BEST PRACTICE STANDARDS

THE PROPER USE OF CRIMINAL RECORDS IN HIRING

national HIRE network

LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

NATIONAL WORKRIGHTS INSTITUTE

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Executive Summary 1

Best Practices 4

Purpose 6

Overview 7

Develop a Relevance Screen for Criminal History 8

Selecting a CRA 11

“Ban the Box” 13

The Interview 14

Criminal History Records Check 15

The Final Hiring Decision 16

Always Follow the Fair Credit Reporting Act 19

General Human Resource Policies to Create a Positive Environment 19

Appendix A: Best Practice for Individualized Assessment of Rehabilitation 21

20 Best Practice Standards: On the Use of Criminal Background Checks in Hiring Decisions 22

References 23

Hiring new employees is a critically important function in any business, government agency, or non-profit organization. Every hiring decision represents a major investment that employers must make with limited information. Checking criminal history is just a small part of this process, which may also include verifying education, prior employment and other reference information. The Best Practice Standards in this document will help employers properly weigh adverse personal history to find those applicants who will contribute most to the productivity of the organization.

Responsible hiring practices should incorporate the recommendations made by the Equal Employment Opportunity Commission (EEOC), the agency that enforces federal employment discrimination laws, in its 2012 "Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964." The Best Practice Standards presented here set out concrete, practical procedures that will help employers make hiring decisions that:

- Comply with the EEOC Guidance and limit liability under Title VII of the Civil Rights Act and state and local anti-discrimination laws;
- Comply with the Fair Credit Reporting Act (FCRA); and
- Minimize the risk of liability from hiring an unfit employee.

As the EEOC Guidance pointed out, proper use of criminal history data begins with looking at the risks that arise from the nature of the job. Starting with the job description for the position, the Standards give examples of questions about risks associated with the job that will identify the kinds of prior convictions that are relevant. This is the first determination the employer makes in developing what is called a "Relevance Screen," which lays out which convictions should be considered in the hiring process.

The second determination for the Relevance Screen is the length of time to consider convictions, referred to in these Standards as the "look-back" period. Some states have statutes that limit this period for many jobs. Where no state limitation applies, if research data is available to guide

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the employer on how long to consider convictions, the EEOC Guidance recommends using that research. The employer must make an informed judgment about how long to consider convictions.

When applying the Relevance Screen, only convictions and pending prosecutions should be considered. Arrests that are not subject to active prosecution should not be considered. In states that do not allow consideration of any arrests whatsoever, the state law must be followed.

When a criminal background check is necessary, the employer should engage the services of an experienced Consumer Reporting Agency (CRA). The employer should select the CRA based on its knowledge, expertise and thoroughness, not primarily on low cost. The employer should insist that the CRA (1) be sure that all information is confirmed from the original source, not from private industry databases; (2) report convictions only when full name and all other available identifiers match; (3) be sure the disposition is current; and (4) report all charges related to a single incident as a single entry.

When a criminal background check is necessary, the employer should engage the services of an experienced Consumer Reporting Agency.

While there are exceptions, job postings or announcements generally should not refer to criminal background checks, and the application form should not require candidates to list convictions. Many large organizations, including most federal government agencies, do not inquire about criminal history at the interview, but defer the criminal background check until after the employer has decided to make an offer of employment. Other employers may inquire about criminal history at the interview, which is

consistent with these Standards as long as the inquiry is limited to convictions of the type and within the period identified by the Relevance Screen.

If the leading candidate for the job has no convictions described by the types and dates determined for the Relevance Screen, the hiring decision is complete. But the leading candidate may have a conviction within the parameters of the Relevance Screen. Then the employer needs to assure that the final hiring decision is made by a manager who can balance the competing factors in order to give no more weight to the conviction than is truly appropriate for the risk. This may be the manager who supervises the position, or it may have to be a member of senior management.

In making the final decision, the manager should follow the recommendation of the EEOC Guidance to consider all evidence relevant to rehabilitation and low risk of future misconduct. A list of many of the types of relevant evidence is included in Appendix A of the Standards.

While there are exceptions, job postings or announcements generally should not refer to criminal background checks, and the application should not require candidates to list convictions.

Employers must remember that millions of workers with prior convictions have turned their lives around and become productive members of society. These workers are disproportionately from minority communities. Employers need to follow sensible procedures in considering the past conviction records of job applicants, since failing to do so will both hurt the employer's interests and risk discriminating against productive workers of every heritage. Following the Best Practice Standards set forth here will enable employers to protect their interests and the interests of those they serve, without unduly burdening applicants for past mistakes.

1. CONSIDER ONLY CONVICTIONS AND PENDING PROSECUTIONS

The fact that someone has been charged with a crime should not disqualify them for a job if they were not convicted. If a person is being prosecuted for an offense that is relevant to a job for which they have applied, an employer may consider it.

2. CONSIDER ONLY CONVICTIONS THAT ARE RELEVANT TO THE JOB IN QUESTION

A person who has committed an illegal act in the past may be more likely than the average person to commit a similar act in the future, but they are no more likely to commit other offenses. A person who has been convicted of DUI may put the public at risk in a job that involves driving, but not in other jobs.

3. CONSIDER ONLY CONVICTIONS RECENT ENOUGH TO INDICATE SIGNIFICANT RISK

The risk that someone who has been convicted of a crime will commit another offense decreases over time. Employers should consider the available evidence on recidivism rates before rejecting an applicant.

4. DO NOT ASK ABOUT CRIMINAL RECORDS ON APPLICATION FORMS

Delaying learning about an applicant's criminal record until the interview or later enables the employer to make more informed hiring decisions.

5. USE A QUALIFIED CRA TO CONDUCT RECORD CHECKS

All consumer reporting agencies are not equal. Employers should consider the quality of CRAs' procedures and results and not decide which one to use based solely upon cost.

6. CRAS SHOULD REPORT ONLY CONVICTIONS THAT ARE RELEVANT AND RECENT

Employers should determine in advance the convictions that it considers relevant for specific jobs and the time period during which they are relevant. These determinations should be provided to the CRA with instruction to report only convictions that meet these criteria.

7. REPORT CONVICTIONS ONLY WHEN FULL NAME AND ONE OTHER IDENTIFIER MATCH

In a country of over 300 million people, many people have the same first and last name. A conviction should only be reported to an employer when the full name (including middle name where available) and at least one other identified match.

8. CONFIRM ALL INFORMATION FROM ONLINE DATABASES WITH ORIGINAL SOURCE

Online databases are not always accurate or up to date. All information from such databases should be confirmed with the original source.

