



# OLR RESEARCH REPORT

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## **UPDATED REPORT: CRIMINAL BACKGROUND CHECKS AND EMPLOYMENT DECISIONS**

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You asked the following questions about criminal background checks and rules concerning hiring convicted felons:

1. whether employers' use of such checks is increasing,
2. what occupations require such checks by law,
3. which state agencies do pre-hire criminal background checks and which disqualify job applicants with felony convictions, and
4. when employers can fire or refuse to hire individuals who have served out their prison sentences.

This report updates OLR Report [99-R-1025](#) (Criminal Background Checks and Employment Decisions). Please note that the Office of Legislative Research is not authorized to provide legal opinions, and this report should not be construed as such.

### **SUMMARY**

According to several commentators, employers are conducting more criminal background checks on job applicants and current employees than in the past. They attribute this to potential liability from negligent hiring lawsuits, security concerns in the workplace after the September

11, 2001 terrorist attacks, and easier access to information on the Internet, among other reasons.

Although Connecticut's legislatively expressed public policy is to encourage employers to hire qualified ex-offenders ([CGS § 46a-79](#)), state laws also require criminal background checks for many whose work involves direct contact with children and for law enforcement and prison job applicants.

State law enforcement agencies (which include police, corrections department personnel, courthouse security, and prisoner transportation personnel) are the only governmental entities in the state that by law may deny employment based solely on a person's criminal history ([CGS § 46a-81](#)). In all other cases, state officials cannot deny felons employment, occupational licenses, or permission to engage in state-regulated professions by reason of the prior conviction before considering (1) the relationship between the nature of the crime committed and the job or license for which the person has applied, (2) information pertaining to the convicted person's degree of rehabilitation, and (3) the time elapsed since conviction or release. Additionally, a state employer cannot inquire about an applicant's past convictions until the applicant has been deemed otherwise qualified for the position ([CGS § 46a-80](#)).

When the state makes an adverse employment decision based on conviction information, it must give the candidate written notice of the information it relied on and the reasons for its decision. It cannot use arrest records that were not followed by a conviction or convictions that have been erased in making employment or licensing decisions, and it cannot distribute or disseminate such information in connection with an application for employment or for a permit, license, certificate, or registration.

State laws generally do not limit private employers' criminal background check use, except that employers may not inquire into a prior arrest, charge, or conviction that was erased, nor may they deny employment solely on the basis of an erased arrest, charge, or conviction. State law also imposes notice requirements on companies that perform background checks and report the information back to employers ([CGS § 31-51i](#)).

Two federal laws regulate employer use of criminal background checks in hiring employees: (1) the federal Fair Credit Reporting Act (FCRA) and (2) Title VII of the Civil Rights Act of 1964. FCRA applies when employers utilize outside companies to perform background checks on job applicants and sets standards that employers must follow when

making adverse employment decisions based on the information from those background checks. Title VII, as interpreted by the Equal Employment Opportunity Commission and the courts, requires that any conviction-based disqualification for employment be justified by “business necessity” because otherwise it may be discriminatory.

## **EMPLOYER RATIONALE**

After increasing throughout the 1990s, it appears that employers' voluntary use of criminal background checks has continued to rise. A 2005 report by the National Task Force on the Commercial Sale of Criminal Justice Record Information noted an “explosion in criminal background checks” since September 11, 2001. According to a 2012 [survey](#) by the Society for Human Resources Management, 69% of employers conduct criminal background checks on all job candidates, and approximately 90% conduct background checks on select candidates. Additionally, private companies conduct millions of background checks per year (Noam Weiss, “Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act,” 78 Brook. L. Rev. 271 n.1-2 (2012)).

Some argue that a criminal history can be an accurate predictor of an individual's likelihood to commit a crime. For example, the following studies provide statistics on recidivism rates:

1. The Bureau of Justice Statistics [reported](#) that more than three-quarters of felony defendants have a prior arrest history, while approximately 69% have multiple prior arrests.
2. A 2011 [Pew research report](#) found that the three year recidivism rate for inmates released in 1999 was 45.4% and 43.3% for those released in 2004.
3. Dermot Sullivan discussed the relevance of recidivism rates as indicative of the likelihood that an individual will commit a crime (“Employee Violence, Negligent Hiring, and Criminal Records Checks: New York's Need to Reevaluate Its Priorities to Promote Public Safety,” 72 St. John's L. Rev. 581, 583 (1998)).
4. A 2012 [report](#) by the Office of Policy and Management found that in Connecticut, of the 14,400 men released from state prisons in 2005, nearly 80% were arrested again by 2010.

Other reasons cited include employer concerns about workplace safety; security concerns after the September 11, 2001 terrorist attacks; business loss and bad publicity from their employees' crimes, misconduct, or incompetence; child abuse and abductions in the news in recent years; false or inflated information by job applicants in the news; the growth of information accessibility on the Internet; and fear of negligent hiring suits brought by these workers' victims or survivors (Privacy Rights Clearinghouse, "Employment Background Checks: A Jobseeker's Guide," <https://www.privacyrights.org/fs/fs16-bck.htm#1> (updated May 2013); 85 *A.B.A. Journal* (Mar. 1999)).

