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Fair Chance Hiring for Employers Part Six: Shifting Background Screening Goals from Exclusion to Inclusion

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For most jobs, employer background checks are unnecessary. However, if your company performs background checks for some or all positions, it can adopt policies to reduce unfair barriers to hiring workers with arrest and conviction records. NELP's eight-part "Fair Chance Hiring for Employers" series of policy briefs comprehensively explores the steps employers can take toward fair chance hiring. Part Six describes how to carefully limit record screening and avoid unfairly excluding job applicants with records.

Despite laws mandating the contrary, employers often deny jobs to people with records—who are disproportionately Black, Latinx, and Indigenous—based on convictions that are old or not related to the position sought. If, after making a conditional offer, your company expends time and funds on screening qualified applicants for some or all positions, you should expressly instruct your screening staff to aim for inclusion. The following are three ways to enhance fairness by limiting screening staff's scrutiny to only recent and more significant conviction records and by making clear that no candidate should ever be rejected unless a conviction is closely related to the job.

A. Clearly communicate fair chance expectations to background screeners

The individuals reviewing background check results for your company must not only be trained to read such reports, but they should also be brought onboard with the mission of fair chance hiring. As with other staff, it's important they understand both why the company seeks to welcome more workers with records and what internal policy changes are being made to that end. Most importantly, you must clearly explain the expectation that they should not rescind a job offer because of a person's record unless absolutely necessary. Otherwise, your staff may err on the side of being overly exclusive.

Historically, background screening personnel may have viewed their role as searching for any reason *not* to hire a person because of their record. That impression was likely reinforced by supervisors, who may have scrutinized their job performance only to ensure people with records were not mistakenly hired. But such a mindset will quickly undermine any efforts at fair chance hiring. With enough creativity, anyone can argue that *any* conviction is related to *any* job. If your background screening personnel are not part of a fair chance mindset, then the default may be to find a reason to exclude candidates based on their records.

The job performance expectations for background screening personnel must now extend in both directions. Not only must they ensure that new hires are fit, but they must ensure that qualified applicants are not unfairly excluded from working at your company. Make clear to such personnel and their supervisors that the company's goal is to avoid rescinding job offers based on conviction history as much as possible. To that end, your company should clearly delineate which types of records background screeners may *not* consider when evaluating an applicant and stress that a job offer should never be rescinded unless the conviction is recent and clearly related to the duties of the position such that it will impact job performance. The next two subsections further explore these instructions and how to responsibly limit the discretion of background screeners.

A Fair Chance Is More Important Than Unfounded Fears of Liability

Employers frequently raise concerns about negligent hiring liability, but such fears are overblown.[1] Liability will simply be unproveable if an employee's past offense is not both recent and directly related to the duties of their job. Most past conviction records do not create the "foreseeable" risk of harm that is legally required to prove negligent hiring liability. Similarly, relatively few jobs involve the types of duties that might lead to negligent hiring claims.[2] In contrast, if you do not conduct a good-faith individualized assessment and decline to hire individuals because of records that are unrelated to the job, your hiring policies may violate the federal civil rights laws that protect workers from hiring discrimination.[3]

Importantly, an employee with a record is generally no more likely to cause harm on the job than any other employee. The likelihood of *any* additional offense drops significantly within just a few short years of the initial offense[4]—particularly when a person is employed in a stable, well-paid job[5]—and an on-the-job offense is even less likely. There is no research to support the fears that workplace violence is generally attributable to employees with records or that hiring people with records increases workplace violence. Negligent hiring liability lawsuits can be brought only by customers and not by colleagues, because of workers compensation laws.[6] Moreover, employers can easily insure against financial loss resulting from dishonest acts by any employee, with or without a record. In fact, the Federal Bonding Program provides free fidelity bonds for new employees with conviction records.[7]

B. Limit the scope of what records you consider

Any record can be deeply stigmatizing, so you should require your screening team (whether internal or a contracted external entity) to follow clear guidelines for which records *not* to consider when conducting their analysis. Those guidelines should be based on both the type of records and length of time since the offense.

