



ZASHIN & RICH

Best Hiring Practices

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Agenda

- Overview of the Law
- Steps of the Hiring Process
 - Applications
 - Background Checks
 - Interviews
- Case Examples



Federal Laws

- Title VII of the Civil Rights Act of 1964 as amended, is the foundation of many laws governing employment practices, including hiring.
- Adopted to ensure equal opportunity protection and prohibits job discrimination based on race, color, religion, sex (including pregnancy) and national origin in: recruitment; hiring; transfers; benefits; promotion; salary; disciplinary action and termination.



Federal Laws

Other federal laws that prohibit discrimination in hiring:

- **Americans with Disabilities Act of 1990 as amended (ADA)**, which prohibits employment discrimination against qualified individuals with disabilities.
- **Genetic Information Nondiscrimination Act of 2008 (GINA)**, which prohibits discrimination on the basis of genetic information.
- **Age Discrimination in Employment Act of 1967 (ADEA)**, which protects individuals who are 40 years of age or older.



Ohio Law

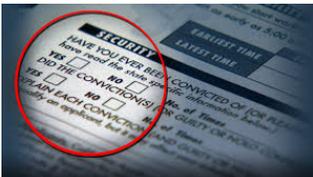
O.R.C. § 4112.02 Unlawful discriminatory practices. It shall be an unlawful discriminatory practice:

(A) For any employer, because of the race, color, religion, sex, military status, national origin, disability, age, or ancestry of any person, to discharge without just cause, to refuse to hire, or otherwise to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment.



Applications – “the box”

- Question: Do you want to include “the box” on your application forms?
- What is the Box?



Applications – Ohio and “the box”

- Ohio “Banned the Box” for Public Employers (H.B. 56 – eff. Mar. 23, 2016)
 - Public Employers prohibited from inquiring about criminal convictions on the job application.
 - “**Public Employer**” includes State, County, Township, Municipal Corp., or any other body corporate and politic that is responsible for government activities in a geographic area smaller than that of the state.




Applications – Ohio and “the box”

Impact - Are Public Employers prohibited from asking about criminal convictions?

- **No.** H.B. 56 does not prohibit public employers from inquiring about felony convictions later in the hiring process. The inquiry is only “banned” from the job application itself.
- Employers should develop a procedure regarding how, and when, it will make the inquiry. The employer should follow that procedure for each position without deviation.



Applications – Other States and “the box”

“Ban-the-box” movement across the country.

State	Private Employers	Public Employers
California		X
Colorado		X
Connecticut		X
Delaware		X
Georgia		X
Hawaii	X	X
Illinois	X	X
Maryland		X
Massachusetts	X	X



Applications – Other States and “the box”		
State	Private Employers	Public Employers
Minnesota	X	X
Nebraska		X
New Jersey	X	X
New Mexico		X
New York		X
Oklahoma		X
Oregon	X	X
Rhode Island	X	X
Vermont		X
Virginia		X
Wisconsin		X



Applications - Arrests/ Convictions

Q: If “ban-the-box” laws do not apply, what else should an employer consider in determining the weight given to arrests and convictions?

- A: 2012 EEOC Enforcement Guidance (issued Apr. 25, 2012)



Applications - Arrests/ Convictions

- **EEOC Conclusions:**
 - People excluded from jobs due to prior convictions may result in unintentional race discrimination.
 - An arrest, by itself, is never job-related and consistent with business necessity.
 - Arrest does not establish that criminal conduct has occurred.
 - Individuals are presumed innocent until proven guilty.
 - Many arrests don't result in convictions.
 - Employers must be able to show that conviction data is “job related and consistent with business necessity.”



Applications - Arrests/ Convictions

- To show “**Business Necessity**,” an employer must develop a targeted screening process that considers three factors established in *Green v. Missouri Pacific Railroad* (8th Cir., 1975). They are:
 - The nature/gravity of the crime;
 - The time elapsed since the conviction/release from prison; and,
 - The nature of the job/position sought.
- Employer should provide an opportunity for an “**individualized assessment**.”
- Blanket “No hire policies” for felony convictions prohibited except in limited positions required by Federal statute.



Applications - Convictions

Keep in Mind EEOC guidance. . .

- Is not controlling on courts’ interpretation of Title VII.
- Courts and litigants may refer to EEOC’s interpretations for guidance.



Background Checks

- Employers may use background checks to investigate potential convictions. However, employers must also consider . . .
- The **Fair Credit Reporting Act (FCRA)**, 15 U.S.C. § 1681, *et seq.*, which governs the collection, dissemination, and use of an applicant’s or employee’s credit, criminal background, motor vehicle driving record, and other similar information.



Background Checks - FCRA

- Threshold Requirement: Employer must utilize a third party to provide consumer report on applicant/employee.
- FCRA has 5 basic requirements:
 1. Notice;
 2. Authorization;
 3. Pre-Adverse Action Disclosure;
 4. Adverse Action Notice;
 5. Certification.



Background Checks - FCRA

Notice and Authorization – Employer must provide applicant/employee with appropriate notice before obtaining a consumer report. That notice must:

- Be clear and conspicuous;
- Be in writing;
- Disclose that the employer may obtain a consumer report and may use that information to make an employment decision; and
- Be separate from other documents.



Background Checks - FCRA

Notice and Authorization

Generally, before requesting a consumer report, the employer must obtain written authorization from the applicant/employee. 15 U.S.C. § 1681(b)(2)(A)



Background Checks - FCRA

Pre-Adverse Action Disclosure – Applies where employer decides to take adverse action, in whole or in part, on information in consumer report. Disclosure must:

- Include a copy of the consumer report;
- Include a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" (available on Consumer Financial Protection Bureau website);
- Be issued a reasonable amount of time before employer takes any adverse action.



