Expert Q&A on Criminal Charges and Employment Decisions

by Practical Law Labor & Employment

Law stated as of 18 Aug 2020 • USA (National/Federal)

An expert Q&A with Justin T. Kelton of Abrams Fensterman discussing the complex legal issues surrounding criminal history discrimination and the employment relationship. It covers legal and practical considerations facing employers learning of pending criminal charges against a current or potential employee and more.

Understanding permitted and prohibited use of employees' and applicants' criminal information can be challenging for employers. So-called ban-the-box laws and other antidiscrimination laws vary by state and locality but generally impose some limitations on when employers can seek criminal history information and what types of information employers may consider when taking employment actions. Employers must understand how these laws apply to different circumstances.

One situation that may arise is when an employer does not actually make a criminal history inquiry but somehow learns of past, pending, or potential criminal charges against an applicant or employee (for example, from law enforcement authorities or someone else notifying the employer or, in high profile cases, seeing it on the news). The employer may find itself facing public image issues and potential liability under negligent hiring or retention or other theories because of the individual's alleged conduct, all while trying to ensure compliance with laws governing use of criminal history in employment decisions. How an employer may handle situations like this depends largely on applicable state law and a variety of considerations, including:

- The nature of the criminal charge and the alleged acts or conduct.
- The status or disposition of the charge (for example, pending or dismissed).
- The employer action at issue (for example, inquiring about an individual's criminal history or taking action based on that information).
- The timing of certain employment inquires or actions (for example, on a job application or after a conditional offer of employment).

Practical Law Labor & Employment reached out to Justin T. Kelton of Abrams Fensterman to discuss the legal and practical considerations involved in this complex analysis and best practices for employers. Justin is a partner at Abrams Fensterman in New York City, where he handles a broad range of complex employment litigation, high stakes commercial disputes, and confidential investigations.

What laws govern an employer's consideration of employees' or applicants' criminal history?

This issue is mostly addressed by state law, so it is important for employers to be aware of the specific laws that apply in their jurisdiction. Although state and local laws do vary considerably, there are many common themes and overlapping concepts regarding prohibited inquiries and employment actions.

In New York, for example, there is a complex statutory patchwork with a number of laws that address how employers may deal with employees' or applicants' criminal histories. The most broadly applicable statute in New York is Executive Law Section 296(16), part of the New York Human Rights Law. This section provides that it is unlawful for an employer "to make any inquiry about" or "to act upon adversely" any arrest or criminal accusation "not then pending against that individual" that was followed by, among other things, "a termination of that criminal action or proceeding in favor of such individual … or by an order adjourning the criminal action in contemplation of dismissal…" (N.Y. Exec. Law § 296(16)).

The statute also provides that "no person shall be required to divulge information pertaining to" any arrest or criminal charge that is "not then pending" or was followed by a termination in favor the individual. If an individual is asked to provide information in violation of the law, the employee or applicant is allowed to "respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur." (N.Y. Exec. Law § 296(16).)

Another statute that may come into play is New York Corrections Law § 752, which provides that no one may be denied employment based on a prior criminal conviction unless either:

- There is a direct relationship between the criminal offenses and the specific license or employment sought or held by the individual.
- The granting or continuation of the employment involves "an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

(N.Y. Correct. Law § 752.)

New York's Correction Law also provides a list of factors employers should consider when making an employment determination regarding a previous criminal conviction, including the specific job duties involved and the time elapsed since the criminal offense (N.Y. Correct. Law § 753).

That employers must consider portions of the state's antidiscrimination laws and corrections laws in this analysis shows just how complex this topic can be, and this is just one state. Ensuring compliance with these laws can be even more challenging for multistate employers. The statutory scheme varies from state to state, but many jurisdictions have laws similar to those in New York. State law may also permit or even require criminal background checks for certain professions or industries (for example, law enforcement or childcare), so that is another important consideration for employers.

For more information on state laws, see:

- Practice Note, Ban-the-Box State and Local Laws Chart: Overview.
- Background Check Laws: State Q&A Tool: Criminal Background Check Law.

For more information on New York State and New York City laws specifically, see Protected Categories Under New York State and New York City Laws, 13A N.Y. Prac., Employment Law in New York § 3:3 (2d ed.).