For certain categories of records, using them as a basis for disqualification is patently unfair. Perhaps most obviously, arrests and charges that did not result in conviction constitute mere allegations that don't prove guilt. Similarly, participation in a diversion program is offered to some individuals as an alternative to conviction and should not be treated like one. Juvenile offenses, by definition, occurred when a person was a child. Infractions and petty offenses are so minor as to be categorized separately by some jurisdictions. And conviction records that have been sealed, expunged, dismissed, or pardoned all represent offenses that the government has determined should no longer hold a person back (yet may still appear on a background check report).

Background screeners should not consider certain categories of records:

- Non-conviction records (arrests, charges, diversion programs)
- Sealed, expunged, dismissed, or pardoned records
- Juvenile records
- Infractions and other petty offenses
- Misdemeanors
- Felonies that occurred more than five years ago

In addition to non-convictions and expunged records, your company should exclude consideration of minor and older offenses from its screening process. Consider instructing background screeners to categorically ignore misdemeanors. While the distinction between misdemeanors and felonies can be unclear, and felonies can involve less significant offenses than some misdemeanors, the categories nevertheless offer a bright line for background screeners to narrow the universe of offenses they consider. Without clear instructions, background screeners may consider—and rescind job offers based on—misdemeanor offenses. At least one state, New Mexico, already disregards misdemeanors when conducting background checks for occupational licenses.[8] Your firm should follow suit and focus attention on more significant offenses that are actually relevant to job performance.

Your company should also foreclose the possibility that a record could indefinitely hold back a qualified employee. Opportunities for record-clearing remain limited across the country, with some states (and the federal government) offering *no* expungement of convictions and allowing them to remain on a person's record forever.[9] Instruct background screeners to look back no longer than five years and disregard older offenses. Such a numerical cut-off makes clear when a conviction is recent enough to be potentially relevant. Importantly, this approach does not mean that every recent conviction will be disqualifying; rather, screeners will next determine if the conviction is sufficiently job-related to merit rescission of the conditional offer.

A five-year cutoff for considering past convictions is supported by academic research and aligns with emerging trends in law. One notable study concluded that, six or seven years after release, the likelihood of committing an offense was only marginally higher for a formerly incarcerated person than for the general population.[10] More recent research concluded that, after a relatively short time, ranging from three to seven years for different offenses, the probability of a new arrest for an individual with a record fell *below* the probability for the general population.[11] Lookback limits are also a growing trend in state law and agency practice. For example, California law prohibits commercial background check companies from reporting convictions that occurred more than seven years prior.[12] Somewhat similarly, regulations issued by the State of Washington provide that conviction-related job denials are not justified by business necessity if the offense occurred more than 10 years prior.[13]

C. Forego automatic exclusions in favor of thorough, individualized written assessments of job-relatedness

If the background check report reveals a recent felony conviction that has not been sealed or expunged, your background screeners should next assess the job-relatedness of the conviction. Consistent with federal anti-discrimination law, you should not reject a candidate based on a past conviction unless that offense is directly related to the regular duties of the job and would impact performance.

Title VII of the Civil Rights Act of 1964 prohibits race discrimination in employment. Because employers' use of criminal background checks can have a "disparate impact" on Black, Latinx, and Indigenous people, record-based exclusions must be "job related for the position in question and consistent with business necessity."[14] Consistent with federal case law, the Equal Employment Opportunity Commission (EEOC) instructs employers to consider at least three factors when determining whether an offense is job related:

1. The nature and gravity of the offense;
2. The amount of time that has passed; and
3. The nature of the job held or sought.

Those factors represent the bare minimum. In contrast, if your screening team views their role as excluding people with records, then the likely response will be negative and to exclude the candidate for any conviction.

You can help your team perform a thorough job-relatedness analysis by setting clear expectations as well as providing additional details about how to perform the job-relatedness analysis. Set clear expectations for your team that a candidate should not be excluded unless absolutely necessary; applicants should be presumed fit unless evidence demonstrates otherwise. You can also further probe each of the above EEOC factors with your team, as described below. Require them to explain their reasoning in writing when they find that a conviction is job-related to add rigor to the process.

Without Careful Guidance, Screening Staff May Look for Reasons *Not* to Hire

"Carmen"[15] is a 40-year-old mother of one in Chicago. She recounts that, after being offered a position with a well-established company, "I was so happy, so relieved that I was actually going to have a career" and "a stable environment for me to work in." At that time, she was nearing the end of parole for a domestic offense from several years earlier.