## **EMPLOYEE CONCERNS**

An employee concern regarding the rise in employment background checks, as identified by the [National Consumer Law Center](#), is that an in-depth investigation could uncover information that is (1) irrelevant, (2) taken out of context, (3) inaccurate, (4) illegal to use for hiring purposes, or (5) which comes from questionable sources.

## **NEGLIGENT HIRE LAWSUITS**

Negligent hire or retention lawsuits hold employers financially responsible for negligently hiring employees whose qualities unreasonably expose the public to a risk of harm. The plaintiff must prove that the employer knew or should have known of the employee's dangerous propensities. As articulated by one court, employers have a duty to exercise "reasonable care to select employees competent and fit for the work assigned to them and to refrain from retaining the services of an unfit employee" (*Di Cosola v. Kay*, 91 N.J. 159, 173, 450 A.2d 508, 515 (1982)). The Connecticut Supreme Court has stated that the tort of negligent hiring "extends to any situation where a third party is injured by an employer's own negligence in failing to select an employee fit or competent to perform the services of employment" (*Shore v. Town of Stonington*, 187 Conn. 147, 155, 444 A.2d 1379, 1383 (1982)).

Courts have disagreed about whether this duty requires employers to conduct criminal record checks, and it appears the Connecticut Supreme Court has not directly addressed this issue. But as several commentators have noted, the imposition of negligent hire liability by courts has created an incentive for employers to perform more background checks on potential employees in an attempt to reduce liability. This is due to the potential for enormous damages, the lack of a "scope of employment" limitation on liability, and the limited protection by workers' compensation laws.

## ***Negligent Hiring Lawsuits in Other States***

***New York.*** New York limits negligent hire liability to situations in which an employer actually knew of an employee's history of engaging in a specific type of criminal conduct (such as violent assault), yet permitted him to work under conditions in which it was foreseeable that he would repeat it. Its courts have expressly ruled that imposing liability on employers for failing to check criminal records is contrary to the state's public policy of reintegrating convicted felons into society (Ford v. Gildin, 613 N.Y.S. 139, 142 (App. Div. 1994)).

More recently, the Appellate Division held that a jury could reasonably conclude that an employer had a duty to conduct an investigation of an employee's background given its actual knowledge that the employee had a conviction, and the fact that he would be working as a custodian in a place crowded with children (T.W. v. City of New York, 286 A.D.2d 243, 245, 729 N.Y.S.2d 96, 98 (2001)).

***Massachusetts.*** But other states, like Massachusetts, have allowed juries to hold an employer responsible for failing to investigate an employee's criminal background before hiring him. One case, Ward v. Trusted Health, resulted in a \$26.5 million jury verdict against the Visiting Nurse Association of Boston and its contractor, Trusted Health, after a home health aide with six prior larceny convictions robbed and murdered the quadriplegic in his care and the victim's grandmother. The court allowed the jury to consider testimony about the practices of other in-home service providers, like meter readers and telephone installers, who customarily conduct pre-hire criminal background checks. The verdict included compensatory damages for pain and suffering as well as punitive damages (Ward v. Trusted Health Resources, JVR No. 361208, 1998 WL 35007820 (Super. Ct. Mass., 1998)).

However, in another case, the appellate court found that an employer did not have a duty to perform a background check on an employee's prior criminal acts despite its knowledge that he had spent 14 years in prison. Because a criminal history investigation would have disclosed that the employee was released on professional evaluations and a recommendation that he be released, and because the employee was to work alone in a warehouse and without regular contact with the regular public, it was not reasonably foreseeable that he would attack a member of the public (*Coughlin v. Titus & Bean Graphics, Inc.*, 54 Mass. App. Ct. 633, 639, 767 N.E.2d 106, 111 (2002)).

## **MANDATORY STATE BACKGROUND CHECKS**

### ***Law Enforcement and Corrections Department Personnel***

State law requires criminal history checks of corrections department personnel applying for positions that will involve direct contact with inmates ([CGS § 18-811](#)). And all law enforcement personnel who go through the Police Officer Standards and Training (POST) program, including state and local police officers and judicial marshals and prisoner transport personnel ([CGS § 6-32g](#)), must submit to such checks by the State Police's Bureau of Identification.

### ***People Working with Children***

State law requires the Department of Public Health (DPH) commissioner to ensure a state and national criminal background check on all prospective employees for a child-caring position in a day care center, group day care home, and family day care home and for initial applicants for a family day care home license ([CGS § 19a-80](#)).

The Department of Social Services (DSS) commissioner, within available appropriations, must require criminal background checks of unlicensed in-home non-relative caregivers receiving DSS child-care subsidies. The department has discretion to refuse such payments if the provider has been convicted of any crime involving sexual assault of, or serious physical injury to a minor ([CGS § 17b-749k](#)).

