history. Automatically excluding all workers with such histories from employment is likely to violate the federal civil rights law that prohibits employment discrimination based on race, ethnicity, and other factors (The law is called “[Title VII of the Civil Rights Act of 1964](#).”). The civil rights law applies

because an employer's practice of excluding all job applicants conviction or arrest histories generally blocks far more African Americans and Latinos—because these communities have been over-criminalized—than white job seekers. As a result, employers must follow the strict requirements of the law to show that they are not illegally discriminating when they ask about or consider an individual's history.

Question

What does the law require of employers when they use conviction or arrest histories in their hiring process?

Answer

There are a number of factors that employers must consider when they conduct background checks, and the rules are different for arrests as opposed to convictions. Except in special cases, the civil rights law does not allow employers to consider dismissed charges. Because they are not proof of criminal conduct, arrests that are not pending and did not lead to conviction cannot be considered by employers in most cases. Employers may consider an applicant's conviction but only if the company also takes into account these other important factors:

- 1) the nature and seriousness of the offense—employers must show that a conviction is “job-related” and less-serious offenses, especially non-violent and misdemeanor offenses, are less likely to be considered “job-related” under the law;
- 2) the time that has passed since the conviction or since the sentence was completed—older convictions are

- generally more difficult for employers to justify under the law;
- 3) the type of job the individual is applying for--if the job requires regular contact with the public, like a sales job, then the employer can more likely justify excluding people with a conviction for a violent crime, but if the job involves less contact with the public, like warehouse or construction jobs, there may be more flexibility;
 - 4) the job applicant's life story before and after the crime—employers should make an “individual assessment” that considers the job applicant's age at the time of the crime, participation in rehabilitation programs, the individual's employment history, and other helpful background information.

Question

When can an employer ask about my conviction or arrest history, and how should I best answer the question?

ANSWER

In most situations, employers can ask for information about an applicant's history on the initial job application. However, asking about arrests and dismissed records, or convictions that are not in any way related to the job being advertised, is generally harder for the employer to justify under the civil rights law. It's important to always be accurate and complete when you fill out the conviction or arrest history question. Otherwise, when the employer later finds out that the application question was not answered accurately, you could end up losing the job if it's offered to you.

Thanks to a growing movement around the country to help people looking for work with a conviction or arrest history, many government employers and some private employers are required by law to remove the conviction or arrest questions from the job application. These employers must wait to conduct the background check until later in the hiring process. This fair hiring process, called “ban the box,” is the law in 12 states and over 60 cities (you can learn more about the laws in your area as well as how to start a ban the box campaign at www.nelp.org/banthebox).

Question

What rights do I have if there is a mistake on my background check report?

ANSWER

Most private employers pay a private company to prepare the background check, and these background check reports are considered “consumer” reports under a federal law called the “[Fair Credit Reporting Act](#).” Under this law, employers must get the applicant’s permission, usually in writing, before asking a background screening company for a report. If the applicant gives the company permission to conduct the background check but he or she is not hired for the job because of information in the report, the employer must provide the applicant with a copy of the report. The background check report must be provided before the employer makes a final decision not to hire the job applicant so that he or she can first correct any inaccurate or missing information.

Question

If I have a conviction or arrest history, what more can I do to help increase my chances of being hired, and what action can I take if my legal rights have been violated?

ANSWER

First, be sure to check your [state](#) and the [cities](#) in which you will be applying to find out if they have a “ban the box” policy. Second, review your rights under the federal civil rights law. If you are a person of color and you believe the employer has discriminated against you because of your conviction or arrest history, you can file a charge of employment discrimination based on race or national origin with the Equal Employment Opportunity Commission (EEOC). To find out how to file an EEOC complaint, visit the EEOC website at <http://www.eeoc.gov/employees/howtofile.cmf> or call 1-800-669-4000. You can also file a lawsuit if the employer or the background check company has not followed the requirements of the Fair Credit Reporting Act. In addition, try to locate a [legal services organization](#) in your area to get information on any possible options to expunge or dismiss offenses on your record, which vary by state. And be sure to get a copy of your rap sheet to review your conviction history so that you know what is on it and to correct any mistakes.