9. GET CURRENT DISPOSITION OF ALL RELEVANT INFORMATION

All information obtained from any source should be updated to ensure that it is current.

10. PROVIDE APPLICANT THE OPPORTUNITY TO CHALLENGE THE CRA'S REPORT

Whether or not required to do so by FCRA, employers should provide applicants with a prompt and convenient method of challenging information in the CRA's report.

11. ALL CHARGES RELATED TO A SINGLE INCIDENT SHOULD BE REPORTED AS A SINGLE ENTRY

Reporting information relating to a single incident in different sections of a report can create the impression that multiple incidents took place. All information related to a single incident should be reported in a single entry.

12. CONSIDER EVIDENCE OF REHABILITATION

People change over time. Some people with criminal convictions change their lives and become good citizens who can be good employees. Applicants with relevant convictions recent enough to be of concern should not automatically be rejected. Instead, he or she should be given the opportunity to present evidence of rehabilitation which the employer should carefully consider before making a decision.

13. MINIMIZE CONFLICT OF INTEREST BY DECISION MAKERS

Employees making hiring decisions regarding applicants with criminal records are in a difficult situation. If the company hires an applicant with a record who later commits another offense, the employee who hired them may be blamed. Hiring decisions should be made by an employee (or employees) who are in the best position to make an objective decision.

14. TRAIN HUMAN RESOURCES STAFF

Hiring decisions regarding applicants with criminal records require an understanding of the practical steps an employer should take to comply with federal and state law on background checks and to comply with federal, state and local anti-discrimination laws, without exposing the employer to unreasonable risks. Human resources employees should be thoroughly trained on these subjects.

15. HAVE A DIVERSITY PROGRAM

One of the benefits of making sound decisions regarding applicants with criminal records is a more diverse workforce. Having a diversity program helps an employer determine how well it is making such decisions.

Evaluating candidates to fill a position has always been a challenge for employers, no matter whether a candidate has a criminal record. Such an important decision inherently comes with risks. For example, there is always a risk that the employee will not perform the job well or will engage in serious misconduct. Depending on the job, applicants with criminal records may present an additional challenge.

Employers who are concerned about negligent hiring liability need to remember that courts may impose liability for a crime committed post-hire by the employee if the employee's work history provides clear indications of instability or unreliability, even when the employee does not have any prior convictions. Employers who do thorough employment reference checks are rarely found to have negligently hired an employee, even when they determine, after learning of a criminal record, that the prior conviction is not relevant to the duties of the job being filled.[1]

These Best Practice Standards, developed by a group of civil rights organizations in consultation with background checking companies, represent high standards that employers and Consumer Reporting Agencies can reasonably be expected to follow.

Employers should also consider the fact that refusing to hire anyone with a criminal record will sometimes deprive the company of a strong candidate and can lead to liability under Title VII of the Civil Rights Act and/or under state and city anti-discrimination laws.

The Best Practice Standards presented here are designed to help employers evaluate applicants with criminal records by applying concrete, practical procedures, based on the recommendations from the EEOC in its 2012 "Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964" (EEOC Guidance).[2] Following them will help employers make hiring decisions that will maximize productivity and minimize the risk of liability.[3]

These Best Practice Standards, developed by a group of civil rights organizations in consultation with background checking companies, represent high standards that employers and Consumer Reporting Agencies (CRAs) can reasonably be expected to follow. These Standards are not meant to reflect either a current consensus of employer practices or the minimum legal standards.

The organization's first step in any new hire is developing the position description and job posting. If the employer decides that it will be cost-effective to do a criminal history record check before extending an offer for the position, part of this initial process should include determining what criminal history would be relevant to the duties and circumstances of the job. The **first section** of these Standards addresses the factors that employers should take into account, as recommended in the EEOC Guidance.

The **second section** of these Standards outlines criteria for selecting a Consumer Reporting Agency (CRA) to do any necessary criminal records checks and the procedures that should be used by that CRA.

The next phase in the process is to recruit applicants and to select those candidates who appear to be best qualified for interviews. The **third section** of these Standards lays out the practical steps that employers should take regarding criminal history record checks in this step of the hiring process.

Then the employer interviews qualified candidates. The **fourth section** of these Standards provides recommendations for the interviewer to follow if the candidate reports that he or she has a record of conviction. The interviewer's objective is to assess the potential benefits that the qualified candidate would bring to the organization and weigh them against the risk that the candidate will engage in misconduct.

The next step is the criminal history records check, which should be conducted by the qualified Consumer Reporting Agency (CRA) selected by the employer. The **fifth section** includes recommendations for best ways to comply with the Fair Credit Reporting Act (FCRA) and guidance on provisional hires and procedures.

The **sixth section** discusses the recommended procedure for the final hiring decision, if the selecting interviewer believes that an applicant with a prior conviction is the candidate with the strongest potential to contribute to the company.

The **seventh section** provides recommendations on general human resources practices for the organization that will help create a positive environment and support the consistent use of these Best Practice Standards.

The best practices apply to both employers and CRAs. When either an employer or a CRA fails to follow the law, enforcement action may be directed at both. These best practices reflect the reality that employers and CRAs are a team in which both parties are responsible for doing things the right way.

AS PART OF PREPARING THE JOB ANNOUNCEMENT, DEVELOP A RELEVANCE SCREEN[4] FOR CRIMINAL HISTORY

The first step in filling a position in the organization is determining the position description. At the same time that the position description is selected or drafted, the employer should consider whether there are requirements (*e.g.*, statutes or contractual agreements with third parties) or risks involved in the job that obligate the employer to screen applicants for a criminal record history.

Should Prior Criminal Conduct Be Considered? If So, What Specific Offenses?[5]

There is some risk that any applicant will commit a criminal offense on the job, even if he or she has no criminal record. Virtually every job offers some opportunity to commit an offense. The purpose of criminal record checks is not to eliminate risk completely, which is impossible, but to reduce it to acceptable levels.

Virtually every job offers some opportunity to commit an offense. The purpose of criminal record checks is not to eliminate risk completely, which is impossible, but to reduce it to acceptable levels.

A criminal conviction should disqualify a job applicant only when there is a connection between the nature of the conviction and the nature of the job that creates a greater risk than hiring the applicant for other jobs.

For example, hiring a person with prior DUI convictions to drive a school bus creates a risk that would not exist in other jobs. Hiring someone with a DUI conviction for a position that does not involve driving would not create such a risk.