Although her conviction was unrelated to her prospective job duties, the company withdrew her conditional offer following a background check. Carmen was "devastated" and "discouraged" by the rejection. "I know I'm a good person. I made a mistake, and that was my past, and that's not the person I am [today]." Like all people, Carmen deserves a good job so that she can support herself and her family.

1) ***Nature of the Offense***

A thorough job-relatedness analysis will closely examine the specific elements of an offense and not rely on rigid matrixes or categorizations.

Train your screening team to not allow the stigma of certain labels—such as "felony," "violent," or "sex" offenses—to instigate an automatic rejection. Most felonies simply aren't directly relevant to the specific duties of most jobs. And while misdemeanors represent a category of less significant offenses for which a person should not be excluded from employment, the reverse is not true: a felony does not necessarily merit exclusion. Not all felonies are significant. As one extreme example, littering can amount to a felony in certain jurisdictions.[16]

Finally, labels like "violent" or "sex" offenses further stigmatize an already stereotyped population and can lead to knee-jerk reactions.[17] A good-faith individualized assessment is especially important for offenses that can sound worse than the underlying conduct and for offenses that are likely to evoke biases and prejudices. Broad terms like "violent" and "sex offense" can overshadow the specifics of what occurred as well as the identity and positive attributes of the person convicted. The circumstances surrounding such offenses are often extremely personal and incredibly unlikely to recur at work. In fact, homicide and sex offenses have among the *lowest* recidivism rates.[18]

When possible, focus on what occurred and the specific conduct of the individual instead of looking only at the title or legal term for an offense. Even when offenses sound significant, the individual's actions may be much more understandable. If the applicant provides mitigating information, review and consider it as part of your assessment. You should consider the context of the situation in which the offense occurred, the degree and permanence of the harm caused, and the age of the applicant when the conduct occurred.

2) ***Amount of Time Passed Since the Offense***

As explained above, a variety of reasons support a five-year lookback limit when conducting a conviction background check. If you are unable or unwilling to adopt such a clear-cut limit on what records you consider, or if you are considering more recent convictions, the amount of time passed should still be evaluated because older offenses simply have less bearing on an individual's ability to perform the job duties.

When considering time elapsed as a component of job-relatedness, try to determine the amount of time that has passed since the conduct underlying the conviction. For reasons including delays in the criminal legal system, the underlying conduct may significantly predate the date of conviction.

While it may be tempting to consider only the amount of time since release from incarceration or completion of the sentence, doing so may be unfair to applicants of color and compound the effects of racism in the criminal legal system. Not only are a greater proportion of people of color impacted by the criminal legal system, but racism by prosecutors, judges, and parole boards translates into Black and Latinx people being sentenced to longer terms of incarceration or probation, serving more time before being paroled, and remaining on parole for longer than similarly situated white people.[19] Moreover, sometimes a sentence is not considered complete until an individual has finished paying unfair fines and fees imposed by the criminal legal system.

Individuals on Probation or Parole Deserve a Fair Chance to Work

One in every 58 U.S. adults are on probation or parole.[20] Not only are people on probation or parole "fit" to work, but they are also typically *required* to seek and maintain employment while on probation or parole. Long terms of probation and parole are yet another overly punitive aspect of the broken U.S. criminal legal system. When conducting an individualized assessment, employers should focus on the underlying conduct rather than parole status, which does not relate to the recency or job-relevance of the offense. If your company instead weighs probation and parole status against job applicants, you will disproportionately reject job applicants of color, who encounter racism at sentencing and parole hearings, thus serving longer periods of probation and parole. In 2018, Black people were nearly four times more likely than white people to be on parole.[21]

3) Nature of the Job

Too often, an employer's job-relatedness analysis ends before reaching the third prong: considering the nature of the job. Instead, screening staff sometimes respond to the nature and apparent severity of an offense and decide they will not hire a person with that record into *any* position with the company. But careful consideration of the typical duties and responsibilities of the relevant job is a step that helps prevent the stigma of a record from being the deciding factor in whether to hire a candidate. Even if the gravity of the offense seems significant, it should matter only insofar as the conduct relates to the specific job duties.

