

5 Myths About Hiring Ex-felons: Fact versus Fiction

Along with the media attention surrounding “Ban the Box” initiatives, many myths are beginning to surface about the use of criminal background checks for employers. While it appears laws are being changed or enacted daily, there are many ways for employers to legally use background checks to protect their businesses and the community at large: as well they should.

For over 20 years, Pre-employ has assisted both employers and applicants as they wade through the legal morass that surrounds the hiring process. As individual and class action lawsuits regarding the criminal background check process continue to grow, even today’s top law firms are frustrated trying to decipher federal, state and local statutes to provide sound advice on the policies and procedures their clients should use.

This white paper outlines many of the myths associated with the criminal background check process. Human resources professionals and CEOs often misunderstand the law, how it applies to their company, and how to protect themselves from a poor hiring decision, as well as a claim. While this white paper is in no way to be construed as legal advice, it can help navigate some of the myths about using criminal background checks for the best hires. Always consult your attorney for any local, state or federal updates or overlaps to the law before making a decision to use a service or an employment determination.

Myth #1: There is nothing to gain in hiring an ex-felon

Fact: There are financial incentives in hiring ex-offenders

In addition to giving a person a chance to re-enter a productive place in society, there can be financial gain for employers who hire an ex-offender. The Work Opportunity Tax Credit (WOTC) is federal tax credit available for employers who hire and retain individuals with significant barriers to employment, such as ex-felons, veterans, and others.

About \$1 billion in tax credits each year have been claimed by employers under WOTC. There's no limit on the number of employees you may hire to qualify for the credits, and there's an easy process to apply.

The credits target:

- Ex-felons
- Veterans
- Other designated demographics

The main objective of the WOTC program is to enable employees to gradually move from economic dependency to self-sufficiency as they earn a steady income and become contributing taxpayers. To qualify for the program, the candidate must:

- Have been convicted of a felony
- Be hired no more than 1 year from the date of their conviction or release from incarceration

For ex-offenders, credits are available based on hours worked and wages earned in the first year. The tax credits are:

- For a minimum of 120 hours per year:
25% of the first year wages, maximum \$2,400
- For a minimum of 400 hours per year:
40% of the first year wages, maximum \$2,400

Some exceptions do apply to the WOTC program. Wages must be calculated on earnings for which the employer pays Federal Unemployment Tax Act (FUTA) taxes. They must also be:

- Wages actually paid by the employer including those for on-the-job training participants
- Subsidized wages, either paid by a third-party or from the employer, do not qualify for the tax credit; although the hours worked can satisfy the minimum retention period

Candidates are disqualified if:

- They are relatives or dependents of the employer
- They are former employees, unless they were summer youth employees
- They are majority owners of the business

The WOTC program joins other workforce programs that help incentivize workplace diversity and facilitate access to good jobs for American workers. The US Department of Labor has all the forms needed to process your request. Forms must be submitted within 28 days of the employee's start date.

Other hiring incentives may be available at the state or local level, including on-the-job training programs and other services.

W.O.T.C
WORK OPPORTUNITY TAX CREDIT

Myth #2: Ex-felons can't be bonded

Fact: Ex-felons can be bonded at no cost to the employer

The Federal Bonding Program (FBP) was established by the U.S. Department of Labor (DoL) in 1966 to provide fidelity bonds that guarantee honesty for "at-risk", hard-to-place job seekers. The bonds cover the first six months of employment at no cost to the employer or applicant.

Fidelity insurance bonds are available and administered through the DoL to indemnify employers for loss of money or property sustained through dishonest acts of their employees, including theft, forgery, larceny, and embezzlement.

The FBP allocates funding and supplies state workforce agencies with a package of promotional bonds to provide a base and incentive for employers. Additional bonds may be purchased from the bonding agent by states, localities, and other organizations providing reentry service.

Employers can receive:

- Bonding from \$5,000 to \$25,000 coverage for 6-month period
- No deductible amount (employer receives 100% insurance coverage)

Additionally, the bonds are easy to claim and administer:

- No wait time. Bonds are instantly issued to employers
- No papers to be signed to obtain the bond
- No follow-up and no termination actions required
- Any job in any state at any company can be covered
- Persons who are not bondable can become bondable by demonstrating job honesty during the 6 month coverage under the FBP. Following the 6-month trial, commercial bonding is available for purchase

This extremely successful tool has resulted in only 1% of bonds issued resulting in a claim.