An employer is expected to take all reasonable steps to protect people and the property of customers, clients, patients, or co-

workers, but the risk that an employee who has a prior conviction will commit an offense harming anyone in the job setting is often exaggerated. The average workplace is safer from the threat of violent crime than the average street or home.[6] In fact, citizens are five times more likely to be the victim of a serious crime of violence away from work than they are while at work.[7]

To determine whether the job being filled requires a criminal history records check – and if so, what specific convictions and what period of time should be covered – the employer needs to consider the factors cited in the EEOC Guidance, the *Green* factors, which have been used by human resource managers for more than 25 years: namely, in this case, "the nature of the job held or sought."[8]

Four Points to Consider About the Nature of the Job

- Specific job duties (for example, interaction with vulnerable people)
- Essential functions of the job
- The circumstances under which the job is performed (e.g., level and regularity of supervision)
- Where the job is performed (e.g., out of doors, in customers' private homes)[9]

In deciding whether to screen for criminal record history as part of a specific job search, the focus should be on whether the position presents more opportunities for crime than the typical job. Does the job give the employee opportunities for unsupervised, one-on-one contact with customers or with vulnerable people (e.g., children, the elderly, people with disabilities)? Does the job give the employee unsupervised or irregularly monitored access to and control over property or financial assets? Does the job give the employee irregularly monitored access to personal and financial information of customers or co-workers? Is the job one of those few that gives the employee access to controlled substances? Is it classified as a "safety sensitive" position (e.g., certain jobs in the nuclear power or transportation industry)?

If the answer to all these questions is "No," there may be no need to screen for criminal history in filling the position. If the answer to one or more of the questions is "Yes," then those answers will indicate whether candidates should be screened for crimes of violence, lapses of integrity (theft, fraud), or both, or whether the candidate might need to be screened for drug convictions.

The employer should ensure that only criminal convictions or pending prosecutions, if state/local law permits, that fall within the relevance screen established for the position are provided to any of the managers involved in the hiring decision. The employer can achieve this by following the procedures described below.

Consider Only Convictions and Pending Prosecutions

All inquiries regarding an applicant's criminal record should be restricted to convictions and pending prosecutions for offenses included in the relevance screen. Unofficial sources of non-

conviction data, which include data on alleged offenses reported by private businesses, should not be consulted. (See the discussion on pages 12-13 below.) The EEOC Guidance emphasizes that an arrest is not proof that any offense was committed. Statutes in a number of states and some cities also prohibit employers from considering arrests that did not lead to convictions, and employers should be take care to comply with those statutes.[10]

Pending prosecutions need to be handled with care. An arrest is not deemed a pending prosecution until a prosecuting attorney has determined that charges arising from the incident that led to the arrest will be filed in court. If a specific, relevant charge (i.e., an offense included in the relevance screen) has been brought recently by formal charging papers (in the federal courts, referred to as an indictment or an information), that charge may be considered while a prosecution is pending, if state/local law permits. "Stale" prosecutions that appear from local court records to be pending more than a year after initial filing require careful individual consideration, such as consultation with the local prosecuting attorney about the status of the case, because those records are likely to be incomplete.

How Far Back Should the Relevance Screen Look at Convictions?

Convictions are one indicator that an applicant might have a propensity for violent conduct or dishonest conduct that the employer does not want to invite into the workplace. But many people who have made one mistake, or even a few mistakes, have served a sentence and never committed another crime. As the EEOC Guidance points out, courts have held that "the amount of time that had passed since the plaintiff's criminal conduct occurred [i]s probative of the risk he pose[s] in the position in question."[11] How long does a person who once committed a crime need to be clear of the criminal justice and corrections systems to be considered no more at risk than a person with a perfectly clean record for committing a crime against the employer, co-workers, customers or others the employer serves?

Common 'Look Back' Periods

Serious Crimes of Violence or Dishonesty:
5, 7, and/or 10 years

Less Serious Crimes:
2 or 3 years

Many studies of repetitive criminal offending ("recidivism") have found that most repeat arrests occur within three years of the first conviction, and that after four to seven years, the risk of recidivism is greatly reduced.[12] Human resource professionals commonly use what are called "look-back" periods, or lengths of time to consider a conviction relevant. These periods are calculated from the date of the conviction or, if the applicant was incarcerated, from the date that he or she was released from incarceration or on parole.[13]

Several states have regulated the length and/or the beginning date for this "look-back" period by state statute, and it is critical that employers be sure to hire a Consumer Reporting Agency for background checks that complies with the applicable local law. If there are no state law time restrictions, the employer should consult other sources to decide what "look-back" period to use for the job in question.

Both for the duration of the "look-back" period and the commencement of the "look-back" period, any of the commonly used periods are consistent with these Best Practice Standards as long as the employer does an individualized assessment review for qualified candidates.

SELECTING A CRA: ENSURING RELIABLE INFORMATION AND A CLEAR REPORT FORMAT

Employers should engage the services of a qualified and experienced organization that provides background screening services. Such companies often provide several options for the nature and extent of the background investigations they conduct. Under the Fair Credit Reporting Act (FCRA) and parallel state statutes, any communication of information from such an organization that is used to establish a person's eligibility for employment is a "consumer report." 15 U.S.C. Sec. 1681a(d)(1)(B). Any organization that regularly provides such reports is deemed to be a Consumer Reporting Agency (CRA), 15 U.S.C. Sec. 1681a(f), and the use of the information provided must comply in all respects with the requirements of the FCRA and of parallel state laws.

Employers should carefully consider the reliability and quality standards of all Consumer Reporting Agencies it is considering before making a selection. Employers should work with a firm that demonstrates familiarity and compliance with the FCRA and parallel state requirements. Price should not be the determining factor in choosing a CRA.

Employers should carefully consider the reliability and quality standards of all Consumer Reporting Agencies it is considering before making a selection. Price should not be the determining factor in choosing a CRA.

Employers should also consider whether the CRA has a certification of reliability or accreditation from a reputable organization. As described below, other factors to consider include whether the CRA follows the recommended best practices for using online databases, such as determining whether a reported conviction is that of the applicant and getting current dispositions. The report format is also important to evaluate.

Use Only Official Sources of Data on Criminal Convictions and Pending Prosecutions, and Confirm All Information From Online Databases with the Courts

Some Consumer Reporting Agencies offer inexpensive "criminal background checks" based solely on database searches. It is never a good practice to rely on reports based solely on these searches.[14] While they contain useful information, databases are not sufficiently current and accurate, principally because they are not updated regularly and may not contain all relevant records. Any reliable report *must* search the records available from the courts in the county and/or state where the candidate resided. Additionally, if federal crimes are considered relevant for the position, the appropriate U.S. District courts should be searched.