One way to help ensure a robust job-relatedness analysis is to provide screening staff with clear instructions on how to determine whether a conviction is job-related. Specific questions to guide their analysis may help to enhance the fairness and consistency of your staff's decisions:

- Does the individual's conduct have a direct and specific negative bearing on the person's ability to perform the duties or responsibilities regularly required for the position?
- Does the position offer frequent opportunities for the same or a similar offense to occur?
- Is it likely that circumstances leading to the offense will recur in the workplace?[22]

Requiring your staff to commit their assessment of job-relatedness to writing will help ensure rigor in their analysis. It will also help protect against liability under anti-discrimination and fair chance hiring laws. Many fair chance laws expressly require employers to conduct such an assessment, and some local laws require employers to record that analysis in writing. At the end of this policy brief, you can find a short sample form to help guide and record this individualized job-relatedness analysis.

Your staff should always begin with the presumption that an offense is *not* job-related and then be required to explain how the above fair chance factors combine to create an unreasonable risk. If your background screening team is unable to articulate the link between specific aspects of the candidate's conviction history with risks inherent in the duties of the job, the record is almost certainly not sufficiently job-related and should not warrant rejection of the job candidate.

Sample Individualized Job-Relatedness Assessment Form

<u>How to Use:</u> Below is an example of a form to help guide and record the individualized job-relatedness analysis. Your screening staff should begin with the presumption that an offense is not job-related and then use this form to articulate how the link between specific aspects of the candidate's conviction history and the specific duties of the job combine to create an unreasonable risk. Retain each completed form for your records and attach the conviction history report.

A. Assessment Information:

Applicant name: [INSERT NAME]
Position: [INSERT POSITION OFFERED TO THE APPLICANT]
Date of conditional offer: [INSERT DATE]
Date of conviction history report: [INSERT DATE]
Date of this assessment: [INSERT TODAY'S DATE]
Assessment performed by: [INSERT NAME AND TITLE OF SCREENING TEAM MEMBER]

B. Job-Relatedness Assessment:

1. The specific duties and responsibilities of the job are: [LIST DUTIES]

2. The conviction(s) of concern are: [LIST CONVICTION(S) AND ATTACH CONVICTION HISTORY REPORT]

3. How long ago the conduct occurred that led to the conviction: [INSERT AMOUNT OF TIME PASSED SINCE THE OFFENSE]

4. Activities since the offense, such as work experience, job training, rehabilitation, education, community service, etc.: [LIST ACTIVITIES CURRENTLY KNOWN FROM RESUME, JOB APPLICATION FORMS, AND INTERVIEW NOTES]

5. Does the offense have a direct and specific negative bearing on the applicant's ability to perform the core duties or responsibilities required for the position?
   ☐ Yes ☐ No
   If yes, explain: [DESCRIBE REASONING]

6. Does the position offer the opportunity for the same or a similar offense to occur?
   ☐ Yes ☐ No
   If yes, explain: [DESCRIBE REASONING]

7. Is it likely that circumstances leading to the offense will recur? ☐ Yes ☐ No
   If yes, explain: [DESCRIBE REASONING]

[IF MORE THAN ONE CONVICTION OF CONCERN, REPEAT #3 TO #7 SEPARATELY FOR EACH CONVICTION]

C. Reasoning:

Based on the factors listed above, we are considering rescinding our offer of employment because [DESCRIBE THE LINK BETWEEN THE SPECIFIC CONVICTIONS OF CONCERN AND THE RISKS INHERENT IN THE DUTIES OF THE EMPLOYMENT POSITION].

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Endnotes

[1] Lewis Maltby & Roberta Meyers Douglas, Legal Action Ctr. & Nat'l Workrights Inst., *Second Chance Employment: Addressing Concerns About Negligent Hiring Liability* 4, 8 (2023), https://www.lac.org/resource/second-chance-employment-report.

[2] *Id.* at 4-5, 8-11 ("[A]lmost all cases in which employers have been found liable for negligent hiring occur in a small number of jobs involving seven specific risks.").

[3] U.S. Equal Emp't Opportunity Comm'n, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e* et seq. (Apr. 25, 2012), http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf.

[4] *See* Megan C. Kurlychek, et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 Criminology & Pub. Pol'y 483, 483 (2006); Alfred Blumstein & Kiminori Nakamura, *Extension of Current Estimates of Redemption Time* 37, 41 (2012), https://www.ojp.gov/pdffiles1/nij/grants/240100.pdf.