Myth #3: They'll only re-offend

Fact: Recidivism rates are substantially reduced for employed ex-offenders

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Myth #4: You can no longer ask about criminal history

Fact: There are ways to legally uncover criminal history

In the past, most employers relied on the “check here if you have ever been convicted of a felony” boxes on applications to discern whether a candidate had a prior criminal history. The EEOC’s Guidelines to Employers, as well as many state and local “Ban the Box” initiatives have muddied the waters for employers regarding the use of this practice.

While the box has limited merit, the question itself, with no context, often excludes candidates without regard to the nature of the offense, whether it is germane to the work being performed, the date of the offense, and whether the candidate has been gainfully employed during the time between the conviction and application. Many agree the opportunity to employment should not be barred without a discussion of the circumstances surrounding the offense, and the steps taken, if any, to rehabilitate in the interim.

Additionally, use of criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964. From the EEOC:

National data supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to investigate Title VII disparate impact charges challenging criminal record exclusions.

The EEOC’s Strategic Enforcement Plan (SEP) of 2012 prioritized the challenge to “blanket” policies and practices that could exclude candidates based on criminal history. The Guidance Letter they issued opens the door to claims when requiring this information.

While state and local “Ban the Box” legislation prohibits employers from inquiring about criminal history during the initial phases of the hiring process, they typically allow an inquiry after a conditional offer of employment has been made. Employers should always adhere to local and state legislation to determine what is allowed in their area to minimize the potential for a claim.

Damages paid for misusing background checks or failure to perform them legally are significant:

- 2015: Publix Super Markets Inc. paid \$6.8 million to settle a class action lawsuit
- Publix had failed to properly disclose plans to run background checks on job applicants
- 2016: Dish Network paid: \$1.75 million to settle FCRA class action suit
- Dish did not provide consent and disclosure forms needed to conduct background checks
- 2016: The United Census Bureau settled at \$15 million for a class action suit of discrimination
- The Bureau used a blanket policy to eliminate candidates for hire
- Common-sense policies allow you to use criminal background checks legally (can vary by jurisdiction):
- Eliminate “blanket” policies that disqualify candidates early in the employment process.
- Request or search for criminal background history only after a conditional offer of employment has been made.
- Consider the nature of the offence in relation to the time of the infraction, the work being performed, and any interim rehabilitation.
- Allow the candidate access to any information and a reasonable opportunity to discuss or refute any data, including data that may be false or misleading.
- Reassess any adverse employment determination in light of new information received.

Myth #5: Criminal background checks are costly

Fact: The cost of not running a background check could be higher

The good old days of don't ask/don't tell are far behind us. But the problem with not asking and telling, of course, is that you could lack critical information that directly relates to a candidate or your business. While there are many requirements when performing criminal background checks, and many regulations about when and how they should/can be performed, the chance of something going terribly wrong if you don't perform them is ever-present.

Negligent hiring civil suits are not widely reported, but Internet searches of these civil cases can be eye-opening. Significant damages have been awarded to plaintiffs who show that an employer was negligent in hiring without a criminal background check, exposing the public to dangerous felons. While some of the cases are extreme, the trend has been set to hold employers responsible when potential risk has not been mitigated by a background check.

- 1999: \$26.5 million. The largest negligent hiring judgement to date was awarded against Trusted Health Resources.
- A home healthcare worker entered a client's home, robbed, and brutally murdered the client and his grandmother. The worker had six prior felony convictions.
- 2016: Undisclosed Amount. A lawsuit was filed against the Prince George's County Public Schools for failure to perform a background check on a school employee.
- The employee pled guilty to fondling an 8 year old on multiple occasions in the school. He had previously been charged with sexual assault.
- 2016: Undisclosed Amount. Capital District Transit Authority is being sued for not performing a criminal background check.
- A mentally disabled patron was molested by a driver alleged to have 64 prior convictions on his record.

Failure to perform due diligence in hiring could be a costly mistake; not just in financial terms, but in injury to others. The results could be disastrous for victims and bankrupt your company.

Conclusion

We've looked at the top 5 myths surrounding criminal background checks and the truths that belie them. As with any business decision, it's important to weigh the risk versus the benefits of using background checks, but the data is clear:

- There are financial incentives to hiring an ex-offender
- Ex-offenders can be bonded at no cost to the employer for the short-term
- The potential to re-offend is lowered with gainful employment
- There are ways to use criminal background checks legally and responsibly
- Background checks may minimize risk to the employer and the community at large

About Pre-employ

Headquartered in Northern California, Pre-employ is a national leader in the screening industry. For more than 20 years, Pre-employ has provided cost-effective solutions that deliver quality employee background screening services, industry best practices, and valuable resources to help minimize risk and enhance the hiring process. For two years in a row, Pre-employ was named to Business News Daily's Best Background Check Services.

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