Verification of potentially reportable records involves additional expense, but it is the only way that the employer can be sure that the Consumer Reporting Agency is complying with the Fair Credit Reporting Act, which requires that the agency "maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date."[15]

Verification involves additional expense, but it is the only way that the employer can be sure that the Consumer Reporting Agency is complying with the Fair Credit Reporting Act.

Some employers have used databases that contain reports of alleged criminal behavior from private sources in their background screening. These databases gather records from companies that have documented alleged criminal incidents outside of the official criminal justice system. Such reports avoid the requirements of due process and result in many instances of false or inaccurate information

in the database. Because of these problems, using such private databases is not consistent with these Best Practice Standards.

For example, some retail firms participate in "retail theft databases" containing reports from participating retail companies. The information in such databases amounts to little more than an accusation from a retail firm or other private source that someone has committed a crime. Those accused have had no due process to verify that the accusations are correct, and are often not informed that a summary of any statements they provide may be included in a database that will limit their job opportunities. Nor do those accused generally have any opportunity to have false accusations removed from the database. Retail theft databases have been the subject of a number of legal actions involving both CRAs and employers.[16]

Report Convictions Only Where at Least the Full Name and at Least One Other Identifier Match

There are over 300 million Americans, and many people have the same first and last name. Reporting a match based on name alone will produce many mistakes. To minimize the number of these mistakes, a conviction can be included in an applicant's record only when the full name (including middle name where available) and all other available identifiers match, as outlined to the right.

Information to Match Before Reporting a Conviction

Information must match at least:
- Full name
- Date of birth

When available, must also match:
- Full or partial social security number
- Race
- Gender
- Physical description
- Driver's license number

Get Current Disposition

Online databases often do not include the final disposition of a charge. CRAs should confirm any information obtained from such databases with the appropriate court, to ensure that the information is complete, accurate, and current at the time it is reported. The Fair Credit Reporting Act (FCRA) requires that every CRA "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates."[17]

Report Format

The format of reports that CRAs provide to employers should be clear and easy to understand. All charges related to a single incident should be reported as a single entry.

"BAN THE BOX" – DO NOT ASK APPLICANTS TO DISCLOSE CRIMINAL RECORD HISTORY IN APPLICATION

The EEOC Guidance recommends as Best Practice that employers follow the procedure popularly known as "Ban the Box," i.e., not asking candidates to disclose criminal history in the

initial application, because "an employer is more likely to objectively assess the relevance of an applicant's conviction if it becomes known when the employer is already knowledgeable about the applicant's qualifications and experience." These Standards recommend deferring the inquiry at least to the interview, after an applicant's basic qualifications have been evaluated.

The only exception is when an employer is legally barred, by statute or contractual obligation, from hiring applicants with specific convictions for the position in question. In this case, the employer should ask about the specific categories of disqualifying convictions, within the time periods relevant to each type of past offense. (E.g., "Within the past five years, have you been convicted of a felony assault offense?") For positions subject to this exception, employers may obtain a criminal history check before selecting applicants for interviews.

Advertising

Aside from the exception above, job postings, classified ads, and other means of communicating that an employer has an open position should not mention criminal records in any way. Potential applicants who have a criminal history typically consider any reference to criminal history background checks as a signal that the employer will not give them fair consideration.

Application Forms

Employment application forms also should not include any questions about the applicant's criminal record, except as explained above.

THE INTERVIEW

Many employers follow the procedure, popular among federal government agencies and other large employers, of not inquiring about criminal record history until after selecting

the preferred candidate and extending a provisional offer of employment. Other employers choose to address the question of criminal history while interviewing the finalists for the position. In either event, inquiries about criminal records should be limited to convictions that the employer has previously determined in the relevance screen analysis are germane to the position.

Employers who explore prior conviction history at the interview should be sensitive to the fact that many applicants may not have an accurate recollection of how long ago a conviction occurred. They also may misinterpret questions and not understand how their conviction applies. (E.g., is a conviction for possessing stolen goods an "offense involving theft"? Should a conviction for "simple assault," where a punch in a college bar fight broke the victim's nose, be reported where the Relevance Screen includes "assault resulting in serious bodily injury"?)

An applicant who is asked about past convictions at the interview should be given the opportunity to clarify or supplement his responses within a brief but reasonable time after the interview.

Because of these potential pitfalls in reporting criminal history, an applicant who is asked about past convictions at the interview should be given the opportunity to clarify or supplement his responses within a brief but reasonable time after the interview, and the interviewer should make it absolutely clear that the applicant will not be penalized for doing so. Finally, often the applicant will over-disclose criminal history because he or she does not want the employer to infer an attempt to hide past offenses. Deferring the inquiry into criminal history until after a provisional offer of employment avoids these difficulties.

In addition, employers who intend to seek tax benefits or other preferential government treatment for employing people with a criminal record may ask questions necessary to determine whether employing the applicant will qualify for that benefit.

Either deferring the inquiry into criminal history until after a provisional offer or addressing the issue at the interview is consistent with these Best Practice Standards, as long as the employer makes an individualized assessment of rehabilitation and other factors in considering an applicant's relevant criminal history.

CRIMINAL HISTORY RECORDS CHECK

If the employer explores criminal history in the interview and provisionally decides to offer the position to that candidate, or if all inquiry has been deferred until the employer makes a provisional offer of employment, the next step is to conduct a criminal history records check.[19] At this point, the applicant should have provided a written consent for the commercial background check, and it is good practice to include information about the background check process, what it entails and the applicant's rights to dispute information obtained.

Provide Relevance Screen to the Selected CRA (see Pages 8-11 above)

The relevance screen developed or selected at the beginning of the hiring process identifies the specific convictions that are relevant to the position and the time period during which the employer considers each type of conviction to be relevant. The employer should provide the relevance screen to the CRA with instructions to report only convictions or active pending prosecutions that meet its criteria.

Provide Applicants the Opportunity to Challenge the CRA's Report

The Fair Credit Reporting Act requires employers who are considering not hiring an applicant because of information regarding criminal offenses to notify the applicant and advise him or her how to obtain from the CRA a copy of the report containing the information that may be disqualifying. By limiting the Consumer Information Report to offenses specified in the relevance screen, the employer will focus this process much better for all parties: The applicant will know exactly what convictions concern the employer.