Do federal antidiscrimination statutes cover alleged discrimination on the basis of an employee's criminal record?

Federal courts have widely held that **Title VII of the Civil Rights Act of 1964** (Title VII) does not cover discrimination based on a criminal record alone. The **Equal Employment Opportunity Commission** (EEOC) has issued non-binding guidance on this issue. This guidance states that the issue of "whether a covered employer's reliance on a criminal record to deny employment violates Title VII depends on whether it is part of a claim of employment discrimination based on race, color, religion, sex, or national origin" (see Consideration Of Arrest And Conviction Records In Employment Decisions Under Title VII, 2012 WL 1499883, at *6 (Apr. 25, 2012)).

A plaintiff may therefore potentially maintain a claim where an employer takes adverse action based on a criminal record and that employment decision is "part of" a claim for discrimination based on a legally-protected class (for example, if an employer rejects an applicant of one race based on criminal record but employs another individual of a different race with the same criminal record).

According to EEOC guidance, an employer may also violate Title VII under a **disparate impact** theory if:

- The employer's neutral policy or practice has the effect of disproportionately screening out a Title VII-protected group.
- The employer fails to demonstrate that the policy or practice is job-related for the position in question and consistent with business necessity.

(2012 WL 1499883, at *8; see also Disparate Impact on Certain Groups, 13A N.Y. Prac., Employment Law in New York § 3:118 (2d ed.).)

Courts differ on how to analyze criminal history policies and how much deference to afford the EEOC's guidance. For more information on consideration of criminal history under Title VII, see Practice Note, Race, Color, and National Origin Discrimination Under Title VII and Section 1981: Arrest and Conviction Records Under Title VII.

The federal Fair Chance Act, which is currently set to go into effect on December 20, 2021, also prohibits federal contractors from inquiring about a job applicant's criminal background in certain parts of the application process.

How do antidiscrimination laws distinguish arrests that have been dismissed, criminal convictions, and criminal charges that are currently pending?

Employers should check their state's law to see not only how the law distinguishes among arrests, charges, and convictions but, when it comes to charges, how it distinguishes between currently pending charges versus past arrests or charges that have been cleared or dismissed.

In New York, for example, there is an important legal distinction between charges that have been dismissed and those that are pending. Section 296(16) of New York's Executive Law makes it unlawful for an employer to inquire about or act on any arrest or charge "**not then pending against that individual**" if the arrest or charge was followed by:

- A termination of that criminal action or proceeding in favor of the individual.

- An order adjourning the criminal action in contemplation of dismissal.

(N.Y. Exec. Law § 296(16).)

Therefore, while an employer in New York may properly consider convictions or pending charges under certain circumstances, the law prohibits employers from making adverse decisions based on charges that were dismissed, terminated in the individual's favor, or adjourned in contemplation of dismissal.

Another interesting distinction is that the protections afforded by Section 752 of the New York Corrections Law apply only to individuals convicted of a crime, as opposed to those facing pending charges (N.Y. Corr. Law § 752). This can lead to the surprising result that in certain cases, individuals convicted of crimes may have greater protections than those with pending charges.

Is there a distinction between considering criminal charges and considering the conduct underlying the charges in making employment decisions?

While federal law does not bar discrimination based on arrest records per se, EEOC guidance states that using arrest records in employment decisions may have a disparate impact on certain protected groups. However, the EEOC guidance states that employers may exclude an individual from employment based on business justification if:

- It appears that the applicant or employee engaged in the conduct leading to the arrest.

- The conduct that indicates unsuitability for a particular position is job-related and relatively recent.

(Policy Guidance on the Consideration of Arrest Records in Employment Decisions Under Title VII, 1990 WL 1104708 (Sept. 7, 1990); see also Consideration Of Arrest And Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act Of 1964, 2012 WL 1499883, at *12 ("Although an arrest record standing alone may not be used to deny an employment opportunity, an employer may make an employment decision based on the conduct underlying the arrest if the conduct makes the individual unfit for the position in question."); EEOC: Tips for Small Businesses: Criminal Records ("[A]n arrest may trigger an inquiry into whether the conduct underlying the arrest justifies a negative employment decision.")).