Background Checks - FCRA

Pre-Adverse Action Disclosure

- FCRA does not define "reasonable amount of time."
- Generally understood this means applicant/employee must have meaningful opportunity to review report and address inaccuracies.
- Federal Trade Commission (FTC) found five (5) days sufficient.



Background Checks - FCRA

Adverse Action Notice – Employer must provide applicant/employee with notice of the following if adverse action taken, based in whole or in part, on information in a consumer report:

- Notice of the adverse action;
- Name, address, and toll-free telephone number of the consumer reporting agency (CRA) that furnished the report;
- A statement that the CRA did not make the decision to take the adverse action;
- Notice of the applicant/employee's right to obtain a free copy of the consumer report from the CRA within 60 days;
- Notice of the applicant/employee's right to dispute the accuracy or completeness of any information in the report.



Background Checks - FCRA

Certification – Employer must provide certification to CRA which affirms the following:

- Employer has a "permissible purpose" for obtaining the report; and
- The employer:
 - Provided the required disclosures to the applicant/employee;
 - Obtained the requisite written authorization from the applicant/employee;
 - Will not use the information contained in the report in violation of any federal or state equal opportunity law or regulation; and
 - Will, if it takes any adverse action based on the consumer report, provide the applicant/employee with a copy of the consumer report and FCRA Summary of Rights.



Background Checks - FCRA

FCRA Violations - the potential penalties:

- For a "Negligent" violation
 - actual damages sustained by the applicant/employee; and
 - Reasonable attorneys' fees and costs.
- For a "Willful" violation
 - Actual damages or statutory damages between \$100 and \$1,000;
 - Punitive damages; and
 - Attorneys' fees and costs.



Background Checks - FCRA

Sources of potential liability in connection with obtaining consumer reports:

1. EEOC Enforcement Activity;
2. Class Action Lawsuits;
3. Comparable State Law Enforcement.



Background Checks – Negligent Hiring

Q: WHY EVEN DO THESE ANYWAY?

A: To avoid “negligent hiring.”



Background Checks – Negligent Hiring

Employers may be liable for negligent hiring if:

- Employer hires an unfit employee;
- Employer fails to make reasonable inquiry into the employee's background;
- A reasonable inquiry would have led to rejection of the employee as a candidate;
- The employer knew or should have known the employee's conduct with others created a risk of harm; and
- Employer failed to conduct a background check that would have led you to reject the employee, and employee harms another person while employed.



Interviews



With the EEOC's pressure increasing, it is more important than ever that employers conduct an appropriate interview and selection process . . .



Interviews – General Principles

- Make sure inquiries are job related.
- Avoid promises.
- Avoid subjective requirements.
- Avoid even casual inquiries into protected categories.
- Do not ask about medical conditions, hospitalization, disabilities, drug prescriptions, past drug addiction or alcoholism, or workers' compensation.



Hiring Decisions

Q: Any Additional Benefits for Hiring Applicants with Convictions?
A: Tax Credits; Bond Program.



Hiring Decisions – Tax Credit

What Is It? The Work Opportunity Tax Credit Program

- A federal tax incentive program for businesses hiring individuals who face significant barriers to employment.
- For hiring individuals who:
 - Have been convicted of a felony; AND
 - Are hired within 1 year after conviction or release from prison.
- Potential Benefit: tax credit up to \$2,400/hire depending on wage level and hours worked.



Hiring Decisions – Tax Credit

How Do Employers Obtain Tax Credit?

- Apply through Ohio Department of Job and Family Services (<http://jfs.ohio.gov/wotc/Participate.stm>)
- Requirements include:
 - Have applicant complete IRS Form 8850 on/before day of job offer;
 - Have applicant complete Dept. of Labor Form;
 - Submit application within 28 days of start-to-work date.



Hiring Decisions – Bond Program

What Is It? Federal Bond Program

- Fidelity Bonds (business insurance policy) issued to employers who hire a job applicant with “risk” factor in personal background (e.g., felony ex-offender).
- Bond protects employer in case of monetary or property loss due to employee dishonesty.
- Effective for six (6) months with a \$5,000 coverage amount.



Hiring Decisions – Bond Program

Eligibility Criteria:

- Ex-offender’s criminal history is verifiable;
- Ex-offender is not self-employed or on a personal service contract;
- Employment is full-time or part-time for which payroll taxes are deducted;
- Ex-offender receives job offer and employer schedules start date.

Bond Program Applications:

- Employer must send details regarding job offer and ex-offender to the Ohio Department of Rehabilitation and Correction.
- Bond is provided to Employers free-of-charge once the Employer applies for the bond.



Case Examples

Alleged Disparate Impact of Credit Histories in Hire Process

- *EEOC v. Kaplan Higher Educ. Corp.*, 790 F.Supp. 2d 619 (N.D. Ohio 2011)



Case Examples

Moving Company Missed Employee's Theft and Burglary Convictions.

- *Abrams v. Worthington*, 169 Ohio App. 3d 94, 2006-Ohio-5516 (10th Dist.)



Case Examples

Never a good idea to say, "You're pregnant. We can't hire you."

- *EEOC v. High Speed Enterprise Inc.*, 833 F. Supp.2d 1153 (D. Az. 2011)



THANK YOU!

If you have questions concerning this presentation, please contact:

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