When the applicant does dispute a reported criminal history record, the CRA has a legal obligation to reinvestigate using all available information.

The employer must give the applicant a reasonable amount of time to dispute the accuracy of this information. This period should take into account and allow for the method of notification between the employer and the applicant. If communicating by U.S. mail, seven days might be unreasonably short for the candidate. If communicating by email, seven days might be unreasonably long for the employer. Employers should use the fastest available form of communication to provide this notice and facilitate making the same form of communication available to the applicant.

When the applicant does dispute a reported criminal history record, the CRA has a legal obligation to reinvestigate using all available information. If this reinvestigation does not change the report, the CRA should use best efforts to help the applicant to obtain an official record of arrests and prosecution from law enforcement or use other methods to resolve the dispute.

When there is a disputed report, the employer should not make a final determination of the applicant's suitability for the job until the investigation is complete. If a decision must be made prior to the completion of the investigation, the employer should consider making a conditional offer of employment, while clearly stating that confirmation of the disputed report will result in termination. However, an employer need not make a conditional offer when the reported offense, if verified, indicates a serious risk of harm to other employees or the public.

THE FINAL HIRING DECISION

Eliminate Conflicts of Interest

HR professionals and other employees making hiring decisions are in a difficult position when considering an applicant with a criminal record. They get no credit for hiring an applicant with

a record who becomes a productive employee. But if an applicant with a record subsequently commits serious misconduct, the hiring employee could be blamed and his or her career could be damaged, perhaps permanently. No matter how qualified the applicant or how minor the offense, it may appear to be in the personal best interest of the person making the hiring decision to reject the applicant.

Employers need to work to eliminate this conflict of interest. A good first step is to allow the person who would supervise the new hire to make the final decision. The supervisor benefits when the most qualified applicant is selected, giving him or her an incentive to take the risk of hiring an applicant with a criminal record.

When the past offense was sufficiently serious, however, even a supervisor has a greater incentive to reject an applicant with a record than to hire him or her. In such situations, additional steps are required, such as having senior management approve hiring decisions involving applicants who have prior convictions.

Consider All Evidence Relevant to Rehabilitation and Low Risk of Future Misconduct

When a well-qualified candidate has a criminal record history that could be problematic to an employer, many factors will be good indicators that the candidate is not likely to be a significant risk to the company. The EEOC recommends that the employer undertake an Individualized Assessment of the applicant's risk in which the employer gives the candidate the opportunity to provide evidence of rehabilitation.[20] Among the factors employers should consider are:

1. Age and Time Elapsed Since Conviction

The likelihood that a person who has committed a crime will re-offend decreases every year he or she continues to be crime-free. Eventually, the likelihood that a person with a conviction will commit another crime is not substantially greater than the chance that a person of the same age and sex with no criminal record will commit a crime. Research on hiring a person with a criminal record under different circumstances indicates that the risk is often less than employers believe. Employers should consider this data when determining whether hiring an applicant with a record creates an unacceptable level of risk.

2. Facts and Circumstances Surrounding the Offense

The name of an offense reveals little about its nature and severity. For example, a rape conviction may stem from an assault at knifepoint in an alley or a 19-year-old having consensual sex with his 17-year-old girlfriend. Employers should consider the facts behind a conviction before determining whether it is disqualifying, where this information is reasonably accessible.

3. Number of Prior Convictions

A single criminal conviction often means very little, especially for non-violent offenses, including minor drug offenses. Surveys consistently show that the vast majority of adults have committed at least one act for which they could have received a criminal conviction. Often the difference between someone with one conviction and someone with none is nothing more than luck.

Multiple convictions, particularly those from separate incidents, are a much stronger indication of risk that the person will repeat the conduct, especially when one or more of the convictions are relatively recent.

4. Age at Time of Conviction

People who commit their first offense when they are older are less likely to re-offend.

5. Employment History

Lengthy continuous employment either before or after the offense is an indication that a person is less likely to re-offend. This is especially true if the employee performed the same type of work as the job for which they have applied. Discussions with prior employers can also be very helpful.

6. Evidence of Rehabilitation

Evidence of stable family relationships is a good indicator of rehabilitation. When the offense involved alcohol or illegal drugs, successful participation in a treatment program is also a good indicator. Employers should carefully weigh any information that the applicant provides against the actual job risks before making a final decision. Appendix A provides an extended list of factors that an employer should review when considering rehabilitation and the risk of future misconduct.

If an employer follows these best practices, there will generally be many instances in which the employer determines that the risk the applicant presents is either acceptable or nonexistent. An employer who has a written policy that provides for an individual assessment but never actually offers a job to anyone who has a past criminal conviction is not following best practices.