[5] *See* Nat'l Emp't Law Project, *Research Supports Fair-Chance Policies* 2 (2016), https://www.nelp.org/publication/research-supports-fair-chance-policies/ (collecting research showing that employment is correlated to reduced recidivism); Christopher Uggen, *Ex-Offenders and the Conformist Alternative: A Job Quality Model of Work and Crime*, 46 Social Problems 127 (1999), https://www.jstor.org/stable/3097165 (finding job quality correlated to reducing the likelihood of offending); Crystal S. Yang, *Local Labor Markets and Criminal Recidivism*, 147 J. Pub. Econ. 16 (2017), https://www.sciencedirect.com/science/article/abs/pii/S0047272716302067 (estimating impact of higher wages on recidivism).

[6] Dallas Augustine, et al., UCLA Inst. for Res. on Labor & Emp't, *Why Do Employers Discriminate Against People with Records? Stigma and the Case for Ban the Box* 7 (2020), https://irle.ucla.edu/publication/why-do-employers-discriminate-against-people-with-records-stigma-and-the-case-for-ban-the-box/.

[7] The Federal Bonding Program, https://bonds4jobs.com/ (last visited Aug. 2, 2023).

[8] N.M. Senate Bill 2 (2021).

[9] Margaret Colgate Love, Collateral Consequences Res. Ctr., *The Many Roads from Reentry to Reintegration* 52-55 (2022), https://ccresourcecenter.org/the-many-roads-to-reintegration/.

[10] Kurlychek, et al., *supra* note 2.

[11] Blumstein & Nakamura, *supra* note 2.

[12] Cal. Civ. Code § 1786.10 -.40.

[13] Wash. Admin. Code § 162-12-140.

[14] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

[15] Safer Foundation interview with "Carmen" (Jan. 27, 2021) (transcript on file with author). To maintain worker anonymity, this brief uses a pseudonym and omits the employer name. The Safer Foundation is a nonprofit social impact organization based in Chicago that focuses on human capital development for people with arrest and conviction records. Visit https://saferfoundation.org/ to learn more.

[16] *See, e.g.*, Fla. Stat. § 403.413(6)(c) (providing that certain littering activity can amount to "a felony of the third degree"); Anthony Brasfield, *Fla. Man, Charged After Releasing Balloons Into Sky, Report Says*, CBS News, Feb. 25, 2013, https://www.cbsnews.com/news/anthony-brasfield-fla-man-charged-after-releasing-balloons-into-sky-report-says/ (reporting on a Florida man who was charged with a felony after "releasing a dozen heart-shaped balloons into the sky").

[17] Opportunity Agenda, *A New Sensibility: An Analysis of Public Opinion Research on Attitutes Towards Crime and Criminal Justice Policy* (2016), https://www.opportunityagenda.org/sites/default/files/2018.

[18] Just. Pol'y Inst., *Defining Violence: Reducing Incarceration by Rethinking America's Approach to Violence* 3-4, 6-8, 14-15 (Aug. 2016), https://justicepolicy.org/wp-content/uploads/justicepolicy/documents/jpi_definingviolence_final_report_9.7.2016.pdf.

[19] Ashley Nellis, Sentencing Project, *The Color of Justice: Racial and Ethnic Disparity in State Prisons* 12-16 (2021), https://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/; Kendra Bradner, et al., Columbia Univ. Just. Lab, *More Work to Do: Analysis of Probation and Parole in the United States, 2017-2018* at 7 (2020), https://justicelab.columbia.edu/sites/default/files/content/More%20Work%20to%20Do.pdf; Glenn R. Schmitt, et al., U.S. Sent'g Comm'n, *Demographic Differences in Sentencing* 2 (2017), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2017/20171114_Demographics.pdf.

[20] U.S. Dep't of Just., Bureau of Just. Stats., *Probation and Parole in the United States 2017-2018* (2020),

https://bjs.ojp.gov/content/pub/pdf/ppus1718.pdf.

[21] Kendra Bradner, et al., *supra* note 17 at 6, fig.4 (calculated using U.S. resident population estimates).

[22] These questions are based on San Francisco's fair chance law. *See* Fair Chance Ordinance, S.F. Police Code, Art. 49, § 4903, https://codelibrary.amlegal.com/codes/san_francisco/latest/sf_police/0-0-0-8603.

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