

## When Can Criminal Histories be used in Making Employment Related Decisions?

Many employers routinely use criminal history information as a crucial tool when making employment related decisions involving hiring, supervising, and firing employees. However, over the course of the last two decades, the Equal Opportunity Commission (EEOC) and various state agencies such as the Minnesota Department of Human Rights (MDHR) have limited an employer's use of criminal history information in the employment process through the issuance of regulatory guidelines, litigation, and legislation.

Most recently, Minnesota passed a law which will go into effect January 1, 2014, requiring private employers to wait until a job applicant has been selected for an interview or until an employer has made an unconditional offer of employment before asking the job applicant about criminal history records or conducting a criminal records check. The new law commonly referred to as the "Bend the Box" law, is an extension of an existing statute imposing similar requirements on public employers which has been in effect in Minnesota since 2009.

Additionally, several courts and State and Federal agencies responsible for enforcing antidiscrimination laws have recognized that an employer's blanket use of an individual's criminal history in making employment decisions may, in some instances, violate State and Federal antidiscrimination laws. Courts and governmental agencies have been particularly suspicious of employment policies which do not distinguish between arrest and conviction records. Blanket policies refusing employment or terminating employees on the basis of arrest records are typically found to be unlawful and discriminatory.

Therefore, employers must walk a tight-rope when considering an employee's or applicant's criminal history. As a general rule of thumb, a blanket policy excluding applicants and/or employees with an arrest or conviction record is likely to be unlawful. While the Minnesota Department of Human Rights has indicated that inquiries about prior convictions do not violate Minnesota Law, the Department warns that an employer's hiring policy regarding criminal convictions may be held to be discriminatory when, absent a bona fide occupational qualification, a minority-group criminal conviction record is an absolute bar to employment.

In general, an employer must demonstrate that the nature of a particular criminal conviction would prevent a job applicant from performing the specific job in an acceptable businesslike manner. State and Federal antidiscrimination statutes require employers to consider all of the job-related circumstances surrounding an applicant's or employee's criminal history in determining that the employment of a particular person would be inconsistent with the safe and efficient operation of the employer's business. The various circumstances which the employer's policy should consider may include the time, nature, number of convictions, the facts surrounding each offense, the job relatedness of each conviction, the length of time between conviction and the employment decision, and any of the applicant's efforts at rehabilitation. In order to avoid discrimination claims, employers must carefully adapt their application forms, personnel manuals, and employee handbooks in a manner consistent with the most recent EEOC guidelines so that an employer can demonstrate that the arrest and/or conviction records relied upon are job-related and nondiscriminatory.