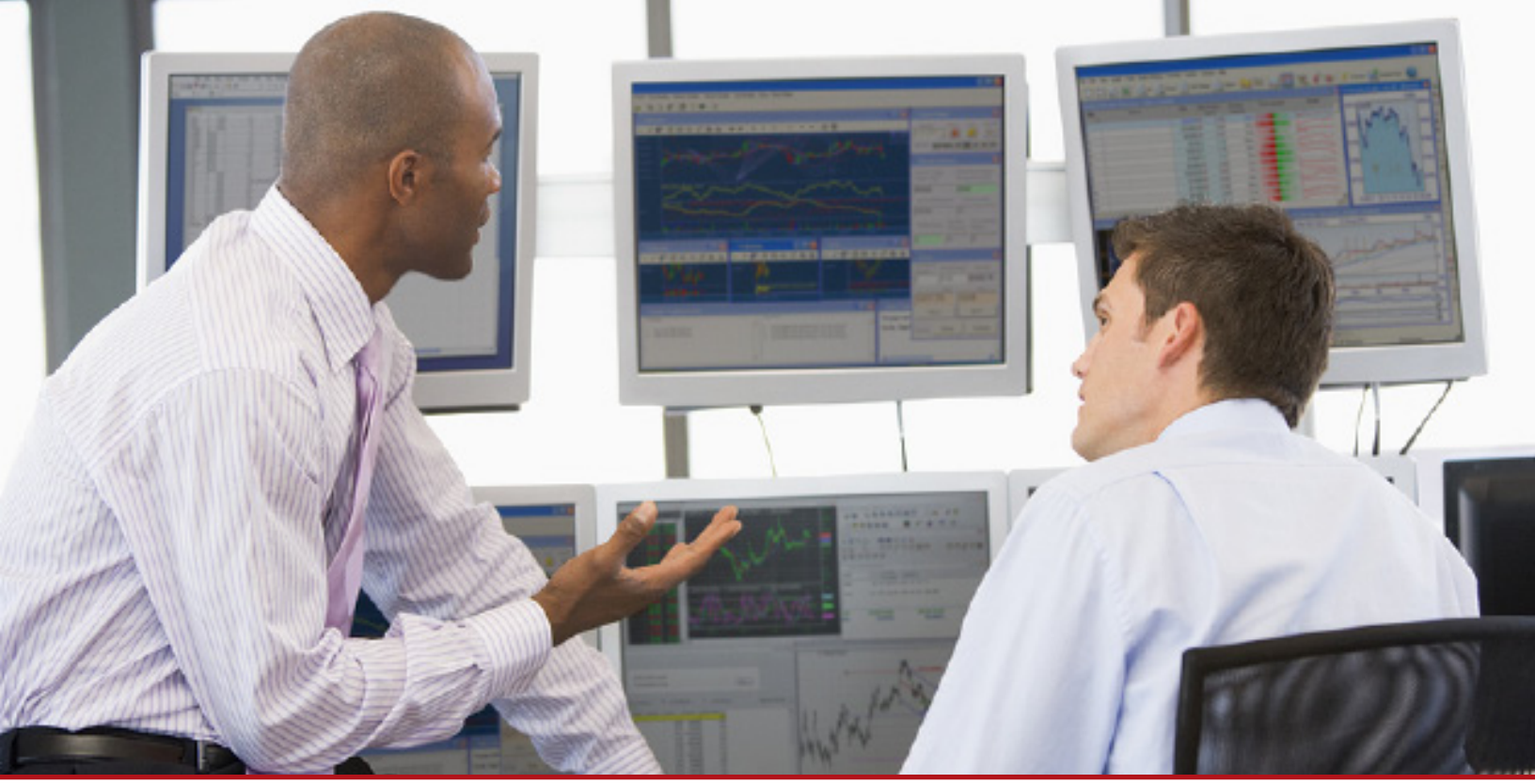
ALWAYS FOLLOW THE FAIR CREDIT REPORTING ACT (FCRA)

The letters notifying an applicant that potentially disqualifying information has been reported, called pre-adverse and post-adverse action letters, may be sent by a third party rather than the employer. In that case, however, the employer should clearly outline that function in a formal contract with the third party. The employer must also remember that while there are many good reasons for the third party to perform that function, the FCRA holds the employer (and in some circumstances, the CRA) responsible for compliance with the statute. Whether the employer outsources the notification function or performs it in-house, the employer should insist upon auditable event logs and monitor compliance carefully, and ensure that the pre-adverse action notice is sent before adverse action is taken, and not afterward, giving the applicant a real chance to challenge the report (see page 16). Even entities that are not covered by the FCRA should follow it as a best practice.

Incumbent employees, particularly those with an established track record at the company, should be terminated only when a newly discovered conviction or new legal requirement creates a compelling need.

Protect Incumbent Employees

When criminal record checks are conducted on incumbent employees, the best practice is to presume that employees are fit for the position. Incumbent employees, particularly those with an established track record at the company, should be terminated only when a newly discovered conviction or new legal requirement creates a compelling need. If the conviction record disqualifies the employee for his current position because of a new statute or legal regulation, or because of a new contractual provision affecting work for an outside organization, the employee should be offered an opportunity to transfer within the company if an appropriate position is available.



GENERAL HUMAN RESOURCE POLICIES TO CREATE A POSITIVE ENVIRONMENT

Human resources practices can help create a positive environment in the accepted culture and operations of the organization to support the consistent use of these Best Practice Standards.

Train Human Resources Staff

HR professionals and supervisors involved in hiring decisions should receive thorough training in the legal requirements and best practices for using criminal records in hiring.

Involve Legal Counsel

It is challenging to create a corporate policy for using criminal record background checks that complies with all applicable laws. Following the principles in the EEOC Enforcement Guidance on Using Arrest and Convictions in Employment Decisions and these Best Practice Standards enables an employer to meet the demands of Title VII while also taking careful steps to avoid liability for negligent hiring. Legal counsel for the company should be deeply involved in the design of such policies.

Have a Diversity Policy

A strong diversity policy not only improves company performance, but also provides a solid foundation for using criminal records in an appropriate manner. Whether an employer is following best practices will generally be reflected in degree to which its diversity program meets its goals. Diversity is not simply a race or gender issue, but one that includes differences in personal backgrounds, experiences, and past lifestyles.

APPENDIX A: BEST PRACTICE FOR INDIVIDUALIZED ASSESSMENT OF REHABILITATION

The Equal Employment Opportunity Commission (EEOC), in its Enforcement Guidance on the Use of Arrest and Conviction Records in Employment Decisions, identifies the following factors as among the appropriate considerations when an employer undertakes an individualized assessment of whether an applicant (or an incumbent employee) has a record of rehabilitation that shows that the risk the person will commit acts harmful to the employer's customers, clients, or workforce is negligible:

- The facts or circumstances surrounding the offense or conduct: for example, when an offender received a purely probationary sentence with no prison time for a felony conviction, that is a common indication that the offense was not as serious as the "felony" classification would typically indicate
- The number of offenses for which the individual was convicted
- Older age at the time of conviction, or release from prison: studies indicate that people who commit offenses when they are older, and are older at the time of release from prison or completion of sentence, are less likely to re-offend
- Evidence that the individual performed the same type of work, post conviction, with the same or a different employer, with no known incidents of criminal conduct
- The length and consistency of employment history before the offense or conduct
- The length and consistency of employment history after the offense or conduct
- Rehabilitation efforts after the offense, e.g., education/training
- References from former employers, particularly from post-offense employment
- Character references and any other information regarding fitness for the particular position
- Whether the individual, since the latest offense, has been bonded under a federal, state, or local bonding program

Other factors not specifically listed by the EEOC, but relevant to many persons with a criminal conviction:

- Parole release obtained after serving only a short period in detention for a felony conviction, with no record of any subsequent offenses
- Establishment of stable family, united with spouse or partner and, if relevant, children
- Other evidence of family responsibility, such as caring for dependent relatives
- Rehabilitation after the offense, such as continuing participation in 12-step programs, succeeding in making a former substance abuser clean and sober