Other positions which require criminal background checks include the following: (1) public school personnel hired after July 1, 1994 ([CGS § 10-221d](#)), (2) school bus drivers ([CGS § 14-44](#)), and (3) employees and volunteers working at outpatient children's psychiatric and extended day treatment facilities (Regs. State Agencies §§ 17a-20-22, 17a-147-11d).

### ***Other Professions***

State law also requires criminal history background checks of occupational license applicants in pari-mutuel gambling events, including jai alai, dog, and horse racing ([CGS § 12-578](#)). State law also allows state and local officials to check people seeking occupational licenses for permission to engage in other regulated professions, including pawnbrokers ([CGS § 21-40](#)), attorneys ([CGS § 51-80](#)), and Department of Energy and Environmental Protection (DEEP) permittees ([CGS § 22a-174](#)). State laws do not limit private employers' criminal background check use, but federal consumer reporting and antidiscrimination laws do.

## **LIMITS ON EMPLOYER USE OF CRIMINAL CONVICTION INFORMATION**

### ***Fair Credit Reporting Act***

Asking job applicants to indicate whether they have been convicted of a crime is permissible in all jurisdictions. But if an employer hires an outsider, such as a private investigator or a background-checking company to gather such information, the federal Fair Credit Reporting Act (FCRA, 15 U.S.C. § 1681, et seq.) requires that the employee or job applicant first give written consent. The law exempts employers considering applicants for positions that pay more than \$75,000 and federal employers doing national security investigations of their employees or job applicants (15 U.S.C. § 1681b(4)).

The FCRA specifies that covered reports cannot include arrest records that precede the report by more than seven years or until the applicable limitations has expired, whichever is longer. It has no limit on the age of criminal convictions that may be reported (15 U.S.C. §§ 1681(a)(2) and (5)).

When an employer makes an adverse decision based on the information gathered (i.e., denying employment, terminating employment, rescinding a job offer, or denying a promotion), it must comply with the following requirements:

1. Before the adverse action is taken, the employer must give the applicant a “pre-adverse action disclosure” (a copy of the report and an explanation of the applicant’s rights under FCRA).
2. After the adverse action is taken, the employer must give the individual an “adverse action notice,” which includes (a) name and contact information of the employment screening company, (b) a statement that the employer made the adverse decision rather than the employment screening company, and (c) notice that the individual has the right to dispute the accuracy or completeness of any information in the report.

Complaints about FCRA violations can be reported to the Federal Trade Commission (FTC) or the Consumer Financial Protection Bureau (CFPB), which took over primary enforcement authority of FCRA on January 1, 2013. Additionally, employers and report preparers who violate the law can be sued for money and punitive damages and reasonable attorney's fees.

Although FCRA sets national standards for employment screening, states may enact stronger laws that supplement FCRA. Connecticut law requires employment screening companies that issue consumer reports to be used for employment purposes to (1) provide notice to the consumer that it is reporting criminal matters of public record, (2) provide the consumer with the name and address of the employer or person to whom the report is being issued, and (3) maintain procedures designed to ensure that any criminal matters reported are complete and up-to-date ([CGS § 31-51i](#)).

### ***Title VII***

Title VII of the Civil Rights Act of 1964 also appears to restrict an employer's ability to use criminal background information in the hiring process (42 USC. § 2000e, et seq.). The Equal Employment Opportunities Commission (EEOC), the federal agency that enforces Title VII, has decided that disqualifying people who have criminal records from jobs is discriminatory because the practice disproportionately affects African American and Hispanic men. (Those two groups have much higher criminal conviction rates than do non-Hispanic white men.)

The EEOC has ruled repeatedly that covered employers cannot simply bar felons from consideration, but must show that a conviction-based disqualification is justified by "business necessity." According to the EEOC, "job-relatedness" is the most important factor in determining business necessity – whether the position applied for presents an opportunity for the applicant to engage in the same type of misconduct which resulted in the applicant's conviction.

The EEOC cited the "*Green* factors" as providing the starting point for analyzing how specific criminal conduct may be linked to particular positions: (1) the nature and gravity of the offense, (2) the time that has lapsed since the offense, and (3) the nature of the job. It also provided examples of best practices for employers to follow when considering criminal history information in employee hiring (EEOC Enforcement Guidelines, "Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (April 25, 2012); *Green v. Mo. Pac. R.R.*, 549 F.2d 1158, 1160 (8th Cir. 1977)).



## **FURTHER READING**

Bednar, "Employment Law Dilemmas: What to Do When the Law Forbids Compliance," 11 Utah B.J. 15 (Dec. 1998).

Connecticut Department of Emergency Services and Public Protection, Police Officer Standards and Training Council,  
<http://www.ct.gov/post/cwp/view.asp?a=2058&Q=291946&postNav=|42935|> (last visited June 5, 2013).

Watstein, "Out of Jail and Out of Luck: The Effect of Negligent Hiring Liability and the Criminal Record Revolution on an Ex-Offender's Employment Prospects," 61 Fla. L. Rev. 581, 585 (2009).

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