Employers must also consider any relevant state law that prohibits inquiry into or consideration of a (non-pending) charge. This presents a complicated issue if the employer:

- Independently learns about an individual's alleged criminal conduct without making a prohibited arrest record inquiry (for example, if the charges are publicly available or widely broadcast or otherwise brought to the employer's attention), raising questions about whether the employer must ignore this information.

- Seeks to make an employment decision based on conduct that renders an individual unsuitable or disqualified for a job but also cannot discriminate based on a dismissed arrest stemming from that conduct.

Although it does not address state law rules and nuances, the EEOC's guidance generally indicates that employers should focus on the nature of the alleged conduct and the likelihood that the conduct occurred, as opposed to any arrests or charges flowing from the conduct (see *Clemons v. WellPoint Cos., Inc.*, 2013 WL 1092101, at *12 (N.D.N.Y. Mar. 15, 2013) ("Once an employer or licensing agency lawfully discovers an arrest record 'it [is] permissible to consider the independent evidence of the conduct leading to the criminal charges.'")).

In some instances, the underlying conduct may not be at issue even if the criminal action was terminated. For example, the charges may have been dismissed based on a technicality (such as a statute of limitations) rather than a lack of evidence. There may be no dispute that the individual engaged in criminal conduct. The conduct may have been caught on camera or the employee or applicant may have admitted to it. In other instances, it may be more challenging for employers to determine the likelihood that the alleged conduct actually occurred. The employer's counsel can help the employer navigate these challenges and advise on best practices to minimize the risk of liability for a potential discrimination claim.

What about an employee engaging in distasteful or embarrassing conduct, which may be illegal but has not necessarily resulted in a criminal charge?

This is an interesting issue that has been arising more frequently in the context of public incidents that have led to individuals being "cancelled" by the public and terminated by their employers. A recent example is a woman widely dubbed as "Central Park Karen." She allegedly called the police on a Black man birdwatching in Central Park who asked her to leash her dog. The incident was caught on video and the woman was accused of racism, fired from her job, and ultimately criminally charged with making a false police report. Similar incidents of distasteful (and potentially criminal) public conduct have recently been reported or recorded in a variety of contexts.

Many employers question whether they can fire an employee engaging in this type of embarrassing public conduct, even if it is entirely unrelated to the employee's job. In most instances, the answer is straightforward. If the employer is in a state with **at-will** employment and the employee has no employment contract or other heightened protections, the employer can terminate the employee for any reason, including embarrassing or inappropriate behavior, even if it is unrelated to the employee's job. Employers and their counsel should analyze each case individually to determine the appropriate course but, generally speaking, individuals engaging in this behavior are not protected from suffering employment consequences.

If the individual's conduct is unlawful and leads to criminal charges, the analysis is the same as discussed above. If the individual's conduct is not illegal, employers must ensure they do not run afoul of any lawful, off-duty conduct laws in their state (see Employee Privacy Laws: State Q&A Tool: Employees' Lawful, Off-Duty Activity).

As a best practices approach, what steps should an employer take after learning that an employee or applicant has a pending criminal charge?

The employer should consult with experienced employment counsel to learn about the individual state laws that may affect the situation. In a state with laws similar to the New York statutes discussed above, the employer should thoroughly document how it came to learn of the information because courts give more leeway to employers happening on this information as opposed to seeking it out intentionally (which may violate a state's unlawful criminal inquiry law).

The employer should then carefully consider any conduct related to the charge, including making a reasoned determination about the likelihood that the conduct occurred and the time that has passed since the conduct. The employer should also analyze whether the information affects the individual's ability to perform the job at issue. Depending on the answers to these questions and the particular state law that applies, the employer should work with its counsel to reach and implement an appropriate and defensible decision regarding how to deal with the employee or applicant.

Employers should also have policies and procedures in place that address criminal background checks (and other background checks) and train employees with hiring authority on these policies (for example, see Standard Document, Guidelines for Using Background Checks in Employment: Drafting Note: Criminal Records).

For more resources on background checks in general, including state-specific resources, see Background Checks Toolkit.