20 Best Practice Standards

On the Use of Criminal Background Checks in Hiring Decisions

1) Identify Risks of the Job for a Relevance Screen of Convictions
2) Review Only Convictions and, Where Permitted, Pending Prosecutions
3) Choose a Reasonable "Look-Back" Period
4) Don't Mention Criminal History in the Job Posting
5) Don't Ask about Convictions in the Application
6) Interview Option 1: Don't Ask about Convictions (Check Before Final Hire)
7) Interview Option 2: Discuss Convictions
8) Use an Experienced Consumer Reporting Agency for Background Checks
9) Provide Relevance Screen to the Consumer Reporting Agency (CRA)
10) Don't Use Databases Containing Non-Conviction Data
11) Confirm All Conviction Data from the Original Source
12) Report Convictions Only When Full Name and All Other Available Identifiers Match
13) Be Sure Disposition Reported Is Current
14) Report All Charges Related to a Single Incident as a Single Entry
15) Allow Time to Challenge a Disputed Report
16) Consider All Evidence Relevant to Rehabilitation
17) Choose Hiring Official Senior Enough to Balance All Factors
18) Presume Incumbents with a Track Record are Fit to Stay
19) If necessary, Offer Incumbent Appropriate Transfer
20) Train Human Resources Staff on Proper Use of Conviction Records

REFERENCES

1 *See, e.g., Federico v. Superior Court (Jenry G.),* 59 Cal.App.4th 1207, 69 Cal.Rptr.2d 370 (3d Dist. 1997), review denied 1998 (where employer had testified that he knew of prior convictions of sexual abuse of young males, the employer was not liable for sexual assault on a minor because the employer "neither knew nor had reason to know that individual … posed undue risk to third persons in light of work to be performed," i.e., teaching adult hairstyling students and performing administrative tasks on premises of hairstyling college); *Coughlin v. Titus & Bean Graphics*, 54 Mass. App. Ct. 633, 767 N.E.2d 106 (2002) (employer who knew employee had a conviction for a violent felony and assigned him to work in a warehouse where employee had no contact with the public was not liable for murder of a woman whom employee lured into warehouse before working hours). A similar rule has been applied when the employer did not know of prior convictions, but the nature of the job did not require inquiry. *See, e.g., Guidry v. National Freight, Inc.*, 944 S.W.2d 807 (Tex. Civ. App. 1997) (employer of long-haul truck driver not liable for rape committed by driver during a stop in the course of an over-the-road trip; nature of the job required that the employer hire safe drivers, not that the employer guarantee the safety of members of the general public); *Reed v. Hercules Const. Co.*, 693 S.W.2d 280 (Mo. App. 1985) (general contractor whose employee got into an argument while on the job, pulled a gun and shot the other party, had no duty to "conduct a background check on a job applicant before hiring him as a general laborer on a construction site").

2 The EEOC Guidance is available online at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

3 Nothing in this document is intended as legal advice to any reader or user of these Standards, nor will following the practices described here guarantee that an employer or Consumer Reporting Agency will avoid investigations or avoid liability for its decisions to forego background checks or to use the procedures recommended in this document in conducting background checks.

4 The EEOC Guidance refers to this analysis as a "targeted screen." Some employers have in the past labeled a similar technique a "decision matrix." The authors of these Standards believe the term "relevance screen" describes the idea more clearly.

5 Of course, if the position being filled is one for which a criminal record background check is required by federal or state statute, or by some contractual obligation of the employer, the relevance screen for the background check will have to include all the requirements of the law or contract that applies. Title VII does not place any restrictions on conducting criminal record background checks. On the other hand, Title VII does apply to a mandatory disqualification from the job that is imposed by state statute or by contract. Depending on the facts, such a disqualification can violate Title VII if the disqualification is not appropriately related to the job and justified by business necessity. *See* EEOC Guidance, Section VII, text at nn. 166-67.

6 Workplace violence was on the rise through the early 1990s, but the rate of violent workplace incidents per 1,000 workers has declined 75% since 1993, a 20-year period during which the rate of violent crimes nationally has declined almost as much. Bureau of Justice Statistics, U.S. Department of Justice, "Workplace Violence 1993-2009," page 1.

7 Bureau of Justice Statistics, U.S. Department of Justice, "Workplace Violence 1993-2009," page 3, Table 1. Only 15% of violent crimes are committed in the workplace, and a smaller percentage of property crimes. Bureau of Justice Statistics, "Crime Victimization in the United States, 2008 Statistical Tables," Table 64. Only 3% of all violent crimes are committed by a current *or former* employee (one fifth of the 15% that occur in the workplace). "Workplace Violence 1993-2009," page 6, Table 5. Since simple assault is the most common violent crime in the workplace (78%), *ibid.*, Table 1, it is not surprising that only 7% of all victims of workplace violence sustain injuries for which they seek medical treatment. *Ibid.*, page 8, Table 9. Current and former co-workers only commit 11.4% of workplace homicides. *Ibid.*, page 11, Table 16.

8 *Green v. Missouri Pacific Railroad*, 549 F.2d 1158, 1160 (8th Cir. 1977), cited in EEOC Guidance, Section V-B-1, text at notes 89-92.

9 EEOC Guidance, Section V-B-6-c.

10 The Fair Credit Reporting Act also prohibits Consumer Reporting Agencies from reporting "records of arrest that, from date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is the longer period." 15 U.S.C. § 1681c(a)(2).

11 EEOC Guidance, Section V-B-6-b.

12 Prof. Albert Blumstein, Transcript of Testimony before the U.S. Commission on Civil Rights at Briefing on "The Impact of Criminal Background Checks and the Equal Employment Opportunity Commission's (EEOC) Conviction Records Policy on the Employment of Black and Latino Workers," (December 7, 2012), page 29, lines 6-12 (describing his research in comparing recidivism in a number of states). These studies support a maximum "look-back" period of seven years. Research is continuing in this field. Interestingly, from 1971 to 1998 the Fair Credit Reporting Act prohibited Consumer Reporting Agencies from reporting public records of criminal convictions that were more than seven years old. *See* Public Law 91-508, § 605 (October 26, 1970), and Public Law 105-347 (November 2, 1998). There is no legislative history justifying or explaining the repeal of the 7-year limit on the "look-back" period for criminal convictions that had been in effect for more than 25 years.

13 EEOC Guidance, Section V-B-6-b. In many jurisdictions, the only readily available data on the date of release from confinement will be the projected date that can be determined from the record of the sentence imposed in the court where the conviction occurred. [If the employer chooses to use a release date in measuring the 'look-back" period, of course the applicant should be afforded the opportunity to show that his release actually occurred earlier than the date indicated by the original sentence.]

14 In a very few instances, official compilations by government authorities may be the sole source consulted, if the CRA knows from sufficient past experience that the compilation is reliable, complete, and updated frequently.

15 15 U.S.C. § 1681k(a)(2).

16 *See, e.g.*, "Retailers Track Employee Thefts in Vast Databases," *New York Time*s (April 3, 2013), p. 1, http://www.nytimes.com/2013/04/03/business/retailers-use-databases-to-track-worker-thefts.html.

17 15 U.S.C. § 1681e(b).

18 EEOC Guidance, Section V-B-3, text at n. 109.

19 If relevant criminal history has been explored at the interview, the records review is to confirm that the candidate has fully disclosed his record.

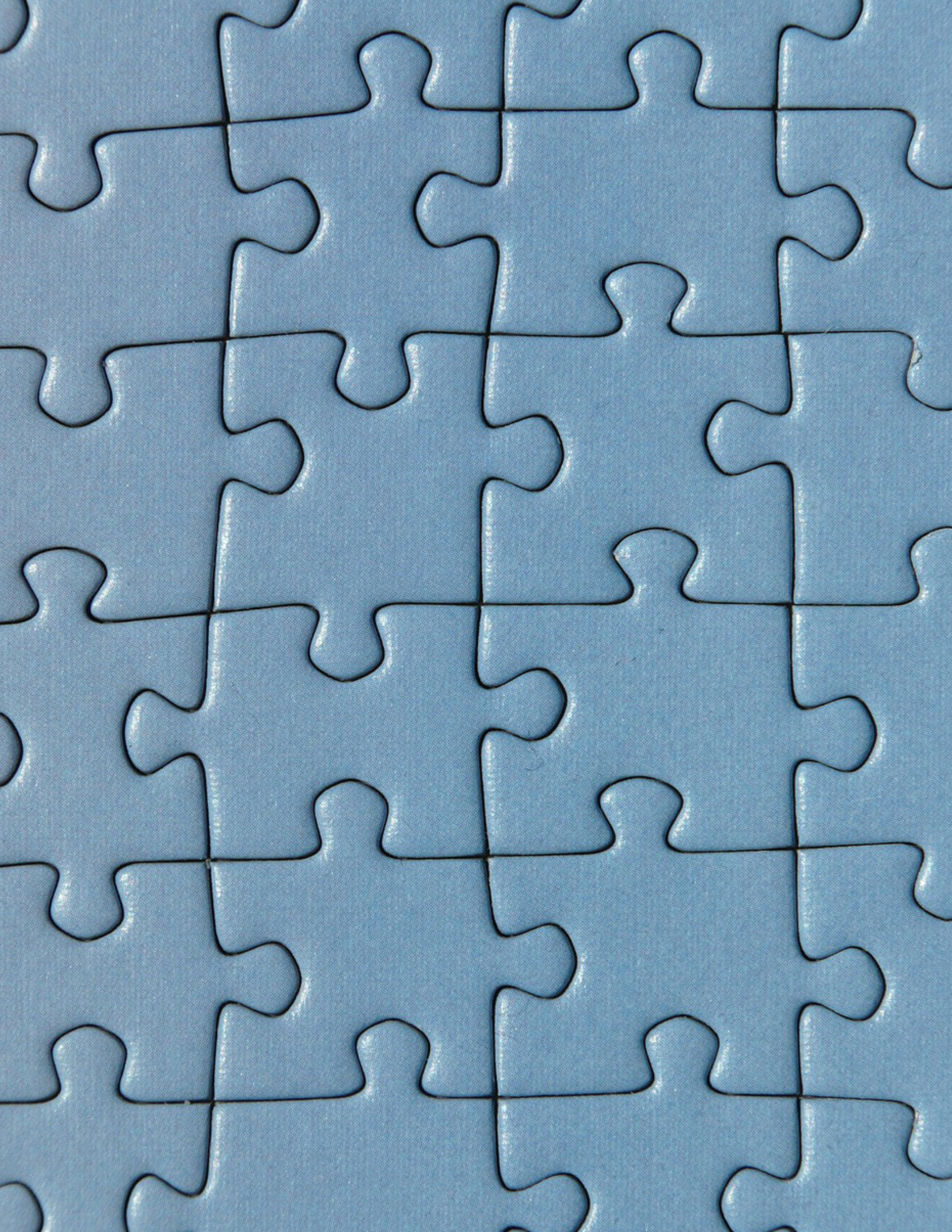
20 EEOC Guidance, Section V-B-9. The employer should consider these same factors in evaluating rehabilitation and the risk of future misconduct prior to disqualifying an applicant if the criminal record history is evaluated prior to an interview. Of course, if the specific position being filled has restrictions from statutes, regulations, or contractual obligations that preclude hiring a person with the applicant's conviction record, evidence of rehabilitation need not be considered.

ABOUT THE ORGANIZATIONS THAT PREPARED THESE STANDARDS

The principal mission of the Lawyers' Committee for Civil Rights Under Law is to secure equal justice for all through the rule of law, targeting in particular the inequities confronting African Americans and other racial and ethnic minorities. The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination and the resulting inequality of opportunity - work that continues to be vital today.

The Access Campaign, initiated in 2009 as a program of the Employment Discrimination Project of the Lawyers' Committee, seeks to abolish the barriers that people of color face in gaining jobs with employers who rely too heavily on criminal history and credit background checks to exclude applicants from employment opportunities. The Access Campaign has engaged in litigation, public policy advocacy, and public education to further this objective.

Established by the Legal Action Center in 2001, the National **H**elping **I**ndividuals with criminal records **R**e-enter through **E**mployment (H.I.R.E.) Network is both a national clearinghouse for information and an advocate for policy change. It is one of several special projects at the Legal Action Center. The goal of the National H.I.R.E. Network is to increase the number and quality of job opportunities available to people with criminal records by changing public policies, employment practices and public opinion.

HIRE accomplishes these goals by providing leadership on public policy advocacy, providing technical assistance and training on overcoming labor market barriers based on a criminal record, and promoting collaboration between individuals directly affected by the criminal justice system, advocates, practitioners, researchers, and policymakers working to improve the employability of people with criminal records.

The National Workrights Institute was founded in January 2000 by the former staff of the American Civil Liberties Union's National Taskforce on Civil Liberties in the Workplace. The Institute's creation grew from the belief that the workplace is a critical front in the fight for human rights. The Institute's mission is to be the one human rights organization which commits its entire effort to workplace issues. The Institute's goal is to improve the legal protection of human rights in the workplace.